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Constitutional Law: Qualified Right of Access to Criminal Trials Recognized

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CASE COMMENTS

CONSTITUTIONAL LAW: QUALIFIED RIGHT OF ACCESS TO CRIMINAL TRIALS RECOGNIZED

*Richmond Newspaper, Inc. v. Virginia**
100 S. Ct. 2814 (1980)

Two reporters for appellant[1] were present at the beginning of a murder trial in a Virginia circuit court when the defendant's attorney requested the trial be closed to the public.[2] The attorney contended that closure was necessary to protect his client's right to a fair trial.[3] When the prosecutor did not object, the trial judge granted the motion and cleared the courtroom.[4] No one, including the reporters, objected.[5] Later that day, appellant moved to vacate the closure order.[6] The judge denied the motion, stating that preservation of defendant's right warranted the closure.[7] Two weeks later, the trial judge

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1. 100 S. Ct. 2814 (1980). Richmond Newspapers, Inc. owns two newspapers in Richmond, Va. — the Richmond Times-Dispatch and the Richmond News Leader. A reporter from each paper was present. EDITOR & PUBLISHER, July 5, 1980, at 10.

2. 100 S. Ct. at 2819. It was the defendant's fourth trial on a charge of stabbing a hotel manager to death in December, 1975. *Id.* at 2818. A conviction for second-degree murder obtained in the first trial was reversed because evidence was admitted improperly. *Id.* The second and third trials ended in mistrials. All three trials were in the Circuit Court of Hanover County, Va. *Id.* Notably, the courtroom in which the proceeding occurred was the same courtroom where Patrick Henry, the American revolutionary, first attained oratorical fame defending the principles of freedom and liberty. Miami Herald, July 3, 1980, §A, at 1, col. 5; TIME, July 14, 1980, at 13.

3. 100 S. Ct. at 2819. The attorney expressed a fear that information might be "shuffled back and forth when we have a recess as to what — who testified to what." *Id.* (quoting Transcript of Sept. 11, 1978, Hearing on Defendant's Motion to Close Trial to the Public, at 2-3).

4. *Id.* at 2819. Trial judge Richard Taylor stated that a Virginia statute gave him the power to close the trial. *Id.* Presumably, he was referring to Virginia Code §19.2-266, which provides in part: "In the trial of all criminal cases . . . the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial." 100 S. Ct. at 2819.

5. *Id.* at 2819.

6. *Id.* The hearing on the motion was also closed to the press and public, with only appellant's counsel allowed to attend. *Id.* Appellant's attorney argued that alternatives to closure should first be considered; the defense counsel argued that an open trial would increase the chance of improper information being seen by jurors. *Id.* (citing Transcript of Sept. 11, 1978, Hearing on Motion to Vacate Closure Order, at 11-12, 16-18).

7. 100 S. Ct. at 2819. At the hearing's conclusion, the judge said: "[I]f I feel that the rights of the defendant are infringed in any way . . . and it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion." *Id.* (quoting Transcript of Sept. 11, 1978, Hearing on Motion to Vacate Closure Order, at 20). The trial ended the next day when the judge granted a motion to suppress the state's evidence. 100 S. Ct. at 2820.

approved a motion allowing appellant to contest the order.[8] The Virginia supreme court upheld the closure order.[9] On write of certiorari,[10] the United States Supreme Court reversed and HELD, the first[11] and fourteenth[12] amendments implicitly guarantee the public a qualified right to attend criminal trials.[13]

The Supreme Court had never before considered a case in which an entire trial was closed to the press and public.[14] Indeed, there had been few cases of total exclusion from a trial in United States history before the instant case.[15]

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8. *Id.* at 2820. Because the trial had already ended, the motion was to intervene nunc pro tune. *Id.* Eventually, Richmond Newspapers was joined in the appeal by 56 other news organizations, including the three major television networks. EDITOR & PUBLISHER, *supra* note 1.

9. 100 S. Ct. at 2820. The Virginia supreme court, without opinion, dismissed appellant's mandamus and prohibition petitions and denied a petition for appeal, merely citing Gannett Co. v. DePasquale, 443 U.S. 368 (1979). *Id. Gannett*, which approved the closure of a pre-trial suppression hearing, was handed down July 2, 1979—seven days before the Virginia supreme court's ruling and exactly one year before the ruling in the instant case.

10. 100 S. Ct. at 2820. Appellate jurisdiction was denied because the validity of the Virginia statute, see note 4 *supra*, was not appropriately argued by appellants before the Virginia courts. *Id.* The Court decided, however, to continue to refer to the parties as appellants and appellee, rather than petitioners and respondent. 100 S. Ct. at 2820 n.4.

11. U.S. CONST. amend. I provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."

12. U.S. CONST. amend. XIV, §1 provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law." The Supreme Court has ruled in numerous cases that the first amendment is applicable to the states through the fourteenth amendment. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941); Gitlow v. New York, 268 U.S. 652 (1925).

13. 100 S. Ct. 2814. The vote was 7-1, with seven members of the Court writing opinions. Chief Justice Burger announced the judgment of the Court and wrote a plurality opinion joined by Justices White and Stevens. Justices White and Stevens both wrote concurring opinions. Justice Brennan, joined by Justice Marshall, wrote a separate opinion concurring in the judgment. Justices Stewart and Blackmum also wrote separate opinions concurring in the judgment. Justice Rehnquist filed the lone dissenting opinion. Justice Powell, a Virginian, disqualified himself because of a longtime friendship with D. Tennant Bryan, chairman of Richmond Newspapers, Inc. Los Angeles Times, July 3, 1980, Part I, at 1, col. 3.

14. 100 S. Ct. at 2821.

15. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the Court reviewed numerous cases involving court closings, but Justice Blackmun pointed out in his dissenting opinion that no case was cited where the public had been totally excluded from all of a trial or all of a pre-trial suppression hearing. *Id.* at 430 n.11. He also expressed doubt whether any such cases existed. *Id.* There have, however, been cases of total exclusion, although few in number. *See* Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1951) (affirming conviction where all members of the general public excluded pursuant to a state law permitting total exclusion in sex crime cases involving minor victim; press not present); People v. Hartman, 103 Cal. 242, 37 P. 153 (1894) (reversing conviction where everyone except officers of the court excluded over defendant's objection); People v. Swafford, 65 Cal. 223, 3 P. 809 (1884) (affirming conviction for kidnapping a minor where everyone except persons connected with the case excluded). *Cf. In re* Oliver, 333 U.S. 257 (1948) (reversing conviction where judge, sitting as a one-man grand jury, summarily charged petitioner with contempt and sentenced him to jail); Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969) (reversing conviction where suppression hearing, held following jury selection, was closed to the public).

This history reflected a tradition inherited from Great Britain. The tradition of open trials has been accepted there since the Norman Conquest.[16] One English court recognized public attendance at trials as an essential quality of the court system.[17]

A high regard for openness also existed among this country's early settlers. Some colonial charters and early state constitutions explicitly provided for public trials.[18] When the sixth amendment was adopted, it also included the right to a public trial.[19] The wording of the amendment, however, guaranteed this right only to the accused; it did not guarantee a similar right to the public. Despite this omission, there was no indication when the amendment was adopted that the common law tradition of open trials was in danger.[20] The question of who had a right to an open trial, however, eventually became the subject of vigorous debate. Some courts held that the amendment guaranteed a public trial only to the accused, while other courts argued that the amend-

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16. Note, *Legal History: Origins of the Public Trial,* 35 IND. L.J. 251, 255 (1960). *See also* Radin, *The Right to a Public Trial,* 6 TEMP. L.Q. 381, 381 (1931-32). Secrecy in the British judicial system has been associated with the 16th and 17th century period of the English Star Chamber, *see, e.g.,* Davis v. United States, 247 F. 394, 395 (8th Cir. 1917); Keddington v. State, 19 Ariz. 457, 459, 172 P. 273, 273 (1918), but actual closed trials were *not* common even during that period. 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 195 (3d ed. 1945). Holdsworth explained that prisoners who appeared before the Star Chamber were prevented from calling witnesses and preparing a defense, but "the trials were at least public." *Id. Accord,* Radin, *supra,* at 386; Note, *supra,* at 254. *See also* 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 273-74 (3d ed. 1945).

17. 100 S. Ct. at 2822 (citing Daubney v. Cooper, 10 B. & C. 237, 240, 109 Eng. Rep. 438, 440 (K.B. 1829)). Legal scholars have for centuries praised the openness of the English trial process. *See* 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524, 584-85 (1827); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 372-73 (13th ed. 1800); 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 103, 121 (6th ed. 1681); M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 342-45 (6th ed. 1820); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 10-12 (L. Alston ed. 1927); E. JENKS, THE BOOK OF ENGLISH LAW 73-74 (6th ed. 1967); L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 715-17 (1948); T. SMITH, DE REPUBLICA ANGLORUM 79 (L. Alston ed. 1906).

18. *See* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 271 (1971) (Pennsylvania constitution — 1776); *id.* at 287 (North Carolina constitution — 1776); SOURCES OF OUR LIBERTIES 188 (R. Perry ed. 1959) (West New Jersey charter — 1677); *id.* at 217 (Pennsylvania charter — 1682). Other early constitutions did not explicitly provide for open trials, but did emphasize that the common law of England would remain in force. *See* SCHWARTZ, *supra,* at 260 (New Jersey constitution — 1776); *id.* at 311 (New York constitution — 1777).

19. U.S. CONST. amend VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

20. Justice Blackmun in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), suggested that since there was no debate about the wording of the sixth amendment, none of the framers must have believed it affected the common law tradition of public trials. *Id.* at 427. Justice Story examined this issue in 1833, and concluded that the "trial is always public." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 662 (1833).

21. *See, e.g.,* United States v. Sorrentino, 175 F.2d 721, 723 (3d Cir. 1949). *Cf.* Keddington v. State, 19 ARIZ. 457, 462, 172 P. 273, 275 (1918) (interpretations of similar state constitutional provisions); Dutton v. State, 123 Md. 373, 387-88, 91 A. 417, 422-23 (1914) (interpretations of similar state constitutional provisions).

ment's public trial clause also provided the public with the right to attend all trials.[22]

As this controversy continued, another issue emerged involving the extent to which pre-trial publicity infringes upon the accused's sixth amendment right to a fair trial. In *Estes v. Texas*,[23] the Supreme Court held that the televising of pre-trial and trial proceedings prevented the defendant from receiving a fair trial.[24] In *Sheppard v. Maxwell*[25] the Court ruled that publicity surrounding a notorious murder trial and the courtroom conduct of newsmen also prevented a fair trial.[26] Although both convictions were reversed, in neither opinion did the Court indicate that the press should have been excluded from the courtroom. The *Estes* decision reflected the Court's opposition to television cameras in court[27] and the *Sheppard* decision reflected their concern about the conduct of newsmen before and during trial.[28] The right of the press to be present in each case was unquestioned; only the nature and extent of its courtroom coverage was at issue.[29]

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22. *See, e.g.*, Lewis v. Peyton, 352 F.2d 791, 792 (4th Cir. 1965); United States v. General Motors Corp., 352 F. Supp. 1071, 1074 (E.D. Mich. 1973). *Accord*, Note, *The Accused's Right to a Public Trial*, 49 COLUM. L. REV. 110, 115 (1949). *Cf.* Neal v. State, 86 Okla. Crim. 283, 289, 192 P.2d 294, 295 (1948) (interpretation of similar state constitutional provision). *See generally* 1 T. COOLEY, COOLEY'S CONSTITUTIONAL LIMITATIONS 647-48 (8th ed. 1927).

23. 381 U.S. 532 (1965).

24. *Id.* at 551-52. The defendant, a well-known financier, was charged with swindling and related offenses. *Id.* at 532.

25. 384 U.S. 333 (1966).

26. *Id.* at 363. The defendant, a doctor, was charged with murdering his wife. *Id.* at 333.

27. 381 U.S. at 551-52. The Court stated that it was not concerned with future developments in the television industry and how they might affect its attitude toward televising judicial proceedings. *Id.*

Another case involving television cameras in the courtroom was scheduled for hearing by the Supreme Court during the October 1980 term. The case, Chandler v. State, 376 So. 2d 1157 (Fla. 1979), *appeal docketed*, No. 79-1260 (U.S. 1980), involves a challenge to Canon 3 A(7) of Florida's Code of Judicial Conduct, which allows television coverage of trials. When the Florida supreme court approved the canon, it noted that *Estes* was limited to its peculiar facts, and that the state of the television art was "crude" at that time. Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 772-73 (Fla. 1979). Relying on the canon, the Third District Court of Appeal had ruled that television cameras in court did not deprive two defendants of their right to a fair trial. Chandler v. State, 366 So. 2d 64, 69 (3d D.C.A. (*per curiam*), *cert. denied*, 376 So. 2d 1157 (Fla. 1979). The Florida supreme court denied certiorari, finding the question was moot because of their *Post-Newsweek* decision. Chandler v. State, 376 So. 2d 1157 (Fla. 1979).

28. 384 U.S. at 362-63.

29. The Court in *Sheppard* noted that the number of reporters could be limited if there was any indication that their presence would be disruptive. *Id.* at 358. The Court also stated: "Of course there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Id.* at 362-63. The Court suggested that a change of venue, a continuance, sequestering the jury, and ordering a new trial were all appropriate methods to combat the effects of prejudicial publicity. *Id.* at 363.

The Court in *Estes* stated: "It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are *always present if they wish to be* and are plainly free to report whatever occurs in open court." 381 U.S. at 541-42 (emphasis added).

Justice Douglas asserted in 1960 that safeguards against prejudicial publicity are designed

Until recently, the right of the press and public to be present at trials was never questioned, however, temporary exclusions have occurred periodically at both trials and pre-trial hearings. Courts have excluded the press and public to protect confidential government information[30] and to protect private trade secrets.[31] State courts have cleared courtrooms to protect the identities of minors and victims of sex crimes.[32] Occasionally, reporters have been permitted to remain while the general public was instructed to leave.[33] In all but one of these instances, however, the closure was temporary.[34] Moreover, first amendment questions, such as the right of access, were never raised. The emphasis throughout these cases has been on the sixth amendment, as well as the fifth and fourteenth amendments' due process clauses.[35]

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not to punish the press, but to grant new trials, changes of venue and continuances. He did not mention closure as an alternative. Douglas, *The Public Trial and the Free Press,* 33 ROCKY MT. L. REV. 1, 5 (1960). Other Supreme Court opinions besides *Estes* and *Sheppard* have expressed the assumption that trials are to be open. *See, e.g.,* Craig v. Harney, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the courtroom is public property"); Pennekamp v. Florida, 328 U.S. 331 (1946) (Frankfurter, J., concurring) ("Of course trials must be public and the public have [*sic*] a deep interest in trials.").

30. *See, e.g.,* United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.), *cert. denied,* 423 U.S. 937 (1975) (temporary exclusion from trial justified to protect the identity of undercover agent); United States v. Bell, 464 F.2d 667, 667 (2d Cir.), *cert. denied,* 409 U.S. 991 (1972) (public, press *and defendant* excluded from pretrial suppression hearing during discussion of government's hijacker profile); *cf.* United States v. Reynolds, 345 U.S. 1 (1953) (discovery in tort case restricted because of reasonable probability that military secrets were involved). *But cf.* Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973) (discovery of certain police investigative records allowed in civil rights case after court balanced public interest in confidentiality of government information against plaintiff's need for information).

31. Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 539 (2d Cir. 1974). The trade secrets were formulae for producing adhesives and coatings for certain plastic products. *Id.* at 535, 535 n.3. The Second Circuit noted that disclosure of the formulae probably would not be necessary at the criminal contempt trial, but if disclosure were necessary, the judge would have the power to temporarily exclude spectators. *Id.* at 539. *Cf.* FED. R. CIV. P. 26(c)(7) (providing civil protection order to guard against disclosure of trade secrets and other confidential research).

32. *See, e.g.,* Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1951) (entire rape trial closed in case involving minor victim); Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) (total exclusion while 10-year old rape victim testified); State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907) (total exclusion while rape victim, age not given, testified). *Cf.* Geise v. United States, 262 F.2d 151 (9th Cir. 1958) (partial exclusion in rape case involving minors). *But see* Globe Newspaper Co. v. Superior Court, 49 U.S.L.W. 3264 (1980), *vacating judgment in,* 401 N.E.2d 360 (Mass. 1980) (striking order permitting mandatory closure in certain sex crime cases); Lexington Herald-Leader, Inc. v. Tackett, 27 Ky. L.S. 8 (June 25, 1980) (ruling that sexual abuse trial should *not* have been closed during testimony of two minor victims; a "reasonable portion of the public" must be allowed in).

33. *See, e.g.,* United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965); Geise v. United States, 262 F.2d 151 (9th Cir. 1958); Reeves v. State, 264 Ala. 476, 88 So. 2d 561 (1956); Moore v. State, 151 Ga. 648, 108 S.E. 47 (1921); Keddington v. State, 19 Ariz. 457, 172 P. 273 (1918). *But see* United States v. Kobli, 172 F.2d 919 (3d Cir. 1949) (exclusion of everyone except the press is too sweeping an exclusion); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944) (exclusion of everyone except defendant's friends, relatives, and press too broad).

34. The exclusion period was for the entire trial in Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1951). See note 15 *supra.*

35. *See, e.g.,* Levine v. United States, 362 U.S. 610, 616 (1960) (fifth amendment); *In re*

Many Supreme Court cases, while not dealing directly with the right to report on trials, have addressed efforts to gather information and to gain access to government facilities. The first amendment has been considered in cases concerning a newsman's efforts to protect the source of his information,[36] a citizen's attempt to travel to Cuba to gather information,[37] and efforts to gain access to prisons,[38] jails,[39] and military bases.[40] In all of those cases, the Court emphasized that first amendment rights are not absolute; they are rights that can be and were restricted in all of the above examples.[41]

In 1976, the Supreme Court considered the right of the press to report on

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Oliver, 333 U.S. 257, 258 (1948) (fourteenth amendment); *id.* at 278 (Rutledge, J., concurring) (sixth and fifth amendments); United States v. Bell, 464 F.2d 667, 669 (2d Cir. 1972) (fifth amendment); *id.* at 670 (sixth amendment); Melanson v. O'Brien, 191 F.2d 963, 965 (1st Cir. 1951) (fourteenth amendment).

36. Branzburg v. Hayes, 408 U.S. 665 (1972).

37. Zemel v. Rusk, 381 U.S. 1 (1965).

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

39. Houchins v. KQED, Inc., 438 U.S. 1 (1978); Adderley v. Florida, 385 U.S. 39 (1966).

40. Greer v. Spock, 424 U.S. 828 (1976).

41. In Branzburg v. Hayes, 408 U.S. 665 (1972), a newsman appeared before a grand jury and refused to identify two drug users whom he wrote about in an article. The Court held that the first amendment freedom of the press does not include a right to keep such information from a grand jury. In dictum, however, the Court stated that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. *Cf.* Carey v. Hume, 492 F.2d 631, 632 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974) (federal court cited Branzburg in ruling that newsmen can be compelled to disclose confidential sources in civil cases).

In Zemel v. Rusk, 381 U.S. 1 (1965), the Court held that the Secretary of State could, for national security reasons, impose restrictions on travel to Cuba. The Court explained that "the right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 17.

In Pell v. Procunier, 417 U.S. 817 (1974) and its companion case, Saxbe v. Washington Post Co., 417 U.S. 843 (1974), the Court upheld state (*Pell*) and federal (*Saxbe*) prison regulations forbidding press interviews with prisoners. In a dissenting opinion in *Saxbe*, Justice Powell, joined by Justices Brennan and Marshall, vigorously argued that a right of access to information should be protected by the first amendment. *Id.* at 857.

Greer v. Spock, 424 U.S. 828 (1976), and Adderley v. Florida, 385 U.S. 39 (1966), both involved freedom of speech issues. In *Adderley*, the Court held that the first amendment did not protect student demonstrators who were arrested after refusing to leave the grounds of a county jail. 385 U.S. at 47-48. In *Greer*, the Court upheld federal regulations prohibiting speeches and demonstrations on a military base without prior approval. 424 U.S. at 828.

In the most recent of these seven cases, Houchins v. KQED, Inc., 438 U.S. 1 (1978), the Court held that a broadcasting company did not have a right of access to an area of a county jail where a prisoner's suicide had reportedly occurred. *Id.* at 15. Chief Justice Burger, stated that the first amendment does not mandate a right of access to government information. *Id.* at 15. Justice Stewart agreed with the Chief Justice, adding that the Constitution assures equal access to the press and public only if government consents to the access. *Id.* at 16. See note 90 *infra*. In a related area, the Court has also ruled that just as the right to gather information can be restricted, so can the right to receive information and ideas. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972). The Court ruled that the first amendment's right to know did not protect the interests of American scholars seeking to obtain a visa for a foreign professor to come to the United States to discuss his views on communism. *Id.* at 753.

open judicial proceedings, but reserved comment on the scope of that right in relation to closed proceedings. In *Nebraska Press Association v. Stuart*,[42] the trial judge denied a closure request[43] but ordered the press not to print anything about the testimony or evidence disclosed at an open pre-trial proceeding.[44] The Court held that the order constituted an impermissible prior restraint on the press' right to report information gathered at a public hearing.[45] Again, however, the majority noted that the first amendment does not provide the press with absolute rights.[46] The Court declined to comment on whether closure orders, as opposed to prior restraint orders would pass constitutional muster, as that question was not directly before the court.[47]

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42. 427 U.S. 539 (1976).

43. *Id.* at 576 (Brennan, J., concurring). The Nebraska supreme court subsequently held that pretrial hearings were not required to be open to the public. *Id.* at 576 n.3.

44. *Id.* at 542. The defendant was charged with the murders of six members of one family. At the hearing, the charges were amended to reflect autopsy findings that the murders were committed during a sexual assault. *Id.* at 542-43.

45. *Id.* at 570.

46. *Id.* The Court noted that before a prior restraint order could be issued, three factors would have to be considered: 1) the nature and extent of pre-trial news coverage; 2) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and 3) the effectiveness of restraining order in preventing the threatened danger. *Id.* at 562.

One year after *Nebraska Press*, the Florida supreme court handed down a decision striking a prior restraint order in a securities fraud case. State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977). Although the case involved only a prior restraint order, the court also made several strong statements about access in general, declaring that access to all courtroom proceedings is a "fundamental right" that normally should be unrestricted. *Id.* at 908-10. The court also asserted that the press and public have a "right to know" what occurs in court. *Id.* at 908. The "fundamental right" and the "right to know" were based apparently on the first amendment. *Id.*

The "right to know" concept has been the subject of debate for several years. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 674 (1978) (author of treatise, a Harvard University law professor, was appellant's attorney in the instant case); Douglas, *supra* note 29, at 1; Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1 (1976); Gellhorn, *The Right to Know: First Amendment Overbreadth?* 1976 WASH. U.L.Q. 25 (1976); Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U.L.Q. 29 (1976); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. (1977). *See also* Lamont v. Postmaster General, 381 U.S. 301 (1965). Professor Emerson, refers to *Lamont* as the "first clear expression of the right to know." Emerson, *supra*, at 3. The opinion does not, however, use the phrase "right to know."

47. 427 U.S. at 564 n.8. Justice Brennan also stated it was not necessary to comment on the closure issue because both parties agreed that the issue was not being contested. *Id.* at 576 n.3. Several commentators have suggested that closing a courtroom has the same effect as a prior restraint, commonly referred to as a "gag order." *See, e.g.*, Fenner & Koley, *The Rights of the Press to the Closed Criminal Proceeding*, 57 NEB. L. REV. 442, 468-69 (1976) (the true reason for closure is to restrain the press—"a novel form of censorship"); Goodale, *supra* note 47, at 34 (closing a courtroom imposes a prior restraint, "at least generically").

The Supreme Court in Craig v. Harney, 331 U.S. 367, 374 (1947) stated that the judiciary had no special privilege "to suppress, edit or censor events which transpire in proceedings before it." Justice Rehnquist made a similar statement in 1976: "Censorship . . . as often as not is excercised not merely by forbidding the printing of information in the possession of a correspondent, but in *depriving him of access* to places where he might obtain such in-

Closure orders, however, were directly at issue soon after *Nebraska Press* in two conflicting cases. In *United States v. Cianfrani*[48] and *Gannett Co. v. DePasquale*,[49] the first amendment issue of right of access was addressed, although sixth amendment analysis dominated both opinions. In the 1978 *Cianfrani* case, the United States Court of Appeals for the Third Circuit held that a pre-trial suppression hearing should not have been closed entirely to the public.[50] Emphasizing a strong sixth amendment requirement of open trials,[51] the Third Circuit stated that the public trial clause should be viewed as guaranteeing this right to the public as well as the accused.[52] The court only briefly considered the first amendment right of access issue, stating that confined, temporary, and strictly regulated limits on access to pre-trial hearings do not violate the first amendment.[53]

In contrast to this decision, the Supreme Court in the 1979 *Gannett* case[54] affirmed a decision to close a pre-trial suppression hearing, holding that the sixth amendment's public trial clause is personal to the accused and does not afford a right of access to the press or public.[55] Only Justice Powell supported the proposition that the first amendment protects the public's interest in attending court proceedings.[56] The first amendment right of access was addressed only briefly by the *Gannett* majority opinion[57] as Justice Stewart chose to emphasize the sixth amendment. Interpreting that amendment literally and restrictively, Justice Stewart asserted that although the sixth amendment contemplates open trials as the norm,[58] there is no explicit

formation." Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 GONZ. L. REV. 1, 17 (1976) (emphasis added). He did not discuss this concept in his dissenting opinion in the instant case. 100 S. Ct. at 2842-44.

A Florida court has recently stated that prior restraint orders and closure orders represent "a distinction without a difference." Ocala Star Banner Corp. v. Sturgis, 388 So. 2d 1367 (Fla. 5th D.C.A. 1980). The court explained that limitations on access are forms of censorship because the press is effectively stopped from printing certain information. *Id.*

48. 573 F.2d 835 (3d Cir. 1978).

49. 443 U.S. 368 (1979).

50. 573 F.2d at 859. The defendant, a prominent politician, was charged with crimes stemming from alleged misuse of public office. *Id.* at 841-42. The Third Circuit stated that temporary closure would have been sufficient to protect against the disclosure of intercepted communications. *Id.* at 859.

51. *Id.* at 848.

52. *Id.* at 853-54. A concurring opinion added that *civil* cases are also presumptively a part of the public domain. *Id.* at 862 (Gibbons, J., concurring).

53. *Id.* at 861. A concurring opinion suggested that the foundation for a right of access should be "the federal common law implied from the first amendment." *Id.* at 862 (Gibbons, J., concurring).

54. 443 U.S. 368 (1979). The *Gannett* majority opinion was written by Justice Stewart, joined by Chief Justice Burger and Justices Powell, Rehnquist and Stevens. Justice Blackmun wrote the dissenting opinion, joined by Justices Brennan, Marshall and White.

55. *Id.* at 379-80, 391. The majority opinion also noted that the right to a public trial does not guarantee a reciprocal right to compel a private trial. *Id.* at 382. In the case, two defendants were charged with murder and other crimes. Both men later pleaded guilty to lesser-included offenses. *Id.* at 368.

56. *Id.* at 397 (Powell, J., concurring).

57. *Id.* at 391-93.

58. *Id.* at 385.

constitutional right of access to a criminal trial.[59] Justice Stewart further maintained that any putative right based on the first amendment was given sufficient consideration by the trial judge.[60] Three concurring opinions varied significantly. Chief Justice Burger stressed that *Gannett* pertained only to pre-trial hearings.[61] Justice Rehnquist asserted that the decision covered trials[62] as well. Justice Powell argued in favor of a qualified first amendment right of access.[63]

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59. *Id.* at 379. Justice Stewart's use of the word "trial" instead of "pre-trial" caused much concern among commentators and his brethen. One commentator, noting that Justice Stewart mentioned "trials" 20 times in his opinion, accused the Court of "cavalier" treatment of the closure issue. Goodale, Gannett *Means What It Says: But Who Knows What It Says?*, NAT'L LAW J., Oct. 15, 1979, at 20. Another commentator suggested that the first amendment had been cast aside too summarily if the opinion did, in fact, apply to trial closures as well as pre-trials. Keeffe, *The Boner Called* Gannett, 66 A.B.A.J. 227, 228 (Feb. 1980).

Chief Justice Burger was the first of four Court members to speak out publicly in an effort to clarify the trial-pre-trial confusion. See note 61 *infra*. Justice Blackmun, the author of the *Gannett* dissent, disagreed with the Chief Justice, telling a group of federal judges that the opinion had to be viewed as also authorizing trial closures. N.Y. Times, Sept. 4, 1979, §A at 15, col. 1. Justice Stevens, speaking at the University of Arizona College of Law, stated that there would be no reason to exclude the public from a proceeding occurring before a jury. N.Y. Times, Sept. 9, 1979, §A, at 41, col. 1. Justice Powell, speaking at an A.B.A. meeting, contended that it would be premature to extend *Gannett* to trials, N.Y. Times, Aug. 14, 1979, §A, at 13, col. 1. One law review referred to the public comments by the justices as "wholly unprecedented." *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 65 n.32 (1979). The extrajudicial comments are also analyzed by Keeffe, *supra*, at 227. *See generally* Note, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 601-03 (1970).

60. 443 U.S. at 392. Justice Stewart noted that no one present at the pre-trial hearing, including appellant's reporter, objected when the closure motion was made. *Id.* At a subsequent hearing requested by appellant, the trial judge balanced the first amendment against the sixth amendment and concluded there was a "reasonable probability of prejudice" to the defendants if the suppression hearing were open. *Id.* at 392-93. The record does not reflect what factors were considered in the trial judge's balancing test.

Justice Stewart also stated that the public interest should be fully protected by the trial participants during a closed proceeding. *Id.* at 383. See note 93 *infra*. Justice Stewart stated further that recognizing a "public interest . . . is a far cry . . . from the creation of a constitutional right." 443 U.S. at 383.

61. *Id.* at 394. About one month after the opinion was announced, the Chief Justice publicly criticized lower court judges who had closed trials based on the *Gannett* decision, again emphasizing that the decision only applied to pre-trial hearings. N.Y. Times, Aug. 9, 1979, §A, at 17, col. 1. In his opinion, the Chief Justice noted that trials had a long history of openness, but no similar tradition existed for pre-trial hearings.

62. *Id.* at 404. Justice Rehnquist stated that a trial or pre-trial hearing could be closed merely by agreement of the parties and approval by the judge; there would be no need to show a danger of prejudicial publicity. *Id.* Moreover, he expressly rejected any right of access based on the first, sixth or fourteenth amendments. *Id.* at 403-04. He contended that the states would be, "in the best tradition of our federal system," free to determine if closure were appropriate. *Id.* at 405. Justice Powell presented an opposing view on this point. *Id.* at 398 n.2.

63. *Id.* at 400. Justice Powell contended that a right of access derived from the first amendment was as constitutionally significant as the sixth amendment right to a fair trial. *Id.* Justice Rehnquist criticized Justice Powell's first amendment analysis and predicted that it would be unlikely that the four dissenters would join him in a subsequent case to find a right of access based on the first amendment. *Id.* at 405 n.2. See note 13 and accompanying

Justice Blackmun's dissent in *Gannett* eschewed the first amendment as a basis for a right of access[64] and argued strongly that the sixth amendment should not be read literally.[65] He asserted that the history of open trials and the important societal interests at stake compelled a different interpretation of the sixth amendment's public trial clause.[66] His opinion suggested that an accused should be required to establish that closure is "strictly and inescapably necessary."[67]

While the opinions in *Gannett* showed an intense dispute over whether there was a right of access implicit in the sixth amendment, the seven members of the Court agreed that the first amendment was not at issue.[68] In the instant case, however, the first amendment became the touchstone as the Court's focus shifted from the accused's rights under the sixth amendment to the public's rights under the first amendment.[69] Chief Justice Burger, who announced the judgment of the Court and authored the plurality opinion,[70] quickly pointed out that the instant case involved a trial whereas *Gannett* involved a pre-trial hearing.[71] Placing heavy emphasis on the historical tradi-

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text, *supra*. Justice Powell stated that he was concurring with the *Gannett* majority because closure was appropriate based on a first amendment-sixth amendment balancing test. See note 47 *supra*.

64. 443 U.S. at 447. Justice Blackmun stated it was not necessary to reach the first amendment issue because he believed the sixth amendment sufficiently protected a public right of access. *Id.*

65. *Id.* at 407-08.

66. *Id.* at 432-33. Justice Blackmun cited the 1978 American Bar Association Standards in support of his position. *Id.* at 433 n.13. The standards adopted the view that the sixth amendment protects the public's interest in having open criminal trials. *See ABA Project on Standards for Criminal Justice, Fair Trial and Free Press, Standard 8-3.2,* at 15 (App. Draft 1978) (cited at 443 U.S. at 433 n.13).

67. 443 U.S. at 440. Justice Blackmun explained that this standard would require a three-part showing: 1) a substantial probability of irreparable damage to defendant; 2) a substantial probability that alternatives would be inadequate; and 3) a substantial probability that closure would be effective. *Id.* at 441-42. Justice Powell criticized the Blackmun standard as too strict. *Id.* at 399. *Accord,* Keeffe, *supra* note 59, at 228 (praising the dissent in all respects except the proposed test). The United States Court of Appeals for the Third Circuit applied a similar standard 10 years earlier when it ruled that a "strict and inescapable necessity" was required for a judge to close a suppression hearing held after a jury had been sequestered. Bennett v. Rundle, 419 F.2d 599, 607 (3d Cir. 1969). The *Bennett* case was not cited in Justice Blackmun's dissenting opinion.

68. Only Justices Powell and Rehnquist asserted first amendment positions. See notes 57 & 65 and accompanying text, *supra*.

69. In the year between *Gannett* and the instant case, the Reporters Committee for Freedom of the Press recorded 270 instances of attempted closures, 159 of which were successful. NEWS MEDIA & THE LAW, Oct.-Nov. 1980, at 34. Of the 159 closures, there were 24 before indictment, 96 before trial, 34 during trial, and five after trial. *Id.* About half of the instances were recorded within two months after *Gannett,* and many of those are cited in full in EDITOR & PUBLISHER, Aug. 18, 1979, at 23-26.

70. See note 13 *supra*.

71. 100 S. Ct. at 2821. The Chief Justice was the only member of the Court to stress the distinction in the *Gannett* opinions. See note 63 *supra*. Although the instant case focused on the first amendment and not the sixth amendment, the justices continued their debate over the sixth amendment holding in *Gannett*. The author of *Gannett,* Justice Stewart, stated that its sixth amendment analysis applied to trials. 100 S. Ct. at 2839. Justice Rehn-

tion of open trials, the Chief Justice stated that trials today must be presumed open just as they were when the Bill of Rights was adopted.[72] He admitted that nothing in the Constitution explicitly guarantees a right of access, but asserted that the primary purpose of the first amendment, not just its literal terms, must be examined.[73] That primary purpose, he contended, is to assure free communication about government functions, including the court system.[74] He reasoned that the first amendment protects to a certain degree, the freedom to listen, the freedom to gather news and receive information, and the freedom to assemble in public places.[75] These freedoms would not be fully protected unless the first amendment was interpreted broadly to include a right of access to criminal trials.[76] To support his interpretation, the Chief Justice cited the ninth amendment, adopted to protect rights not specifically enumerated[77] and prior cases which recognized implied constitutional rights.[78] He concluded that the trial judge arbitrarily foreclosed the right of access without determining whether alternatives to closure were available.[79] He noted that reasonable limitations[80] to access would be acceptable if an overriding interest[81] supported closure, but declined to define specific standards.[82]

Justice Stevens, who approved closure in *Gannett*,[83] joined Chief Justice Burger and maintained that any arbitrary interference with the collection of important government information violates the first amendment.[84] He

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quist agreed, *id.* at 2843, as did, apparently, Justice Stevens. *Id.* at 2831 n.2. Justice Blackmun said the belief that *Gannett* applied to trials was quite understandable. *Id.* at 2841. Justice Brennan agreed with the Chief Justice that the holding applied to pre-trial proceedings, not trials. *Id.* at 2832. Justice White was unclear on the point. *Id.* at 2830.

72. *Id.* at 2825-27.

73. *Id.* at 2826-27.

74. *Id.* The Chief Justice stated: "Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Id.* at 2827.

75. *Id.* at 2827-28.

76. *Id.*

77. *Id.* at 2829, 2829 n.15. U.S. CONST. amend. IX provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

78. 100 S. Ct. at 2829, 2829 n.16. *See, e.g.*, United States v. Guest, 383 U.S. 745 (1966) (right to travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); NAACP v. Alabama, 357 U.S. 449 (1958) (right of association). *See generally* Goodpastor, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

79. 100 S. Ct. at 2829. The Chief Justice contended that sequestration of the jury could have been used to guard against possible prejudicial publicity. *Id.* at 2830.

80. *Id.* at 2830 n.18.

81. *Id.* at 2830.

82. *Id.* The Chief Justice did, however, mention that capacity limitations and maintenance of order could warrant exclusion of some members of the public or press. *Id.* at 2830 n.18.

83. Justice Stevens was the only member of the majority in *Gannett* who did not write an opinion.

84. 100 S. Ct. at 2831. Justice Stevens added that he found it ironic that the Court would find a right of access to courtrooms when two years earlier it would not require a right of access to a county jail. He compared the Court's protection of the interests of the powerful press in the instant case with its previous refusal to provide such protection

argued that the instant closure order represented such an arbitrary interference because nothing in the record justified closure, a fact, he said, which distinguished the instant case from *Gannett*.[85] The third member of the plurality, Justice White, stated in a one-paragraph concurrence that since a majority in *Gannett* had rejected a right of access based on the sixth amendment, he approved of basing the right on the first amendment.[86]

Four justices concurred in the judgment but did not join the Chief Justice's opinion.[87] Justice Stewart, emphasizing the history of public trials,[88] vigorously supported an implied first amendment right of access to all trials, civil as well as criminal.[89] He added, however, that the right of access is subject to reasonable limitations.[90] As he had done in *Gannett*, Justice Stewart declined opinion on whether the first amendment is applicable to pre-trial hearings.[91]

In his concurrence, Justice Blackmun once again criticized the *Gannett* decision,[92] and repeated his contention that a public trial right should be based on the sixth amendment.[93] Although Justice Blackmun applauded the plurality's emphasis on legal history, he criticized the Chief Justice for using

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for powerless prison inmates. *Id.* Justice Stevens referred to the case of Houchins v. KQED, Inc., 438 U.S. 1 (1978), which involved a suit by a member of the media, not a prisoner as might be inferred from his analysis. Part of the irony noted by Justice Stevens was that both Chief Justice Burger and Justice Stewart categorically denied in *Houchins* that a first amendment right of access existed. 100 S. Ct. at 2831 n.1. See note 41 *supra*. In his plurality opinion in the instant case, Chief Justice Burger did not mention his *Houchins* opinion. He did, however, distinguish two other prison cases, stating that prisons, unlike courtrooms, have no tradition of openness. 100 S. Ct. at 2827 n.11.

85. 100 S. Ct. at 2831 n.2. Justice Stevens referred to the holding in *Gannett* as "perfectly unambiguous." *Id. But see* Stephenson, *Fair Trial—Free Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39, 63 (1979) (stating that the opinion is ambiguous); *The Supreme Court, 1978 Term, supra* note 59, at 62 (scope of the ruling "extraordinarily uncertain"). See note 71 *supra*.

86. 100 S. Ct. at 2830.

87. See note 13 *supra*.

88. 100 S. Ct. at 2840.

89. *Id.* at 2840. Justice Stewart was the only justice asserting that the right extended to civil trials. Chief Justice Burger reserved the issue, but did note that civil trials had historically been presumed open. *Id.* at 2829 n.17. Justice Brennan mentioned civil proceedings in the same context as criminal trials, but did not explicitly state that a right of access to civil trials existed. *Id.* at 2838.

The Florida supreme court asserted in 1977 that the public and press have a "fundamental right of access to all judicial proceedings," including civil proceedings. State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 908 (Fla. 1977). See note 46 *supra*.

90. 100 S. Ct. at 2840. Justice Stewart agreed with Chief Justice Burger that capacity limitations and maintenance of order could warrant partial exclusion. See note 82 *supra*. Justice Stewart also noted that the preservation of trade secrets could justify temporary exclusion during a civil trial and that the protection of young witnesses could justify temporary exclusion during a criminal trial. 100 S. Ct. at 2840 n.4. See notes 31 & 32 and accompanying text, *supra*.

91. 100 S. Ct. at 2840.

92. *Id.* at 2841-42. Justice Blackmun said the instant case washed away "at least some of the graffiti that marred the prevailing opinions in *Gannett*." *Id.* at 2841.

93. *Id.* at 2842. In dissent, Justice Blackmun also characterized as an "utter fallacy of thinking" the statement made by Justice Stewart in *Gannett* that the "public interest is fully protected by the participants in the litigation." *Id.* at 2842 n.3.

numerous constitutional bases to support a right of access.[94] Moreover, he expressed grave concern over the uncertain standard of closure resulting from the various opinions.[95] He conceded, however, that a right of access based on the first amendment could be viewed as an alternative to his sixth amendment position.[96]

Justice Brennan, joined by Justice Marshall, stated that the existence of a sixth amendment public trial right for the accused did not foreclose the Court's finding the same right in the first amendment to protect the public.[97] Constitutional rights can overlap from one amendment to another, noted Justice Brennan, who asserted further that reliance on an open trial tradition is legitimate because historical inquiry is a necessary component of constitutional analysis.[98] He stated that although the scope of the first amendment is necessarily limited,[99] public scrutiny of the judiciary is one of its major objectives.[100] As secrecy inhibits the ability to scrutinize, the public must have access to trials.[101]

In a lone dissent, Justice Rehnquist reasserted his *Gannett* position that nothing in the Constitution mandates an open trial if the defendant and prosecutor agree to closure and the judge approves.[102] He accused the Court of assuming too much power over the decisions of state supreme courts.[103] The issue, he contended, was not one concerning the conflict between free press and fair trial; instead, it was whether the Constitution prohibits a trial judge from closing a trial when all parties agree to it.[104] He maintained that the action of the trial judge, already reviewed by the Virginia supreme court, did not require further review by the Supreme Court.[105]

The other members of the Court rejected Justice Rehnquist's literal interpretation of the Constitution in favor of a broad contextual view of the right

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94. *Id.* at 2842. See text accompanying notes 75-78 *supra.*

95. 100 S. Ct. at 2842. Justice Blackmun did not advance or support any standard. He mentioned the test he had proposed in *Gannett,* but only in reference to the criticism that it received by Justice Powell. *Id.* See note 67 and accompanying text, *supra.* He also noted that the Chief Justice, Justices Stewart and Brennan all presented various views on the standard issue. 100 S. Ct. at 2842. See notes 80-82 & 90 and accompanying text, *supra.*

96. 100 S. Ct. at 2842.

97. *Id.* at 2832 n.1.

98. *Id.* at 2834. Justice Brennan emphasized that legal historians from the 16th century up to the present had, without qualification approved of the common law tradition of open trials. *Id.* at 2834-35. See note 17 *supra.*

99. 100 S. Ct. at 2834 ("it must be invoked with discrimination and temperance").

100. *Id.* at 2836. *Accord,* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

101. 100 S. Ct. at 2837. Justice Brennan noted that protecting state secrets, such as national security matters, could warrant temporary closure, *id.* at 2839 n.24, but that otherwise there was no need to define the type of "countervailing interest" that might warrant closure. *Id.* at 2839. He emphasized, however, that a strong presumption of openness would have to be overcome for closure to be allowed. *Id.*

102. *Id.* at 2843. See notes 66-67 and accompanying text, *supra.*

103. 100 S. Ct. at 2843.

104. *Id.* at 2844.

105. *Id.* at 2843.

to public trials.[106] Sidestepping the sixth amendment, the Court focused on the first amendment issue that *Gannett* had reserved. To find an implied right of access in the first amendment, however, it was necessary to expand the traditional meanings of freedom of speech and freedom of the press.[107] The Court first noted that along with a freedom to speak, the first amendment implies a reciprocal guarantee of freedom to listen.[108] Second, it confirmed that the first amendment not only provides protection for publishing the news, but also protects the gathering of information.[109] Viewing these implied rights against the background of a traditionally open judicial system, the Court concluded that the first amendment should be read expansively to include a qualified right of access to criminal trials.[110] The Court did not discuss how this expanded view of the first amendment applies to pre-trial hearings.[111] Presumably, then, a first amendment right of access to pre-trial hearings may exist,[112] although the historical considerations are quite different[113] and

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106. Justice Powell did not participate in the decision. See note 13 *supra.*

107. A columnist for the New York Times who concentrates on the Supreme Court wrote that the instant case represents "a first large step in the development of a new first amendment doctrine." Lewis, *A Right To Be Informed,* N.Y. Times, July 3, 1980, §A, at 19, col. 1.

108. 100 S. Ct. at 2827. This proposition was also suggested in Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) and Thomas v. Collins, 323 U.S. 516, 534 (1945).

109. 100 S. Ct. at 2827. This proposition was asserted in dictum in Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

110. See text accompanying notes 76 & 79-82 *supra.*

111. One court ruled that the instant case applies to pre-trial hearings and that the right of access may extend to depositions. Ocala Star Banner Corp. v. Sturgis, 388 So. 2d 1367 (Fla. 5th D.C.A. 1980). The opinion, from a three-judge panel, stated: "Although not specifically so holding, the import of the decision in *Richmond Newspapers* . . . seems to be that there is a first amendment right of access to pre-trial criminal proceedings." *Id.* at 1369 n.2. The court determined that a pre-trial closure order in a highly-publicized murder trial was overbroad, stating that "if denial of access is proper, there must be some selectivity." *Id.* at 1369. The court certified two questions to the Florida supreme court, one dealing with a suggested test to be used in reviewing pre-trial closure motions, and the other dealing with a possible right of access to depositions. *Id.* at 1372. The proposed test is similar to that used in *Nebraska Press.* See note 46 *supra.* The test would prohibit closure unless 1) it is necessary to prevent a serious, immediate threat to the defendant's right to a fair trial; 2) less restrictive alternatives are unavailable; and 3) closure will, in fact, preserve the defendant's right to a fair trial. *Id.* at 1370.

112. On the same day the instant case was decided, however, the Court declined to accept a challenge to a pre-trial closure order. New York News, Inc. v. Bell, 100 S. Ct. 3055 (1980), *denying cert.* to 47 N.Y.2d 985, 393 N.E.2d 1038, 419 N.Y.S.2d 965 (S.D.N.Y. 1979). Justices Brennan, Marshall and Blackmun would have granted certiorari, one vote shy of the four votes necessary to accept the case. *Id.* at 3056. In *New York News,* the New York Court of Appeals, citing *Gannett,* stated that a trial judge properly used his discretion in ordering a pretrial suppression hearing closed in a second-degree murder case involving a 13-year old defendant. 47 N.Y.2d at 986, 393 N.E.2d at 1039. The court explained that the public's "right to know" would be protected because daily copies of the suppression hearing transcript, edited to exclude statements deemed inadmissible, would be made available. *Id.,* 393 N.E.2d at 1039.

Although the pre-trial closure order in the *New York News* case was not accepted for review, one columnist predicted that the instant case would eventually be the foundation for a right of access to pre-trial hearings: "The Justices did not explicitly say that the

alternatives to closure may not be as effective.[114]

While the instant case removed much of the uncertainty that resulted from the *Gannett* opinion, it also created new uncertainties and failed to resolve the pre-trial hearing access issue. Although each justice agreed that the right of access is not absolute, none of them attempted to specify standards for trial judges to apply in balancing the sixth amendment right to a fair trial against the newly-recognized first amendment right of access. Chief Justice Burger and Justices Brennan and Stewart cited examples of appropriate restrictions on access, but did not consider the problems inherent in gauging the detrimental effects of publicity.[115] The Court may have avoided the task of defining specific closure standards because of the probability that a majority would never agree on any specific test.[116] A more practical explanation is that the Court did not have sufficient time to consider the matter.[117] Even without specific standards, however, the history of openness extensively outlined in the instant case[118] and the strong support expressed for open trials[119]

new doctrine would apply to pre-trial situations, too, but known positions of the Justices indicate that that will be the prevailing view." Lewis, note 107 *supra*.

Editorials immediately called for a right of access to pre-trial hearings. *See, e.g., Closing the Courts,* EDITOR & PUBLISHER, Oct. 11, 1980, at 6 ("the apparently arbitrary power of the courts to exclude press and public from pre-trial proceedings in criminal cases must be challenged anew"); *Wiping the Graffiti Off the Courtroom,* N.Y. Times, July 3, 1980, §A, at 18, col. 1 ("The *Gannett* ruling itself now needs overruling when the chance arises. . . . The cleanup is well begun, but not yet done."); *Secrecy is Our Enemy,* L.A. Times, July 3, 1980, Part II, at 6, col. 1 (urging reconsideration of *Gannett*); *Court Affirms Basic Freedoms,* St. Petersburg Times, July 3, 1980, §A, at 20, col. 1 (contending that total victory can be claimed only when access is allowed to pre-trial hearings as well).

113. Justice Stewart noted in *Gannett* that there was no right to attend pre-trial hearings at English common law. 443 U.S. at 389. Chief Justice Burger noted, however, that modern pre-trial hearings, such as those involving motions to suppress evidence, were unknown at common law. *Id.* at 396. He added that about 85% of all criminal charges are resolved by guilty pleas prior to trial, often as a result of rulings on motions to suppress. *Id.* at 397. Justice Powell added further that suppression hearings today are often as important as the trial itself. *Id.*

114. Jury sequestration appears to be the most effective alternative to trial closure. At a trial, the prospective jurors are known and the jury is selected as the first order of business. In fact, if a jury can be isolated from all publicity, there may be an insurmountable burden on the defendant to prove closure is necessary. *Cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. at 564 ("sequestration of jurors is, of course, always available"). At a pre-trial hearing, however, prospective jurors are unknown, but both changes of venue and continuances would be available to combat prejudicial publicity. See note 29 *supra*.

115. See notes 82, 90 & 101 and accompanying text, *supra*.

116. Considering the 3-2-1-1 plurality in the instant case, see note 13 *supra*, it appears highly unlikely that five out of the seven-member majority would agree on any specific standard.

117. The Court apparently was determined to decide this case during its 1979-80 Term. The instant case was handed down during the last three days of the term, a period when three other major cases were decided. The Court also ruled on the issues of federally funded abortions, see Harris v. McRae, 100 S. Ct. 2671 (1980); federally-imposed racial quotas, see Fullilove v. Klutznick, 100 S. Ct. 2758 (1980); and federally-imposed health and safety standards, see Industrial Union v. American Petroleum, 100 S. Ct. 2844 (1980).

One magazine commented that rarely before had the Court decided so many important cases within such a short period. *Four Big Decisions,* TIME, July 14, 1980, at 10.

118. 100 S. Ct. at 2821-26.

mandate a significant showing of prejudice before closure is warranted.[120]

Many issues remain unresolved by the instant case,[121] particularly pre-trial access issue. Despite this uncertainty the decision represents a victory for the public and a major step forward for the press.[122] Although the Court has handed the press several adverse decisions in recent years,[123] the instant decision largely negates the restrictive impact of *Gannett*.[124] The Court's strong

119. See text accompanying notes 72, 84, 89, 93 & 101 *supra*.

120. About three months after the instant case was decided, the Court denied review in a case in which the United States Court of Appeals for the Eighth Circuit adopted Justice Blackmun's strict standard. See note 67 and accompanying text, *supra*. Powers v. United States, 101 S. Ct. 112 (1980), *denying cert. to* 622 F.2d 317 (8th Cir. 1980). See note 67 and accompanying text, *supra*. The Eighth Circuit denied closure in the case, ruling that the strict test was warranted because the prosecutor objected to closure of the trial. 622 F.2d at 323.

In another trial closure decision handed down shortly after *Powers*, the Court summarily struck an order by a state supreme court which approved mandatory closure during testimony of minor victims in sex crime cases. Globe Newspaper Co. v. Superior Court, 100 S. Ct. 2158 (1980), *vacating judgment in* 401 N.E.2d 360 (Mass. 1980). See notes 15 & 32 and accompanying text, *supra*. The state supreme court had interpreted a state statute to mandate closure during the victim's testimony and to allow closure during any other part of the trial based on the trial judge's discretion. 401 N.E.2d at 371.

121. The most significant issue is the pre-trial hearing access question. Other issues include whether the newly recognized right of access extends to civil trial courtrooms or any other governmental institutions. James Goodale, a lawyer active in first amendment cases, see notes 46 & 59 *supra*, predicted that the right of access may be extended to prisons, police stations and other areas that have frequently been closed to the press and public. TIME, July 14, 1980, at 13.

122. Although the press expressed concern over the Court's failure to resolve the pre-trial issue, see note 112 *supra*, there was virtual agreement that the instant case represented a significant victory for the press and the public. *See, e.g.*, EDITOR & PUBLISHER, July 12, 1980, at 8 (proclaiming that the decision was "a ringing endorsement of the right of the press to attend criminal trials"); St. Petersburg Times, July 3, 1980, §A, at 20, col. 1 ("the people — not merely the press — won a tremendously heartening victory"); L.A. Times, July 3, 1980, Part II, at 6, col. 1 ("a victory for the first amendment, for the press and for the public"). *Cf.* Denniston, *A Restrained Right*, THE QUILL, Sept., 1980 at 12 ("The enthusiasm . . . must be held within bounds, because between the lines of the *Richmond* opinions are the limitations on its scope"); Washington Post, July 3, 1980, §A, at 14, col. 1 ("It will take a while to figure out all the implications of the Supreme Court's decision. . . . So for the moment we will just note with great satisfaction that the court has put a stop to the growing tendency of trial judges to do their work in secret").

123. *E.g.*, Herbert v. Lando, 441 U.S. 153 (1979) (holding reporter's thought and discussions with editorial colleagues are not privileged under the first amendment in a libel action); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (police may, with a warrant, search newsrooms for evidence of crime even if no person on the premises is suspected of involvement); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (press denied access to county jail); Branzburg v. Hayes, 408 U.S. 665 (1972) (reporters who refuse to reveal information to grand jury are not protected from contempt citation by the first amendment).

The *Stanford Daily* decision was, in effect, overruled on Oct. 14, 1980, when President Carter signed a bill requiring police to use subpoenas rather than search warrants in almost all instances involving newsrooms. Gainesville Sun, Oct. 15, 1980, §C, at 8, col. 1.

124. One news report suggested that *Gannett* is now only "an awkward footnote." N.Y. Times, July 3, 1980, §A, at 1, col. 2. That suggestion undoubtedly is premature. Several instances of successful closures were recorded within three months after the instant case was decided. The Reporters Committee for Freedom of the Press recorded 16 successful pre-

reliance on history in discerning a right of access is commendable; however, funneling that history through the first amendment was unnecessary.[125] Since the Court found only a qualified right, the simpler and more logical path would have been a broader interpretation of the public trial clause of the sixth amendment.[126] The historical argument for open criminal trials would have fit more appropriately within the sixth amendment because of its criminal trial orientation.[127] Furthermore, an even stronger emphasis on the ninth amendment was warranted in this case. The ninth amendment was intended to protect traditional rights not specifically enumerated in the Constitution, and should be invoked where history, rather than the language of the Constitution, clearly indicates that a right exists.[128] The appropriate basis for access rights will continue to be debated among commentators,[129] but the result in the instant case is more important than the method. The public does have a right to know what transpires in judicial proceedings, be they criminal trials, pre-trial proceedings or civil trials, and there should be a qualified right of access to all of them.[130]

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trial hearing closures out of 30 attempts since the July 2, 1980 decision. Apparently, however, no trial closure had occurred. NEWS MEDIA & THE LAW, *supra* note 69. See notes 111-112 *supra*.

125. Four years prior to the instant case, one commentator argued that the first amendment was being overworked in cases involving claims of a public right to know. Gellhorn, *supra* note 46, at 28. He emphasized that the first amendment's "special concern" is freedom of debate, expression and opinion. *Id.*

126. Since the rights of the public are not specifically addressed in the sixth amendment, it admittedly would be illogical to find an absolute right for the public in that clause.

127. There is no reference to criminal trials in the first amendment and it is highly improbable that the framers of the Constitution considered a right of access to courtrooms when drafting the first amendment.

128. As Chief Justice John Marshall said in Marbury v. Madison, 1 Cranch 137, 174 (1803): "It cannot be presumed that any clause in the constitution is intended to be without effect." *See generally* Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring) (emphasizing the ninth amendment to support the right of privacy); B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Note, *Constitutional Law — Why Not the Ninth?* (Summer 1973) (unpublished, available through the University of Florida Law Review).

129. *Compare* Note, *supra* note 22 (sixth amendment should guarantee public access to trials) *with* Note, *A Right of Access to a Criminal Courtroom*, 51 U. COLO. L. REV. 425, 437 (1980) (several factors support first amendment right of access) *and* Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1326 (1978) (first and sixth amendments viewed in conjunction with each other provide adequate basis for right of access).

130. The Florida supreme court, which supported access rights before the instant case, see note 46 *supra*, has the opportunity to clarify the uncertainties created by the instant case by answering the questions posed in Ocala Star Banner v. Sturgis, 388 So. 2d 1367 (Fla. 5th D.C.A. 1980). See note 111 *supra*. The test suggested by the Fifth District Court of Appeal, see note 111 *supra*, is reasonable for both trials and pre-trials. The proposed test is not as burdensome on the defendant as is Justice Blackmun's test, see note 67 *supra*, but it is strict enough to achieve an appropriate balance between the defendant's right to a fair trial and the public's right to know. *Cf. Right of Access*, EDITOR & PUBLISHER, July 12, 1980, at 8 (editorial suggesting that a majority of newspaper editors would agree that the right of access can be subjected to a degree of restraint).