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Public Access to Criminal Trials: Richmond Newspapers, Inc. v. Virginia

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PUBLIC ACCESS TO CRIMINAL TRIALS: *RICHMOND NEWSPAPERS, INC. v. VIRGINIA*

I. INTRODUCTION

Richmond Newspapers, Inc. v. Virginia[1] is, in the words of Justice Stevens, a "watershed case." [2] For the first time, the Court recognized that some sort of first amendment right of access to government proceedings exists. The Court, in a plurality opinion (joined by two Justices, accompanied by five concurring opinions and one dissent), held that the right of the public to attend criminal trials is "implicit in the guarantees of the First Amendment." [3]

Richmond Newspapers was handed down exactly one year after the Court announced *Gannett Co. v. DePasquale.*[4] In *Gannett,* the Court rejected a newspaper chain's challenge of the constitutionality of a judge's order excluding the press and public from a pretrial suppression hearing in a highly publicized[5] murder prosecution. However, Justice Stewart's opinion for the plurality strayed beyond a consideration of the facts before the Court. *Gannett* seemed to say that the public has no sixth amendment right to attend criminal *trials.*[6] Even if the public has a *first* amendment right to attend, the *Gannett* decision stated it was given "all appropriate deference"[7] by the trial court. Despite the Chief Justice's implicit warning that *Gannett* must be read narrowly in light of its facts,[8] the resulting confusion was, as noted in *Richmond Newspapers,*[9] both widespread and deep. Indeed, it fueled the arguments which led to the latter decision.

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1. 100 S. Ct. 2814 (1980).

2. *Id.* at 2830 (Stevens, J., concurring.)

3. *Id.* at 2829.

4. 443 U.S. 368 (1979).

5. Justice Blackmun argued in dissent that the lower courts had exaggerated the level of publicity surrounding the case. He produced evidence which indicated that the newspaper accounts were not unusual in their frequency or their vigor. He also noted that the two Gannett papers serving Seneca County, the forum of the trial, had very small circulation there. *Id.* at 406-11.

6. In *Richmond Newspapers,* Justice Blackmun calculated that the *Gannett* Court had referred to closed *trials* at least twelve times. 100 S. Ct. at 2841.

7. 443 U.S. at 392.

8. *Id.* at 394.

9. 100 S. Ct. at 2841-42 nn.1 & 2.

II. STATEMENT OF THE CASE

Two reporters employed by Richmond Newspapers, Inc. were present at the Hanover County, Virginia, courthouse on September 11, 1978 to cover the fourth murder trial of John Paul Stevenson. His previous trials had ended in a conviction, subsequently overturned by the Virginia Supreme Court,[10] and two mistrials.[11] At the start of the September trial, defense counsel moved to exclude all spectators from the courtroom. He expressed concern over difficulties "with information between jurors"[12] and the possibility that published accounts of the trial might reach the jurors. The prosecutor declined comment. Judge Taylor then ordered the courtroom cleared of all spectators on the basis of his authority under a Virginia statute.[13] No one objected to the order until the hearing on the newspaper's motion to vacate the closure order which Judge Taylor had scheduled for the end of the day. At that hearing, Judge Taylor agreed with the defense counsel's arguments for closure and voiced his own concern that the presence of the public in the courtroom was distracting to the jury. At the same time, he acknowledged that these might not be very good reasons.[14] Nevertheless, the trial proceeded to its end the next day and Stevenson was declared not guilty after Judge Taylor struck the Commonwealth's evidence.[15] The Virginia Supreme Court later ruled against the newspaper's petition for a writ of prohibition and mandamus,

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10. Stevenson v. Commonwealth, 218 Va. 462, 237 S.E.2d 779 (1977) (conviction overturned because Stevenson's bloody shirt had been improperly admitted into evidence).

11. The first mistrial occurred when no alternate was available to replace a juror who was excused because of a nervous disorder. The second mistrial was declared because a venireman shared information obtained from newspaper articles about the trial with other veniremen. Brief for Appellants at 3, Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814 (1980).

12. 100 S. Ct. at 2819.

13. *Id.* VA. CODE ANN. [[19.2-266 (Repl. Vol. 1975 & Supp. 1980) reads in pertinent 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 presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

The Virginia Supreme Court has construed this statute as applying primarily to spectators. It has held that the Virginia General Assembly intended that the statute further the goal of a fair trial for all litigants. Johnson v. Commonwealth, 217 Va. 682, 232 S.E.2d 741, 742 (1977). In another decision, an order based on the statute was held violative of the accused's right to a public trial under VA. CONST. art. 1, § 8. Cumbee v. Commonwealth, 219 Va. 1132, 254 S.E.2d 112 (1979) (total closure not justified merely because of the "type of case").

14. 100 S. Ct. at 2819 (quoting Transcript of September 11, 1978 Hearing on Motion to Vacate at 11-20).

15. 100 S. Ct. at 2820. The trial was tape recorded and Judge Taylor's reasons for striking the evidence were garbled. Brief for Appellants at 42 n.37.

citing *Gannett* without comment.[16]

III. Basis of Jurisdiction

The Justices disputed the basis of the Court's jurisdiction; decision on this issue was postponed until the Court considered the merits.[17] Richmond Newspapers had sought appellate review[18] primarily because it wished to have Virginia's court closure statute declared unconstitutional.[19] Justices Brennan and Marshall were sympathetic to this argument,[20] but the Court held that the proper jurisdictional basis was by writ of certiorari and considered the case as an attack on the constitutionality of Judge Taylor's order itself.[21] In so doing, the Court avoided a direct questioning of the constitutionality of the Virginia statute and, by implication, court closure statutes of other states.[22] Instead, the Court's holding limits judges' discretion in issuing closure orders in criminal trials, whether that discretion derives from statutory or common law authority.

IV. Gannett Clarified

At the outset of *Richmond Newspapers,* the Supreme Court, in an opinion written by Chief Justice Burger and joined by Justices White and Stevens, moved to restrict *Gannett's* scope. The Court stated that in *Gannett* it "was not required to decide whether a right of access to *trials,* as distinguished from hearings on *pre*trial motions, was constitutionally guaranteed."[23] The Court interpreted Gannett to stand only for the proposition "that the Sixth Amendment's guarantee to the accused of a public trial [gives]. . . neither the public nor the press an enforceable right of

16. 100 S. Ct. at 2820.

17. Richmond Newspapers, Inc. v. Virginia, 444 U.S. 896 (1979) (memorandum opinion).

18. 100 S. Ct. at 2820. *See* 28 U.S.C. § 1257(2) (1948).

19. Brief for Appellants at 14-20.

20. 100 S. Ct. at 2839. They would have declared Va. Code Ann. § 19.2-266 unconstitutional because it authorizes trial closures at the "unfettered discretion of the judge and parties." *Id.*

21. 100 S. Ct. at 2820. *See* 28 U.S.C. § 2103 (1962) (providing for consideration by writ of certiorari where Supreme Court review is improvidently taken by appeal).

22. Many states permit trial closures by statute under unusual circumstances. *See, e.g.,* Ariz. R. Crim. P. 9.3(b) (1968) (on application of defendant if court finds a clear and present danger to fair trial); Cal. Penal Code § 868.5 (West 1981) (rape cases at defendant's request); Iowa Code Ann. § 605.16 (West 1980-81) (where agreed to by parties); Mass. Gen. Laws Ann. ch. 278, §§ 16A-16C (West Cum. Supp. 1981) (crimes of minors, husband and wife cases, and those involving incest or rape); Minn. Stat Ann. § 631.04 (West 1981) (no spectators under 17 years of age).

23. 100 S. Ct. at 2821 (emphasis in original).

access to a *pre*trial suppression hearing."[24] Justice Rehnquist disagreed with these findings in dissent and recalled his concurring opinion in *Gannett* where he argued that the constitutional questions in such cases are for lower courts to resolve.[25] Nevertheless, the Court proceeded to its own resolution, noting "that the precise issue presented here has not previously been before this Court for decision."[26]

V. The Court's Analysis

The Court's analysis focuses upon inquiries into 1) the history and current practice of government toward permitting trial access, 2) society's interests favoring access, and 3) the government's reasons for denying access.

Its first inquiry revealed a long tradition of public attendance at trials extending from before the Norman Conquest to the years of American colonization.[27] The English view that the "presumptive openness of the trial"[28] is "one of the essential qualities of a court of justice"[29] was, the Court stated, incorporated into the earliest state laws.[30] The Court concluded that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open"[31] and that the same presumption holds true today.[32]

The fact that the case for access rests upon this strong tradition was the crucial element in the Court's analysis. The Court referred to "[t]he right of access to places traditionally open to the public,"[33] thereby indicating that the right to attend criminal trials derives from that broader

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24. *Id.* (emphasis in original).

25. *Id.* at 2842-44 (Rehnquist, J., dissenting).

26. *Id.* at 2821.

27. 100 S. Ct. at 2821-25. *See generally* Radin, *The Right to A Public Trial*, 6 Temp. L. Q. 381 (1932). The fact that the tradition has been broken by the Star Chamber and occasionally under compelling circumstances does not seem to affect the overall strength of the tradition.

28. 100 S. Ct. at 2822.

29. *Id.* (quoting Daubney v. Cooper, 109 Eng. Rep. 438, 440 (K.B. 1829)).

30. 100 S. Ct. at 2822-23.

31. *Id.* at 2823.

32. *Id.* at 2825.

33. *Id.* at 2828. The tradition of openness was a major factor in the Court's ruling that a trial for criminal contempt conducted wholly within a judge's chambers violated the constitutional mandate of an open trial. *See* In re Oliver, 333 U.S. 257 (1948). *See generally The Supreme Court, 1978 Term*, 93 Harv. L. Rev. 60, 69 (1979) which notes that the Court has used the traditional openness analysis in other contexts as well.

right. Its rationale for distinguishing *Pell v. Procunier*[34] and *Saxbe v. Washington Post Co.*,[35] two cases relied upon by the Commonwealth, was that the appellants in those cases sought access to prisons, and prisons do not share the long tradition of openness with criminal trials.[36] These signals and others within the Court's opinion demonstrate the pivotal role played by tradition in the Court's analysis.

The Court next inquired into society's practical interests favoring public access to trials and found "a nexus between openness, fairness, and the perception of fairness."[37] Three significant benefits to society were attributed to this nexus. First, openness was found to enhance the integrity of trials by giving "assurance that the proceedings [are] conducted fairly to all concerned, and . . . [by discouraging] perjury, the misconduct of participants, and decisions based on secret bias or partiality."[38] Second, "the open processes of justice serve an important prophylatic purpose, providing an outlet for community concern, hostility and emotion."[39] By bringing the accusation and conviction or acquittal of a crime under the public eye, open trials "reaffirm the temporarily lost feeling of security"[40] that a crime causes and satisfy "that latent 'urge to punish' "[41] that might otherwise be vented through vigilante-style self help. Third, open trials inspire confidence and satisfaction from public observation of the fair administration of justice. The rationale for unexpected verdicts may be seen by everyone first-hand, so that the criminal process satisfies the appearance of justice. The resulting confidence helps the system work more effectively.[42] Thus, the Court concluded that "[f]rom this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the

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34. 417 U.S. 817 (1974).

35. 417 U.S. 843 (1974). In both *Pell* and *Saxbe* the Court rejected challenges to prison regulations forbidding press interviews of specific inmates. Essentially, the Court held in both cases that the government could not be compelled to provide press access to these prisoners because it did not provide such access to the public.

36. 100 S. Ct. at 2827 n.11.

37. *Id.* at 2824.

38. *Id.* at 2823. *Accord,* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("press serves to guarantee the fairness of trials"); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (press enhances fairness by placing officials under public scrutiny).

39. 100 S. Ct. at 2824.

40. *Id. See* Cox Broadcasting Corp. v. Cohn, 420 U.S. at 492 (accusation, prosecution, and conviction are of legitimate concern to the public).

41. 100 S. Ct. at 2824 (quoting Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings,* 110 U. PA. L. REV. 1, 6 (1961).

42. 100 S. Ct. at 2825. *See also* Note, *The Right to Attend Criminal Hearings,* 78 COLUM. L. REV. 1308, 1309-10, 1323-26 (1979).

very nature of a criminal trial under our system of justice."[43]

On the basis of these findings and the practical requirements of free exercise of press and speech, the Court decided that the right of the public to attend trials is entitled to constitutional protection. The Court was impressed by the fact that "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open."[44] The Court also recognized that the "explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."[45] Therefore, the opinion concluded, the first amendment guarantees of speech and press "can be read as protecting the right of everyone to attend trials."[46] Arbitrary court closures were thus deemed offensive to the first amendment.

To determine whether Judge Taylor's closure order was constitutionally sound, the Court balanced the public's interests in open trials against the Commonwealth's countervailing interests in a closed trial. Unfortunately, the nature of the test is not clear because the record showed that "the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial."[47] Having nothing in the record to balance against society's interests, the Court's opinion ended abruptly with the declaration that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[48]

It is prudent to note here some of the issues that the Court did not address. The *Richmond Newspapers* holding is very narrow and must be read according to its facts. A close reading reveals that the Court did not

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43. 100 S. Ct. at 2825.

44. *Id.* at 2827.

45. *Id.*

46. *Id.* This is basically what Justice Powell asserted in his *Gannett* concurrence. 443 U.S. at 397-401.

47. 100 S. Ct. at 2829-30. Accepted first amendment tests do not apply here because the Court has never recognized a first amendment right of access to government proceedings. Access cases should not be confused with cases dealing with prior restraint or with contempt citations imposed by courts to prevent the publication of information already acquired. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (contempt citation for publication of information concerning a judicial misconduct inquiry); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (gag order). *See generally* Note, *The Right to Attend Criminal Hearings, supra* note 42, at 1315-16.

48. 100 S. Ct. at 2830.

extend the public's right to attend civil trials.[49] Nor did the Court provide any indication of the strength of the right to attend criminal trials where the public is excluded due to interests other than fairness, or special situations where the tradition of openness is lacking, such as juvenile trials or those involving rape or incest.[50] The Court also reserved comment on whether the press enjoys any rights superior to those of the public.[51] In addition, the Court did not expressly state whether the right to attend criminal trials applies to pretrial hearings. The plurality opinion will be useful by analogy in future arguments, but it is not binding precedent on any issue other than the right to attend criminal trials.[52]

Justices Stewart and Blackmun, in their separate concurring opinions, show general agreement with the Court's analysis. Justice Stewart's only significant deviation from the Court's view is his recognition of an equivalent right to attend civil trials,[53] a finding that the Court reserved.[54] Justice Blackmun found the Court's analysis "troublesome" because of its reliance on the first amendment as a source of protection for the right to attend criminal trials.[55] He did not elaborate on his concerns beyond observing that "uncertainty marks the nature—and strictness—of the standard of closure the Court adopts."[56] However his opinion reveals a preference for this sixth amendment solution he proposed in dissent in *Gannett*.[57]

In trying to understand the reasons for Justice Blackmun's adherence to the sixth amendment solution, one is reminded that the sixth amendment is limited by its terms to trials.[58] Thus, any right of access derived

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49. *Id.* at 2829 n.17. *See generally* Annot., 79 A.L.R. 3d 401 (1977).

50. For cases and comment on closures to protect juveniles and victims of sex offenses from trauma, see J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED, TRIAL RIGHTS §§ 100-03 (1974); 3 WHARTON'S CRIMINAL PROCEDURE § 439 (C. Torcia ed. 1975); 6 J. WIGMORE, EVIDENCE § 1835 (J. Chadbourn rev. 1976).

51. The cases have generally held that the press enjoys no rights greater than those of the public. *See* Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co. 417 U.S. 843 (1974). *But see* Houchins v. KQED, Inc., 438 U.S. 1, 17-19 (1978) (Stevens, J., dissenting) (restrictions against cameras and sound recorders are unreasonable when applied to journalists because of their special needs in conveying information to the public).

52. *Richmond Newspapers* has been cited for its discussion of society's interests in public proceedings. *See In re* National Broadcasting Company, Inc., No. 80-1345 (2d Cir. Oct. 1, 1980).

53. 100 S. Ct. at 2840.

54. *Id.* at 2829 n.17.

55. *Id.* at 2842.

56. *Id.*

57. *See* 443 U.S. at 406-48 Blackmun, J., dissenting).

58. The sixth amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

from the sixth amendment may not logically be extended by the courts to confer a right of access to other government proceedings. The first amendment right is derived from the broadly applicable speech and press protections and could conceivably be extended to protect access wherever it is sought. In spite of this initial advantage, the rationale behind the sixth amendment right of access seems strained.[59] The sixth amendment solution is not as flexible as the Court's first amendment approach within the sphere of trials and cannot accommodate special circumstances which may sometimes warrant closure. Although this recently articulated constitutional right is untested and uncertain, it seems probable that the Court will limit it to those proceedings which, like trials, are traditionally open to the public. As more cases of this nature reach the the Court, the structure and extent of the first amendment right should become increasingly more certain.

VI. The Structural Role Analysis

Justice Brennan, joined by Justice Marshall, agreed with the plurality that, "without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public."[60] In reaching that conclusion, Justice Brennan analyzed the facts according to the "structural role" formula, which is substantially different from the traditional openness formula used by the Court. The structural role formula is based upon the theory that the first amendment "embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican form of self-government."[61] When application of this formula reveals that public access to a particular government process substantially aids in advancing the goals and efficiency of that process, the public has a right of access to that process protected by the first amendment. Two principles govern this analysis. "First, the case for a right of access has special force" when the government historically and currently permits access to particular

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> trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

59. *See The Supreme Court, 1978 Term, supra* note 33, at 66-68 (finding prior opinions of the Court inconsistent with Justice Blackmun's arguments).

60. 100 S. Ct. at 2832 (Brennan, J., concurring).

61. *Id.* at 2833 (emphasis in original).

proceedings or information.[62] Second, and most important, "the value of access must be measured in specifics,"[63] not broad "rhetorical statements that all information bears upon public issues."[64] The format of the structural role analysis is similar to that of the Court's analysis in that both balance history and current practice and the benefits to the press and public against governmental interest in denying access. However, the weight of the factors and the strictness of the tests are different.

Justice Brennan's analysis began with a survey of the government's past and present practices in permitting access to trials. This was not as extensive a survey as the Court's, but it too determined that tradition is squarely behind the case for public access to trials.[65] The second, crucial phase of this analysis involved a determination of the degree to which public access furthers the "practical purposes"[66] of the trial. Justice Brennan found that public access enhances the integrity of trial proceedings to the benefit of both defendant and society. Access was found to safeguard against the use of courts as weapons for the persecution and suppression of religious and political philosophies.[67] It was also noted that access promotes accurate factfinding because interested parties and witnesses may come forward when they receive notice of trials in published accounts.[68] Similarly, the presence of spectators tends to impress witnesses with the gravity of the proceedings and thereby encourages truthful testimony.[69] These findings led Justice Brennan to conclude that public access substantially promotes the fair administration of justice, which is the primary aim of trials. In addition to benefiting the defendant, public access was found to promote broad societal interest by demonstrating the fairness of law to society while discouraging suspicion and disrespect which is bred by secrecy.[70] Justice Brennan's findings here were similar to the Court's, but he placed special emphasis on the "pivotal role"[71] played by

62. *Id.* at 2834.

63. *Id.*

64. *Id. See generally* Brennan, *Address,* 32 RUTGERS L. REV. 173, 177-83 (1979).

65. 100 S. Ct. at 2834-37.

66. *Id.* at 2837. *Cf.* Houchins v. KQED, Inc. 438 U.S. at 30-38 (1978) (Stevens, J., dissenting) (determination of the degree to which public access via the press furthers the functions of prisons); Saxbe v. Washington Post Co., 417 U.S. at 862-64 (1974) (Powell, J., dissenting).

67. 100 S. Ct. at 2836.

68. *Id.* at 2838.

69. *Id.* at 2839.

70. *Id.* at 2837.

71. *Id.* at 2838. *Cf.* Maryland v. Baltimore Radio Show, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from a denial of certiorari) ("One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there. . . .").

trials and trial access in government. A finding that access plays a structural role in fostering self-government is a prerequisite to a grant of first amendment protection under this analysis. Inspection of the broad ramifications of trials revealed that

> court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.[72]

Justice Brennan determined that public access is a vital check on the courts as they perform these functions, "akin in purpose to the other checks and balances that infuse our system of government."[73] Because of this important function and those functions benefiting the defendant, Justice Brennan was compelled to conclude that "public access is an indispensible element of the trial itself. Trial access, therefore, assumes structural importance" in government.[74]

On this basis, Justice Brennan declared the rule that trials are presumptively open. Like the Court, he did not divulge what "countervailing interests might be sufficiently compelling to reverse this presumption."[75] Nevertheless, his opinion suggests that those interests must be so strong as to justify a prior restraint on publication.[76] Several times in his opinion, Justice Brennan likened the protection deserved by the right of access to the "almost insurmountable"[77] protection held by free speech and press and invoked cases and language that are hallmarks of prior restraint law. His sole example of a concern that may be sufficiently compelling to overcome the presumption was national security—so far the only recognized justification for prior restraint.[78] These clues indicate that under

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72. 100 S. Ct. at 2838.

73. *Id.*

74. *Id.* at 2839.

75. *Id.*

76. Commentators have proposed the theory that trial closures are, for all practical purposes, prior restraints and therefore unconstitutional under Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). *See, e.g.*, Fenner & Koley, *The Rights of the Press and the Closed Criminal Proceeding*, 57 NEB. L. REV. 442 (1978). Several courts have agreed. *See, e.g.*, Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971). *But see* Gannett Co. v. DePasquale, 443 U.S. at 399 (Powell, J., concurring) (closure differs from a gag order in that the press is not told what it may or may not publish).

77. 100 S. Ct. at 2833. *See* 427 U.S. at 559 (It is "the least tolerable infringement on First Amendment rights.").

78. 100 S. Ct. at 2839 n.24. *See* Brown v. Glines, 100 S. Ct. 594, 609-11 (1980) (Brennan, J., dissenting); United States v. Nixon, 418 U.S. 683, 714-16 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

the structural role analysis, only national security interests may overcome the presumption of open trials. Such a rule, if ever applied authoritatively, could be disastrous for the courts. Although Justice Brennan notes that restrictions on access are permissible when reasonable and imposed in the interests of decorum,[79] he does not exempt other closures from the rigors of this test. Thus closures to protect juveniles and the privacy of rape victims would not be allowed under this test, as they have been in the past.[80] As a consequence, vicitms of sex crimes might be even less willing to report offenses, knowing that they would have to recount their experience before a crowded courtroom. The standards of the structural role balancing test are too rigorous for practical application to trials. Fortunately, it is unlikely that they will be applied by the Court as most of the Justices seem to favor the more flexible and practical test adopted by the Court.

VII. A Proposed Formula for Consideration of Closure Motions

Although the Court did not expressly state what findings must be made by a trial judge before ordering closure, a workable formula emerges from the various opinions in *Richmond Newspapers* and *Gannett*. The following formula includes the minimum standards for constitutionality.

Before a trial judge grants a motion to exclude the public and press from a criminal proceeding, he should first determine that there is a substantial likelihood that their presence will interfere with the defendant's right to a fair trial. The threat of interference must be more than merely speculative, but it need not be certain.[81] Evidence such as unusually high levels of publicity contributes to the requisite showing of substantial likelihood.[82] The public's presence must also threaten the defendant's right

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79. 100 S. Ct. at 2839 n.23.

80. *See* note 50 *supra*. One may infer from Justice Brennan's mention of national security interests as a justification for closing trials that the structural role analysis would apply to *all* closures, for whatever reason.

81. Justice Powell suggested that a likelihood of jeopardy is a sufficient threat to warrant consideration of closing a pretrial suppression hearing. Gannett Co. v. DePasquale, 443 U.S. at 400. Justice Blackmun would require a showing of substantial probability but this seems too great a burden to put on the defendant initially. *Id.* at 441. *See also* ABA Standards Relating to Fair Trial & Free Press § 3.2(c).

82. The judge must consider all relevant factors in evaluating the likelihood of the threat. *See, e.g.*, Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (population density of the forum); United States v. Pfingst, 477 F.2d 177 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973) (span of time between publicity and trial); United States v. Bletterman, 279 F.2d 320 (2d Cir. 1960) (inflammatory character of the publicity); Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574, *reh. denied*, 314 U.S. 706 (1941) (no showing of public turbulence).

to a fair trial. *Richmond Newspapers* and *Gannett* deal only with closures to protect the rights of the defendant. This test is not applicable to closures to protect trade secrets, maintain decorum, safeguard national security and the like.

The judge must next determine that "alternative solutions"[83] cannot effectively diminish the threat to a fair trial. Alternative solutions include continuance,[84] change of venue[85] and venire,[86] sequestration of the jury and witnesses,[87] *voir dire,*[88] and even counseling of the press on its journalistic responsibilities.[89] Admittedly, these alternatives present difficulties, but none are unmanageable.[90] Only upon a showing that these solutions would fail may a judge resort to the extreme remedy of closure.

Third, any restrictions imposed by the court on public access must be carefully tailored so as to extend no further than is reasonably necessary to ensure a fair trial.[91] Every effort must be made to accomodate the pub-

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83. 100 S. Ct. at 2830. *See* 443 U.S. at 400 (Powell, J., concurring). *Id.* at 442 (Blackmun, J., dissenting). *Cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (Court decried the lack of consideration of alternative solutions).

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

85. *See, e.g.,* Irvin v. Dowd, 366 U.S. 717 (1961). *See generally* Annot., 33 A.L.R.3d 17 (1970 & Supp. 1980).

86. *See* ABA STANDARDS RELATING TO FAIR TRIAL & FREE PRESS § 3.4 (c).

87. Sheppard v. Maxwell, 384 U.S. 333 (1966).

88. *See, e.g.,* United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied,* 410 U.S. 970 (1973). For a discussion of *voir dire* in Federal courts, see Annot., 28 A.L.R. FED. 26 (1976).

89. "It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors." Nebraska Press Ass'n v. Stuart, 427 U.S. at 560. The judge may also proscribe extrajudicial comments to the press by attorneys and court personnel. Sheppard v. Maxwell, 384 U.S. at 361. But a judge may not forbid the press to publish information already within its possession or contained in court records unless publication would present a clear and present danger sufficient to justify a prior restraint. Nebraska Press Ass'n v. Stuart, 427 U.S. at 556-70; Bridges v. California, 314 U.S. 252 (1941). Nor may the judge hold a reporter in contempt of court for his reporting of information learned in open court. Pennekamp v. Florida, 328 U.S. 331 (1946).

90. 100 S. Ct. at 2830. *See generally* REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS - FAIR TRIAL" ISSUE, 45 F.R.D. 391 (1968).

91. 443 U.S. at 400 (Powell, J., concurring); *Id.* at 444 (Blackmun, J., dissenting). *Accord,* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (statute regulating freedom to act in the exercise of religion must not unduly infringe upon that freedom). But in applying restrictions to attendance, the judge must bear in mind that the defendant's right to a fair trial is "superior". 100 S. Ct. at 2821 (dictum). *Cf.* Estes v. Texas, 381 U.S. 532 (1965) (press and public serve an important function at trial but must necessarily be subject to the maintenance of absolute fairness at trial). *See also* Note, *The Right of the Press to Gather Information,* 71 COLUM. L. REV. 838 (1971).

lic's right to attend the trial. Thus, the closure may not extend to parts of the trial where the public's presence does not pose a threat.[92]

These findings may be made only after the court has provided a hearing on the motion to close the courtroom. The press and public must have a reasonable opportunity to voice their objections.[93] However the judge need not provide a forum for each excluded spectator to air his grievances so long as he entertains representative objections. The hearing may be informal, but it must generate a reliable record for appellate review.[94]

It is difficult to imagine any set of circumstances which could justify the closure of a trial under this test. The prophylactic resources available to the judge for the protection of the defendant's right to a fair trial are extremely flexible and effective. These resources are not as effective in pretrial proceedings, however, and it is likely that some pretrial criminal proceedings may be closed in conformity with this test. Admittedly, the test is very strict, but first amendment freedoms do not easily yield.

VIII. CONCLUSION

Richmond Newspapers has made it clear that the public has a first amendment right to attend criminal trials; *Gannett* is now little more than a case interpreting the sixth amendment to protect only the accused. The significance of the *Richmond Newspapers* decision obviously transcends the limited realm of criminal trials. It suggests the existence of a broad first amendment right of access to all government proceedings that are traditionally open to the public. The Court should, in developing that right, continue to move as it has in the past, cautiously and closely tethered to the facts of the case before it. As the area of first amendment freedoms is explosive, the cases within it are frequently distorted. It is hoped that the Court will soon articulate the scope of the right to attend criminal trials and pretrial hearings, as well as the broader right of access, without sacrificing precision.

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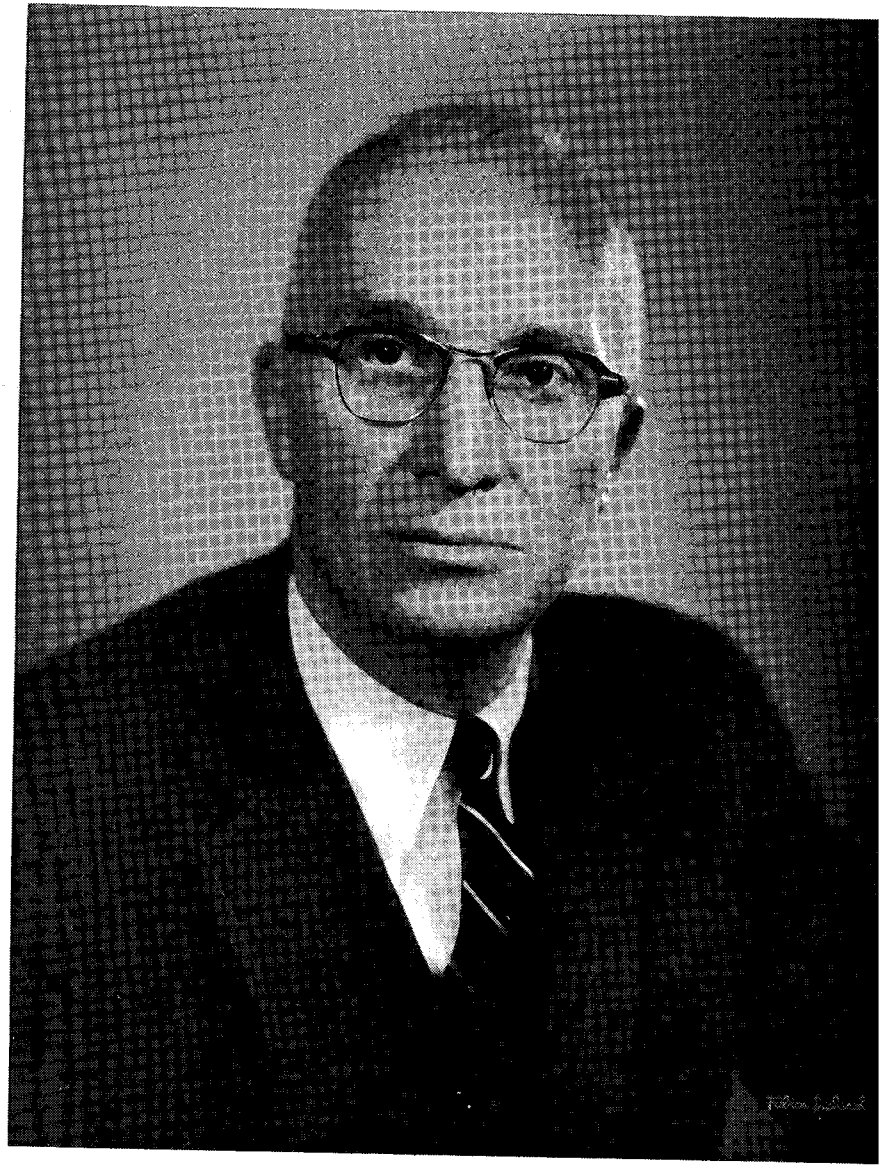
92. *See* United States v. Kobli, 172 F.2d 919 (3rd Cir. 1949).

93. 443 U.S. at 401 (Powell, J., concurring); *id.* at 445-46 (Blackmun, J., dissenting). Neither Justice Powell nor Justice Blackmun would seem to require notice beyond the courtroom, as it would cause unreasonable delays in the progress of the trial. *But see* Note, *The Right to Attend Criminal Hearings, supra* note 42, at 1328 (1978) (suggesting that those with a significant interest in the trial deserve notice).

94. 100 S. Ct. at 2829-30; *id.* at 2831 (Stevens, J., concurring). The Justices do not seem disposed to substitute the claims of counsel at oral argument for the recorded contemporary findings of the trial judge.



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