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Note: *Richmond Newspapers, Inc. v. Virginia*: A Demarcation of Access

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Note: *Richmond Newspapers, Inc. v. Virginia*: A Demarcation of Access

Several months after this symposium, the Supreme Court announced its decision in Richmond Newspapers, Inc. v. Virginia, holding that the Constitution implicitly guarantees the right of the public to attend a criminal trial, which a court must keep open to the public, absent an express finding of an overriding interest. This note explores the numerous opinions in Richmond Newspapers to determine whether that case has expanded access rights since the recent decision in Gannett Co. v. DePasquale. The author reconciles the two decisions and concludes that the issues raised in the symposium remain vital.

John Paul Stevenson was indicted by the State of Virginia in March 1976 for the murder of a hotel manager.¹ He was promptly tried and convicted of second degree murder in July. A year later, the Supreme Court of Virginia reversed this initial conviction,² and a second³ and a third⁴ trial in the same court resulted in mistrials. Before the fourth trial began, two reporters for Richmond Newspapers, Inc., were among observers in the courtroom when the defense attorney moved to close the trial to the public.⁵ The judge granted the closure motion, stating that "the statute gives me that power specifically and the defendant has made the motion."⁶

1. *Stevenson v. Commonwealth*, 218 Va. 462, 237 S.E.2d 779, 780 (1977). The victim died from multiple stab wounds; the defendant was indicted after the police obtained the bloodstained shirt he wore on the day of the murder. The blood type of the stains matched that of the deceased. *Id.*

2. *Id.* The Supreme Court of Virginia reversed the conviction because the trial court improperly admitted into evidence the bloodstained shirt, which police had acquired from the defendant's wife.

3. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2818 (1980). The mistrial resulted when the court granted a juror's request to be excused and no alternate juror was available. *Id.*

4. The second mistrial resulted when a prospective juror who had read about the previous trials related the inadmissible information about the bloodstained shirt to other prospective jurors before the third trial began. 100 S. Ct. at 2818.

5. Defense counsel moved for closure because he did not "want any information being shuffled back and forth [in a] recess as to . . . who testified to what." *Id.* at 2819. The prosecutor stated that he had no objection to the motion; the two reporters employed by Richmond Newspapers failed to object at the time of the motion. *Id.*

6. *Id.* at 2819 (quoting Transcript of Sept. 11, 1978 Hearing on Defendant's Motion to Close Trial to the Public at 2-3, *Stevenson v. Commonwealth*, 218 Va. 462, 237 S.E.2d 779 (1977) [hereinafter cited as Transcript]). The trial court referred to VA. CODE § 19.2-266 (1950), which provides in part:

In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose

Later that day the newspaper requested that the judge vacate the closure order.⁷ After hearing oral argument, the judge denied the request to vacate and ordered the trial to continue "with the press and public excluded."⁸ The trial continued and the defendant was acquitted,⁹ but two weeks later the court granted the newspaper's motion to intervene *nunc pro tunc*.¹⁰ The newspaper then unsuccessfully petitioned for writs of mandamus and prohibition to the Supreme Court of Virginia,¹¹ which also denied its petition for appeal from the closure order.¹² On certiorari,¹³ the Supreme Court of the United States *held*, reversed: The right of the public and the press to attend criminal trials is constitutionally mandated, "[a]bsent an overriding interest"¹⁴ articulated in the findings of the trial court. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

BACKGROUND

The Supreme Court has recently displayed a growing sensitivity toward the right of the accused to obtain a fair trial and toward the conflict of this right with the traditional rights of the media and the public to have access to and report judicial proceedings.¹⁵ The clash between the rights of defendants to fair trials and the rights of a free press has become more visible as a result of increased technological capabilities and growing access demands by the media. In 1966, the case of *Sheppard v. Maxwell*¹⁶ exemplified

presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

7. 100 S. Ct. at 2819. A hearing was set for the close of the first day of trial. The judge ruled that the hearing was part of the trial and cleared the courtroom.

8. *Id.* at 2820 (quoting Transcript, *supra* note 6, at 12).

9. *Id.* A court order issued on the second and final day of the trial disclosed that after the jury had been excused, the judge granted the defendant's motion to strike testimony concerning the bloodstained shirt and found the defendant not guilty. The court made tapes of the trial available to the public upon completion of the trial. *Id.* at 2820 n.3.

10. *Id.* at 2820.

11. *Id.*

12. *Id.*

13. The petitioner also sought appellate review under 28 U.S.C. § 1257(2) (1976). The Court denied this request, as the newspaper did not challenge the validity of the Virginia statute promptly or explicitly in the state courts. 100 S. Ct. at 2820 n.4.

14. 100 S. Ct. at 2830.

15. *E.g.*, *Gannett Co. v. DePasquale*, 443 U.S. 368, 383-84 (1979); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976); *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *Estes v. Texas*, 381 U.S. 532, 549 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963); *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961); *Marshall v. United States*, 360 U.S. 310, 312 (1959).

16. 384 U.S. 333 (1966).

an abuse of such press access. In *Sheppard*, the Supreme Court reversed the conviction of Dr. Sam Sheppard for the murder of his wife because the trial judge did nothing to limit the effects of intense prejudicial publicity surrounding the trial.¹⁷ According to Justice Clark, writing for the Court, "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."¹⁸

The *Sheppard* decision was significant because it focused on the importance of judicial control over the courtroom setting. The Court held that the trial judge has the power to control the press and that "the cure lies in those remedial measures that will prevent the prejudice at its inception."¹⁹ Justice Clark enumerated possible preventive measures, including continuance, change of venue, sequestration of the jury, and proscription of any extrajudicial statements that divulged prejudicial matters.²⁰ The most effective of these proposed measures is judicial control over courtroom access by the press to eliminate the source of potentially prejudicial information.²¹

The *Sheppard* decision created a judicial obligation to control sensational media coverage to protect the fair trial rights of the accused. This obligation spawned a multitude of responses,²² in-

17. The trial judge took no action to stop pretrial publicity because he believed he lacked the necessary power. *Id.* at 357-58. That belief was not unreasonable, in view of the lack of relevant precedent in 1954, at the time of the trial. Not until 1961 did the Supreme Court reverse as unconstitutional a state conviction because of jurors' exposure to prejudicial pretrial publicity, in *Irvin v. Dowd*, 366 U.S. 717 (1961). In *Marshall v. United States*, 360 U.S. 310 (1959), the Court reversed a federal conviction where the jurors had read news accounts of information "of a character . . . so prejudicial it could not be directly offered as evidence." *Id.* at 312. The Court based the *Marshall* reversal on its supervisory power to apply proper standards for enforcement of the criminal law in the federal courts. *Id.* at 313 (citing *McNabb v. United States*, 318 U.S. 332 (1943)).

18. 384 U.S. at 355.

19. *Id.* at 363.

20. *Id.* at 361. The Court occasionally has reiterated these options as viable alternatives to protect the fair trial rights of the accused without denying the media an opportunity to report on the proceedings. See, e.g., 100 S. Ct. at 2840 n.4 (Stewart, J., concurring).

21. 384 U.S. at 358. See Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 406 (1977).

22. See Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, 45 F.R.D. 391 (1969). Members of the judiciary developed this report to implement the *Sheppard v. Maxwell* decision. It was amended in 1971. See Supplemental Report of the Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, 51 F.R.D. 135 (1971). In response to the *Gannett* and *Richmond* decisions, the Committee has recently issued a revised report. See note 117 and accompanying text *infra*.

cluding the use of prior restraining orders to prevent the press from reporting prejudicial information it obtained.²³ Judges widely used these "gag orders"²⁴ until the Supreme Court substantially curtailed their use, in *Nebraska Press Association v. Stuart*.²⁵

The Court in *Nebraska Press* unanimously held that a restraining order that prevented the press from releasing information obtained at a pretrial hearing was an improper restraint on publication.²⁶ It adopted a test establishing a high threshold of justification for the imposition of prior restraining orders.²⁷ Although the Court did not absolutely bar the use of gag orders, the language in the opinion is prohibitive, and the Court is unlikely to sustain such an order in the future.²⁸ Some commentators viewed the case as a first step toward eliminating the permissible use of other types of press restraints.²⁹ But the decision did not otherwise restrict the ways judges could indirectly limit the dissemination of information, such as by closing hearings.³⁰

23. Trial judges have relied upon Justice Clark's recommendation that they control statements outside the courtroom as authority for the issuance of "gag orders" to trial participants. 384 U.S. at 360-62; see Portman, *supra* note 21.

24. From 1967 to 1975, trial judges issued 39 gag orders, including 13 in 1974 and 14 in 1975. Landau & Roney, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55, 57 (1976).

25. 427 U.S. 539, 569-70 (1976).

26. *Id.* at 570.

27. The test, which allows for the "gravity of the evil" of prejudicial publicity, to be "discounted by its improbability" of harming the accused's right to a fair trial, *id.* at 562, is based on Judge Learned Hand's well-known formulation in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). This standard was still not high enough for Justice Powell, who filed a concurring opinion offering an even higher standard for the issuance of prior restraints. 427 U.S. at 571-72 (Powell, J., concurring); see Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 540-42 (1977).

28. See *New York Times v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971).

29. E.g., Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485, 495 (1977); Shellow, *The Voice of the Grass: Erwin Charles Simmants' Efforts to Secure a Fair Trial*, 29 STAN. L. REV. 477, 484 (1977).

30. The Court stated: "Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies." 427 U.S. at 564 n.8.

Justice Brennan, joined by Justices Stewart and Marshall, also implied that closure orders were not foreclosed: "Both petitioners and the State of Nebraska agree that the question whether preliminary hearings may be closed to the public consistently with the 'Public Trial' Clause of the Sixth Amendment is not before us, and it is therefore one on which I would express no views." *Id.* at 576 n.3 (Brennan, J., concurring).

By directly controlling the source of prejudicial publicity, the trial court indirectly but effectively prevented the press from disseminating such information. See Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 470 (1977).

THE *Gannett* RESULT

One indirect method of controlling prejudicial information, which simultaneously inhibits the press, is controlling access to the source of information. The Supreme Court in *Gannett Co. v. DePasquale*³¹ held that a trial judge may limit the public's and the press's access to a pretrial suppression hearing. The extent to which this limitation applied to other judicial proceedings has been a source of confusion and consternation to commentators³² and judges³³ alike, in part because the 5-4 decision yielded opinions by five of the Justices.³⁴

Gannett arose from a pretrial suppression hearing in a murder case.³⁵ At the outset of the hearing, the defense moved for closure, the prosecution did not object, and the judge granted the motion.³⁶ The Gannett Company, which had a reporter at the hearing who had not objected and who left the courtroom when so ordered, unsuccessfully appealed the closure order. The Supreme Court granted certiorari.³⁷

The Court in *Gannett* held that the public and the press have no constitutional right of access to a pretrial proceeding if the parties agree it should be closed to protect the fair trial rights of the defendant.³⁸ A majority agreed that the sixth amendment right to a public trial is for the benefit of the defendant, not the public.³⁹

31. 443 U.S. 368 (1979).

32. E.g., Lewis, *Keynote Address: The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793 (1980); Younger, *In Search of Premises*, 34 U. MIAMI L. REV. 807 (1980); see 100 S. Ct. at 2841 n.1.

33. See Younger, *supra* note 32, at 810. Professor Younger reviews some of the more unusual judicial responses to *Gannett*.

34. 443 U.S. 368 (1979). The justices writing in the *Gannett* decision were: Stewart, J., majority, *id.* at 370; Burger, C.J., concurring, *id.* at 394; Powell, J., concurring, *id.* at 397; Rehnquist, J., concurring, *id.* at 403; Blackmun, J., concurring in part and dissenting in part, *id.* at 406.

35. The closure order issued by the trial judge in *Richmond* took place 10 months before the *Gannett* decision. As one commentator put it, however, "a majority of the Burger Court had long since made its antipathy toward the press a matter of notoriety." Zion, *How the Court Parried the Gannett Decision*, Nat'l L.J., Aug. 4, 1980, at 15.

36. 443 U.S. at 375.

37. On the first appeal, the New York Appellate Division vacated the closure order for failure to show extraordinary circumstances justifying such an order. *Gannett Co. v. DePasquale*, 55 A.D.2d 107, 389 N.Y.S.2d 719 (1976). On the second appeal, the New York Court of Appeals reinstated the judge's order, noting that "criminal trials are presumptively open to the public, including the press" but not at the expense of the accused. *Gannett Co. v. DePasquale*, 43 N.Y.2d 370, 373, 372 N.E.2d 544, 547, 401 N.Y.S.2d 756, 759 (1977), *cert. granted*, 435 U.S. 1005 (1978).

38. 443 U.S. at 394.

39. *Id.* at 381.

Much of the confusion among lower courts after *Gannett* developed from an interpretation of the majority opinion as applying to the trial proper. Although closure of a pretrial hearing was at issue, the majority opinion continually used the word "trial" when discussing the power of a judge to issue a closure order.⁴⁰ This failure to distinguish adequately between the pretrial and the trial stage of a judicial proceeding caused over 130 courts to close some part of a proceeding, with at least thirty-five courts closing actual trials to the press and the public.⁴¹ Some trial judges went so far as to close trials to the press but not to the public.⁴²

THE SHIFT IN THE COURT

Faced with confusion from all sectors, the Court granted certiorari⁴³ in the *Richmond* case in an attempt to clarify some of the areas left in doubt after *Gannett*. The *Richmond* decision garnered seven opinions, the greatest number of the Term.⁴⁴ A majority agreed that the public and the press presumptively have access to criminal trials under the first amendment. Yet an analysis of the individual opinions in *Richmond* shows that although the decision prohibits the closing of trials when the judge states no adequate reason therefor, it offers no general guidance about what circumstances would justify a closed trial.⁴⁵

In a plurality opinion,⁴⁶ Chief Justice Burger found a guaran-

40. Justice Stewart's majority opinion referred 12 times to the closing of a trial. Chief Justice Burger, in his concurrence, distinguished the pretrial hearing in *Gannett* from an actual trial but went on to join the majority opinion without limiting his concurrence only to the judgment. In his *Richmond* concurrence, Justice Blackmun noted that *Gannett* could have been explicitly limited to the pretrial setting had the Chief Justice not joined the majority opinion. 100 S. Ct. at 2841 (Blackmun, J., concurring).

41. NEWSWEEK, July 14, 1980, at 24. One commentator has offered a reason for the obvious oversights in the Stewart opinion: that the opinion was originally intended to be a dissent and as such was not drafted with the care and precision of a majority opinion intended to become the law of the land. This dissent, with a few hasty changes, then became a 5-4 majority when Justice Powell switched sides at "the 11th-hour." Zion, *supra* note 35.

42. Younger, *supra* note 32, at 810.

43. 444 U.S. 896 (1979).

44. NEWSWEEK, July 14, 1980, at 24.

45. Justice Brennan suggested that a trial may be closed to keep national security information secret. 100 S. Ct. at 2839 n.24 (Brennan, J., concurring).

46. For a recent discussion of the precedential value of plurality decisions, see Note, *The Precedential Value of Supreme Court Plurality Opinions*, 80 COLUM. L. REV. 756 (1980). The problem created by a plurality opinion such as *Richmond* is the increased discretion it provides lower courts. Since a plurality opinion is unable to command a majority, it usually is accompanied by a number of concurrences explaining the differences in position; these additional opinions give a lower court judge relying on the case different options within a supposedly binding decision.

teed right of the public and the press to attend criminal trials, unless closure would serve an overriding interest set forth in the findings of the trial judge.⁴⁷ The Chief Justice relied on the first amendment as applied to the states through the fourteenth amendment to create an express guarantee of communication "on matters relating to the functioning of government."⁴⁸ In support of his interpretation of the first amendment, Chief Justice Burger developed a lengthy historical analysis of the origins of the criminal trial and its traditional openness in the Anglo-American system.⁴⁹ The Chief Justice distinguished *Gannett* by reiterating the point of his *Gannett* concurrence that "a hearing on a motion before trial to suppress evidence is not a trial" ⁵⁰ Although he held that there is a strong presumption that trials should be open, the Chief Justice specifically declined to define those circumstances that would permit closure of a criminal trial to the press and public.⁵¹

Justices White and Stevens joined the Chief Justice's opinion, but also wrote separately. Justice White chided the Court for rejecting the theory that the sixth amendment guarantees public access to judicial proceedings, as argued by the dissent in *Gannett*, and called the present case "unnecessary."⁵² Justice Stevens called the decision "a watershed case."⁵³ He applied the first amendment expansively, interpreting the decision as holding that "an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment."⁵⁴ Unlike Justice White, Justice Stevens found

47. 100 S. Ct. at 2830.

48. *Id.* at 2827.

49. *Id.* at 2821-26.

50. *Id.* at 2821 (quoting *Gannett Co. v. DePasquale*, 443 U.S. at 394 (Burger, C.J., concurring)) (emphasis in original).

51. *Id.* at 2830 n.18. Although requiring an "overriding interest" to close trials, the Chief Justice partially retreated in the same footnote, stating that a trial judge may impose reasonable limitations on access to a trial. Again, he did not delineate what would constitute reasonable circumstances. *Id.* The failure to offer suggestions leaves room for interpretation, as did the decision in *Nebraska Press*. Compare *id.* with note 30 and accompanying text *supra*.

52. *Id.* at 2830. (White, J., concurring).

53. *Id.* The media seized upon this phrase to celebrate their satisfaction with the decision. See, e.g., N.Y. Times, July 3, 1980, § A at 1; NEWSWEEK, July 14, 1980, at 24.

54. 100 S. Ct. at 2831. With this broad interpretation, Justice Stevens attempted to extend the case to governmental access situations similar to those in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (no right of access to a prison). See Note, 33 U. MIAMI L. REV. 680 (1978). Justice Stevens found it ironic that the *Richmond* decision extended protection to such a strong segment of society, the press, whereas the *Houchins* decision "involved the

Richmond consistent with *Gannett*. The absence of any articulated reason for closure, he argued, coupled with the "perfectly unambiguous"⁵⁵ *Gannett* holding that sixth amendment rights inure to the accused and not the public, adequately distinguished the two cases.⁵⁶

Justice Brennan's concurrence attempted to tie together the freedom-of-access cases of the past decade.⁵⁷ He placed the concept of freedom of access to governmental information along a continuum, arguing that the greater the governmental interest in security or confidentiality, the greater the degree of restraint necessary.⁵⁸ Justice Brennan stated that "the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information"⁵⁹ He viewed criminal trials as falling in an area on the continuum in which there was little justification for restricted access.⁶⁰ He supported his argument with a lengthy historical analysis similar in scope to that of the Chief Justice. Justice Brennan accounted for *Gannett* by arguing that although *Gannett* had held that the sixth amendment right to a public trial inures only to the accused,⁶¹ it had not foreclosed a public right of access grounded in another provision of the Constitution.⁶² He thus viewed the first amendment as independently establishing a public right of access to trial.⁶³

Justice Stewart, the author of the *Gannett* opinion, unconvincingly argued in his *Richmond* concurrence that *Gannett* had explicitly left open the question whether other provisions of the

plight of a segment of society least able to protect itself," prison inmates. 100 S. Ct. at 2831 (Stevens, J., concurring).

55. 100 S. Ct. at 2831 n.2. *But see id.* at 2841 & nn.1 & 2 (Blackmun, J., concurring).

56. *Id.* at 2831 n.2.

57. *Id.* at 2832-39 (Brennan, J., concurring); see *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Estes v. Texas*, 381 U.S. 532 (1965); *Zemel v. Rusk*, 381 U.S. 1 (1965).

58. "[O]ur decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality." 100 S. Ct. at 2833 (Brennan, J., concurring).

59. *Id.* at 2832.

60. *Id.* at 2839.

61. *Id.* at 2832.

62. *Id.* at 2832-33.

63. Justice Brennan analogized the independent derivation of public trial rights to the area of racial segregation, a practice the Court has found independently offensive to both the equal protection clause and the fifth amendment due process clause. *Id.* at 2832 n.1.

Constitution guaranteed a right of access to the courtroom.⁶⁴ His analysis of the first amendment distinguished prior cases, reviewing the traditional amount of first amendment activity taking place in the area to which access is sought. Justice Stewart applied a continuum analysis similar to that of Justice Brennan, finding a military base, prison, and jail inherently less public and thus less accessible than a courtroom.⁶⁵

Justice Blackmun, in a sharp concurring opinion directed at the plurality opinion, welcomed the Court's historical analysis of the public nature of the criminal trial. He confidently noted that the present opinion recounted, unnecessarily, the legal history that he had taken "great pains in assembling" in his *Gannett* dissent.⁶⁶ Although still believing that the *Gannett* majority had incorrectly interpreted the sixth amendment,⁶⁷ Justice Blackmun reluctantly accepted the plurality's analysis of the first amendment as an alternative means of providing some protection for the public to attend trials.⁶⁸

Justice Rehnquist, in dissent, reiterated his *Gannett* position

64. *Id.* at 2839-41 (Stewart, J., concurring). *But see* *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). Justice Stewart, writing for the Court in *Gannett*, stated that any first amendment right "to attend . . . criminal trial[s] was not violated." *Id.* at 393. Significantly, Justice Stewart found that the actions of the trial judge "were consistent with any right of access the [newspaper] may have had under the First and Fourteenth Amendment." *Id.* at 392. His opinion also identified the factors that would have weighed in favor of the press but found them absent in that case. He argued in *Gannett* that the sixth amendment right of the accused to a fair trial outweighed any first amendment rights attaching to the press or public. *Id.* at 390-91. The opinion concluded that the Constitution provided the press no affirmative right of access. This analysis hardly comports with his *Richmond* concurrence in which Justice Stewart found the first amendment question to have been specifically left open in *Gannett*. 100 S. Ct. at 2839-42 (Stewart, J., concurring).

65. In conspicuous contrast to a military base, *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505; a jail, *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149; or a prison, *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495, a trial courtroom is a public place. Even more than city streets, sidewalks, and parks as areas of traditional First Amendment activity, *e.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162, a trial courtroom is a place where representatives of the press and of the public are not only free to be, but where their presence serves to assure the integrity of what goes on.

100 S. Ct. at 2840 (Stewart, J., concurring).

66. *Id.* at 2841 (Blackmun, J., concurring).

67. "It is gratifying . . . to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett*." *Id.*

68. *Id.* at 2842. Justice Blackmun specifically declined to review the majority's errors in the *Gannett* decision other than to refer vaguely to the present case as representing the "utter fallacy of thinking" that the litigants in an adversarial system adequately protect the public interest. *Id.* at 2842 n.3 (Blackmun, J., concurring). Justice Stewart had offered this argument, in *Gannett*. 443 U.S. at 384.

that the Constitution provides no right of review when the litigants have agreed upon a closure order by the judge. The dissent pointed to principles of federalism and warned against the Court's increasing willingness to exercise decisionmaking power over the administration of justice in each of the fifty states.⁶⁹

COMMENT ON *Richmond*

The plethora of opinions in *Richmond* reflects the division within the Court on the right-of-access issue. The failure of any opinion to gain a majority permits the distillation of only the narrowest of holdings. Although the decision did not absolutely forbid the closing of a trial, common to all opinions on the prevailing side is a test to overcome the first amendment privilege so forbidding that the use of a closure order may no longer be available to protect the right of the accused to a fair trial. Chief Justice Burger found an inherent presumption in our system of justice that trials be public.⁷⁰ This presumption is grounded on the unwavering English and American tradition recognizing, throughout history, that the administration of law in a free society requires open trials.⁷¹

According to the plurality opinion, judges may close trials only when there is an "overriding interest" for closure. Although he did not specify what interests might qualify, the Chief Justice did enumerate alternatives to closure that satisfied "the constitutional demands of fairness."⁷² These alternatives are similar to those pro-

69. *Id.* at 2843. This federalism argument comports with Justice Rehnquist's philosophy of limiting adversary proceedings in certain social conflicts. "[T]here are many valuable institutions in any society which, although ultimately subject to the rule of law, cannot be freely subjected to the adversary judicial process without significant damage to those institutions." Rehnquist, *We are Family, Lawyers Stay Away*, Nat'l L.J., July 28, 1980, at 15, 16. See also Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 3 (1978).

70. 100 S. Ct. at 2821. "[V]alid interpreting of the Constitution . . . must rest not only on a reading of the words of the texts in question but also upon whatever historical evidence relevant to those words discloses their essential meaning." Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4, 13 (1961).

71. 100 S. Ct. at 2821-25. Justice Brennan agreed. *Id.* at 2834-35 (Brennan, J., concurring).

72. 100 S. Ct. at 2830.

There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial Nor is there anything to indicate that the sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the

posed in *Nebraska Press*,⁷³ in which the Court disallowed prior restraints as an available method of protecting a defendant's right to a fair trial. The Chief Justice wrote the *Nebraska Press* majority opinion as well as the plurality opinion in *Richmond*, and his reasoning in each case focused on less drastic means available to safeguard a defendant's right to a fair trial. *Richmond* thus implies that the use of closure orders at trial is now limited to the same extent as the use of prior restraining orders: their vitality has been virtually extinguished.⁷⁴

An overbroad reading of *Nebraska Press* and *Richmond* suggests that any judicial order that precludes the gathering and disseminating of government information is presumptively unconstitutional. Some in the media have cited *Richmond* to claim a greatly expanded interpretation of a right of access.⁷⁵ The remainder of this casenote considers the precedential value of a decision as fragmented as *Richmond*, and whether it meaningfully broadens the scope of the public's right of access to information controlled by government.⁷⁶ A related consideration is whether *Richmond* im-

manageable.

Id.

73. 427 U.S. at 563-64.

74. See *New York Times v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

Further, both *Nebraska Press* and *Richmond* relied heavily on the alternative measures for judicial control of the courtroom suggested by Justice Clark in the *Sheppard* case:

[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue the case* until the threat abates, or *transfer it* to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel.

Nebraska Press, 427 U.S. at 553 (citing *Sheppard v. Maxwell*, 384 U.S. at 362-63) (emphasis in original).

[T]here exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during trial.

Richmond, 100 S. Ct. at 2830 (citing *Sheppard v. Maxwell*, 384 U.S. at 357-62).

75. One commentator claims that the case recognizes a limitless application of the first amendment in the right-of-access area. Goodale, *Gannett is Burned by Richmond's First Amendment 'Sunshine Act'*, Nat'l L.J., Sept. 29, 1980, at 24; Goodale, *The Three-Part Open Door Test in Richmond Newspapers Case*, Nat'l L.J., Sept. 22, 1980, at 26.

Given the continued disagreement between the members of the Court about the value of the *Gannett* decision, such an evaluation is unsupportable. But because the press has such a great interest in a broad application of *Richmond*, its own urging of that interpretation has little credibility.

76. The *Richmond* decision brought an immediate response from the Justice Department, which proposed guidelines that specify when government attorneys should seek out or acquiesce to a closure motion. Attorney General Civiletti stated the position of the Justice

parts new logic in the debate over the meaning of the first amend-

Department: "These guidelines constitute an exercise of self restraint Even where the law would permit closure, we will not approve unless it is clearly necessary to serve the ends of justice." 6 MEDIA L. REP. (News Notes, No. 15). The proposed guidelines are as follows:

§ 50.9 POLICY WITH REGARD TO OPEN JUDICIAL PROCEEDINGS

Because of the vital public interest in open judicial proceedings, the Government has a general affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted. The Government should move for or consent to closed proceedings only when closure is plainly essential to the interests of justice. In furtherance of the Department's concern for the right of the public to attend judicial proceedings and the Department's obligation to the fair administration of justice, the following guidelines shall be adhered to by all attorneys for the United States.

(a) These guidelines apply to all federal trials, pre-trial evidentiary hearings, plea proceedings, sentencing proceedings, or portions thereof, except as indicated in (e) below.

(b) A Government attorney has a compelling duty to protect the societal interest in open proceedings.

(c) A Government attorney shall not move for or consent to closure of a proceeding covered by these guidelines unless:

(1) no reasonable alternative exists for protecting the interests at stake;

(2) closure is clearly likely to prevent the harm sought to be avoided;

(3) the degree of closure is minimized to the greatest extent possible;

(4) the public is given adequate notice of the proposed closure, and the motion for closure is made on the record;

(5) transcripts of the closed proceedings will be unsealed as soon as the interests requiring closure no longer obtain; and

(6) failure to close the proceedings will produce

(A) a substantial likelihood of denial of the right of a party to a fair trial,

(B) a substantial likelihood of imminent danger to the safety of parties, witnesses, or other persons, or

(C) a substantial likelihood that ongoing investigations will be seriously jeopardized.

(d) A Government attorney shall not move for or consent to the closure of:

(1) a civil proceeding except with the express authorization of the Associate Attorney General, based on articulated findings which meet the requirements of (c) above; or

(2) a criminal proceeding except with the express authorization of the Deputy Attorney General, based on articulated findings which meet the requirements of (c) above

(e) These guidelines do not apply to:

(1) the closure of part of a judicial proceeding where necessary to protect national security information or classified documents; or

(2) *in camera* inspection, or the receipt, consideration or sealing, during the course of an open proceeding and as governed by substantive or procedural law (including the rules of evidence), of the following: trade secrets or similar commercial information, material which jeopardizes confidential investigative sources and methods, or grand jury information; or

(3) conferences traditionally held at the bench or in chambers during the course of an open proceeding.

6 MEDIA L. REP. (News Notes, No. 15) (Aug. 12, 1980).

A request for comments on the proposed standards yielded uniformly unfavorable criti-

ment language: "or of the press."⁷⁷

AD HOC BALANCING

Because *Richmond* produced seven different opinions, none of which received more than three votes, any broad conclusions based on the case are suspect. Despite the 7-1 decision to reverse, the Justices were truly a Court divided. Each Justice followed an individual route to his decision, and the majority failed to agree on all but the narrowest holding.

Richmond is likely to be of little assistance to the many trial judges still confused after *Gannett*. Such a composite of individual balancing without regard for the concerns addressed by fellow Justices has been characterized as an individualized ad hoc balancing test.⁷⁸ A general ad hoc balancing causes a court to be

cast loose in a vast space, embracing the broadest possible range of issues, to strike a general balance in the light of its own best judgment. . . . [T]he test allow[s] a court to reach either conclusion in almost every case

. . . .
The test cannot afford police, prosecutors, other government officials and the individual adequate advance notice of the rights essential to be protected. Moreover, the test is unworkable from the viewpoint of judicial administration, requiring for ultimate decision an ad hoc resolution by the highest tribunal in each case.⁷⁹

Such confusion likely occurs when the Court uses an ad hoc balancing of the same factors. But when each Justice uses different factors, as in *Richmond*, the decisionmaking process is further fragmented. Cases turn on the point at which each Justice balances his own set of issues, with the resultant holdings being limited to their facts. This situation manifests itself in *Richmond*, because six Justices wrote opinions reversing the lower court, but each Justice felt compelled to distinguish his balancing test.

In *Richmond*, Justice White refused to examine the applica-

cism. Many urged guidelines creating an affirmative duty for government attorneys to seek open hearings whenever possible. Others worried that the proposed guidelines would create increased secrecy in the federal courts. 6 MEDIA L. REP. (News Notes, No. 20) (Sept. 23, 1980).

77. U.S. CONST. amend. I.

78. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 913-14 (1962).

79. *Id.*

tion of the first amendment to the issue, although he accepted the Chief Justice's conclusion.⁸⁰ Justice Stevens focused on the complete absence of reasons proffered for closure.⁸¹ Justice Brennan contrasted the first amendment rights of the public against the sixth amendment rights of the defendants.⁸² Justice Stewart examined the relative openness of various institutions.⁸³ Chief Justice Burger rested his decision on the differences between the pretrial and the trial proceedings, and on history.⁸⁴ Justice Rehnquist's dissent refused even to accept a role for the federal courts in adjudicating such claims arising in state criminal justice systems.⁸⁵ Such a diversity of factors used by each Justice within one decision illustrates the individualized balancing used to arrive at a composite decision.

A case decided under this methodology offers little value to lower courts trying to decide future cases. Each distinct opinion in a composite decision suggests the importance of a different set of factors, allowing great leeway in the lower courts when applying a Supreme Court decision. This diversity among the Justices may occasionally grant refreshing insights, but prevents the Court from fulfilling one of its primary obligations, that of providing interpretive guidance on the laws of the land. Nonetheless, *Richmond* must be examined to extract the principle on which one may fairly say a majority of the Court has agreed.

ACCESS TO GOVERNMENT SOURCES

The all but absolute right of access to a trial found in *Richmond* offers hope to the media that courts will read the decision to require ever-expanding presumptions of access. In a concurring opinion, Justice Stevens stated, "for the *first* time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment."⁸⁶ Previously the Court had rejected right-to-access arguments in the context of a pretrial hearing,⁸⁷ a prison,⁸⁸ and a jail.⁸⁹ The Court also declined

80. 100 S. Ct. at 2830 (White, J., concurring).

81. *Id.* at 2831 (Stevens, J., concurring).

82. *Id.* at 2835 (Brennan, J., concurring).

83. *Id.* at 2840 (Stewart, J., concurring).

84. *Id.* at 2826 (Burger, C.J.).

85. *Id.* at 2844 (Rehnquist, J., dissenting).

86. *Id.* at 2831 (Stevens, J., concurring) (emphasis added).

87. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

to hear cases in which the courts below had denied access to a death row execution⁹⁰ and a trial of a United States senator.⁹¹ Thus, *Richmond* is a break from the Court's repeated decisions denying access.⁹² Now that the Court has at least granted public access in one "access" case, the relevant standard for access must be identified. An examination of the opinions shows that if *Richmond* means anything beyond the criminal trial context, it means only that the public and the press presumptively have access to government functions historically open to the public.

Examining *Richmond* in the context of the prior cases, one might predict that a majority of the Court, consisting of the *Gannett* dissenters⁹³ and a portion of the *Gannett* majority,⁹⁴ would grant access only to those Court proceedings historically considered public, as in the case of the trial proper. Chief Justice Burger's analysis applied a historical limitation, as he distinguished cases "concerned with . . . institutions [that] do not share the long tradition of openness."⁹⁵ Justice Brennan's reasoning implicitly embraced that standard: "the Constitution carries the gloss of history."⁹⁶ Justice Blackmun recognized the necessity for a historical

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

89. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Id.* at 15.

90. *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977), *cert. denied*, 438 U.S. 914 (1978).

91. *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *rehearing denied*, 562 F.2d 1257, *cert. denied*, 435 U.S. 968 (1978).

The cases cited in notes 87-91 did not resolve whether the public has a right of access to such information within the government's control. Since members of the press are at best agents of the public in disseminating information that is subject to first amendment protection, "newsmen have no constitutional right of access . . . beyond that afforded the general public." *Pell*, 414 U.S. at 834. Each of these cases has found that there was no right of public access to the information sought. See generally Paul & Ovelman, *Access Litigation*, 6 LITIGATION 31 (1980).

92. Previously, repeatedly unsuccessful attempts at access litigation had led some commentators to urge litigators either to sue in state court or reformulate the issues to avoid the access question. See Paul & Ovelman, *supra* note 91.

93. They are Justices Blackmun, White, Brennan, and Marshall.

94. Within the *Gannett* majority, Chief Justice Burger and Justices Powell and Stewart have evinced an interest in accepting an historical analysis as grounds for qualifying the first amendment right of access.

95. 100 S. Ct. at 2827 n.11.

96. 100 S. Ct. at 2834 (Brennan, J., concurring). Justice Marshall joined Justice Brennan's concurrence. Justice Brennan's concurrence specifically noted two distinct principles that required access. The first relied on history, because "a tradition of accessibility implies the favorable judgment of experience." *Id.* The second would consider the nature of the institution and the salutary effect public access would have on the functioning of the insti-

limitation; he found "[t]he court's return to history . . . a welcome change in direction."⁹⁷

Thus, most of the Justices are willing to recognize a first amendment privilege of access restricted to areas historically open to the public.⁹⁸ The limitation of historical openness allows first amendment access to areas that the public traditionally expects to be accessible. Any such expectation, coupled with the new first amendment right recognized in *Richmond*, may now provide reasonable access to many areas previously untested in the courts. *Richmond*, however, does not construe the first amendment as an open-ended Freedom of Information Act request, because historical restraints will protect government from demands not within traditional expectations.

As Justice Stewart advocated in his now famous remarks at the Yale Law School:

The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.⁹⁹

If each situation is reviewed in a proper historical context, information commonly kept secret from the public will remain se-

tution itself: "[W]hat is crucial . . . is whether access to a particular government process is important in terms of that very process." *Id.*

Brennan's second principle, while failing to command a majority of the Court, certainly offers potential for increased access claims because it would allow courts to examine particular institutions and the effect of access on them, without having to meet the threshold requirement of historical openness. For a further discussion of Justice Brennan's concurrence, see Stotzky, *Foreword: The First Amendment and the Press*, 34 U. MIAMI L. REV. 785 (1980). The Chief Justice also noted the salutary effect of open trials on the public perception of justice: "When a shocking crime occurs, a community reaction of outrage and public protest often follows . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion." 100 S. Ct. at 2824.

97. 100 S. Ct. at 2841 (Blackmun, J., concurring).

98. The Court drew no distinction between the public and the press in its historical analysis. Chief Justice Burger wrote, "most people receive information concerning trials through the media whose representatives 'are entitled to the same rights [to attend trials] as the general public.'" 100 S. Ct. at 2827 n.12 (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965)).

99. Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 636 (1975).

cret.¹⁰⁰ Therefore, given the limitations implicit in *Richmond*, the case does not grant any newly defined areas of access to the public under the first amendment other than the trial. New areas may or may not become accessible, depending on a future determination of their "historical" openness.

The press has begun to urge that *Richmond* represents a complete reversal of the Court's repeated rebuff of past access claims by the press in nontrial cases.¹⁰¹ For example, a brief submitted in support of releasing the tapes used in the "ABSCAM" bribery trial of Representative Michael Myers argued that "the theory underlying *Richmond*—based, as it is, on the benefits of open judicial proceedings . . . is far more consistent"¹⁰² with a decision that permits access. The brief acknowledged that "the right of access [to the tapes] is fortified by and its exercise informed by our constitutionally grounded tradition of openness of judicial proceedings—the same right at issue in *Richmond Newspapers* itself."¹⁰³

The holding in *Richmond* may well extend to the newly established practice in some states of allowing television cameras in courtrooms, to be decided by the Court in *Chandler v. Florida*.¹⁰⁴ Proponents of allowing "cameras in the courtroom" argue that such coverage is compatible with the broad interests set forth in *Richmond*. An amicus brief filed in *Chandler* by sixteen news organizations argued that *Richmond* "creates at least a presumption" in favor of newsgathering "that facilitates the widest and most direct public review"¹⁰⁵ of criminal trials. "The teaching of

100. In the context of prior restraints, the panel discussion in this symposium reviewed some of the areas of governmental information commonly concealed from the general public. See *Panel Discussion*, 34 U. MIAMI L. REV. 891 (1980).

101. One such simplistic analysis concluded that *Richmond* reduced *Gannett* "to the status of an awkward footnote in the Court's recent history." N.Y. Times, July 3, 1980, § A, at 1, col. 2.

102. 6 MED. L. REP. (News Notes, No. 21) (Sept. 30, 1980). The videotapes, used as evidence by the prosecution, showed Representative Myers apparently accepting money from undercover F.B.I. agents who were posing as the representatives of a wealthy Middle Eastern businessman. His accepting the money was the basis of the bribery charges. The United States Circuit Court of Appeals, Second Circuit, held that the media had a right of access to the tapes. See *United States v. Myers*, No. 1667 (decided Oct. 1, 1980), *id.* at 1961.

103. *Id.*

104. 366 So. 2d 64 (Fla. 3d DCA 1978), *prob. juris. noted*, 100 S. Ct. 1832 (1980) (No. 79-1260). Over the defendant's objection, the trial court in *Chandler* permitted television coverage of the trial under authority of FLA. CODE JUD. CONDUCT, Experimental Canon 3A(7). On appeal, the court affirmed the trial court's decision and stated that the use of cameras did not deny the defendant a fair trial, even though the jury had not been sequestered.

105. 6 MED. L. REP. (News Notes, No. 22) (Oct. 7, 1980).

Richmond about the strength of our society's commitment to open and publicized trials necessarily means that certain minimal risks will be accepted in order to vindicate the public's right to acquire the most meaningful information."¹⁰⁶

Chandler is noteworthy because it represents an ideal instance to test whether the press should be afforded even *greater* access rights than the public under certain circumstances, as necessary for the press to act as the public's informational "agent." Much of the discussion in this symposium has considered whether the language of the first amendment, "or of the press," gives the press preferred constitutional protection beyond the free speech to which everyone is entitled. Although the Court has stated that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally,"¹⁰⁷ *Chandler* could be the occasion to change that rule. A majority of the Justices have suggested that notwithstanding the language of *Branzburg* and *Pell*, the press might indeed be a special first amendment beneficiary. For example, it may be entitled to preferential seating, as a surrogate of the public, where space is limited in a public forum.¹⁰⁸ Now that *Richmond* has held that trials are public, "[a]s a practical matter . . . the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals."¹⁰⁹

Depending on the outcome of *Chandler*, the press, until otherwise instructed by the Supreme Court, will probably continue to embrace the concept of expanded access to all areas of governmental information.¹¹⁰ That it will fully attain this goal, arguably nec-

106. *Id.*

107. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). That dictum was elevated to a holding in *Pell v. Procunier*, 417 U.S. at 834-35 (1974).

108. In a footnote in *Richmond*, Chief Justice Burger noted: "[S]ince courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives." 100 S. Ct. at 2830 n.18. Justices Stevens and White joined that opinion. Justices Brennan and Marshall, *id.* at 2832 n.2, and Justice Stewart, *id.* at 2840 n.3, expressed similar views. Justice Powell, dissenting in *Saxbe v. Washington Post Co.*, argued that "[t]he press is the necessary representative of the public's interest . . . and the instrumentality which effects the public's right." 417 U.S. at 864 (Powell, J., dissenting).

109. 100 S. Ct. at 2832 n.2 (Brennan, J., concurring).

110. The appellant's reply brief in the *Chandler* case chastizes the press for reading too much into *Richmond*, beyond any plausible interpretation.

These self-appointed "surrogates", however, serve their own special interests. Who "appointed" the media to act for the public? The media! While a free

essary to its "agency" function,¹¹¹ is unlikely. First, its obvious self-interest in enhanced access undermines its editorial credibility in arguing for such access. Further, the facts of *Richmond* do not support the inference that such access transcends the right to attend trials. When *Richmond* is placed in the context of past cases,¹¹² it is evident that the Court did not intend to have *Richmond* read as broadly as the institutional press suggests.

DOES *Gannett* SURVIVE?

The historical balancing test will nevertheless allow future Court decisions to grant access to areas not now considered within the public domain but which may later be deemed so.¹¹³ Will the closure of a pretrial hearing, not specifically overruled in *Richmond*, now withstand a first amendment challenge? *Gannett's* survival and its reach must be ascertained, to determine the validity of over 130 judicial proceedings closed as a result of the *Gannett* decision.

Gannett unequivocally remains intact despite *Richmond*. Although the Court in *Richmond* displayed a convincing concern for the public interest in a trial, there is no indication that this interest in a public forum extends to pretrial proceedings. Further, the closure of pretrial proceedings can withstand the test of historical analysis. In the majority opinion of *Gannett*, Justice Stewart detailed the history of both English and American law and concluded that "the public had no right to attend pretrial proceedings."¹¹⁴

The Justices in the *Gannett* majority all drafted their *Richmond* opinions with an eye toward preserving the *Gannett* holding.

press may be the backbone of our system of justice, the Defendant's right to a fair trial is its *life's blood*. Presumably the press could accurately report on what occurred on a particular day and in a particular courtroom without a single television camera ever poking its tunnel-vision eye into the courtroom. But, how does a wrongfully convicted defendant recover the loss of his freedom?

Reply Brief for Appellant at 4-5, *Chandler v. Florida*, 366 So. 2d 64, *prob. juris. noted*, 100 S. Ct. 1832 (1980) (No. 79-1260).

111. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting); see *Lewis*, *supra* note 32.

112. See e.g., *Gannett*, 443 U.S. at 384-87; *Houchins v. KQED Inc.*, 438 U.S. 1 (1978) (no right of access to a jail); *Saxbe*, 417 U.S. at 863; *Levine v. United States*, 362 U.S. 610, 616 (1960) (public excluded from a criminal contempt hearing).

113. As the right of the public to gather information expands statutorily, as it has under the Freedom of Information Act, 5 U.S.C. § 552 (1976), the first amendment right of access should also expand. Whether the Court will read greater statutory access to imply even wider constitutional access remains to be seen.

114. 443 U.S. at 389.

Chief Justice Burger noted that "the precise issue presented here has not previously been before this Court for decision."¹¹⁵ Justice Brennan narrowed his *Richmond* opinion by reviewing the historical implications of trials only, so as not to infringe on the *Gannett* holding on pretrials.¹¹⁶ The carefully worded opinions all make clear distinctions between the two cases, seeking to limit the potentially broad reach of the *Richmond* decision. It appears that the *Gannett* majority still stands ready to uphold a pretrial closure order agreed upon by all the participants, with the line of demarcation falling between the open trial and the closed pretrial proceeding.

The United States Judicial Conference recently adopted this view of the law post-*Richmond*. In a discussion of the recent developments since "Fair Trial-Free Press" guidelines for the federal judiciary were adopted, the report noted that "[t]he subsequent decision in *Richmond Newspapers, Inc. v. Virginia* dealt with a trial and did not disturb the holding in *Gannett*, as to closure of a pretrial proceeding."¹¹⁷ The report found the *Richmond* decision "[i]mplicitly approving *Gannett's* ruling."¹¹⁸

CONCLUSION

The *Richmond* decision represents the Court's attempt to mend the havoc it wrought in *Gannett*. The use of closure orders in all types of judicial proceedings demonstrates the rampant confusion throughout the judiciary. The Court in *Richmond* has attempted to bring order to this area by finding trials presumptively open, yet allowing pretrial proceedings to be closed at the will of the parties, as in *Gannett*. This line of demarcation is an obvious one advocated in the *Richmond* opinions.

The tension between the first and sixth amendments will continue as *Richmond* removes another judicial means of protecting

115. 100 S. Ct. at 2821.

116. Justice Brennan limited his opinion with particularity:

[W]hat is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

To resolve the case before us, therefore, we must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself.

Id. at 2834.

117. *Revised Report to the Judicial Conference Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 6 MED. L. REP. 1897, 1899 (Oct. 21, 1980).

118. *Id.*; see note 22 *supra*.

the accused's right to a fair trial. The *Richmond* decision for the first time recognizes a right of access to governmental information, and establishes that communication rights must be honored at least when no other constitutional concerns are articulated. So far, however, the Court has limited this right of access to the trial, and until further comment from the Court, *Gannett* is undisturbed.

Although all of the participants in the symposium expressed their awareness of the *Richmond* case, the Court had not handed down the decision at the time of the lecture. Thus, the articles presented do not reflect the Court's decision to grant access to governmental information. It is interesting to note that even before *Richmond*, the speakers uniformly urged that some access be granted. Their disagreement about the extent of this right of access was as great as the diversity within the Court in the *Richmond* decision. In reading the arguments presented by the speakers, one should realize that the *Richmond* decision underscores rather than dissipates many of the concerns raised by the symposium's participants.

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