Denver Law Review

Volume 59 | Issue 4 Article 5

February 2021

Some Observations on the Swinging Courthouse Doors of Gannett and Richmond Newspapers

Richard M. Schmidt Jr.

Gregory M. Schmidt

SOME OBSERVATIONS ON THE SWINGING COURTHOUSE DOORS OF *GANNETT* AND *RICHMOND NEWSPAPERS*

RICHARD M. SCHMIDT, JR.*
GREGORY M. SCHMIDT**

INTRODUCTION

For nearly two hundred years, the closing of a courtroom in the United States to the press or public was an extremely rare event. In the last five years it has become commonplace. The closure motion is threatening to become a routinely employed weapon in every criminal defense attorney's arsenal and its use in civil proceedings is growing at an alarming rate.

The Supreme Court has both promoted and responded to this development. It has now granted certiorari in three courtroom closure cases in the last four years. The first two decisions addressed the validity of closures designed to protect criminal defendants from the dissemination of prejudicial publicity. In *Gannett Co. v. DePasquale*,[1] the Court approved closure of a pretrial suppression hearing, holding that the sixth amendment right to a public trial is personal to the accused and does not provide the public or the press an independent right to attend such a proceeding. In *Richmond Newspapers, Inc. v. Virginia*,[2] however, the Court overturned closure of a trial, finding that the first amendment provided the requisite right of attendance to the public and press.

How the Court could have spoken with less clarity and given less direction to lower courts than it did in the twelve opinions issued in these two cases is difficult to imagine. While the Court now has fashioned a constitutional pigeonhole of uncertain dimensions for the public's right to attend criminal trials, it did so only by first lurching in one direction, then essentially reversing its ground without explanation and without specifying any standards to govern closure decisions. Left undecided and very unclear are a number of important issues including the extent to which this right attaches to various pre-trial and post-trial criminal proceedings; whether it attaches to any or all civil proceedings; what, if any, procedural predicates must precede a closure order; and what types and degrees of countervailing interests will justify closure.

The result of the Court's actions has been rampant confusion and a spate of lower court decisions addressing motions to close nearly every con-

* B.A., J.D. University of Denver. Member, Bar Associations of Colorado and the District of Columbia. Partner, Cohn & Marks, Washington, D.C.

** B.A. Swarthmore College, J.D. Stanford University. Member, Bar Associations of California and the District of Columbia. Associate, Covington & Burling, Washington, D.C.

1. 443 U.S. 368 (1979).

2. 448 U.S. 555 (1980).

ceivable type of judicial proceeding and arriving at nearly every conceivable permutation of outcome.[3] Perhaps in response to these obvious signs of continued systemic distress, the Court has taken yet another closure case this session, *Globe Newspapers, Co. v. Superior Court*,[4] where the Court determined that a state statute requiring exclusion of the general public and press from criminal trials during the testimony of minor victims of sexual offenses violated the first amendment. The *Globe Newspapers* case, however, appears an unlikely vehicle for the Court to resolve the many uncertainties engendered by *Gannett* and *Richmond Newspapers*. Indeed, given the current divisions on the Court, it is quite possible that the *Globe Newspapers* decision will further muddy the waters, serving only to publicize the closure mechanism and provoke yet another rush of closure motions, all too many of which will be granted by a doctrinally ill-equipped judiciary.

At least in part to compensate for lack of guidance from the Supreme Court, efforts are under way on a number of fronts to codify and implement the holdings of *Gannett* and *Richmond Newspapers*, both of which were concerned solely with the use of closures to ensure jury impartiality. Both the Judicial Conference[5] and the Justice Department[6] have recently proposed or adopted guidelines to govern their respective clientele in deciding whether to approve, join, or initiate fair-trial closure motions. A new Federal Rule of Criminal Procedure to govern fair-trial closure decisions in criminal cases has been proposed by the Advisory Committee on the Federal Rules.[7] In addition, the American Bar Association (ABA) Standards on Criminal Justice, which have governed this area since 1968, but which were substantially revised in 1978, are being reexamined in light of *Gannett* and *Richmond Newspapers*.

This article will concentrate on the status of courtroom closures which are sought as a means of protecting criminal defendants from prejudicial publicity. It will briefly review the history of fair-trial courtroom closures

---

3. *See infra* notes 136-37 and 163-72.

4. 1981 Mass. Adv. Sh. 1493, 423 N.E.2d 773, *rev'd*, 102 S. Ct. 2613 (1982). On June 23, 1982, after this article went to press, the Supreme Court held the Massachusetts statute to be unconstitutional. Glope Newspapers Co. v. Superior Court, 102 S. Ct. 2613 (1982). The five-justice majority opinion, authored by Justice Brennan, found that the only legitimate state interest supporting such closures, the trauma and embarrassment of the minor victims, did not justify a mandatory closure statute, though it might be sufficient in particular cases. Once again the Court spoke through several Justices; there were three other opinions. *See infra* notes 213 and 215. The case appears to represent a triumph for the access analysis developed by Justice Brennan in *Richmond Newspapers*, see *infra* text at notes 160-168, 212-215, but its narrow holding severely limits its precedential value and it seems unlikely to slow the rush of closure motions and orders.

5. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, REVISED REPORT ON THE 'FREE PRESS-FAIR TRIAL' ISSUE, 87 F.R.D. 519 (approved September 25, 1980) [hereinafter cited JUDICIAL CONFERENCE COMMITTEE REVISED REPORT].

6. UNITED STATES DEPARTMENT OF JUSTICE, GUIDELINES ON THE CONDUCT OF CLOSED CRIMINAL PROCEEDINGS, 28 C.F.R. § 50.9 (1981).

7. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, ADVISORY COMMITTEE NOTE TO PROPOSED FED. R. CRIM. P. 43.1 (Oct. 1981), *reprinted in* 30 CRIM. L. REP. (BNA) 3001, 3019 (October 21, 1981) [hereinafter cited as JUDICIAL CONFERENCE COMMITTEE REPORT].

before scrutinizing and commenting upon the decisions in *Gannett* and *Richmond Newspapers*. After gleaning and analyzing whatever principles can be gleaned from these decisions, the authors will venture some observations as to the appropriate scope of the developing right of access in the criminal justice context.

I. FAIR-TRIAL CLOSURES: A THUMBNAIL HISTORY

It has become something of a ritual in discussing courtroom closings to begin with Justice Black's 1948 survey in *In re Oliver*:[8] "[The Court was] unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."[9]

The impressive sweep of Justice Black's statement is circumscribed somewhat by the acknowledgement that it applies only to entire trials. A few appellate courts had even then sanctioned limited closures, excluding some or all of the public from some portions of a variety of proceedings.[10] It appears, however, that exclusion of the press had never been approved.[11] Even those few closures that had been approved were for purposes other than ensuring an impartial jury;[12] closure was simply not used as a fair-trial safeguard. There exists no comparable canvass of pre-trial proceeding closures, but this practice must have been even more rare since the exclusionary rule had not been promulgated at the time and suppression hearings were unknown.[13] In startling contrast, the Reporter's Committee on Freedom of the Press, in a noncomprehensive survey, has recorded over 230 successful motions for closure of trial or pre-trial proceedings in the less than three years following the decision in *Gannett*, over half of which were premised on fair-trial grounds.[14]

The long Anglo-American tradition of open courtrooms has now been exhaustively surveyed in *Gannett* and *Richmond Newspapers*.[15] It is worth a brief review of the very short history of closed courtrooms to underscore both

8. 333 U.S. 257 (1948).

9. *Id.* at 266 (footnote omitted).

10. *See generally Gannett*, 443 U.S. at 388 n.19, 431-32 n.11 (Blackmun, J., concurring in part and dissenting in part).

11. 333 U.S. at 272 n.29. *See also Gannett*, 443 U.S. at 431-32 n.11 (Blackmun, J., concurring in part and dissenting in part). Justice Black also excepted juvenile proceedings, which, for better or for worse, are classified as civil proceedings, and also courts martial. 333 U.S. at 266 n.12.

12. *See, e.g.*, Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944) (testimony of minor victims of sexual offenses); State v. Croak, 167 La. 92, 118 So. 703 (1928) (obscene evidence).

13. In *Gannett*, neither the majority opinion nor Justice Burger's historical review in his concurring opinion cites any instances of closed pre-trial proceedings. A number of state codes appear to sanction such action under various circumstances. *See Gannett*, 443 U.S. at 390-91, 394-96 (Burger, C.J., concurring). *See also* CAL. PENAL CODE § 868 (West 1981) (requiring closure of preliminary hearings at request of defendant).

14. Reporter's Committee on Freedom of the Press, Court Watch Summary (January 29, 1982); *id.* (November 1, 1980). The Reporter's Committee statistics are somewhat difficult to interpret, but it appears that at least 123 of these closures were justified on the grounds of protecting the accused's fair-trial rights. Of these, only 20 were trials and 103 were pre-trial proceedings. The statistics do not reveal whether these proceedings were closed in whole or in part.

15. This history is most thoroughly recapitulated in the dissent in *Gannett*, 443 U.S. at 418-33 (Blackmun, J., concurring in part and dissenting in part). The Chief Justice's plurality and

the eagerness and rapidity with which this country's courts have embraced this novel technique for protecting the judicial processes against the perceived dangers of prejudicial publicity and the role that the Supreme Court has played in fostering its use.

A. *The Storm Builds*

The Supreme Court did not reverse a criminal conviction because of prejudicial publicity until eleven years after *In re Oliver*.[16] The first reversal linked to the new mass medium of television followed in 1963.[17] In short order came the Warren Commission's criticism of the manner in which both the media and the government handled the Oswald and Ruby cases.[18] Virtually contemporaneously, the convictions of Billy Sol Estes and Sam Sheppard, which had been secured in spectacularly infamous fashion, were reversed by the Supreme Court in opinions which strongly exhorted the bench to be more aggressive in protecting the judicial processes from the apparently unprecedented intensity and pervasiveness of the new mass media.[19]

With the *Sheppard* decision came Justice Clark's still-authoritative laundry list of measures available to trial judges to preserve the accused's right to a fair trial.[20] Largely ignored in the ensuing years has been the fact that the bulk of the *Sheppard* opinion dealt with mistakes that the trial judge had made in conducting the trial.[21] Many of the prophylactic and remedial measures proposed by Justice Clark go essentially to preserving the decorum of the court during trials. But the leitmotif of Justice Clark's opinion was that "the cure lies in those remedial measures that will prevent the prejudice at its inception."[22] It is the manifestations of this message, particularly prior restraints on the press, gag orders on participants, and courtroom closures, which have come to dominate the free press-fair trial controversy.

Interestingly, excluding the press and public from criminal proceedings was not one of Justice Clark's recommended tools for preserving the integrity of the judicial process. In short order, however, the ABA's own Advisory Committee on Fair Trial and Free Press, the Reardon Committee, specifically advocated closure not only of pre-trial proceedings but of trials as well. Purporting to do no more than ratify the practice followed in a number of

---

Justice Brennan's concurrence in *Richmond Newspapers* also contain extensive dissertations on the topic. 448 U.S. at 564-69, 589-93.

16. Irvin v. Dowd, 366 U.S. 717 (1961) (first state conviction overturned); Marshall v. United States, 360 U.S. 310 (1959) (first federal conviction overturned). *See generally* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547-56 (1976); J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS ch. 9 (1979); Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 436-43 (1977).

17. Rideau v. Louisiana, 373 U.S. 723 (1963) (film of murder suspect confessing to local sheriff televised in community where trial took place).

18. Report of the President's Commission on the Assassination of President Kennedy, 219-24, 231-42 (1964).

19. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965).

20. 384 U.S. at 357-62. *See also Nebraska Press Ass'n*, 427 U.S. at 562-65.

21. Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A. J. 55, 56 (1976); *see* Younger, *The Sheppard Mandate Today: A Trial Judge's Perspective*, 56 NEB. L. REV. 1, 5 (1977).

22. 384 U.S. at 363.

states, the procedural standards promulgated by the Reardon Committee and adopted by the ABA sanctioned defense motions to close any preliminary hearing in whole or in part on the ground that

> dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at trial and is therefore likely to interfere with [the defendant's] right to a fair trial by an impartial jury. The motion shall be granted unless . . . there is no substantial likelihood of such interference.[23]

Similarly, section 3.5(d) required closure of trials upon the defendant's motion unless 1) it was determined that there was no substantial likelihood of interference with the accused's right to a fair trial or 2) the jury was sequestered.[24]

The Supreme Court first indicated its apparent approval of the closure tool in dicta in *Branzburg v. Hayes*:[25] "Newsmen have no constitutional right of access to the scenes of crime and disaster when the general public is excluded, and they may be prohibited from attending . . . trials if such restrictions are necessary to assure a defendant a fair trial before an impartial jury."[26] For whatever reason, few trial courts chose to pick up on these suggestions. While gag orders on all manner of participants and members of the public and even direct prior restraints on the press became frequent, courtroom closure remained a seldom-considered and little-used option.[27]

The turning point, ironically enough, was the press's most significant post-*Sheppard* victory in the free press-fair trial struggle, *Nebraska Press Association v. Stuart*.[28] In that case, the Court struck down a direct prior restraint forbidding the media to publish information it had acquired concerning events which had transpired in open court. In so doing, the Supreme Court set down predicates for judicial prior restraints on the press that may well make it impossible for a court to issue a constitutional prior restraint to pre-

---

23. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.1 (Approved Draft 1968) [hereinafter cited as ABA STANDARDS]. *See also* REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391 (1968); SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL (1967).

24. ABA STANDARDS, *supra* note 23, § 3.5(d).

25. 408 U.S. 665 (1972).

26. *Id.* at 684-85. *See also* Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 496 n.26 (1975) (suggestion that government can keep information contained in official court records sealed from public and press).

27. *See, e.g.*, Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971) (trial closure reversed for lack of clear and present danger of prejudice); Oliver v. Postel, 30 N.Y.2d 171, 331 N.Y.S.2d 407, 282 N.E.2d 306 (1972) (trial closure order reversed for lack of clear and present danger prejudice). Closures for reasons other than protecting fair trial rights were, however, considerably more frequent. *See, e.g.*, Lloyd v. Vincent, 520 F.2d 1272 (2d Cir. 1975) (closure permissible to preserve order, protect participants, maintain confidentiality of information); Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974) (confidentiality of trade secrets); United States v. Bell, 464 F.2d 667 (2d Cir. 1972) (confidentiality of skyjacker profile); Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969) (harrassment of witnesses); Geise v. United States, 262 F.2d 151 (9th Cir. 1958) (privacy of minor witnesses in rape case). A number of similar instances are collected in MacKenzie, *On Cleansing The Courtroom—The Public's Right To A Public Trial*, 38 AM. U.L. REV. 769 (1969).

28. 427 U.S. 539 (1976).

serve a criminal defendant's right to a fair trial.[29]

At the same time, however, Chief Justice Burger, writing for the majority, specifically noted that the closing of pre-trial proceedings had been recommended by various studies.[30] Moreover, he expressed some sympathy for the Nebraska trial court which, because the pertinent state statute was only later interpreted in this fashion by the Nebraska Supreme Court, "could not know that closure of the preliminary hearing was an alternative open to it . . . ; but once a public hearing had been held, what transpired there could not be subject to prior restraint."[31] By placing closures in an apparently benign contrast to prior restraints, the Chief Justice's opinion was widely, and, as it turns out, correctly viewed as heralding the next wave of free press-fair trial litigation.[32]

B. *Locating a Constitutional Niche*

Whether it was because of the suggestions made in the *Nebraska Press Association* opinion or because the decision made closure orders more attractive to defendants by limiting the more direct means of curtailing prejudicial publicity,[33] the number of closure motions and orders began to mount.[34]

Those opposing the orders, generally media interests, pointed forcefully and effectively to the long tradition of open court proceedings. The precursor of the jury trial was, after all, an event which every freeholder was re-

29. *Compare* Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 18-19 (1980); Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of* 'Nebraska Press Association v. Stuart,' 29 STAN. L. REV. 497, 504 (1977) *with* Schmidt, *supra* note 16, at 469-70.

30. 427 U.S. at 564 n.8.

31. *Id.* at 568.

32. *See, e.g.*, STAFF OF SUBCOMM. ON CONST. RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., FREE PRESS-FAIR TRIAL iii, 21 (1976). *See also* Schmidt and Volner, Nebraska Press Association: *An Open or Shut Decision?*, 29 STAN. L. REV. 529, 530 (1977).

33. Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 n.2 (1978).

34. Pre-trial closure motions: *see, e.g.*, United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978) (closure of suppression hearing reversed under strict and inescapable necessity standard); Commercial Printing Co. v. Lee, 262 Ark. 87, 553 S.W.2d 270 (1977) (pre-trial voir dire closing); Star Journal Publishing Corp. v. County Ct., 197 Colo. 234, 591 P.2d 1028 (1979) (pre-trial closures require clear and present danger to fairness and no reasonable alternative means available); Gannett Pac. Corp. v. Richardson, 59 Hawaii 244, 580 P.2d 49 (1978) (closure of preliminary proceeding upheld under substantial likelihood of prejudice standard); Keene Publishing Corp. v. Keene Dist. Ct., 117 N.H. 959, 380 A.2d 261 (1977) (closure of probable cause hearing reversed under clear and present danger standard); New York v. Berkowitz, 93 Misc. 2d 873, 403 N.Y.S.2d 699 (1978) (fitness hearing closed because revealing testimony would pose a serious and imminent threat to fair trial); Philadelphia Newspapers, Inc. v. Jerome, 478 Pa. 484, 387 A.2d 425 (1978) (closure of suppression hearing upheld under necessity to assure fair trial standard). Trial closures: *see, e.g.*, Detroit Free Press v. Macomb Circuit Judge, 405 Mich. 544, 275 N.W.2d 482 (1979) (trial closure reversed for failure to conduct evidentiary hearing and investigate less intrusive means); Williams v. Stafford, 589 P.2d 322 (Wyo. 1979) (closure of bar review proceeding upheld under clear and present danger standard). Post-trial closure motions: *see, e.g.*, Miami Herald Publishing Co. v. State, 363 So.2d 603 (Fla. Dist. Ct. App. 1978) (closure of sentencing hearing overturned under serious and imminent threat and no less restrictive alternative standard); Gannett Co. v. Mark, 54 A.D.2d 612, 387 N.Y.S.2d 336 (1976) (post-trial motion hearing closure overturned as premature and overbroad under compelling and unusual circumstances standard). *See also* Note, *The Right To Attend Pretrial Criminal Proceedings: Free Press, Public Trial, and Priorities in Curbing Pretrial Publicity*, 28 SYRACUSE L. REV. 875, 876 (1977).

quired to attend.[35] English criminal and civil trials have been open ever since. Coke, Blackstone, Bentham, Hale, and nearly every other luminary in British jurisprudence have noted this feature and extolled its virtues.[36]

And the virtues, all have agreed, are manifold.[37] Open trials have been upheld as curbing perjury,[38] informing witnesses who may have knowledge of the events to come forward and testify,[39] and alerting non-parties of possible threats to their interests.[40]

Some of these benefits may have appeared more compelling in times when trials were quite localized community events and have been dismissed as a little quaint and out of place in our urbanized and atomistic modern society.[41] But the justifications for open proceedings have always rested on broader grounds, on systemic concerns that have gained even greater currency with the expanded role and increased activism of both the government as a whole and the judiciary in particular.[42] Open trials are seen as a significant protection against judicial despotism, both for defendants as individuals[43] and as a class.[44] "Sunlight is said to be the best of disinfectants. . . ."[45]

The interests underlying the policy of open proceedings clearly extend beyond those of criminal defendants either individually or collectively. At a minimum, public proceedings protect the public against unjust favoritism towards particular defendants, as well as unjust severity.[46] Moreover, reporting and criticism of courtroom events "can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system."[47] Thus, open proceedings inspire confidence

35. *See Gannett*, 443 U.S. at 419 (Blackmun, J., concurring in part and dissenting in part).

36. 1 J. BENTHAM, THE RATIONALE OF JUDICIAL EVIDENCE 522-24, 583-84 (1827); 3 W. BLACKSTONE, COMMENTARIES 372-73; 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 103 (6th ed. 1681); M. HALE, THE HISTORY OF THE COMMON LAW IN ENGLAND 344-45 (6th ed. 1820). *See generally* authorities cited *supra* note 15.

37. *See generally Richmond Newspapers*, 448 U.S. at 569-73 (opinion of Burger, C.J.), 593-97 (Brennan, J., concurring); *Gannett*, 443 U.S. at 383 (opinion of Stewart, J.), 427-32 (Blackmun, J., concurring in part and dissenting in part).

38. 3 W. BLACKSTONE, COMMENTARIES 372-73. *Accord*, Lewis v. Peyton, 352 F.2d 791 (4th Cir. 1965); United States v. Kobli, 172 F.2d 919, 921 (3d Cir. 1949) (*en banc*).

39. *See, e.g.*, *In re* Oliver, 333 U.S. at 270 n.24; United States v. Cianfrani, 573 F.2d 835, 849, 852 (3d Cir. 1978); Bennett v. Rundle, 419 F.2d 599, 606 (3d Cir. 1969); 6 J. WIGMORE, EVIDENCE § 1834 at 436 (J. Chadbourne ed. 1970).

40. 6 J. WIGMORE, *supra* note 39, § 1834 at 438.

41. *See* Note, *supra* note 33, at 1323 n.118. The continuing vitality of at least one of these justifications is vividly demonstrated, however, by an incident occurring during the trial of Sirhan Sirhan for the murder of Robert Kennedy. The testimony of a psychiatrist testifying for Sirhan was reported in the New York Times. A reader pointed out the substantial similarities between the psychiatrist's testimony and passages from a book on crime and psychiatry. The passages and testimony were published in the Times and the witness effectively impeached. *See* MacKenzie, *supra* note 27, at 778-79.

42. *See, e.g.*, Cox, *supra* note 29, at 24.

43. *See, e.g.*, Fenner & Koley, *The Rights of the Press and the Closed Court Criminal Proceeding*, 57 NEB. L. REV. 442, 478 (1978).

44. *See* Note, *supra* note 33, at 1325; Fenner & Koley, *supra* note 43 at 478-79.

45. *Nebraska Press Ass'n*, 427 U.S. at 587 (Brennan, J., concurring) (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933)).

46. *See, e.g.*, Lewis v. Peyton, 352 F.2d 791, 792 (4th Cir. 1965); Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 467, 351 N.E.2d 127, 133-34 (1976).

47. *Nebraska Press Ass'n*, 427 U.S. at 587 (Brennan, J., concurring).

in the proceedings of the judiciary[48] and dispel the ignorance and distrust . . . and suspicion bred by secrecy.[49]

Along somewhat different lines is the public's interest in deterrence and retribution, two of the major goals of the criminal justice system.[50] The cathartic aspect of the public trial as societal ritual sustains and promotes the willingness of the citizenry to act through the collective law enforcement and adjudication mechanisms. It also has been noted that trials "illustrate conflicts within society with clarity and emotional impact,"[51] thus serving a vital role in the development of social values.

The tradition and importance of the public's right to attend criminal proceedings has been universally acknowledged,[52] but prior to *Richmond Newspapers* courts differed significantly on whether this right of the public was of constitutional dimension and, if so, under what provision of the Constitution. The Constitution expressly refers to public trials in only one place, the sixth amendment.[53] Accordingly, many courts, most notably the Third Circuit,[54] pronounced the sixth amendment to be the fountainhead of a right of public access to criminal proceedings.[55]

In 1978, upon the urging of a committee headed by Judge Alfred T. Goodwin of the United States Court of Appeals for the Ninth Circuit, the ABA revised its Criminal Justice Standards.[56] The Revised Standards adopted the Third Circuit's position and declared that the public's right to attend criminal trials arises from the sixth amendment, and is a "right [that] does not belong solely to the accused to assert or forgo as he or she desires."[57] Expressing the belief that the no substantial likelihood of interference test of the original ABA Standards was inadequate to vindicate this policy,[58] the Revised Standards would permit closing a pre-trial proceeding or trial only

48. *In re Oliver*, 333 U.S. at 270 n.24.

49. *Nebraska Press Ass'n*, 427 U.S. at 587 (Brennan, J., concurring).

50. *See* Note, *supra* note 33, at 1323 n.116.

51. Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1906-09 (1978).

52. *See* Estes v. Texas, 381 U.S. 532, 614-15 (1965) (Stewart, J., dissenting) ("The suggestion that there are limits on the public's right to know what goes on in the courtroom causes me deep concern." *Id.*) Nearly every state has a separate constitutional provision paralleling the sixth amendment and guaranteeing the accused the right to a public trial. Several state constitutions go further and have a separate provision with no specific link to the accused. *See also Gannett*, 443 U.S. at 429-30 n.10 (Blackmun, J., concurring in part and dissenting in part). In any event, many state courts, under state provisions of both varieties, have expressly held that the public has a separate enforceable right to attend trials. *Id.* at 414 n.3, 429 n.10.

53. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

54. United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978). It appears that the Third Circuit is the only court ever to have actually held that the sixth amendment right to a public trial was not personal to the accused. *Gannett*, 443 U.S. at 381 n.9. *See also* Note, *supra* note 33, at 1321.

55. *See also* United States v. Clark, 475 F.2d 240, 246-47 (2d Cir. 1973); Bennett v. Rundle, 419 F.2d 599, 606-07 (3d Cir. 1969); Lewis v. Peyton, 352 F.2d 791, 792 (4th Cir. 1965); United States v. General Motors Corp., 352 F. Supp. 1071 (E.D. Mich. 1973); *accord*, Fenner & Koley, *supra* note 43, at 475-81.

56. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) [hereinafter cited as "REVISED STANDARDS"].

57. *Id.* Commentary to § 8-3.2 at 8.33.

58. *Id.* Commentary to § 8-3.5 at 8.55.

if the dissemination of information from the proceedings would create a clear and present danger to the fairness of the trial, and the prejudicial effect of such information on trial fairness "cannot be avoided by any reasonable alternative means."[59]

Both courts and commentators continued to stumble over the fact that the sixth amendment speaks only of the accused.[60] The attempt to read a public right of access into this provision was rejected by some as being inconsistent with the literal language of the sixth amendment and as straining even flexible constitutional language beyond its proper bounds.[61]

It was also apparent from the nature of many of the interests served by open proceedings that the first amendment was a likely locus for any such right to attend. There is, after all, a long-standing and respected body of first amendment law recognizing the full and free flow of information as a core objective of the first amendment.[62] It was not a difficult step to recognize a correlative right not only to disseminate but to receive information and ideas.[63] In a somewhat independent vein, the Court has recognized that the right to gather news is not without some measure of constitutional protection.[64]

Though many would perceive in these principles a first amendment right of access to public information and institutions, the Supreme Court repeatedly pulled up short of this step.[65] The Court's hesitancy appeared in significant part to be grounded in the fear that it would be unable rationally to delimit or circumscribe this potentially all-encompassing principle.[66] At first the Court's decisions could be characterized as merely refusing to grant the press a right of access superior to that of the public.[67] In *Houchins v.*

59. *Id.* §§ 8-3.2 (pre-trials); 8-3.5 (trials).

60. *See, e.g.*, Note, *supra* note 33, at 1321-26. *See also* Estes v. Texas, 381 U.S. 532, 538-39 (1967) (Harlan, J., concurring); *In re* Oliver, 333 U.S. at 270 n.25; United States v. Cianfrani, 573 F.2d 835, 861-62 (3d Cir. 1978) (Gibbons, J., concurring); United Press Ass'n v. Valente, 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954); Cox, *supra* note 29, at 19.

61. *See* Note, *supra* note 33, at 1321.

62. *See, e.g.*, Central Hudson Gas and Elec. Corp. v. Service Comm'n, 447 U.S. 557 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976); New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

63. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976); Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *see generally* Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974).

64. Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972).

65. *See, e.g.*, Nixon v. Warner Communications, Inc., 435 U.S. 589, 608-10 (1978); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 829-35 (1974). *See also* Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972); Zemel v. Rusk, 381 U.S. 1, 16-17 (1965).

66. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 16-17 (1965). For a more recent expression of this apprehension, see *Richmond Newspapers*, 448 U.S. at 603 (Blackmun, J., concurring in judgment). *See also Address by Justice Brennan*, 32 RUTGERS L. REV. 173, 196 (1979); Note, *supra* note 33, at 1317.

67. *See* Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

KQED, Inc.,[68] barely two months before the adoption of the ABA's Revised Standards, a plurality of the Court appeared to go significantly further: "[N]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[69] Chief Justice Burger, writing for himself and Justices White and Rehnquist, added that the right to gather news "affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information."[70] Concurring in the result, Justice Stewart was equally emphatic: "Forces and factors other than the Constitution must determine what government-held data are to be made available to the public."[71]

In *Houchins* the institution to which access was sought was a prison, a traditionally closed institution. Access proponents suggested that the *Houchins* decision, along with its predecessors, *Pell v. Procunier*[72] and *Saxbe v. Washington Post Co.*,[73] did not extend beyond prisons and jails, a view that in retrospect has been confirmed.[74] At the time, however, the rule of *Houchins* seemed broader: while the press was assured the same effective right of access to government institutions as the public,[75] neither press nor public had a first amendment right of access to government proceedings.[76]

Justice Stevens, joined by Justices Brennan and Powell, dissented in *Houchins*. He would have found that the Constitution requires, under certain circumstances, that the government affirmatively provide public access to information within its control. In reasoning that becomes more interesting in light of the decisions in *Gannett* and *Richmond Newspapers*, Justice Stevens placed the right of access under the first amendment. However, he found the right of access to be particularly compelling in the prison context. The public's interest in the criminal justice process, he argued, carries over from conviction to incarceration.[77] And, Justice Stevens noted: "By express command of the Sixth Amendment the proceeding must be a 'public trial.' It is important not only that the trial itself be fair, but also that the commu-

---

68. 438 U.S. 1 (1978).

69. *Id.* at 15 (opinion of Burger, C.J.). Justice Stewart's concurrence was even clearer on this point:

> The First and Fourteenth Amendments do not guarantee a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.

Id. at 16.

70. *Id.* at 11. *Cf.* Note, *supra* note 33, at 1315 (distinguishing between unwilling governmental and private sources).

71. 438 U.S. at 16.

72. 417 U.S. 817 (1974).

73. 417 U.S. 843 (1974).

74. *See* Note, *supra* note 51, at 1904. *See also* Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923, 924-25 (1980) (suggesting that *Houchins* and related decisions concerned only the rights of the press vis-à-vis the public).

75. 438 U.S. at 17 (Stewart, J., concurring). This puzzling concept and the *Houchins* opinion are discussed in J. BARRON & C. DIENES, *supra* note 16 at § 8.13.

76. *See* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 466 (1980). *See also* J. BARRON & C. DIENES, *supra* note 16, § 8.13 at 498, 501, 504.

77. 438 U.S. at 36-38 (Stevens, J., dissenting).

nity at large have confidence in the integrity of the proceeding."[78] He then repeated dicta from a Fourth Circuit opinion on the scope of the sixth amendment: " 'The right to a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake . . . .' "[79]

In any event Justice Stevens appeared to represent a clear minority on the Court. After *Houchins* and its predecessors, it is not at all surprising that those who believed the right to attend criminal proceedings was of constitutional dimension sought to lodge that right in the sixth, not the first, amendment.

II. *GANNETT*: REJECTION OF THE SIXTH AMENDMENT RATIONALE, AND A LOT MORE

In *Gannett Co. v. DePasquale*,[80] the Supreme Court upheld the closing by a state court judge of a pre-trial hearing on a suppression motion. In doing so, five members of the Court expressly declared that the sixth amendment "right to a . . . public trial, by an impartial jury, [is] personal to the accused."[81] But the five Justices wrote four opinions in the case that said a great deal more and expressed strong disagreement about virtually every other facet of the case, including what the Court held and what it likely would hold in the future.

A. *Facts*[82]

A Rochester, New York suburbanite disappeared with two male acquaintances during a boating trip to a lake in a neighboring county, about forty miles from Rochester. The two acquaintances returned in the boat the same day and drove away in the victim's truck with the sixteen-year-old wife of one of the men. The suburbanite's family reported his absence, bullet holes were discovered in the boat, and an intensive search for the victim and the suspects was begun.

Over the next two weeks, both Gannett-owned newspapers in Rochester, each claiming only a small circulation in the county where the defendants were to be tried,[83] carried seven stories concerning the man's

78. *Id.* at 36-37 (footnote omitted).

79. 438 U.S. at 37 n.32 (quoting Lewis v. Peyton, 352 F.2d 791, 792 (4th Cir. 1965)). Justices Marshall and Blackmun did not participate in *Houchins*. They were on opposite sides in *Pell* and *Saxbe*, however, and there was every reason to believe that the result in *Houchins* would not have changed had they participated. *See* Emerson, *supra* note 76, at 466.

80. 443 U.S. 368 (1979).

81. *Id.* at 379-80.

82. These facts are taken from Justice Stewart's opinion for the Court, 443 U.S. at 371-77, supplemented where indicated by Justice Blackmun's dissent, 443 U.S. at 407-10, 447-48.

83. The morning paper had a daily circulation of 1,022 or 9.6% of the market of the county where these events transpired. Its Sunday circulation was 1,532 or 14.3% of the market. The evening paper had but one daily subscriber in Seneca County. The county had a population of 34,000. 443 U.S. at 371-72 n.1. There were other newspapers in the county and at least one television station Gannett owned. Although the New York court relied upon the fact that the Gannett television station had also reported these events, 401 N.Y.S.2d 756, 758, 43 N.Y.2d 370, 372, 372 N.E.2d 544, 546 (1977), the Supreme Court opinions made no mention of this fact.

disappearance, the search for the body, the search for three suspects, the capture of the suspects in Michigan, and their subsequent arraignment, indictment, and not-guilty pleas. Although none of these stories was sensational, numerous incriminating details were revealed, including the criminal record of one of the suspects and the fact the other had led police to the spot where he had buried the decedent's gun. Also revealed was the fact two of the suspects were sixteen years old.

The defense filed motions to suppress allegedly involuntary statements made by the defendants to police and to suppress physical evidence that had been seized as fruits of the allegedly involuntary confessions. Although the motions to suppress were heard some three months after the Rochester newspapers last reported the not-guilty pleas of the defendants, the defense argued that the unabated buildup of adverse publicity jeopardized the defendants' right to a fair trial. They therefore requested that the public and press be excluded from the pretrial hearing.[84] Neither the District Attorney nor the Gannett reporter, present in the courtroom, opposed the closure.

Gannett later moved the court to set aside the exclusionary order and grant immediate access to the transcript. After a hearing, the trial judge denied the motion. The judge conceded that there was a constitutional right of access to pre-trial criminal proceedings, though it was unfortunate that no one had objected to the motion at the time it was made. He found, however, that because opening the hearing would pose a reasonable probability of prejudice to the defendants, the right of the defendant to a fair trial outweighed Gannett's right of access.[85] The trial judge did not expressly consider alternatives to closure.

B. *The Majority Opinion*

Writing for a bare majority,[86] Justice Stewart started with the plain language of the sixth amendment. He found that it mentioned only the accused and nowhere referred to a public right to a public trial.[87] He then constructed a sort of legislative history for the sixth amendment, tracing the public's right to attend criminal proceedings back to early England and through the colonial period. Noting that "[n]ot many common-law rules have been elevated to the status of constitutional rights,"[88] he concluded that this history "ultimately demonstrates no more than the existence of a

84. 443 U.S. at 409 (Blackmun, J., concurring in part and dissenting in part). The quoted words are those of Justice Stewart and the New York Court of Appeals, not the defense attorney. As the dissent noted, the defense apparently made no showing at all as to the publicity that had already occurred, basing its motion solely on the prospect that evidence inadmissible at trial might be admitted at the hearing. *Id.* at 408.

85. The trial judge's initial ruling, made before any objection had been registered by Gannett, was that "the hearing 'was not the trial of the matter' and that 'matters may come up . . . that may be prejudicial to the defendant.' " *Id.* at 408 (Blackmun, J., concurring in part and dissenting in part).

86. Chief Justice Burger and Justices Powell, Rehnquist, and Stevens joined the opinion.

87. 443 U.S. at 379-81.

88. *Id.* at 384.

common law rule of open civil and criminal proceedings."[89] He found no evidence that the public trial concept was intended to signal a departure from the common-law practice but also no evidence that the sixth amendment was intended to incorporate this particular common-law practice.[90]

At issue was only the right to attend a pre-trial hearing. Nevertheless, the textual analysis could not be confined to any particular stage of criminal proceedings; indeed, if anything it applied *a fortiori* to trials as opposed to pre-trial proceedings. It was not surprising, then, that Justice Stewart referred to the putative right throughout these portions of the opinion as the "right of access to a criminal *trial* on the part of the public."[91] But, it was not clear why Justice Stewart, frequently drifted from the sixth amendment to the Constitution and continually couched his holding as a finding that there is no constitutional right to attend criminal proceedings.[92]

The precise scope of the opinion became even less clear as Justice Stewart abandoned the narrow textual analysis and espoused an institutional justification for infringement of the admittedly strong societal interest in witnessing both pre-trial and trial proceedings. He first recited an appreciable portion of the litany of benefits of openness in judicial proceedings: improvement in the quality of testimony, inducement of unknown witnesses to come forward with relevant testimony, causing all the trial participants to perform their duties more conscientiously, and "generally giving the public an opportunity to observe the judicial system."[93] But he analogized to the strong societal interests represented by the other sixth amendment guarantees extended to the accused, such as a speedy trial and trial by jury. Full responsibility for protecting the public's interests in these guarantees is placed in the hands of the judge and the prosecutor, who both must consent to any waiver of these rights.[94] Since a member of the public, unlike the judge or prosecutor, cannot prevent the accused's waiver of these important rights, Justice Stewart reasoned, surely the public has no standing to prevent an accused's waiver of the right to a public trial.[95] "In short," he opined, "our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."[96]

Whatever the validity of this reasoning, it clearly extends beyond the

89. *Id.*

90. *Id.* at 383-87. Justice Stewart also argued that the historical analysis, because it did not differentiate between criminal and civil trials, proved too much in the context of the sixth amendment. *Id.* at 386 n.15.

91. *See, e.g., id.* at 379 (emphasis added).

92. *See, e.g., id.* at 383, 385, 394.

93. *Id.* at 383.

94. *Id.* at 382-84. *See* Singer v. United States, 380 U.S. 24, 34-35 (1965). *Singer* upheld the constitutionality of FED. R. CRIM. P. 23(a) which states, in its entirety: "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." *See also* Barker v. Wingo, 407 U.S. 514 (1972) (acknowledging possible interest of defendant in delaying trial despite sixth amendment right to speedy trial). *But see* Faretta v. California, 422 U.S. 806 (1975) (absolute right of self representation notwithstanding right to the assistance of counsel).

95. 443 U.S. at 384.

96. *Id.*

narrow question of whether the sixth amendment provides a public right of access to criminal proceedings. The Court appeared to be declaring that the public interest in open criminal proceedings, from wherever it may arise, is fully protected by the institutional interests of the judge, the prosecutor, and the defendant. It appeared then that Justice Stewart's frequent use of Constitution in place of sixth amendment was advertent.

The foregoing textual and public policy analyses were applied equally to trials and pre-trial proceedings, although Justice Stewart perceived an even weaker claim of constitutional stature for the right to attend pre-trial proceedings. In reviewing the history of the right to attend criminal proceedings, he found substantial evidence that even under the common law there was no tradition of public attendance at pre-trial proceedings.[97] He postulated that public access to pre-trial suppression hearings poses special risks of unfairness because the purpose of the hearings is to review and possibly to shield from the jury potentially unreliable or illegally obtained evidence.[98] Justice Stewart found the danger of publicity concerning suppression hearing to be "particularly acute because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial."[99] It was apparent to Justice Stewart that closure of pre-trial proceedings was often "one of the most effective methods that a trial judge can employ"[100] to ensure trial fairness. And he immediately footnoted this declaration with the admonition that the criminal justice system "permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial."[101]

The insensitivity of this analysis to the interests motivating the policy of open courtrooms, especially with respect to pre-trial proceedings, is discussed below,[102] as is the validity of Justice Stewart's view of the dynamics of the judicial system.[103] But it is worth noting here that these last two points implicitly assume that the public's interest is not of a constitutional nature. Thus, Justice Stewart's argument that the need for these severe protective measures is demonstrated by the uncertainty of the degree of prejudice flowing from failure to do so, turns traditional constitutional and particularly first amendment analysis on its head. One need look no further than *Nebraska Press Association v. Stuart*, where the Court rejected a pre-trial prior restraint in part because the trial judge's "conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable."[104] Justice Stewart's reversal of this traditional presumption can only be accepted on the premise that he assumed no constitutional right, and certainly no first amendment right, was implicated by closure. Similarly, his exhortation to trial judges to be

97. *Id.* at 387-91. *See* Richmond Newspapers, 448 U.S. at 560 (opinion of Burger, C.J.).
98. 443 U.S. at 378-79.
99. *Id.* at 378.
100. *Id.* at 379.
101. *Id.* at n.6.
102. *See infra* text accompanying notes 211-27.
103. *See infra* text accompanying notes 228-42.
104. 427 U.S. at 563.

overcautious in protecting defendants' sixth amendment rights makes no sense if the protective measures infringe upon the first amendment rights of others; otherwise his call to arms would amount to encouraging judges to be overbroad in issuing closure orders.

Notwithstanding all these indications that the Court was effectively ruling that the right of access to any stage of criminal proceedings was not located anywhere in the Constitution, Justice Stewart then expressly confronted the question of whether this right could be located in the first amendment. Remarkably, citing his own concurring opinion in *Houchins*, he came very near to asserting that the question of a first amendment right of minimum access to at least some government institutions was still an open question.[105] He promptly declared the Court need not decide whether there is any such constitutional right because "this putative right was given all appropriate deference by the state *nisi prius* court in the present case."[106]

Justice Stewart's opinion ends, then, with a non-holding purporting to leave open an issue the rest of the Court's analysis would seem to decide. At the very least, however, this non-holding appeared to be a determination that the balancing standard (permitting closure upon a showing of a reasonable probability of prejudice) and procedures adopted by the lower court would adequately protect first amendment rights.

B. *The Concurring Opinions: Compounding the Confusion*

Of the four justices who joined in Justice Stewart's opinion, only Justice Stevens did not succumb to the temptation to write separately. The three who did, succeeded not only in highlighting the conflicting cross-currents in the Court's opinion, but also in making it virtually impossible to discern the decision's precedential effect.

Chief Justice Burger's concurrence basically tracked the majority opinion. He, too, rested in the first instance on the plain language of the sixth amendment. He, too, conducted a mini-tour through the common-law history of open criminal trials. While acknowledging that the public has an interest in observing the performance not only of the litigants and the witnesses but also of the advocates and the presiding judge, he also found that "interest alone does not create a *constitutional* right."[107]

Despite the apparent breadth of this statement, and the fact that he joined the opinion of the Court, the Chief Justice insisted that he was writing to emphasize that "a hearing on a motion before trial to suppress evidence is not a *trial*, it is a *pre*trial hearing."[108] He elaborated upon the historical analysis in the majority opinion and noted that, although suppression hearings were unknown in civil pre-trial proceedings at the time the Constitution

105. 443 U.S. at 391-92: "Some members of the Court, however, took the position in [*Pell*, *Saxbe* and *Houchins*] that the First and Fourteenth Amendments do guarantee to the public in general, or the press in particular, a right of access that precludes their complete exclusion in the absence of a significant governmental interest."

106. *Id.* at 392.

107. *Id.* at 394 (emphasis added).

108. *Id.* at 394 (emphasis in the original).

was adopted, civil proceeding hearings were not wholly unknown at the time. At common law, he concluded, "there was a very different presumption for proceedings which preceded trial."[109] The Chief Justice concluded with an essentially opaque functional analysis:

> In the entire pretrial period, there is no certainty that a trial will take place. Something in the neighborhood of 85 percent of all criminal charges are resolved by guilty pleas, frequently after pretrial depositions have been ruled upon.
>
> For me, the essence of all of this is that by definition 'pretrial proceedings' are exactly that.[110]

Justice Powell, too, joined in the Court's opinion. Nevertheless, he wrote separately to state his view that the Gannett reporter, as agent of the public at large, had an interest protected by the first and fourteenth amendments in being present at the pre-trial suppression hearing.[111] In direct contrast to the Chief Justice, Justice Powell rejected the notion that closure of pre-trial suppression hearings must be judged by a different standard from trials. He declared that because of the paucity of criminal trials and the often-dispositive nature of suppression hearings, "the public's interest in this proceeding often is comparable to its interest in the trial itself."[112] He noted that in this respect he was in agreement with the four dissenting justices, who would have found a sixth amendment right of access. Reasoning from this agreement, he announced, contrary to Justice Rehnquist's suggestion,[113] that lower courts "cannot assume . . . they are . . . free from all constitutional constraint" in closing criminal proceedings.[114]

Justice Powell emphasized the importance of providing trial judges with a clear constitutional standard to govern closure decisions.[115] The urgency connotated by this perception, however, did not prevent him from concocting a flexible set of standards which did not comport with that of the four dissenters and which, in fact, had never been adopted by the Court or any of its members. Justice Powell would permit closure whenever "a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report judicial evidence that will not be presented to the jury."[116]

To this general principle, Justice Powell added three specific requirements: 1) the trial court must consider whether there are alternative means "reasonably available by which the fairness of the trial might be preserved without interfering substantially with the public's interest in prompt access to information concerning the administration of justice;"[117] 2) the exclusion order must extend no further than is necessary to achieve these goals; and

109. *Id.* at 394, 396.
110. *Id.* at 397.
111. *Id.*
112. *Id.* at n.1.
113. *See infra* text accompanying note 123.
114. 443 U.S. at 398 n.2.
115. *Id.* at 398.
116. *Id.* at 400.
117. *Id.* at 400-01.

3) representative groups who are present at the time the motion for closure is made must be given an opportunity to be heard.[118]

In this instance, Justice Powell believed "the procedure followed by the trial court fully comported with that required by the Constitution."[119] He made much of the fact that no objection had been made before the closure order. He agreed with the trial judge's conclusion that substantial prejudice was likely given "the nature of the evidence to be considered at the hearing, the young age of two of the defendants, and the extent of the publicity already given the case . . . ."[120] The fact that the trial judge did not give any explicit consideration to alternatives to closure and sealing of the transcript was forgivable in light of the uncertain nature of Gannett's claims and the unsettled nature of the law.[121]

The final concurrence was that of Justice Rehnquist, who took the opportunity to emphasize that despite the Court's seeming reservation of the first amendment question, "it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings."[122] After quoting Justice Stewart's concurrence in *Houchins*, he declared that the Court had emphatically rejected Justice Powell's position and announced that "in my view, and, I think, in the view of a majority of this Court, the lower courts are under no constitutional constraint [and are] free to determine for themselves" whether or not to close court proceedings.[123]

He then derided Justice Powell for suggesting that there was a majority of the Court who would repudiate the doctrine of *stare decisis* and find constitutional limitations to courts' authority to close their proceedings, even though those limitations would necessarily stem from two different sources in the Constitution. This would indeed be, said Justice Rehnquist, the odd quintuplet. Moreover, he declared, as a practical matter, such an amalgam of views would "place outside of any limits imposed by the United States Constitution all but the most bizarre orders closing judicial proceedings . . . ."[124]

C. *The Dissent*

In an elaborate and painstaking dissent, Justice Blackmun, joined by Justices Brennan, White, and Marshall, disparaged the sixth amendment

118. *Id.* Justice Powell placed the burden of proof on the party seeking to close the trial to demonstrate that the fairness of the trial likely would be prejudiced by public access. The burden would then shift to the members of the press and public who object, to demonstrate that satisfactory alternative procedures are available. *Id.* at 401.

119. *Id.* at 403.

120. *Id.* at 402. The reference to the "young age" of the defendants is mystifying. The rationale for closing juvenile proceedings lies in their civil, *in loco parentis* natures. The *Gannett* defendants were being tried as adults. Surely Justice Powell was not suggesting a general rule that pre-trial publicity is more likely to cause unfair trials for younger defendants?

121. *Id.* at 403 n.4.

122. *Id.* at 404. Among the authorities cited for this proposition was the *Gannett* dissent.

123. *Id.* at 405.

124. *Id.* at 405 n.2.

textual analysis of the majority as a mere mechanical inference.[125] Justice Blackmun rested primarily upon an exhaustive examination of the common-law practice of open trials and found in the strength of that tradition and recognition of its public benefits an inference that the language of the sixth amendment had not been intended to preclude assertion of the right by the public.[126] He expounded at length upon the societal benefits of openness in criminal proceedings,[127] finding, as did Justice Powell, that these values accrue not only from open trials but from open pre-trial proceedings such as suppression hearings, which are close equivalents of trials on the merits.[128] In any event, Justice Blackmun concluded that trials and their close equivalents could not be closed to the public without a showing that closure is "strictly and inescapably necessary in order to protect the fair trial guarantee."[129]

Justice Blackmun elaborated in some detail a multipart inquiry by which this determination should be made. He first placed on the party seeking closure the burden of providing an "adequate basis to support a finding that there is a substantial probability that irreparable damage to his fair trial right will result from conducting the proceeding in public."[130] This showing would require in the first instance evidence as to the impact on the jury pool of the information revealed at the hearing. In particular, this would involve an assessment of the nature and extent of the publicity prior to the motion to close, information relating to the size of the jury pool, the extent of media coverage in the pertinent locality and the ease with which a change of venue can be accomplished. Also pertinent would be whether and to what extent the information sought to be suppressed has already been divulged to the public.

Second, the accused must show a "substantial probability that alternatives to closure will not protect his right to a fair trial."[131] Third, the ac-

125. *Id.* at 407. Throughout his dissent, Justice Blackmun insisted upon characterizing the issue not as whether the sixth amendment grants the public an independent right of access but rather whether that amendment grants the accused the right to compel private criminal proceedings. *See, e.g.*, *id.* at 415. Justice Stewart easily disposed of this more severe formulation by noting that either the prosecutor or the trial judge could *sua sponte* prevent closure, whether or not the public has an independent right of access. As a practical matter, however, Justice Blackmun was surely correct that without recognition of an independent public interest in open proceedings, the institutional objectives of the judge and the prosecutor will not fully protect the interests of the public. *See infra* text accompanying notes 233-39.

126. 443 U.S. at 418-27.

127. *Id.* at 427-33. Briefly, he found that public trials not only ensure the impartiality of proceedings, but enable the public to scrutinize the performance of police and prosecutors, educate the public as to the performance and functions of important government officials, and promote public confidence in the administration of justice.

128. *Id.* at 433-39. His reasoning rested solely on a functional analysis, *i.e.*, that suppression hearings are conducted in the manner of trials, are often dispositive, involve important questions as to the conduct of law enforcement officials and involve the potential exclusion of highly relevant evidence. *Id.* at 434-36. *See infra* text accompanying notes 216-232. Justice Blackmun essentially acknowledged that there was no common-law right to attend pre-trial proceedings. *Id.* at 436.

129. *Id.* at 440. The Third Circuit first enunciated this standard. *See* United States v. Cianfrani, 573 F.2d 835, 854 (3d Cir. 1978); Bennett v. Rundle, 419 F.2d 599, 607 (3d Cir. 1969).

130. 443 U.S. at 441.

131. *Id.*

cused should demonstrate that there is a "substantial probability that closure will be effective in protecting against the perceived harm."[132] Fourth, should the trial court determine that the accused has established the necessity of closure, the sixth amendment still requires that "restrictions imposed should extend no further than the circumstances reasonably require."[133] Finally, Justice Blackmun would require the court to permit contemporaneous objections from those present in the courtroom (though he would not require notice to the public), to state its reasons for the record and to make a complete record of the proceedings.[134]

In this case, Justice Blackmun found no factual basis for the closure order. The reporting had been circumspect and accurate, no story had appeared for ninety days, the papers had a tiny circulation in the venue, virtually all of the information to be brought out at the hearing was already known and alternatives to closure seemed readily apparent and apparently effective.[135]

There remains the dissent's curious treatment of the first amendment issue. Early in his dissent Justice Blackmun noted that notwithstanding Justice Powell's "concern . . . this Court heretofore has not found, and does not today find, any First Amendment right of access to judicial or other governmental proceedings."[136] Gannett's assertion of a first amendment right of access and its claim that the appropriate closure standards were those adopted in *Nebraska Press Association* to govern prior restraints were dispatched in short order:

> I do not agree. As I have noted, this case involves no restraint upon publication or upon comment about information already in the possession of the public or the press. It involves an issue of access to a judicial proceeding. To the extent the Constitution protects a right of public access to the proceeding, the standards enunciated under the Sixth Amendment suffice to protect that right. I therefore need not reach the issue of First Amendment access.[137]

Of course, the standards he had enunciated under the sixth amendment would have sufficed to protect the right of access only if the sixth amendment approach had been adopted by the Court, which it was not. Was Justice Blackmun implying that the dissenters would accept Justice Powell's suggestion and continue to decide cases on a principle rejected by a majority of the Court? Or was he indicating that Justice Rehnquist was correct in citing the dissent as authority for the final entombment of the first amendment right of access? Or was he simply acknowledging that whatever he held, it would not change the outcome of this case?

D. *What Did Gannett Hold?*

The one clear holding adopted by a majority of the Court in *Gannett* is

132. *Id.* at 442.
133. *Id.* at 444.
134. *Id.* at 445-46.
135. *Id.* at 407-10, 447-48.
136. *Id.* at 411.
137. *Id.* at 447.

that the sixth amendment does not in and of itself provide the public with a right to attend a pre-trial suppression hearing. As a technical exercise in statutory interpretation, this conclusion is plausible, if by no means compelling.[138] Unfortunately, the dispositive analysis employed by Justice Stewart cannot be confined to this narrow holding. His conclusion that sixth amendment rights must be viewed as personal to the accused is premised in the first instance on the plain language of the sixth amendment and the lack of any contrary intent of the drafters. As such it applies with equal force to trials as well as pre-trial proceedings. Even this extension would not have created significant controversy, if the opinion were clearly restricted to the sixth amendment. But Justice Stewart went on to enumerate the public benefits of open proceedings and to declare them adequately protected by the participants in the litigation. He repeatedly referred to constitutional rather than sixth amendment rights. The history of open criminal proceedings, he stated, did no more than demonstrate the existence of a common law right and "not many common law rights have been elevated to the status of constitutional rights."[139] Justice Rehnquist took this cue to announce that the Court had indeed freed lower courts from all constitutional restraints on closures, save possibly for the most bizarre orders.

Thus the Court's reservation of the first amendment question seemed *pro forma*. The dissent was surely correct that to find a reasonable probability of prejudice in the skimpy facts in the record before the Court was largely to emasculate to a large extent any first amendment right that might subsequently be recognized.

Justice Powell's opinion, however, indicated that the constitutional standard would be more stringent in the future. By pointing to the four dissenters, he in effect declared his proposed standards to be the minimum showing required by the Constitution, under a combination of the first and sixth amendments. Nevertheless, as Justice Rehnqust properly complained, there was in fact no majority finding the public's right of attendance to be protected, only an odd quintuplet. If *stare decisis* had any vitality (and these cases cast serious doubt on that proposition), there were only four justices who had signalled their allegiance to the principle of a first amendment right of access.[140] Whatever one can make of Justice Blackmun's statement in *Gannett* that he need not decide the first amendment issue, there could be little doubt, both from the tone of the opinion and the extraordinary efforts he undertook to shoehorn the right of access into the sixth amendment, that he was strongly disinclined to find such a right. The final touch was provided by the Chief Justice, who implied that he would treat trials differently than pre-trial proceedings. Although this, too, was a theme of the Court's opinion, it was repudiated by the odd quintuplet, who would find an equally strong right to access to trials and to their close equivalents such as suppression hearings.

138. *See supra* note 60.

139. 443 U.S. at 384.

140. *See* Houchins v. KQED, Inc., 438 U.S. 1, 19 (1978) (Stevens, J., dissenting, joined by Brennan and Powell, JJ.); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (Powell, J., dissenting, joined by Brennan and Marshall, JJ.).

The result of this almost impenetrable melange of conflicting signals was predictable. Both the commentators and the press expressed uncertainty, confusion, and disbelief.[141] The confusion intensified as nearly all the Justices took to the stump and made wildly varying clarifications.[142] More important, the confusion was accompanied by a remarkable rush of closure motions and orders.[143]

III. *RICHMOND NEWSPAPERS*: ADOPTION OF THE FIRST AMENDMENT RATIONALE AND A LOT LESS

Whether it was to staunch this flow or "to escape further pummeling by the press,"[144] the Court granted certiorari in the case of *Richmond Newspapers, Inc. v. Virginia*,[145] a mere five months after the decision in *Gannett*. And one year to the day after the *Gannett* decision, the Court held that the first amendment did provide the public with an enforceable right of access to criminal trials.

Notwithstanding the confusion that had followed the five opinions in *Gannett*, the eight Justices participating in *Richmond Newspapers*[146] found it necessary to express their views in seven different opinions, none of which collected more than three votes.

A. *Facts*[147]

The defendant, John Paul Stevenson, was charged with the murder of a hotel manager in a small town in Virginia. His initial conviction had been overturned by the Virginia Supreme Court because it was based on a blood-stained shirt which had been admitted improperly into evidence.

After the second trial, a newspaper account had reported not only the mistrial but also the details surrounding the accused's original conviction and its reversal. The third trial had ended in a mistrial because a prospective juror had read about the previous trials in the newspaper and had told other prospective jurors about the case before the trial started.

Two months later, at the outset of the fourth trial, the defense moved to

141. An excellent array of the confused reactions is contained in Rapid City Journal v. Circuit Ct., 283 N.W.2d 563 (S.D. 1979), where the majority accepted Justice Rehnquist's interpretation of the holding of *Gannett*. One dissent accepted Justice Powell's position on the first amendment and another dissent, relying in part on the Chief Justice's concurrence, would have found a sixth amendment right of access to trials but not to pre-trial proceedings. Much of the legal and journalistic commentary decrying the obscurity of the *Gannett* decision was collected by Justice Blackmun in his concurring opinion in *Richmond Newspapers*. 448 U.S. at 602 nn.1, 2.

142. *See* Reznek, Gannett v. De Pasquale *and* Richmond Newspapers v. Virginia: *Re-opening Courtroom Doors and Constitutional Windows*, 10 CAP. U.L. REV. 101, 114 n.66 (1980). *See also* Cox, *supra* note 29; Schmidt, *The* Gannett *Decision: A Contradiction Wrapped In An Obfuscation Inside an Enigma*, 18 JUDGES' J. 12, 13 (1979); Stephenson, *Fair Trial-Free Press: Rights In Continuing Conflict*, 46 BROOKLYN L. REV. 39, 63-64 (1979).

143. *See generally* Reporter's Committee on Freedom of the Press, Court Watch Summary, *supra* note 14. *See also* United States v. Powers, 622 F.2d 317, 321 n.2 (8th Cir. 1980); Cox, *supra* note 29, at 20; Reznek, *supra* note 142, at 116-18.

144. Cox, *supra* note 29, at 24.

145. 448 U.S. 555 (1980).

146. Justice Powell did not participate.

147. 448 U.S. at 559-63.

close the trial to the public. In support of this motion, defense counsel offered nothing more than the assertion that a family member of the decedent had been present in court earlier and counsel did not want information being shuffled back and forth at the recess. Neither the prosecutor nor the two reporters present objected. The trial judge granted the motion apparently without further comment. The newspaper moved to vacate the closure order later that day and a hearing was held at the conclusion of the day's proceedings. In support of the motion, defense counsel recounted that this was the fourth trial, that there had been a problem with information passing between jurors and that he did not want information prejudicial to the accused to leak out to the jurors of this small community. The trial judge, declaring obscurely that his ruling might be different if the courtroom were set up in such a fashion that the jury would not see and be distracted by spectators, ratified the closure order. He reasoned that if the rights of the defendant are infringed in any way, a defense motion to close should be granted so long as it "doesn't completely override all rights of everyone else. . . ."[148]

B. *The Plurality Opinion*

Chief Justice Burger, writing for himself and Justices White and Stevens, made no attempt to clarify or explain the conflicting strands in *Gannett*. Indeed, he immediately indulged in precisely the same ambiguity that had riddled the Court's opinion in *Gannett*: "In *Gannett* . . . the Court was not required to decide whether a right of access to *trials*, as distinguished from hearings on *pre*trial motions, was *constitutionally* guaranteed."[149]

The Chief Justice properly stated that *Gannett* was limited to a sixth amendment holding pertaining to pre-trial proceedings and did not decide whether the first amendment guarantees a right of access to trials.[150] But he did not explain why the sixth amendment analysis in *Gannett* did not apply equally to trials or why the public policy conclusions in *Gannett* did not apply equally to any putative first amendment right to attend pre-trial proceedings or trials.

In any event, the Chief Justice proclaimed that

> [h]ere for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.[151]

The Chief Justice retraced the familiar history of open trials, a history supported by reasons as valid today as in centuries past, concluding that a presumption of openness inheres in every criminal trial.[152] He recounted the usual array of reasons supporting this history, including the educative effect on the citizenry which increases the respect for the law and inspires confi-

148. *Id.* at 561.
149. *Id.* at 564 (emphasis added to "constitutionally").
150. *Id.*
151. *Id.*
152. *Id.* at 573.

dence in judicial remedies by providing intelligent acquaintance with the methods of government.[153] The Chief Justice signaled out for special attention the significant community therapeutic value in open trials, the satiation of the urge to punish, and the need for retaliation and vengeance within the framework of organized society and the rule of law.[154]

The question remained as to how to elevate this common-law tradition to constitutional stature. The Chief Justice first observed that the right to attend trials served the same core purpose as the express first amendment rights, "assuring freedom & communication on matters relating to the functioning of government."[155] Then, venturing where the Court had repeatedly balked, he expressly cited the decisions establishing the freedom to listen and to receive information and ideas and concluded: "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public *at the time that amendment was adopted*."[156]

The Chief Justice found further support in the public forum doctrine, equating courtrooms with streets, sidewalks, and parks as traditionally open places: "People assemble in public places not only to speak or to take action, but also to listen, observe and learn . . . ."[157] The Chief Justice then addressed the State's argument that the right to attend trials must fail because it was nowhere spelled out in the Constitution. He equated the right to attend criminal trials with, in Justice Blackmun's words, a pot pourri of other constitutionally unarticulated fundamental rights such as the rights of association, privacy, and interstate travel.[158]

Having recognized the right, the Chief Justice left to another day the task of establishing the appropriate standard to govern its accommodation with the rights of the accused to a fair trial. He found dispositive the failure of the lower court to make any findings in support of his order or to examine any of the various tested alternatives to closure. Beyond that the Chief Justice would say only that "[a]bsent an overriding interest, articulated in findings, the trial of a criminal case must be open to the public."[159] Even if this standard could be regarded as anything but purely tautological, the superior right of an accused to a fair trial had already been identified at the outset of his opinion as an overriding interest. The Chief Justice, then, was refusing to specify any fair-trial closure test.

C. *Justice Brennan's Concurrence*

Justice Brennan's concurrence provided an extension of the views he espoused in *Nebraska Press Association*. Less grudgingly than the Chief Justice, he, too, attempted to place the right of access to trial proceedings in the

153. *Id.* at 572.
154. *Id.* at 570-72.
155. *Id.* at 575.
156. *Id.* at 576 (emphasis added).
157. *Id.* at 577-78.
158. *Id.* at 579-80.
159. *Id.* at 581.

context of a larger right of public access to governmental information. This right of access to information rested on the structural importance of public debate in a democracy and on the implicit antecedent assumption that to be valuable, public debate must be not only "uninhibited, robust and wide-open," but also "informed."[160] The prior right-of-access decisions, all of which had resulted in rejections of the putative right, simply reflected the special nature of the right.[161] When read with care, Justice Brennan stated, these decisions are consistent with the general rubric that "any privilege of access to government information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality."[162]

Justice Brennan located two helpful principles in determining how to cull out the information to which this theoretically endless access principle applies. First, because a tradition of accessibility implies the favorable judgment of experience, the right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Second, the value of access must be measured in specifics and the importance of access to a particular governmental process must be measured in terms of that very process.[163]

Needless to say, in assessing the importance of public access to the trial process, Justice Brennan found the judgment of experience to have been favorable. As to the effect of access on the functioning of the process, he relied in part on the belief that public access promoted accurate factfinding and in part on the belief that secrecy was profoundly inimical to the demonstrative functions of the trial process, including the demonstration that the laws are fairly administered.[164] Importantly, Justice Brennan also rested heavily on the notion that the judiciary is a coordinate branch of government whose role, particularly with respect to the vitally important task of construing and protecting constitutional rights, has extended far beyond the adjudication of private disputes.[165] To Justice Brennan, public access to trials assumed the status of "an important check, akin in purpose to the other checks and balances that infuse our system of government."[166]

These factors, said Justice Brennan, "tip[ped] the balance strongly toward the rule that trials be open."[167] He never said, however, what was on the other side of this balance, nor did he assess any claims by the Government that there were countervailing interests promoted by judicial secrecy and confidentiality that were systematically impaired by openness. He also expressly declined to declare which state interests might be sufficient in particular cases to overcome the presumption of closure, noting that in this case

160. *Id.* at 586.
161. *Id.* at 587.
162. *Id.* at 586.
163. *Id.* at 588-89.
164. *Id.* at 593-97.
165. *Id.* at 595.
166. *Id.* at 596. For a discussion of the checking value with respect to newsgathering and trial reporting, see Blasi, *The Checking Value In First Amendment Theory*, 77 AM. B. FOUND. RESEARCH J. 521, 591-611, 636-37 (1977).
167. 448 U.S. at 598.

the judge's decision had rested on a state closure statute which gave trial judges unfettered discretion.[168]

D. *The Remaining Opinions*

The remaining opinions were singularly unenlightening. Justice Stewart, the author of both the concurring opinion in *Houchins* and the majority opinion in *Gannett*, concurred in the judgment, calmly pronouncing that the first amendment clearly gives the public and press a right of access to trials. He made virtually no attempt to reconcile this position with either of his prior opinions. He did join in the Chief Justice's public forum analogy, which, as discussed below,[169] provides a basis for distinguishing Justice Stewart's conclusion, if not his reasoning, in *Houchins*. Then, incredibly, he bolstered his decision by alluding to the many good reasons for open trials set out not only in the two main opinions in *Richmond Newspapers*, but in Justice Blackmun's dissent in *Gannett* as well. The only hint of a reconciliation of his current stance with his position in *Gannett* came in his declaration that the Court had not yet delivered the ultimate answer as to the first amendment status of access to pre-trial hearings.[170]

Justice Blackmun concurred in the judgment as a secondary position to his preferred sixth amendment position. He said little, however, other than to chastise the Court for *Gannett* and to bemoan the task of wrestling with the problems of delimiting a first amendment right of access.[171] Justice Rehnquist dissented, decrying the Court's usurpation of constitutional power from the states and the elective branches of government.[172]

Justice Stevens concurred in the Chief Justice's opinion, pronouncing this to be a watershed case because the Court unequivocally held that an arbitrary interference with access to important information is an abridgement of the first amendment. He pointed out that he had dissented at length in *Houchins*. He then expressly incorporated by reference in his concurrence that portion of his dissent in *Houchins* where he had relied in part on the sixth amendment in deriving a right of access to prisons. Apparently speaking to those who might be puzzled as to how his position had escaped unscathed his silent concurrence in the Court's opinion in *Gannett*, Justice Stevens simply cited the language of the sixth amendment and declared *Richmond Newspapers* to be in no way inconsistent with the perfectly unambiguous holding of *Gannett* that the sixth amendment is personal to the accused. The drafters of the sixth amendment, he stated, had merely been identifying the accused as the party with the greatest interest in a public trial.[173]

168. *Id.*
169. *See infra* text accompanying notes 202-07.
170. 448 U.S. at 598-99.
171. *Id.* at 601-04.
172. *Id.* at 604-06.
173. *Id.* at 582-84.

E. *What Is Left of Gannett?*

Before assessing the status of fair-trial closures in light of *Richmond Newspapers*, it might well be asked just what remains of *Gannett*. That the answer is not obvious is amply demonstrated by the range of views expressed by courts and commentators in the wake of *Richmond Newspapers*. The Judicial Conference Committee on the Operation of the Jury System sees in *Richmond Newspapers* implicit approval of *Gannett*.[174] Indeed, notwithstanding the views of the odd quintuplet in *Gannett*, declaring access to pre-trial suppression hearings to be as important as access to trials, at least one court has found in the welter of views expressed in *Gannett* and *Richmond Newspapers*, that a state may require exclusion of the public from any preliminary hearing, even if the hearing has all the characteristics of a suppression hearing.[175] Others have taken the position that while there is some first amendment right of access to pre-trial proceedings, that right is sheltered by a less protective standard than the one applying to trials.[176] Still others have placed access to trials and all pre-trial proceedings on equal constitutional footing.[177]

Significant divergences in approach are also evident among those articulating a balancing standard with which to weigh first amendment rights against the countervailing concern of trial fairness. Some have adopted the overall standard proffered by Justice Powell in *Gannett*: whether an open hearing will likely prejudice the sixth amendment rights of the defendant.[178] Others, such as the Judicial Conference Committee, have adopted a reasonable likelihood of prejudice standard;[179] the Justice Department guidelines require a "substantial likelihood" of prejudice.[180] The Ninth Circuit, faced with a trial closure, found no standard in *Richmond Newspapers* and searched the confusing *Gannett* case for guidance. It concluded the trial judge must find that the defendant's right to a fair trial will be prejudiced before closure is permitted. The court then permitted partial closure.[181] Other courts have reaffirmed the clear and present danger test of the Revised Standards, although at least one court expressly adopted the Revised Standards governing pre-trial closures after declaring that *Gannett* controlled the decision.[182] The courts and codifiers have shown an encouragingly greater

174. JUDICIAL CONFERENCE COMMITTEE REVISED REPORT, *supra* note 5, at 523. *But cf.* Advisory Committee Note, *supra* note 7, at 67 (*Richmond Newspapers* has some application to pre-trial proceedings).

175. San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 179 Cal. Rptr. 772, 638 P.2d 655 (1982) (upholding constitutionality of state statute making exclusion mandatory upon defendant's request).

176. *See, e.g.*, State v. Burak, 37 Conn. Supp. 627, 431 A.2d 1246, 1248 (1981).

177. *See, e.g.*, United States v. Edwards, 430 A.2d 1321, 1344 (D.C. App. 1981) (en banc); Patuxent Publishing Co. v. Maryland, 48 Md. App. 689, 693, 429 A.2d 554, 556 (Ct. Spec. App. 1981); Richmond Newspapers Inc. v. Virginia, 281 S.E.2d 915, 922-23 (Va. 1981).

178. *See, e.g.*, State v. Burak, 37 Conn. Sup. 627, 431 A.2d 1246, 1248 (1981); United States v. Edwards, 430 A.2d 1321, 1345 (D.C. 1981); Richmond Newspapers, Inc. v. Virginia, 281 S.E.2d 915, 922-23 (Va. 1981).

179. *See supra* authorities cited note 174.

180. UNITED STATES DEPARTMENT OF JUSTICE, GUIDELINES ON OPEN JUDICIAL PROCEEDINGS, 28 C.F.R. § 50.9(c)(6)(i).

181. Sacramento Bee v. United States Dist. Ct., 656 F.2d 477, 481-83 (9th Cir. 1981).

182. Kansas City Star v. Fossey, 630 P.2d 1176 (Kan. 1981). *See also In re* P.R., 637 P.2d 346

degree of acceptance of the procedural predicates for fair-trial closures outlined in the *Gannett* opinions of Justices Powell and Blackmun.[183]

In fact, *Gannett* should be viewed as a nullity with respect to first amendment issues, both as to the question of whether the first amendment issues right of access will be extended to pre-trial proceedings and as to what the balancing standard governing any fair-trial closures of protected proceedings should be. Although *Gannett's* first amendment non-decision technically approved the reasonable probability standard utilized by the trial court, the opinion also found the public's right to attend all criminal proceedings to be fully protected by the participants. It concluded that the common law right of access simply did not attain constitutional stature. Yet this reasoning was repudiated by seven of the eight justices who participated in *Richmond Newspapers*, including the author of the opinion in *Gannett*. Moreover, with the possible exception of the plurality opinion, a majority of those voting in *Richmond Newspapers*, again including the author of the opinion in *Gannett* clearly viewed the first amendment status of pre-trial proceedings to be an open question. While *Gannett* offers an empirical justification for distinguishing between trials and pre-trial proceedings,[184] the only aspect of the decision which can logically survive *Richmond Newspapers* is the very limited proposition that the language of the sixth amendment precludes the use of that amendment as a source for a public right of access to criminal proceedings.

IV. WHAT DOES *RICHMOND NEWSPAPERS* IMPLY FOR THE FUTURE OF FAIR-TRIAL CLOSURES?

Richmond Newspapers unquestionably constitutionalizes the public's right to observe criminal trials. The seven-to-one vote, an all-too-rare margin in the Burger Court on constitutional issues,[185] at first blush seems a resounding affirmation of this important and long-held civil liberty. But the decisive margin was present only with respect to criminal trials themselves. The Court obviously remains deeply divided as to the broader issues underlying a first amendment right of access. The decision is, nevertheless, certain to be offered in support of a wide variety of claims of access to other kinds of judicial and governmental proceedings.[186] Whether *Richmond Newspapers* is in fact Justice Stevens' watershed or landmark decision establishing the pub-

(Colo. 1981) (contempt proceeding for grand jury witness; clear and present danger standard reaffirmed).

183. *See, e.g.*, Sacramento Bee v. United States Dist. Ct., 656 F.2d 477, 482 (9th Cir. 1981) (opportunity to object, use of less intrusive alternatives and narrowly drawn exclusions); *In re* United States *ex rel.* Pulitizer Publishing Co., 635 F.2d 676, 678-79 (8th Cir. 1980) (voir dire closure: opportunity to object, articulated findings as to less intrusive alternatives). *See also* JUDICIAL CONFERENCE COMMITTEE REVISED REPORT, *supra* note 5; JUDICIAL CONFERENCE COMMITTEE REPORT, *supra* note 7.

184. *See supra* text accompanying notes 94-100.

185. *See generally* Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, app. (1981).

186. *See, e.g.*, *In re* Application of NBC, 648 F.2d 814 (3d Cir. 1981) (suggesting applicability to videotape evidence admitted at trial). *See also* Fenner & Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 430-32 (1981) (civil judicial proceedings); Note, *supra* note 51, at 1921-23 (civil proceedings); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 157 (1980).

lic's right of access to these and other important governmental operations and information generally and whether it will lead to a "significant and salutary recasting of much first amendment doctrine,"[187] are beyond the scope of this article. The welter of views expressed in *Richmond Newspapers* (and, of course, *Gannett*) instead will be analyzed to answer the more limited questions of whether the right of access will and should be extended beyond trials to other criminal proceedings and, if so, what balancing standard should govern closures of protected criminal proceedings when the asserted state interest is to protect an accused's right to a fair trial.

A. *The Divergent Principles of the Major Opinions*

Both the Chief Justice and Justice Brennan found a first amendment right of public access to criminal trials. Both relied heavily on the traditional openness of criminal trials (as did the dissent in *Gannett*). But, because of their differing objectives, the two Justices employed the element of history in quite different ways, with significantly different implications.

1. Underpinnings of the Right to Know

Before assessing these implications, it may be useful to digress briefly and reexamine the underpinnings of the right of access to state-held information. Such an examination reveals an immediate irony in the fact that a constitutional right of access has first surfaced in such a venerable context. For the recent clamor, if it can be called that, over recognition of a first amendment right to know has been prompted by changes in the historic relationship between the government and the citizenry and in the relationships among the coordinate branches and levels of government.

The right to know is infused primarily, as Justice Brennan noted, with the Meiklejohnian insight that self-expression is a necessary predicate of self-government.[188] Citizens must be both qualified to act as political decisionmakers and equipped with sufficient information to make intelligent political decisions; public debate is an important, if not the only, means by which they acquire these tools.[189] Advocates of a constitutional right of access generally are among those who fear that because of certain changes in the structure of our society, public debate is in danger of becoming critically contentless and uninformed.

The change most often alluded to is the sheer growth of government and its usurpation of numerous functions that before were entrusted to individuals and private institutions. Professor Cox has encapsulated the argument as follows:

---

187. *See The Supreme Court, 1979 Term*, *supra* note 186, at 149.

188. 448 U.S. at 587 (Brennan, J., concurring) (citing, *inter alia*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

189. *See, e.g.*, Note, *supra* note 74, at 928-31. For simplicity of exposition, this discussion is devoted to the instrumental or functional purposes of a first amendment right to know. It is clear, however, that other important purposes of free discussion and expression, such as the promotion of individual dignity, autonomy, and self-definition, *see, e.g.*, Note, *supra* note 51, at 1906-09, are also furthered by such a principle. *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

> Recognition of the right [to know] may well be essential if the first amendment is to continue to serve the basic function of keeping the people informed about their government . . . . Because of [the] scale and complexity [of the activities of the federal government], coupled with the interdependence of all aspects of society, government itself is often the chief, if not the only, source of information for the people about the conduct of those who are supposed to be the people's agents. The central problem today is how to deal with governmental secrecy and—all too often—with government deception.[190]

Critics of the right to know doctrine observe that the concept is more comfortably lodged in a model of participatory or direct democracy, whereas the Constitution establishes only a representative form of self-government. Citizens in this country "do not directly either make or implement public decisions, though through their power to elect their representatives, they retain their authority to choose the direction of governmental policy."[191] Professor BeVier, for example, sees in a first amendment right of access an unavoidable insistence that every citizen has the right to a hands-on experience at every level of government, a result which would threaten government's basic viability.[192]

Yet, even within the confines of represenative democracy, citizens must have the means of assessing the adequacy of the performance of the actual decisionmakers. The quest for recognition of an affirmative right of access to government processes arises from the awareness that often the mere results of a particular governmental policy or decision are not in themselves sufficient to enable meaningful evaluation of that decision or policy. The citizens also must know something of the premises of a decision, the information the policymakers possessed, and the choices that confronted them. Those arguing for a right of access believe that the changing nature of government has made even this indirect manipulation of government more difficult. This is not to say that the right to know necessarily contemplates direct participation, influence, or even observation of every governmental decision at the time it is made or even ever.[193] If, as Justice Brennan hypothesizes, the right of access is only designed to fulfill a checking function, "akin in purpose to the other checks and balances,"[194] surely this objective can be substantially accomplished short of converting our government to a participatory democracy.

Another important change in the structure of the federal government has been the diminished authority of elected officials in relation to the administrative and judicial branches. This decline has resulted not only from

---

190. Cox, *supra* note 29, at 24. *See also* Emerson, *supra* note 76, at 464.

191. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 505-06 (1980).

192. *Id.* at 509-10.

193. Meiklejohn, for example, saw in the first amendment a mechanism for ensuring that everything worth saying shall be said but this did not contain an implicit requirement that "on every occasion, every citizen shall take part in the public debate." A. MEIKLEJOHN, *supra* note 188, at 25.

194. 448 U.S. at 596. *See also The Supreme Court, 1979 Term*, *supra* note 186, at 154 n.33.

the rapid growth of the executive bureaucracy, but also from the now well-established practice of delegating legislative authority to the executive and judicial branches through broad, vaguely worded statutes.[195] We have grown comfortable with the fact that administrative agencies are entrusted with the regulation of whole fields of activity, constrained by little more than the admonition that they do so "in the public interest."[196] And since the turn of the century, courts have been entrusted with such fundamentally political responsibilities as determining the degree of concentration in American business, imposing upon themselves a rule of reasonableness.[197]

The federal judiciary, moreover, has been more than just a passive recipient of legislative duties and responsibilities. The past thirty years have witnessed a vigorous and aggressive expansion of the sphere of federal judicial decisionmaking and an ever more pervasive reliance upon courts to make fundamental social and political determinations through constitutional adjudication.[198]

This unquestionable shift in the balance of authority has important and potentially disturbing ramifications in a democracy, where the government's legitimacy derives from its electoral mandate. The point, as Professor Ely has observed, is not that these faceless bureaucrats do a bad job, "it is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are."[199] Judicial assumption of legislative functions in the name of constitutional norms is particularly troublesome, for when courts invalidate acts of the political branches on constitutional rather than statutory grounds, they not only override coordinate branch judgments, they do "so in a way that is not subject to 'correction' by the ordinary lawmaking process."[200] The right of access appears to be premised in part on the belief that a greater degree of direct citizen observation of the processes of government can provide, in some instances, an admittedly not wholly adequate surrogate for some of the accountabililty and legitimacy that has been eroded by the growing hegemony of the administrative and judicial branches.[201]

---

195. *See generally* J. ELY, DEMOCRACY AND DISTRUST 131-34 (1980).

196. *See, e.g.*, Communications Act of 1934, 47 U.S.C. § 303(r) (1976) (FCC to regulate in public interest, convenience, and necessity); United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (upheld FCC assertion of jurisdiction under § 303(r) over cable television, an industry which did not exist at the time the statute was enacted).

197. *See, e.g.*, the Sherman Act, 15 U.S.C. § 2; United States v. American Tobacco Co., 221 U.S. 106 (1911) (rule of reason).

198. *See generally* Nagel, *A Comment on the Burger Court and "Judicial Activism,"* 52 U. COLO. L. REV. 223 (1981).

199. J. ELY, *supra* note 195, at 4 (1980).

200. *Id.* at 131.

201. *Cf.* G. ROBINSON, E. GELLHORN & H. BRUFF, THE ADMINISTRATIVE PROCESS 27 (1980) (legitimacy of agencies derives from indirect accountability to other branches and direct pressure from interested public). In this narrow context, the argument is admittedly vulnerable to the criticism that it invokes the increased scope of judicial authority to justify the creation of yet another judicially enforced constitutional right. Although it is not an entirely satisfactory answer, the short response is that with respect to access to judicial proceedings the courts are merely extending the reach of the Constitution into their own sphere of decision-making. This, of course, does not fully ameliorate the federalism concern, which is the infringement upon the prerogatives of state courts and legislatures to develop state closure standards. *See, e.g.*, Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 607 (1980) (Rehnquist, J., dissenting); BeVier,

Neither of these developments seems compelling in the narrow context of whether there exists a constitutional right to observe criminal trials, a right which appears to have changed relatively little over the years. But they do suggest another way of looking at the history of open judicial proceedings. It is possible to see in the strong and unbroken tradition of open trials, an early, if implicit, recognition that the attenuated legitimacy of an appointed judiciary in our otherwise representative democracy, particularly a judiciary with ultimate and uncheckable authority in certain areas, creates a concomitant need for a greater degree of direct citizen observation and understanding of its processes. This concern cannot be confined to criminal trials alone, but applies alike to all judicial proceedings.

2. Where The Major Opinions Lead

Returning, then, to the opinions in *Richmond Newspapers*, the shortcomings of the Chief Justice's historical analysis are plain. To the Chief Justice, the uncontradicted common-law history of open trials was essentially dispositive. At its narrowest, his opinion twice relied on the fact that the tradition of trial openness was fully recognized at "the time the [First] Amendment was adopted."[202] Even the educative and therapeutic effects of public trials were only reasons supporting the tradition. In this most distilled formulation, first promulgated in *Gannett*, the Chief Justice's rubric essentially takes the form of the classic, now largely abandoned, historical test for determining whether the seventh amendment right to a jury trial attaches to a particular cause of action.[203]

The seventh amendment historical test has been both harshly criticized and lavishly praised and often for the same reason: its unparalleled rigidity. Those who favor expansion of the right have generally applauded the

supra note 191, at 512. But the insurmountable difficulty, at least in the context of fair-trial closures, is that there is no alternative. The asserted conflicting interest is the sixth amendment, another right over which the judiciary has asserted ultimate authority. Any coordinate branch action, *e.g.*, a Courtrooms in the Sunshine Act, would be limited by the judicially-enforced sixth amendment.

This analysis should not and is not intended to imply any substantive assessment as to whether these expansions in executive and judicial authority are in general or in their particulars wise or desirable. It derives solely out of the tension between democratic theory and, in this case, constitutional adjudication and is irrelevant to one's politics—liberal or conservative. *See, e.g.*, Estreicher, *Platonic Guardians of Democarcy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U.L. REV. 547, 550 (1981). The point is simply that whatever one's views are as to the appropriate and necessary scope of federal judicial authority, the fact that the federal judiciary is a less electorally accountable branch in and of itself provides a justification for greater openness of its processes. This is a far preferrable alternative to, for instance, the ill-advised Congressional efforts to selectively prune federal court jurisdiction. *See, e.g.*, 97th United States Congress, S. 158 (abortion), S. 528 (school busing), S. 583 (abortion), H.R. 72 (school prayer), H.R. 73 (abortion), H.R. 114 (federal court review of state cases); *Constitutional Restraints Upon the Judiciary*, Hearings before the Subcommittee on the Constitution of the Committee of the Judiciary, U.S. Senate, 97th Cong. 1st Sess. (1981); Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, 97th Cong. 2d Sess. (1982).

202. 448 U.S. at 575-76.

203. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 476 (1935). "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Id.*

Supreme Court's move to a more rational test because it enlarges the scope of the right.[204] Conversely, those who oppose the extension of jury trial rights, motivated in most instances by the belief that jury trials are inefficient anachronisms, urge the resuscitation of the rule and the restriction of the right to causes of action to which it attached in 1791.[205] However one views the underlying right to which the test is applied, the certain effect of the strict historical test is to freeze arbitrarily the right of access to judicial proceedings in the amber of post-Revolutionary America.

The Chief Justice did later analogize to public forum law, referring to the long-standing, if not transcendent, minimum access doctrine, which declares that access to traditionally open places such as streets, parks, and sidewalks cannot be broadly and absolutely denied.[206] This somewhat reluctant analytical broadening provides the basis for a more useful and fruitful inquiry. Not surprisingly, the concerns arising from public claims of access to government-owned property are identical in many instances to those generated by claims of access to goverment-controlled information.[207]

The minimum access notion has developed in fits and starts over the last forty years; its acceptance by the Court has been neither secure nor of certain dimension.[208] Accordingly, the Chief Justice's use of it to establish a right of access to courts has been hailed as a revival of the principle.[209] But the Chief Justice revives the minimum access principle only to imprison it. His formulation recalls the branch of the minimum access principle that would encompass only traditional forums. Access to nontraditional forums, on the other hand, need not be guaranteed, it need only be nondiscriminatory.[210]

---

204. *See, e.g.*, McCoid, *Procedural Reform and the Right to Jury Trial: A Study of* Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 2, 13-14, 23-24 (1967).

205. *See, e.g.*, Redish, *Seventh Amendment Right To Jury Trial, A Study In The Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486 (1975).

206. 448 U.S. at 578. *See also id.* at 599-601 (Stewart, J., concurring in the judgment).

207. For an attempt to apply the public forum doctrine to the right of access, see Note, *supra* note 74, at 933-39.

208. The concept received its initial articulation in Justice Robert's familiar dictum on behalf of the plurality in Hague v. CIO, 307 U.S. 496 (1939).

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . [This right of access] must not, in the guise of regulation, be abridged or denied.

Id. at 516-516. *See also* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968), *rev'd on other grounds*, Hudgens v. NLRB, 424 U.S. 507 (1976). *See generally* Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, in FREE SPEECH AND ASSOCIATION 115 (Kurland ed. 1975); Stone, Fora Americana: "Speech in Public Places," in FREE SPEECH AND ASSOCIATION 342 (Kurland ed. 1975); Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117, 118-32 (1975). The minimum access notion is to be contrasted with the equal access concept, where the restrictions on access are scrutinized merely to ensure that restrictions on members of the public are nondiscriminatory. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 143 (1968); *id.* at 150-51 (White, J., concurring).

209. *See The Supreme Court 1979 Term, supra* note 186, at 155.

210. *Compare* Hague v. C.I.O., 307 U.S. 496, 515 (1939) (streets, parks, and sidewalks) *with* Greer v. Spock, 424 U.S. 828 (1976) (military base); Hudgens v. NLRB, 424 U.S. 507 (1976) (shopping center); Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (street car); Adderley v. Florida, 385 U.S. 39, 47-48 (1966) (jail grounds).

Extending the guarantee of minimum access even to traditional forums or to traditionally available governmental information is not an insignificant step. Nor is it fully satisfactory. The minimum access principle seeks to ensure the availability of sufficient channels of communication by preventing the state from completely forbidding public use of certain public places for expressive purposes, subject to nondiscriminatory time, place, and manner restrictions. The Court's myopic solicitude for only traditional public forums has been rightly criticized as failing to respond to technological and sociological changes that have dramatically reduced the actual importance of many traditional forums.[211] In time, this will result in a net decline in the effective reach of expressive outlets and a decreased ability of speakers to reach their desired audiences. Similarly, the push for public access to government-held information derives from changes in the nature of government and changes in the type and amount of information possessed by the government. Protection of merely traditionally available information fails utterly to accommodate these concerns.

Justice Brennan's not yet fully articulated alternative holds the promise of recognizing and encompassing these developments. Justice Brennan started at the opposite pole from that of the Chief Justice, finding a broad presumption of a citizen right of access to all governmental functions and operations. He did turn first to the helpful delimiting principle of a tradition of access. But the role of history was seriously circumscribed; a history of openness amounted to little more than empirical evidence that permitting public access to a particular governmental process has not in fact proved unduly disruptive of that process and, perhaps, an implicit recognition that the structural purposes of the first amendment have been particularly well-served by access to this function or process.

But a tradition of access has no independent significance. It is simply a sign that there has been a successful resolution of the underlying balancing process that must be undertaken in every instance, based on the information sought and opposing interests invaded. Access is to be "subject to a degree of restraint dictated by the nature of the information and countervailing interests in security and confidentiality."[212] And this balance is to be based on specifics, the importance of access to observe a particular governmental process in terms of that particular process.

Obviously this framework is still somewhat inchoate, not to mention tautological, and will need considerable refinement. It must be said that neither of the delimiting principles uncovered thus far provides a great deal of guidance. But there seems little reason to believe, as some have argued, that the process of circumscribing this first amendment right will be inherently more difficult than in any number of other first amendment contexts.[213]

211. *See* Stone, *supra* note 208, at 342, 354-61; Note, *supra* note 208, at 136.

212. 448 U.S. at 586.

213. It has been observed, for instance, that the basic thrust of Justice Brennan's formulation is similar to the public forum incompatibility analysis announced in Grayned v. Rockford, 408 U.S. 104 (1972). "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable. . . .' The crucial question is whether the manner of expression is basically incompatible with the normal activity of a

In any event, the analysis sketched out by Justice Brennan in *Richmond Newspapers* appears to require a dual-level analysis. The first question is whether the right extends to the type of information or type of government process to which access is sought. A strong tradition of access may be sufficient to resolve this level of inquiry. Where such a history is not present, the court must then analyze the nature of the information or process, assessing its importance in terms of citizen understanding and control of the processes of government. This entails an assessment of the importance of the process or function itself and the degree to which the information sought reveals important aspects of that process. Included here would be an analysis of the importance of the checking function of access to this type of information and the value of that function in this context. Also pertinent are any direct benefits that public observation provides to the actual functioning of the process.

On the other side of the balance, the court must determine at this stage whether there are any systematic reasons for denying public access, any important state interests that will be unavoidably and consistently abridged by permitting the public to observe directly the functioning of this governmental process. If so, those interests must be weighed against the value of presumptively opening the proceeding. Whatever the particular balancing standards developed for this level of the analysis, public forum doctrine teaches that the "thumb of the Court [must] be on the speech side of the scales."[214]

Finally, even if it is decided that public access is not inherently incompatible with the functioning of a governmental process, the breadth of the particular claim of access must be evaluated on a case-by-case basis in light of any legitimate state interests furthered by confidentiality and security. At this level, it seems appropriate to utilize the familiar balancing standards applicable to restrictions on expression.[215] Courtroom closures to protect

particular place at a particular time." *Id.* at 115-16. Indeed, at least one commentator has urged the incorporation of the *Grayned* test in the access context. *See* Note, *supra* note 74, at 935-36.

214. Kalven, *supra* note 208, at 142.

215. *See, e.g., In re* Halkin, 598 F.2d 176, 191 (D.C. Cir. 1979) (protective order in discovery proceedings constitutionally permissible only if 1) the harm posed by dissemination is substantial and serious; 2) the order is narrowly drawn and precise; and 3) there is no alternative means of protecting the public interest that intrudes less directly on expression). *See generally* Procunier v. Martinez, 416 U.S. 396, 413 (1974). *See also The Supreme Court, 1979 Term, supra*, note 186, at 158.

Justice Brennan's first amendment access analysis appears to have been adopted by a majority of the Court in Globe Newspapers v. Superior Court, 102 S. Ct. 2613 (1982). In that case, the Court struck down a Massachusetts criminal trial closure law which required the exclusion of the press and public during the testimony of all minor victims of sexual offenses. Justice Brennan's opinion, joined by Justices White, Brennan, Marshall and Blackmun, reiterated the two-pronged "structural" access test announced in *Richmond Newspapers*, assessing first whether there was tradition of access and, second, the functional importance of public access in terms of the particular governmental process.

Justice Brennan then noted that both of these inquiries had been resolved with respect to criminal trials in *Richmond Newspapers*. As a result, Justice Brennan announced, trials can be closed for reasons based on the content of the communication sought to be suppressed only in the face of a compelling state interest and a narrowly drawn closure order. Id. at 2620.

In this case, the statute mandated only a partial closure. The state asserted two interests in support of these closures: to protect minor victims from trauma and embarrassment and to encourage these victims to come forward and testify. The second interest was rejected as specu-

fair-trial rights of defendants are content-based restrictions and thus, constitutional only if supported by a compelling or important state interest, the restriction is narrowly drawn, and there is no less drastic means of accomplishing that objective.

B. *Access to Pretrial Hearings in Criminal Cases*

The diverging implications of the analyses developed by the Chief Justice and Justice Brennan in *Richmond Newspapers* are graphically illustrated by applying them to the question of whether there is a public right of access to pre-trial hearings, and, in particular, to suppression hearings. The Chief Justice's rigid historical analysis clearly excludes suppression hearings from the ambit of any public right of access to judicial proceedings. Certainly no such practice existed in 1791. Public attendance at suppression hearings subsequently has not acquired a historical patina comparable to that which has settled upon the right to attend trials.[216]

Any structural or functional first amendment analysis must lead to a contrary result. For, as Justice Blackmun articulated in his *Gannett* dissent, the nature of "the suppression hearing implicates all the policies that require that the trial be public."[217] Suppression hearings have the same mechanics as a trial and thus derive the same benefits from publicity in terms of inducing witnesses to come forth, promoting the conscientiousness of the participants, deterring perjury of witnesses, and checking the abuse of judicial power. Moreover, quite often suppression hearings are the only important public proceeding that takes place during a criminal prosecution. Thus, whatever educative and therapeutic effects accrue to the public from observing trials must also flow from public access to suppression hearings.

Indeed, these last two purposes are often more directly implicated by suppression hearings than by trials. By definition, suppression hearings arise out of allegations of serious misconduct by law enforcement officials, misconduct which has allegedly resulted in the infringement of important civil rights. In those instances in which evidence is not suppressed, despite even serious misconduct by law enforcement officials, a closed suppression hearing

---

lative. Justice Brennan found that the first asserted interest could be compelling but was not inherently present in every case. The result was that closure could be justified only after a case-by-case assessment of the nature of the offenses, the age and vulnerability of the youthful victim, etc.

Chief Justice Burger's dissent, joined by Justice Rehnquist, could also be read as endorsing an analysis incorporating an assessment of the specific structural value of public access in the circumstances. While this is essentially the same overreaching rubric espoused by Justice Brennan, the Chief Justice insisted that it is hard to find a limiting principle in Justice Brennan's analysis. He then reverted to his historical approach, rejecting the right to access claim in this context in part because the public had long been excluded from trials involving sexual assaults. In addition, he disagreed with Justice Brennan's assessment of the importance of the state's asserted interests.

Justice O'Connor's brief concurrence also indicated an unwillingness to extend the right of access beyond criminal trials, though she did not elaborate on the means by which she would so confine the right of access. Justice Stevens dissented solely on the mootness issue.

216. *See The Supreme Court, 1979 Term, supra* note 186.

217. 443 U.S. at 433-39. *See also* United States v. Cianfrani, 573 F.2d 835, 848-51 (3d Cir. 1978).

will result in the suppression of this information for a substantial period of time. By delaying its dissemination and divorcing it from a meaningful news event, a court is generally ensuring that these facts will never appreciably penetrate the public consciousness.[218] To return to the public forum analogy, just as nontraditional forums or mediums of communications have in many instances supplanted or superseded traditional public forums or mediums in importance, so the suppression hearing has in many instances assumed the traditional role of the trial. If the public is to remain informed concerning the functioning of the criminal justice system and if that system is to benefit from participation by the public, the right of access must make the appropriate adjustment.

Equally significant is the damage to the public's perception of the administration of justice. As the Chief Justice stressed in his paean to the value of open trials in *Richmond Newspapers*, "withdrawing from both the victim and the vigilante the enforcement of the criminal laws . . . cannot erase from the people's consciousness the fundamental, natural yearning to see justice done."[219] To quote the Chief Justice, a "result considered untoward may undermine public confidence, and where the [proceeding] has been concealed from public view, an unexpected outcome can cause a reaction that the system has failed and at worst has been corrupted."[220] The exclusionary rule often results in the suppression of highly relevant and even dispositive evidence. In many instances, it operates to acquit or terminate the prosecution of a clearly guilty individual. It is a rule promulgated under the belief that it serves the "imperative of judicial integrity. . . ."[221] But if the public is deprived of a full understanding as to the values which are being balanced, implementation of the rule is virtually certain to create precisely the opposite impression.[222] Indeed, it is hard to imagine an event more likely to inspire criticism and cynicism toward the administration of justice than the unexplained failure to convict those against whom there is strong or overwhelming evidence of guilt.

The Chief Justice has frequently and bitterly complained about the exclusionary rule.[223] The rule does represent an extraordinary judicial incursion into the administration of law enforcement, an incursion which is essentially uncheckable by the coordinate branches. It is for this very reason, however, that the administration of the rule must be exposed to the public as fully and completely as possible, whatever one's view of its wisdom or the appropriateness of its promulgation by the judiciary. To suggest, as the Chief Justice did in *Gannett*,[224] that pre-trial hearings may be opened only after we modify the exclusionary rule, is precisely to reverse the constitutional priorities.

218. *See Nebraska Press Ass'n*, 427 U.S. at 560-61; Bridges v. California, 314 U.S. 252, 268 (1941). *See also Gannett*, 448 U.S. at 442 n.17 (Blackmun, J., dissenting).

219. 448 U.S. at 571.

220. *Id.*

221. *See* 448 U.S. at 594 n.19 (Brennan, J., concurring in the judgment).

222. 443 U.S. at 435-36 (Blackmun, J., concurring in part and dissenting in part).

223. *See, e.g.*, Bivens v. Six Unknown Named Narcotics Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting).

224. 443 U.S. at 396.

It is clear, then, that an assessment of both the importance of the information sought and the benefits of public access to the functioning of suppression hearings yields very much the same results as it would for trials. There remains the question of whether there are any countervailing state interests that are systematically threatened by creating a constitutional presumption of pre-trial proceeding openness against which these values must be weighed.

The only such interest which has been hypothesized is Justice Stewart's special risk of unfairness arising from the possible dissemination into the venire of inadmissible (and highly prejudicial) evidence. The actual dimension of this risk even in highly publicized cases is open to serious doubt, as discussed below. But this interest must be rejected here for a more fundamental reason. To defeat the extension of a right of access to a particular process, as opposed to a particular case, it must be demonstrated that that access is inherently incompatible with the functioning of the process and that it will consistently and unavoidably result in the abridgment of an important or overriding state interest. Virtually no one has suggested that any substantial risk of unfairness is presented by opening suppression hearings in most, or even many, criminal cases.[225] The proper approach is to recognize the existence of the right and account for the risks on a case-by-case basis, determining in each instance whether opening a particular hearing will impermissibly endanger the fair-trial right of that particular defendant.[226]

Much of what has been said with respect to suppression hearings is, of course, applicable to virtually any pre-trial proceeding and, indeed, any post-trial proceeding. The analysis will vary slightly depending upon the format and purpose of each proceeding. Thus the interests in deterring perjury or aiding accurate factfinding would not seem significant in the absence of an evidentiary hearing. Similarly, the cathartic or therapeutic effect would point strongly towards opening a non-evidentiary sentencing proceeding. But the primary reasons supporting the right of citizen access to the judicial processes, the educative and therapeutic effects and the checking function, are common to all judicial proceedings.

In any event, a right of public access has been properly acknowledged not only with respect to suppression hearings,[227] but to jury voir dire,[228] pre-

225. *But see* San Jose Mercury-News v. Municipal Ct., 30 Cal. 3d 498, 179 Cal. Rptr. 772, 638 P.2d 655 (1982) (upholding preliminary hearing closure statute in part on grounds that non-lawyers may be misled by the superficial resemblance between preliminary hearing and trial and ascribe to a one-sided hearing the legitimacy and credibility of a trial, thereby perhaps compelling a defendant to abandon his right of silence at such a hearing and try his case in the media). *See also In re* Application of NBC, 648 F.2d 814 (3d Cir. 1980) (Weis, J., dissenting) (would have deprived public of access to Abscam videotape evidence admitted at trial because the videotape does not employ euphemisms but produces the truth of stark reality, sometimes so brutally as to be unsuitable for general audiences.).

226. United States v. Edwards, 430 A.2d 1321, 1344 (D.C. 1981).

227. *See, e.g.*, Keene Publishing Co. v. Cheshire County Sup. Ct., 406 A.2d 137 (N.H. 1979); Pennsylvania v. Hayes, 6 MEDIA L. REP. (CCH) 1273 (1980).

228. *See, e.g.*, United States v. Layton, 519 F. Supp. 959 (N.D. Cal. 1981); *In re* United States *ex rel.* Pulitzer Publishing Co., 635 F.2d 676, 678-79 (8th Cir. 1980). *But cf.* Hovey v. Superior Ct., 28 Cal. 3d 1, 80, 168 Cal. Rptr. 128, 181, 616 P.2d 1301, 1354 (1980) (court promulgated rule requiring voir dire of each prospective juror in capital cases to be done individually and in sequestration).

trial competency hearings,[229] pre-trial detention hearings,[230] and post-trial sentencing proceedings.[231] In general, it would appear that the public right of access should attach to any important or significant stage of the criminal process that can be conducted in open court.[232]

C. *The Appropriate Fair-Trial Closure Standard*

Whenever the *Richmond Newspapers* right of access is extended to a particular judicial proceeding, the right of access must still be balanced against any important or significant countervailing interests which will be endangered by its exercise.[233] In the abstract, protecting a defendant's right to a fair trial is clearly such a potentially overriding interest. The question, as always, is how great a danger to this interest must be demonstrated before it attains the status of a compelling state interest and an abridgment of the right of access will be tolerated. Believing this result was not foreclosed by *Gannett*,[234] nor daunted by the evident trend toward a less rigorous standard,[235] the authors would argue for retention of the standard expressed in the ABA's Revised Criminal Justice Standards, that the moving party demonstrate a clear and present danger of prejudice to the defendant from failure to close a judicial proceeding. And, of course, even if a clear and present danger is established, the closure must be no broader than necessary and the moving party must establish the unavailability of less intrusive alternatives.[236]

229. *Compare* People v. Berkowitz, 93 Misc. 2d 873, 403 N.Y.S.2d 699 (1978) ("Son of Sam" murder case; pre-trial competency hearing closed to public because of massive pre-trial publicity and prospect of much inadmissible evidence being admitted with condition that transcript be released within a week of determination of competency and trial by sequestered jury) *with* People v. Berkowitz, 65 A.D.2d 581, 409 N.Y.S.2d 706 (App. Div. 1977) (change of venue motion denied because of large venire from which to select jury).

230. *See, e.g.*, United States v. Edwards, 430 A.2d 1321 (D.C. 1981).

231. *See, e.g.*, United States v. Feeney, 501 F. Supp. 1324 (D. Colo. 1980); Miami Herald Publishing Co. v. State, 363 So. 2d 603 (Dist. Ct. App. 1978). *See also* Gannett Co. v. Mark, 54 A.D.2d 818, 387 N.Y.S.2d 336 (App. Div. 1976).

232. *See* United States v. Edwards, 430 A.2d 1321, 1344 (D.C. Cir. 1981) (access right arises with respect to all critical pre-trial proceedings). *Cf.* Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967). This would encompass not simply any stage where what transpires could affect an accused's substantive position, his likelihood of conviction or of punishment, but also proceedings such as bail hearings where the issue is whether an accused will remain incarcerated prior to trial or pending appeal. *See* Fenner & Koley, *supra* note 186, at 435. It should be noted that on this point we part company with the dissenting opinion in *Gannett*, which distinguished preliminary probable cause hearings, where a determination is made whether to bind a defendant over for trial, from suppression hearings as "not critical to the criminal justice system. . . ." 448 U.S. at 437. Justice Blackmun, of course, was also taking an essentially historical approach. As a result, he felt compelled to separate suppression hearings, unknown at common law, from those preliminary hearings which clearly had been historically closed or closable. It should also be noted that Justice Blackmun assumed preliminary hearings not to be trial equivalents in form. It seems clear that in many jurisdictions, however, substantive issues, such as the suppression of evidence can and do arise at preliminary hearings and that the preliminary hearings can be of great import to the remainder of the proceedings. *See, e.g.*, San Jose Mercury-News v. Municipal Ct., 30 Cal. 3d 498, 179 Cal. Rptr. 772, 638 P.2d 655 (1982).

233. *See generally The Supreme Court, 1979 Term, supra* note 186, at 158-59.

234. *See supra* text accompanying notes 174-84.

235. *See supra* text accompanying notes 178-80.

236. REVISED STANDARDS, *supra* note 56, at §§ 3.2, 3.6(d).

At the outset it is worth emphasizing the theoretical inaccuracy of defining the state's interest as that of seeing that the defendant is not deprived of his right to a fair trial. As Professor Tribe has argued, the sixth amendment right to a fair trial is in fact an absolute; it does not permit a conviction without a fair trial. Thus, the interest in conflict with the right of access is not the defendant's right to a fair trial but the state's interest in securing convictions and punishment of the guilty and in preserving public confidence in the administration of justice by seeing that its actions are just.[237]

Whatever the theoretical soundness of this observation, as a practical matter, it is generally wrong. Juxtaposed in the wide gulf that in reality separates these two rights, is administrative convenience and efficiency of the court. As a result, in highly publicized proceedings, it is almost always one of the two rights that yields. What is clothed in the garb of protecting an accused's right to a fair trial is often mere administrative convenience or expense. For the choice facing trial judges is almost invariably between the use of an easy-to-implement, highly visible, and less directly expensive judicial tool (for example, closure or gag order) and a more disruptive, time-consuming or expensive mechanism (for example, prolonged voir dire, change of venue, continuance, sequestration, or even reversal).[238] Nor, as experience has now rather conclusively proven, can the executive branch be relied upon to protect the public's right of access.[239] Thus, even when the press is given notice and an opportunity to participate, the trial judge will bear a uniquely difficult burden in protecting the expressive interests.[240]

This is not to say that the state's interests are inevitably trivial or inflated. The unsatisfactoriness of relying solely on extreme remedies such as reversals is evident. As a practical matter, relying solely on that remedy will effectively guarantee that the fair-trial rights of defendants will consistently be given short shrift.[241] The point is simply, to paraphrase Justice Brennan, that the apparent congruence of the defendant's sixth amendment rights with the judiciary's administrative and institutional "incentives and [the] dynamics of the system . . . will inevitably lead to overemployment of the technique."[242] The pattern of overreaching by the judiciary since *Sheppard* is

237. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-11, at 625 n.15 (1978). *See also* Note, *supra* note 51, at 1914-15.

238. REVISED STANDARDS, *supra* note 56, Commentary to §§ 3.6 at 8.55-.56.

239. The Reporter's Committee, Court Watch Summary, *supra* note 14, reported that prosecutors opposed closure motions about one-third of the time. *See generally* Fenner & Koley, *supra* note 43, at 456-57.

240. Younger, *supra* note 21, at 7. Judge Younger pointedly observed that *Nebraska Press Association* presented "the rare situation in which a trial judge's decision on *any* issue enjoy[ed] the support of *both* parties all the way to the United States Supreme Court and [was] unanimously reversed." *Id.* He also noted: "Emotionally and intellectually, the burden on a trial judge who is asked to go against the wishes of a defendant in a capital case on a major constitutional point *where the State joins in the defense position* is almost unbelievable." *Id.* (emphasis in original).

241. *See* J. BARRON & C. DIENES, *supra* note 16, ¶ 9.1.

242. *Nebraska Press Ass'n*, 427 U.S. at 607 (Brennan, J., concurring) (referring to prior restraints). In opting for a lesser standard, the Advisory Committee on the Federal Rules reasoned in part that because the clear and present danger standard was applied to prior restraints in *Nebraska Press Ass'n*, that a less stringent test could be employed against closures. The Advisory Committee pointed to the crucial differences between prior restraints and closures, most

consistent with respect to all manner of fair-trial measures.[243] And the ultimate difficulty is that these administrative or political concerns become shielded in the armor of the accused's sixth amendment rights, and thus are beyond even a theoretical check from the legislature.

For all these reasons retention of a stringent formulation such as the clear and present danger standard is essential to the safeguarding of the important first amendment issues at stake. Whenever the first amendment has come under attack in the interest of improved judicial administration, the clear and present danger standard has consistently represented the highest degree of solicitude for expressive interests.[244] It is true, as the Commentary to the Revised Standards points out, that the clear and present danger standard has had a checkered history in other contexts.[245] Regardless of whatever deviations in application have occurred in turbulent times and over the wide range of areas in which the test has been applied, this standard remains the single most demonstrative symbol to trial judges and lawyers alike that they are entering an area where important interests are in danger of infringement.[246]

---

notably the tendency of prior restraints to enmesh the judiciary in the daily workings of the press. *See* JUDICIAL CONFERENCE COMMITTEE REPORT, *supra* note 7, at 72. *See also Gannett*, 443 U.S. at 393 n.25. Note, however, that the REVISED STANDARDS adopted Justice Brennan's view in *Nebraska Press Ass'n* that virtually no fair-trial prior restraints are permissible. Moreover, while the differences between prior restraints and closures are significant, there are strong reasons for adopting a tough stance on closures as well. Thus, in closures as opposed to prior restraints, there will be no uninvolved eyewitnesses to the events. And it seems inevitable that closure orders will be accompanied by gag orders on those in attendance not to discuss the events that transpired during the proceedings.

243. *See, e.g.*, United States v. CBS, 497 F.2d 102 (5th Cir. 1974) (sketch artist ban); Hamilton v. Municipal Ct., 270 Cal. App. 2d 797, 76 Cal. Rptr. 168 (1979) (gag order); Comment, *Gagging the Press in Criminal Trials*, 10 HARV. C.R.-C.L. L. REV. 608 (1975).

244. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 531 (1976); Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 322 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

245. REVISED STANDARDS, *supra* note 56, Commentary to § 8.1-1 at 8.10. And, unfortunately, in *Nebraska Press Ass'n*, Chief Justice Burger resurrected perhaps the most discredited formulation of the clear and present danger standard, *Nebraska Press Ass'n*, 427 U.S. at 562, Learned Hand's inquiry as to whether "the gravity of the 'evil,' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger." Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). There are those who see this as part of a continuing effort by the Burger Court to emasculate any categorical taint in first amendment jurisprudence and to introduce into every first amendment area a "pure" ad hoc balancing approach. *See, e.g.*, Emerson, *supra* note 76, at 446-47; Schmidt, *supra* note 16, at 458-64. In any event, there is no reason to believe that the clear and present danger standard will be any more or less vulnerable to this process than any other formulation.

246. The clear of the clear and present danger standard also highlights the importance of a serious empirical inquiry. *See infra* text accompanying notes 247-69. The rubric of the dissent in *Gannett*, that "an accused who seeks closure [must] establish that it is strictly and inescapably necessary," 443 U.S. at 440 (Blackmun, J., concurring in part and dissenting in part), encapsulates this concern nearly as forcefully, and, of course, incorporates the less drastic alternatives requirement. There seems little difference in the balance of interests represented by this standard and that represented by the clear and present danger standard in its various metamorphoses. The argument for retention of the clear and present danger standard is based on a concern for the somewhat greater difficulties of persuading courts to implement a standard rejected in *Gannett*, even if that case no longer has any valid application to the first amendment inquiry, and the desirability of utilizing a test which has a better established position in the first amendment hierarchy.

D. *The Importance of a Serious Empirical Assessment of the Danger of Prejudice*

There is one other aspect of the *Gannett* opinion which seems likely to create enduring problems. That is Justice Stewart's sweeping and unrefined characterization of the special risks presented by open pre-trial proceedings and his unqualified assessment that closure will often be one of the most effective ways of obviating these risks. The Court, apparently believing these observations to be intuitively obvious, did not attempt to bolster these assertions with support from the growing body of empirical research by social scientists as to the nature and risks of jury prejudice from pre-trial publicity,[247] nor did it refer to the less voluminous but growing body of empirical data being generated by conscientious trial courts.[248] In accordance with its intuition, the Court upheld a trial court finding of a reasonable probability of prejudice to the defendants, based on a record which contained precious little evidence of any serious risk to the accuseds' right to fair trials.[249]

This legacy of *Gannett* is a particularly unfortunate one, for nearly every recent indicator points in the opposite direction, towards the conclusion that the occasions on which a criminal defendant faces a serious threat to his right to a fair trial from prejudicial publicity of even the most damaging sort are extremely rare. When such a danger does exist, it is almost always in a context where the closure of a particular judicial proceeding will have virtually no ameliorative effect. Indeed, it is safe to say that, short of a categorical rule against closures, the best hope for a proper accommodation of first amendment rights with society's interest in obtaining just convictions is to ensure that every trial judge undertakes a serious and thorough look at the actual danger that opening a particular hearing will make it impossible, or even significantly more difficult, to give the accused a fair trial.

The heightened sensitivity of the judiciary to the danger of prejudicial publicity is no doubt part of a trend toward giving increased weight and recognition to individual rights of all stripes. But it is also in part attributable to a fear of what is perceived to be the growing pervasiveness and immediacy of the new mass media, particularly television.[250] There can be no question but that the early empirical efforts such as the Reardon Report were strongly influenced by the perception that these changes in the nature of communication were both radical and potent.[251] One can almost feel the future shock as the Court confronted the potential dangers presented by police broadcasting the filmed interrogation and confession of a murder suspect immediately after his arrest,[252] or the entire country witnessing the broadcast of the actual killing of a Presidential assassin in the midst of a crowd of

247. *See generally* Schmidt, *supra* note 16, at 447-51; Simon, *Does The Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact of Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977); J. BUDDENBAUM, R. WEAVER, R. HOLSINGER & C. BROWN, PRETRIAL PUBLICITY AND JURIES: A REVIEW OF RESARCH (Modern Media Institute manuscript 1980) [hereinafter cited as J. BUDDENBAUM & R. WEAVER].

248. *See infra* text accompanying notes 257-64.

249. *See supra* text accompanying notes 82-85.

250. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966).

251. *See, e.g.*, Schmidt, *supra* note 16, at 432, 443.

252. Rideau v. Louisiana, 373 U.S. 723 (1963). *See also id.* at 732 (Clark, J., dissenting) (noting only three of twelve jurors had seen the film).

reporters. One can sense the Justices recoil as television sought to expose the courtroom sanctum to mass audiences.[253]

Now *Estes v. Texas*[254] has given way to *Chandler v. Florida*[255] and television seems firmly ensconced in the courtroom. And as we have lived with and studied the effects of the mass media (and the nature of human psychology), it has become more and more evident that the media's influence, at least in this narrow area, has been far less revolutionary than was earlier imagined. The social science literature has been thoroughly canvassed elsewhere and it is beyond the scope of this essay to explore its full implications.[256] We will be content to note some recent findings by trial courts in sensational cases. From these observations comes the clear lesson that the most common judicial mistake, one made by the trial judges in both *Gannett* and *Richmond Newspapers*, is to focus exclusively on whether the information that might be revealed at a hearing is facially prejudicial. At least two other important questions must be answered: 1) is there a significant likelihood that the information will actually reach a substantial number of veniremen; 2) if the information is likely to reach a substantial portion of the venire, is there a significant likelihood that a substantial number of those who receive it will be so affected as to remember it and be actually prejudiced against the defendant at the time of trial?

The answers to these questions, certainly in major metropolitan areas, is almost certain to be no. A judge in suburban New York City found that only twenty percent of the jury panel in a rape case had read about or were even aware of the case despite intense publicity and notices sent out to the parents of all grammar school children in the venue warning them of the presence of a rapist preying on local children.[257] As a result of this experience, the judge refused to close a suppression hearing in the trial of Jean Harris, the highly publicized killer of the "Scarsdale Diet Doctor."[258]

In one of the early ABSCAM cases—that of Congressman Michael Myers—Judge Pratt found, despite extremely intense publicity, that roughly half of the jury panel had no recollection whatsoever of ABSCAM. Of those who did, only eight or ten had anything more than a generalized recollec-

253. Estes v. Texas, 381 U.S. 532 (1965). *See also id.* at 568 (Warren, C.J., concurring). Warren's opinion has been characterized as near hysterical in its "worry over the evil potential of television." Nesson & Koblenz, *The Image of Justice:* Chandler v. Florida, 16 HARV. C.R.-C.L. L. REV. 405, 406 (1981).

254. 381 U.S. 532 (1965).

255. 449 U.S. 560 (1981).

256. *See supra* authorities cited note 247.

257. New York v. Harris, 6 MEDIA L. REP. (BNA) 2107, 2108-09 (October 8, 1980) ("[W]hile litigants themselves are actually aware of everything that appears in the press about their case, they tend to distort the public's perception and recollection of these events in which they have themselves a deep, vital and abiding interest, whereas to the public at large, it is just a passing event in an otherwise hectic society." *Id.*).

258. *Id. See, also*, United States v. Capo, 595 F.2d 1086, 1089 n.1, 1091 (5th Cir. 1979) (90% of jury panel had heard about or seen two newspaper stories and 121 television news reports within three months of trial concerning murders related to drug charges facing defendants; nevertheless, only a handful had more than a vague awareness of case; judge did not commit error, after conducting ten days of intensive *in camera* voir dire, in denying motion to change venue).

tion.[259] Then after releasing to the press the smoking gun videotapes placed in evidence at that trial, Judge Pratt found he still had no trouble finding an impartial jury in the immediately subsequent trial of Congressman Frank Thompson.[260] Judge Pratt concluded that "the public interest not only wanes quickly but probably does not exist in the way members of the press think it does, or perhaps other people think it does."[261] Five years ago, Professor Simon pointed to the acquittals of Angela Davis, John Connally, Maurice Stans, and John Mitchell, all figures of national prominence, tried under conditions of the most intense publicity.[262] This is probably evidence of yet another characteristic of jurors, one that has been expressly relied upon by the Supreme Court in refusing to overturn convictions merely on the ground that some of the jurors initially had preconceived notions of guilt based on pre-trial publicity,[263] namely their willingness to accept their responsibilities as jurors and to be persuaded by subsequent, more authoritative information.[264]

Finally, in his dissent in *Gannett*, Justice Blackmun properly raised a question of great significance that trial judges facing closure motions almost never ask: will the closure order actually have any impact on the amount or nature of publicity that is generated?[265] Justice Blackmun singled out the situation where the information the defense seeks to conceal has already been revealed, similar to the situation in *Gannett* itself. But there are at least two other situations where closure orders are likely to be either completely ineffective or possibly even damaging to the accused's sixth amendment rights. The first of these is the pervasive publicity case, such as Watergate. In these cases the court prosecutions may be a small and relatively incidental part of a much larger picture; totally suppressing information about the pro-

259. United States v. Myers, 6 MEDIA L. REP. (BNA) 1801 (August 15, 1980).

260. Reported in United States v. Criden, 648 F.2d 814, 830 (3d Cir. 1980) (Weis, J., concurring and dissenting). *See also* Michigan v. Harris, 6 MEDIA L. REP. (BNA) 1399 (May 30, 1980) (pervasive publicity in county did not prevent empanelling of impartial jury).

261. United States v. Myers, 6 MEDIA L. REP. (BNA) 1801, 1803 (August 15, 1980).

262. Simon, *supra* note 247, at 528. Professor Simon reports that Mitchell's attorneys paid for a poll which showed 75% of a national sample had heard of the Watergate cover-up and 84% in the District of Columbia, thought Mitchell and Stans guilty. Only 2% thought them innocent. *Id.* at n.60.

263. *See, e.g.*, Murphy v. Florida, 421 U.S. 794 (1975). *See also* Irvin v. Dowd, 366 U.S. 717 (1961):

> It is not required, however, that jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722-23.

264. *See* Schmidt, *supra* note 16, at 450. It has also been determined that prior courtroom experience decreases a juror's willingness to prejudge a defendant. In a correlative vein, it has been found that nonsensational media coverage may actually decrease willingness to prejudge if the coverage reduces the reliance upon interpersonal sources of information. *Id. See* J. BUDDENBAUM & D. WEAVER, *supra* note 247, at 2.

265. 443 U.S. at 442.

ceedings will have a *de minimus* impact on the amount and kind of publicity that reaches a jury panel or jury.[266] A similar dilemma is presented by the small town murder, such as the Simants case which led to the prior restraint vacated by the Supreme Court in *Nebraska Press Association*. As the Chief Justice observed:

> Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.[267]

Would the closure of the preliminary hearing have had any appreciable effect on the likelihood that Simants could have been tried by an impartial jury in the town where the crime took place? The answer is clearly no. (And indeed the entire town was excluded from the jury). Was the publicity arising from the preliminary hearing likely to be as pervasive in other possible venues? Possibly, but obviously this is a quite different inquiry.[268] By closing the hearing, would the trial judge have nevertheless enhanced the possibility of preserving such a conviction from reversal despite his refusal to grant a change-of-venue motion? The answer to this question is less clear, though one would hope it is no. However, given the demonstrated reluctance of appellate courts to overturn convictions on fair-trial grounds, it is not at all unreasonable to assume that in many situations the real danger to a defendant's right to a fair trial is the use of an apparently solicitous but actually ineffective panacea such as a gag or closure order when a more substantial form of relief such as a change of venue, exhaustive voir dire, or sequestration is mandated.

Whatever overarching rubric is adopted, a detailed multi-step factual inquiry such as that set forth by Justice Blackmun should unquestionably be required.[269] This record is essential not only to promote careful judicial consideration of such motions and to preserve a satisfactory appellate record but to contribute to the development of an adequate body of empirical data to guide trial judges who suddenly face their first sensational criminal case. The improved knowledge flowing from these more conscientious inquiries will reveal the extent to which the free press-fair trial dilemma is truly more apparent than real.

---

266. *See supra* note 262. *See also* United States v. Haldeman, 559 F.2d 31, 70-71 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 933 (1977) (refusal to overturn Watergate convictions despite intense pre-trial publicity).

267. *Nebraska Press Ass'n*, 427 U.S. at 567. *See also id.* at 599-600 n.22 (Brennan, J., concurring).

268. *See, e.g.*, United States v. Civella, 493 F. Supp. 786, 789-90 (W.D. Mo. 1980) (refusal to close hearing; grant of change of venue motion after determining that publicity had been less intense elsewhere).

269. *See supra* text accompanying notes 130-35.

V. CONCLUSION

In a sense, the free press-fair trial controversy represents a conflict of paradigms. On the free press side, represented here by the right of access, is the ideal of a vigorous and vital marketplace of ideas, the uninhibited, robust and wide-open public discussion of political and social events and issues. This model is grounded on the notion that the competence of citizens as voters, as self-governors, derives from their participation in this debate and that the more information they have concerning the workings of their government, the more competent they are as self-governors. It also embodies the further assumption that an important mechanism by which this debate acquires meaning is direct citizen observation of the processes of government, and acquisition of sufficient information underlying the specific actions of governmental bodies and officials to allow those actions to be meaningfully judged.

On the other side are the due process principles governing the fairness of criminal trials, embodied in the desire that the "conclusions . . . reached in a case will be induced only by evidence and argument in open court."[270] At its core, this model assumes that citizens as jurors, unlike judges when sitting as factfinders, are not capable of adhering to this principle and excluding from their consideration evidence not relevant to their determination. In short, the due process model assumes that citizens as jurors are made less competent by receiving at least certain kinds of additional information.

These two views of the public are probably both largely true; yet they suggest very different emphases in approaching the free press-fair trial dilemma. The fact that both visions of the citizenry have some elements of truth makes it inevitable that this conflict will never be entirely resolved. But judges are not sufficiently sensitive to the destructive interplay between these two paradigms, because whenever a judicial proceeding is closed to protect a particular defendant by concealing information from potential or actual jurors, information is unavoidably concealed from the public. It is concealed, moreover, in just the cases most likely to be of general interest to the public and thus to be of the most use in educating the public as to the workings of the judicial system.

Undoubtedly, educating the average citizen as to the nature and workings of the judicial system helps to make that citizen more competent as a juror. The converse also is likely to be true: the more ignorant a juror is as to the role and responsibilities of the courts and their designated fact-finders, the more difficult it will be to ensure that that juror carries out those responsibilities in a given case. Thus, to the extent that courts consistently refuse to give proper weight to first amendment concerns in this context, they are, in the long run, exacerbating the very problems at which their prophylactic measures are aimed.[271]

---

270. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

271. *Cf.* Whitney v. California, 274 U.S. 357 (1926) (Brandeis, J., concurring). "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech not enforced silence." *Id.* at 377.