

COURTROOM CLOSURE AND THE RIGHTS OF THE FREE PRESS

Although the open courtroom is an integral part of the American criminal justice system,¹ trial courts recently began to restrict access to the public and the press.² In 1979 the Supreme Court in *Gannett Co. v. DePasquale* sanctioned the exclusion of press and public from a pre-trial hearing.³ This ruling severely debilitated the traditional public trial guaranteed by the sixth amendment.⁴ Trial judges across the United States closed their doors at all stages of criminal proceedings.⁵

1. *See, e.g., In re Oliver*, 333 U.S. 257, 266 (1948) ("Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.") (footnote omitted); *United States v. Powers*, 477 F. Supp. 497 (S.D. Iowa 1979), *aff'd*, 622 F.2d 317 (8th Cir. 1980). *See generally* Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1931); Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138 (1966).

2. Landau, *Fair Trial and Free Press—a Due Process Proposal: The Challenge of the Communications Media*, 62 A.B.A.J. 55 (1976). This article reflects the following data:

Years	Closed Court or Closed Records	Prior Restraint on Participant Statements	Prior Restraint on Publication
1967	1	2	0
1968	5	7	1
1969	1	4	1
1970	0	7	0
1971	5	6	2
1972	4	1	4
1973	8	7	4
1974	12	11	13
1975	25	18	14

Id. at 57. For more recent data on courtroom closures, see Court Watch Summary, unpublished report compiled by the Reporter's Committee for Freedom of the Press, Washington, D.C. (1979). *See generally* Sheppard v. Maxwell, 384 U.S. 333, 358 (1969); Younger, *The Sheppard Mandate Today: A Trial Judge's Perspective*, 56 NEB. L. REV. 1, 6 (1977) (*Sheppard* Court "stressed that the trial judge *must* take steps to protect the trial against prejudicial outside influences" (emphasis in original)); Note, *Exclusion of the Press and Public from Pretrial Criminal Proceedings to Guarantee Fair Trial*, 25 WAYNE L. REV. 883, 884 (1979) ("The trend toward closure . . . is directly attributable to the increased emphasis on the trial judge's duty to protect the accused."); 47 GEO. WASH. L. REV. 319, 322 (1978).

3. 443 U.S. 368 (1979).

4. The sixth amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI. The right to a public trial under the sixth amendment has been incorporated into the fourteenth amendment due process clause so as to apply to the states. *See, e.g., Faretta v. California*, 422 U.S. 806 (1975); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

5. *See* Court Watch Summary, unpublished report compiled by the Reporter's Committee

These courtroom closures, coupled with frequent attacks on the rulings by the press, perpetuated the confusion that surrounds the fair trial-free press conflict.

In 1980 the Supreme Court in *Richmond Newspapers v. Virginia* attempted to dispel the confusion.⁶ In *Richmond* a trial judge excluded the press and public from a two day murder trial. The Supreme Court held that the first and fourteenth amendments⁷ implicitly guarantee the public and the press the right to attend criminal trials. Because the Court did not overrule *Gannett*,⁸ however, this attempt to resolve the fair trial-free press conflict merely complicated the dilemma.

This Note analyzes the interests represented in this fair trial-free press conflict. The decision to close the courtroom necessarily implicates both the sixth and first amendments. This Note will explore the resolution of the conflict in *Gannett* and *Richmond* to determine the effects of courtroom closure.

I. COURTROOM CLOSURE PRIOR TO *GANNETT*

A. *Sixth Amendment Right to a Public Trial*

Traditionally, trials in America have been open to the public.⁹ Courts recognize that the public trial provides a forum for contemporaneous public scrutiny of the judicial system. The public's presence at trials restrains any attempt to utilize the courts as instruments of op-

for Freedom of the Press, Washington, D.C. (1979). Courts have closed proceedings in the following jurisdictions: Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Idaho, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, Washington D.C., West Virginia, Wisconsin, and Wyoming. *Id.*

6. 100 S. Ct. 2814 (1980).

7. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. The freedom of speech and press, guaranteed under the first amendment, has been incorporated into the fourteenth amendment due process clause to apply to the states. *Cf.* *Gitlow v. New York*, 268 U.S. 652 (1925) (assumes incorporation).

8. 100 S. Ct. at 2821.

9. *See* *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."). Even when publicity has been restricted, the courts recognize the public nature of a trial. *See* *Estes v. Texas*, 381 U.S. 532, 541-42 (1965) (public has a "right to be informed as to what occurs in its courts. . . . [R]eporters . . . are always present if they wish to be and are plainly free to report whatever occurs in open court."). *See generally* *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); *United Press Ass'n v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954) (Frossel, J., dissenting); 3 J. STORY, FAMILIAR EXPO-

pression.¹⁰ The fear in America of closed trials has been imputed to the infamous secret proceedings of the Spanish Inquisition, the English Court of the Star Chamber, and the French Monarchy's *lettre de cachet*.¹¹ The Supreme Court stated that these institutions suppressed "political and religious heresies in ruthless disregard of the right of an accused to a fair trial."¹² The common law, therefore, guaranteed the accused the right to a trial before a public forum. The sixth amendment now embraces this guarantee.¹³

Many courts recognize that the sixth amendment does more than simply protect the accused's right to a public trial. These courts maintain that the amendment also deters judicial arbitrariness,¹⁴ reduces the possibility of perjury,¹⁵ increases the possibility of obtaining additional evidence,¹⁶ and enables the public to scrutinize the judicial branch of

SITION OF THE CONSTITUTION OF THE UNITED STATES 234 (1840); Quick, *A Public Criminal Trial*, 60 DICK. L. REV. 21, 29-33 (1955); Comment, 52 MICH. L. REV. 128, 128-30 (1953). See also note 24 *infra*.

10. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1969); *Estes v. Texas*, 381 U.S. 532, 539 (1965); *In re Oliver*, 333 U.S. 257, 270 (1948).

11. *In re Oliver*, 333 U.S. 257, 268-69 (1948). See generally Radin, *supra* note 1, at 381 (suggestion that at common law "man could be spirited away from his friends, held incommunicado and sentenced to death without ever facing any other person than his judges").

12. *In re Oliver*, 333 U.S. 257, 270 (1948).

13. When Congress first framed the Bill of Rights, Madison proposed a provision that guaranteed the accused the right to a public trial. This provision became part of the sixth amendment. F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 30 (1951).

14. Contemporaneous public review prevents abuse of judicial power by the judge or the prosecutor. E.g., *In re Oliver*, 333 U.S. 257, 270 (1948); *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949); *State v. Schmit*, 273 Minn. 78, 85-86, 139 N.W.2d 800, 806-07 (1966); *People v. Jelke*, 308 N.Y. 56, 62, 123 N.E.2d 769, 771-72 (1954). See generally J. BENTHAM, *A TREATISE ON JUDICIAL EVIDENCE* 69 (1825); Note, *supra* note 1, at 1139.

15. Witnesses will be less likely to perjure themselves when they know that their testimony is being scrutinized by the public. E.g., *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 606 (3d Cir. 1969) (en banc); *Snyder v. Coiner*, 365 F. Supp. 321, 324 (N.D.W. Va. 1973), *aff'd*, 510 F.2d 224 (4th Cir. 1975); *State v. Schmit*, 273 Minn. 78, 85-86, 139 N.W.2d 800, 806-07 (1966); *State v. Haskins*, 38 N.J. Super. 250, 255, 118 A.2d 707, 709 (1955); *People v. Jelke*, 308 N.Y. 56, 62-63, 123 N.E.2d 769, 772 (1954). See generally J. BENTHAM, *supra* note 14, at 68; Note, *supra* note 1, at 1139 ("[f]earing contradiction . . . a witness may prefer to testify truthfully").

16. Key witnesses, unknown to the litigating parties, may come forward with important testimony. E.g., *In re Oliver*, 333 U.S. 257, 270 n.24 (1948); *United States v. Cianfrani*, 573 F.2d 835, 850 (3d Cir. 1978); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 606 (3d Cir. 1969) (en banc); *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949); *Tanksley v. United States*, 145 F.2d 58, 59 (9th Cir. 1944); *Snyder v. Coiner*, 365 F. Supp. 321, 324 (N.D.W. Va. 1973), *aff'd*, 510 F.2d 224 (4th Cir. 1975); *State v. Schmit*, 273 Minn. 78, 87, 139 N.W.2d 800, 807 (1966); *People v. Jelke*, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954). See generally J. BENTHAM, *supra* note 14; 6 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1834, at 436-38 (Chadbourn rev. ed. 1976); Note, *supra* note 1, at 1139.

government.¹⁷ Thus, courts often construe the sixth amendment to serve the public interest.

Courts are fragmented over whether this public interest is sufficient to give the public an enforceable constitutional right to attend trials. Some courts interpret the sixth amendment public trial provision to benefit only the accused.¹⁸ These courts rely on the text of the sixth amendment, which explicitly states that the accused shall enjoy the right to a public trial.¹⁹ They recognize a strong public interest in trials, but reject the argument that this interest has the status of a constitutional right. Conversely, other courts recognize that the public's right to be present is "as basic as that of the defendant."²⁰ The common law supports the latter interpretation of the sixth amendment. The English legal system required public trials even before there was any substantial regard for the accused's rights.²¹ Courts also reason that the poli-

17. *E.g.*, *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *State v. Hensley*, 75 Ohio St. 255, 79 N.E. 462 (1906); *Neal v. State*, 86 Okla. Crim. 283, 192 P.2d 294 (1948).

18. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 538-39 (1965) ("The purpose of the [sixth amendment] requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned."); *In re Oliver*, 333 U.S. 257, 270 n.25 (1948) (sixth amendment guarantees "all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial") (citing *People v. Murray*, 89 Mich. 276, 286, 50 N.W. 995, 998 (1891)); *Geise v. United States*, 265 F.2d 659, 660 (9th Cir.), *cert. denied*, 361 U.S. 842 (1959) ("Sixth Amendment right to a public trial is a right of the accused, and of the accused only"); *United States v. Sorrentino*, 175 F.2d 721, 723 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949) (defendant can waive right to public trial); *United Press Ass'n v. Valente*, 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954) ("whatever concern the public may have for a defendant's right to a fair trial, it can seldom match that of the person whose life or liberty is at stake"); *People v. Pratt*, 27 A.D.2d 199, 278 N.Y.S.2d 89 (1967) (right to a public trial personal to the accused).

19. For a discussion on the definition of "accused," see Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 (1978).

20. *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 161, 125 N.E.2d 896, 899, *appeal dismissed*, 164 Ohio St. 261, 130 N.E.2d 701 (1955) (*per curiam*). *Accord*, *United States v. Cianfrani*, 573 F.2d 835, 854 (3d Cir. 1978) ("strong presumption in favor of public proceedings"); *United States v. Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971) ("independent right to be present to see that justice is fairly done"); *Johnson v. Simpson*, 433 S.W.2d 644, 646 (Ky. 1968) ("In our opinion the question of the right of the public to attend court proceedings . . . is . . . well established").

21. In the seventeenth and early eighteenth centuries, the accused was treated in the following manner:

- (1) The prisoner was kept in confinement more or less secret till his trial, and could not prepare for his defense. He was examined, and his examination was taken down.
- (2) He had no notice beforehand of the evidence against him, and was compelled to defend himself as well as he could when the evidence, written or oral, was produced at his trial. He had no counsel either before or at the trial.
- (3) [T]he witnesses were not necessarily (to say the very least) confronted with the prisoner, nor were the originals of documents required to be produced.

cies underlying the sixth amendment are frequently separate from, and even opposed to, the interests of the defendant.²² The Third Circuit found “[t]he right thus accorded to members of the public to be present at a criminal trial . . . has been imbedded in our Constitution as an important safeguard not only to the accused but to the public generally.”²³ Courts agree, therefore, that the public has a vital interest in open trials.²⁴ Few courts, however, grant this interest the status of a constitutional right.

The conflict over who benefits from the sixth amendment necessarily leads courts to disagree over another issue: Whether the defendant can compel a private trial. The Supreme Court has held that “[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.”²⁵ A majority of courts, there-

(4) It does not appear that the prisoner was allowed to call witnesses on his own behalf; but it matters little whether he was or not; as he had no means of ascertaining what evidence they would give, or of procuring their attendance. In later times they were not examined on oath, if they were called.

Radin, *supra* note 1, at 383-84 (quoting STEPHENS, HISTORY OF THE CRIMINAL LAW OF ENGLAND 350 (1883)).

22. *E.g.*, United States v. Cianfrani, 573 F.2d 835, 852 (3d Cir. 1978). See also J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 576 (1827). Bentham maintained that:

[M]atters might easily be so arranged, as that the acquittal of the defendant, though guilty, might be the result; and this without being productive of any of that disrepute, which would naturally attach upon the conduct of the judge who should be given impunity to a malefactor whose guilt was written in legible characters upon the face of the evidence.

Id.

23. United States v. Kobli, 172 F.2d 919, 924 (3d Cir. 1949).

24. Craig v. Harney, 331 U.S. 367 (1947); Fite v. Retail Credit Co., 386 F. Supp. 1045 (D. Mont. 1975), *aff'd*, 537 F.2d 384 (9th Cir. 1976); United States v. General Motors Corp., 352 F. Supp. 1071 (E.D. Mich. 1973); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); Mayberry v. Yeager, 321 F. Supp. 199 (D.N.J. 1971); Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971); Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966) (en banc); State v. White, 97 Ariz. 196, 398 P.2d 903 (1965) (en banc); Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); Gore Newspaper Co. v. Tyson, 313 So. 2d 777 (Fla. Dist. Ct. App. 1975), *rev'd on other grounds sub nom.* English v. McCrary, 348 So. 2d 293 (Fla. 1977); Williamson v. Lacy, 86 Me. 80, 29 A. 943 (1893); Cowley v. Pulsifer, 137 Mass. 392 (1884); Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); E.W. Scripps Co. v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, *appeal dismissed*, 164 Ohio St. 261, 130 N.E.2d 701 (1955) (per curiam); Newspapers, Inc. v. Circuit Court, 65 Wis. 2d 66, 221 N.W.2d 894 (1974). See generally ABA, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS, Standard 8-3.2 (approved draft 1978); Congressional Research Service, *The Constitution of the United States of America—Analysis and Interpretation*, S. DOC. 92-82, 92d Cong., 2d Sess. amend. VI, at 1199-1200 (1973); Quick, *supra* note 9, at 29-33; Note, *supra* note 19, at 1326 (“when taken in conjunction, [the sixth and first amendments] . . . support a qualified right of attendance”).

25. Singer v. United States, 380 U.S. 24, 34-35 (1965).

fore, find that although defendants may waive their right to a public trial,²⁶ they do not have the concomitant right to demand a private trial.²⁷ Thus, courts disagree over whether the sixth amendment affords the public a right to attend criminal trials but generally concur that a defendant does not have an absolute right to a private trial, even when the defendant believes that a secret trial would promote his best interest.²⁸

B. *The Sixth Amendment v. the First Amendment*

Even if there is no sixth amendment public right to attend criminal trials, the press asserts a right to attend under the first amendment protection of the free press. The press plays a particularly important role in the criminal justice system. The press has been both praised for ensuring the accused a fair trial and condemned for denying him a fair trial.²⁹

The Supreme Court has recognized that a responsible press³⁰ is "the

26. The defendant generally waives the right to a public trial without a timely objection. *See, e.g.,* *United States v. Cappello*, 327 F.2d 378 (2d Cir. 1964); *People v. Cash*, 52 Cal. 2d 841, 345 P.2d 462 (1959) (en banc).

27. *E.g.,* *United States v. Cianfrani*, 573 F.2d 835, 852 (3d Cir. 1978) ("defendant has no absolute right to compel a private trial"); *Lewis v. Peyton*, 352 F.2d 791, 792 (4th Cir. 1965) (no compelled private trial because public trial provision protects "the public's right to know what goes on when men's lives and liberty are at stake"); *United States v. American Radiator & Standard San. Corp.*, 274 F. Supp. 790, 793 (W.D. Pa.) ("Sixth amendment . . . does not preserve to [defendant] a right to a private trial"), *aff'd*, 388 F.2d 201 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968); *Johnson v. Simpson*, 433 S.W.2d 644, 646 (Ky. 1968) ("public is a party to all criminal proceedings").

Other courts have held that the defendant can waive his right to a public trial without consideration of the public's right of access to the trial. *Geise v. United States*, 265 F.2d 659 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); *United States v. Sorrentino*, 175 F.2d 721 (3d Cir.), *cert. denied*, 338 U.S. 368 (1949); *United States v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954).

28. This ruling is consistent with Supreme Court sixth amendment cases. *See* *Barker v. Wingo*, 407 U.S. 514 (1972) (defendant cannot compel the opposite of his right to a speedy trial by waiver); *Singer v. United States*, 380 U.S. 24 (1965) (defendant cannot compel bench trial by waiving right to jury trial). *But see* *Faretta v. California*, 422 U.S. 806 (1975) (defendant granted right of self-representation by waiving right to counsel).

29. *See* *United States v. Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972) ("if allowing the press to publish . . . carried the prospect of poisoning the minds of potential jurors, it likewise offered the promise of administering an antidote against the societal diseases of corruption"); Garry & Riordan, *Gag Orders: Cui Bono?*, 29 STAN. L. REV. 575, 589-90 (1977) ("The press may be a fickle friend of criminal defendants, helping to save some from the rope or dungeon it vociferously urges upon others.").

30. The Supreme Court has recognized a duty on the part of the press to act responsibly. In *Nebraska Press Ass'n v. Stuart* the Court ruled that:

[T]he extraordinary protections afforded by the First Amendment carry with them some-

handmaiden of effective judicial administration.”³¹ Zealous reporting enlightens the general public on the law and the functioning of the judicial system. Reporting also may be the only effective check on the defendant’s right to a fair trial.³² The press guards against the miscarriage of justice by subjecting the judiciary to intensive public scrutiny and criticism.³³ Freedom of the press thus serves a dual function: Protection of the public’s right to know³⁴ and the defendant’s right to a fair

thing in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers. 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.

427 U.S. 539, 560 (1976). The American Bar Association has proposed model guidelines for the bar and press to follow voluntarily. The suggested model sets out certain types of information that generally should not be released. The model states:

The release and publication of certain types of information may tend to be prejudicial without serving a significant function of law enforcement or public interest. All concerned should be aware of the dangers of prejudice in making pre-trial disclosures of the following types of information . . . :

- (a) opinions about an accused’s character, guilt or innocence;
- (b) admissions, confessions or the contents of a statement attributed to the accused, except that a lawyer may announce that the accused denies the charges against him;
- (c) references to the results of any examinations or tests, such as fingerprints, polygraph examination, ballistics or laboratory tests;
- (d) statements concerning the credibility or anticipated testimony of prospective witnesses;
- (e) opinions concerning evidence or argument in the case, and whether or not it is anticipated that such evidence or argument will be used at trial; or
- (f) prior criminal charges and convictions, although they usually are matters of public record. (Their publication may be especially prejudicial immediately preceding trial).

When a trial has begun, the news media generally may report anything done or said in open court. They should consider very carefully, however, publication of any matter or statement excluded from evidence outside the presence of the jury. This type of information may be highly prejudicial, and if it reaches the jury could result in mistrial. This precaution is especially important in instances when the jury has not been sequestered for the duration of the trial.

ABA, LEGAL ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS; FAIR TRIAL, FREE PRESS, VOLUNTARY AGREEMENTS 8 (1974).

31. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). The Court emphasized that the press’ function in the criminal justice system was “documented by an impressive record of service over several centuries.” *Id.*

32. See J. BENTHAM, *supra* note 22, at 524. Bentham stated that:

[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institution might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

Id.

33. See *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

34. The public, under the first amendment, also has a right to receive information. See, e.g.,

trial.³⁵

Even when zealous reporting results in adverse publicity, the rights of the accused are not necessarily jeopardized.³⁶ The Supreme Court has ruled that "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."³⁷ Juror exposure to detailed accounts of the crime or of prior convictions will not presumptively deprive the defendant of a fair trial.³⁸ Qualified jurors need not be totally ignorant of the facts involved. A fair trial is denied only

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); Linmark Assoc. v. Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Proconier v. Martinez, 416 U.S. 396 (1974); Kleindienst v. Mandel, 408 U.S. 753 (1972); Lamont v. Postmaster General, 381 U.S. 301 (1965). See generally Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; Fenner & Koley, *The Rights of the Press and the Closed Court Criminal Proceeding*, 57 NEB. L. REV. 442 (1978); Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977). It is also interesting to note that Justice Stewart, who wrote the majority opinion in *Gannett*, has maintained that the public's right to know should not be limited. In his dissent in *Estes v. Texas* he opposed barring broadcast media from the courtroom, stating that "[t]he suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern." 381 U.S. 532, 614-15 (1965) (Stewart, J., dissenting).

35. *E.g.*, *Estes v. Texas*, 381 U.S. 532, 538-39 (1965) ("History had proven that secret tribunals were effective instruments of oppression."); *In re Oliver*, 333 U.S. 257, 270 (1948) ("[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."); *United States v. Cianfrani*, 573 F.2d 835, 847 (3d Cir. 1978) (Anglo-American belief that the "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.") (quoting *In re Oliver*, 333 U.S. at 268); *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949) (European secret trials had been "in ruthless disregard of the right of an accused to a fair trial.") (footnote omitted); *People v. Jelke*, 308 N.Y. 56, 62, 123 N.E.2d 769, 771 (1954) (open judicial proceedings afford greater security to the individual in the administration of justice).

36. Excessive publicity, causing an unfair trial, deprives the defendant of his right to due process. See *Rideau v. Louisiana*, 373 U.S. 723 (1963). The fifth amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. The fourteenth amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1. See generally Landau, *supra* note 1, at 59 (must provide the defendant "fundamental fairness").

37. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). *Accord*, *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (consider totality of circumstances to determine if trial fundamentally unfair). *Cf.* *Lutwak v. United States*, 344 U.S. 604, 619 (1953) ("A defendant is entitled to a fair trial but not a perfect one."). In cases where the Court has reversed the conviction the publicity has been especially pervasive and adverse. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (intensive press coverage at trial, turning proceeding into a "carnival"); *Estes v. Texas*, 381 U.S. 532 (1965) (disruptive press coverage at pretrial hearing, sufficient to tempt jurors to forget burden of proof required to convict); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (television film of defendant making in-custody confession to bank robbery, kidnapping, and murder).

38. *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

when jurors are inflexibly biased.³⁹

Courts agree that closure of the courtroom is appropriate under certain circumstances.⁴⁰ Wide dissemination of extremely prejudicial information can jeopardize the defendant's right to a fair trial. The trial court may control public attendance by exercising its duty to ensure a fair and orderly trial.⁴¹ The court can limit public attendance to prevent overcrowding because an overly large crowd may interfere with the orderly administration of justice.⁴² The court can exclude persons creating disturbances⁴³ and order the door locked to prevent distraction from constant movement of spectators.⁴⁴ Courts also have excluded the public during the testimony of certain witnesses. The public is excluded when children testify to distasteful facts,⁴⁵ when the presence of spectators would endanger the safety of witnesses,⁴⁶ and when wit-

39. *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961).

40. *E.g.*, *Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975). *See generally* Note, *supra* note 1; Note, *supra* note 2.

41. The Supreme Court, in *Sheppard v. Maxwell*, established the trial judge's duty to protect the defendant's right to a fair trial. In *Sheppard* the Court reversed Sheppard's murder conviction because the trial judge had failed to protect the accused from pervasive prejudicial publicity. The Court found the judge must affirmatively protect the accused's right to a fair trial. The Court maintained that, "[g]iven the pervasiveness of modern communications and the difficulty of effacing the prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." 384 U.S. at 362. The Court stressed that the presence of the press must be limited when necessary to prevent a carnival atmosphere at trial. *Id.* at 358. *Accord*, *CBS v. Young*, 522 F.2d 234, 241 (6th Cir. 1974) ("[A] trial judge should have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammatory publicity."). *See generally* Younger, *supra* note 2. The trial judge suggested that in dealing with publicity cases: (1) There should be a presumption of no order against the press; (2) if an order is deemed necessary, it should be as narrow as possible; and (3) the trial judge should concentrate on the use of intensive *voir dire* and jury instructions. *Id.* at 20-21.

42. *E.g.*, *Myers v. State*, 97 Ga. 76, 98-99, 25 S.E. 252, 260 (1895); *Tate v. Commonwealth*, 258 Ky. 685, 693, 80 S.W.2d 817, 821 (1935); *State v. Saale*, 308 Mo. 573, 579-81, 274 S.W. 393, 395-96 (1925); *People v. Miller*, 257 N.Y. 54, 60-61, 177 N.E. 306, 308 (1931). *See also* *Bishop v. State*, 19 Ala. App. 326, 97 So. 169 (1923); *Jackson v. Commonwealth*, 100 Ky. 239, 252-55, 38 S.W. 422, 424-25 (1896).

43. *E.g.*, *Orlando v. Fay*, 350 F.2d 967, 971-72 (2d Cir. 1965); *State v. Copp*, 15 N.H. 212, 214-15 (1844); *State v. Genese*, 102 N.J.L. 134, 142, 130 A. 642, 646 (1925); *Grimmett v. State*, 22 Tex. Crim. 36, 40, 2 S.W. 631, 633 (1886).

44. *E.g.*, *Bishop v. State*, 19 Ala. App. 326, 97 So. 169 (1923); *People v. Buck*, 46 Cal. App. 2d 558, 116 P.2d 160 (1941).

45. *E.g.*, *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935); *Beuchamp v. Cahill*, 297 Ky. 505, 180 S.W.2d 423 (1944); *State v. Damm*, 62 S.D. 123, 252 N.W. 7 (1933), *aff'd on rehearing*, 64 S.D. 309, 266 N.W. 667 (1936); *Grimmett v. State*, 22 Tex. Crim. 36, 2 S.W. 631 (1886).

46. *E.g.*, *Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975); *People v. Hinton*, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972), *cert. denied*, 410 U.S. 911 (1973).

nesses would be embarrassed or reluctant to testify.⁴⁷ The court may exclude at least some members of the public when evidence is expected to be obscene.⁴⁸ Clearly, therefore, a trial is not absolutely a public event.

The first amendment commands that the press be allowed to freely gather and publish the news;⁴⁹ the sixth amendment demands the accused be tried before an impartial jury.⁵⁰ The Supreme Court, when faced with this conflict, has engaged in a balancing⁵¹ of the first and sixth amendment interests.⁵² In determining the weight to be given the first amendment, the Court has distinguished between the media's right to publish and its right to gather information. The Court has found that the first amendment affords a special protection against orders that impose a prior restraint on speech. A prior restraint is a court order that forbids publication of material in the media's possession.⁵³ Any system of prior restraint comes to the Court with a "heavy presumption

47. *E.g.*, *Bruno v. Herold*, 408 F.2d 125 (2d Cir.), *cert. denied*, 396 U.S. 818 (1969); *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); *State v. Callahan*, 100 Minn. 63, 110 N.W. 342 (1907).

48. *E.g.*, *United States v. Kobli*, 172 F.2d 919, 922 (3d Cir. 1949); *State v. Croak*, 167 La. 92, 118 So. 703 (1928).

49. *See note 7 supra*.

50. *See note 4 supra*.

51. That one constitutionally amendment should not have absolute priority over another has long been recognized. Justice Frankfurter, in *Pennekamp v. Florida*, maintained:

A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.

328 U.S. 331, 355 (1946) (Frankfurter, J., concurring). Because of the unwillingness to set an absolute priority, the Court has engaged in a balancing of interests. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965). Justice Douglas, however, disagreed with any balancing of the first amendment. He maintained "that all of the 'balancing' was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment . . . advance[d]." *Branzburg v. Hayes*, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting).

52. In determining any balance between the sixth and first amendments, the Court must consider the policies underlying the two amendments. The first amendment's protection of free speech and press promotes public knowledge and awareness. The sixth amendment guarantees the accused a fair, open trial. These two policies are often complementary. Just as the norm of a public trial promotes public awareness, public awareness ensures the accused a fair trial. *See generally* Note, *supra* note 19, at 1326.

53. *See generally* Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648 (1955).

against its constitutional validity.”⁵⁴ Courts are extremely reluctant to uphold prior restraints on publication.⁵⁵ A first amendment right to gather information, however, is not uniformly upheld.⁵⁶ Many courts hold that the government has no duty to provide access to the press.⁵⁷

54. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976). In *Nebraska Press* a unanimous Court struck down a court order prohibiting the press from publishing confessions, admissions, or other inculpatory information. The accused was charged with the brutal murder of six members of a Nebraska family. The crime attracted widespread publicity including incriminating statements made by the accused. The trial judge concluded that an impartial jury would be difficult to impanel if the press were not restrained. Nevertheless, the Supreme Court found the prior restraint invalid. *Id.* at 570. The constitutional presumption of invalidity was not rebutted because the trial judge's conclusion as to the publicity “was of necessity speculative, dealing . . . with factors unknown and unknowable.” *Id.* at 563. The Court also found that there was insufficient evidence to prove that (1) there were no less restrictive alternatives, or (2) a prior restraint would be effective. *Id.* at 563-67. The Court refused, however, to bar absolutely the use of prior restraints in all situations. *Id.* at 563-70. See generally L. TRIBE, *THE AMERICAN CONSTITUTIONAL LAW* § 12-11 (1978); Prettyman, *Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?*, 20 ST. LOUIS L.J. 654 (1976); Symposium, *Nebraska Press Assoc. v. Stuart*, 29 STAN. L. REV. 383 (1977).

55. See, e.g., *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Times-Picayune Publishing Corp. v. Schulz*, 419 U.S. 1301 (1974); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Wood v. Georgia*, 370 U.S. 375 (1962); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931). See generally W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 151-52 (1778) (prior restraints on publication invalid at common law); Barnett, *The Puzzle of Prior Restraints*, 29 STAN. L. REV. 539, 542-59 (1977); Fenner & Koley, *supra* note 34, at 460-62; Note, *Prior Restraint and the Press Following The Pentagon Papers Cases—Is the Immunity Dissolving?*, 47 NOTRE DAME LAW. 927 (1972).

56. Some commentators advocate a special right of access for the press because freedom of the press has an express constitutional guarantee separate from freedom of speech. See note 7 *supra*; Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 750-51, 785-88 (1977); Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166, 181 (1975) (“if a freedom of the press, distinct from freedom of speech is guaranteed . . . then it follows that in some situations the journalist may appropriately be granted special access to information controlled by the government”). See also Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech*, 26 HASTINGS L.J. 639 (1975). Justice Stewart has recognized that “[i]f the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.” Stewart, “*Or Of The Press*,” 26 HASTINGS L.J. 631, 633 (1975). Justice Stewart does not believe, however, that the free press guarantee gives the press a special right of access.

The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

Id. at 636.

57. E.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Zemel v. Rusk*, 381 U.S.

Conversely, other courts extend protection because they contend the right to publish would be useless if the press did not have an opportunity to gather news.⁵⁸ The Supreme Court has recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated."⁵⁹ Although the Court has indicated that some protection is necessary,⁶⁰ it has not explicitly found a first amendment guarantee for the media's right of access.⁶¹

1 (1965); *Garland v. Torre*, 259 F.2d 546 (2d Cir.), cert. denied, 358 U.S. 910 (1958); *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958); *Azbill v. Fisher*, 84 Nev. 414, 442 P.2d 916 (1968); *United Press Ass'n v. Valente*, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). See generally *Fenner*, supra note 34, at 487-88; Note, supra note 2, at 889 ("The first amendment [does] . . . not . . . require the removal of barrier to information").

58. E.g., *Branzburg v. Hayes*, 408 U.S. 665, 727-28 (1972) (Stewart, J., dissenting). In *Branzburg* Justice Stewart maintained that:

[A] corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. . . .

News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised.

Id. See *Kovach v. Maddux*, 238 F. Supp. 835, 839 (M.D. Tenn. 1965) ("Without the opportunity to gather and obtain the news, the right to publish or to comment upon it, would be of little value."). See also *Ex parte Jackson*, 96 U.S. 727, 733 (1877) ("Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed without the circulation, the publication would be of little value.").

59. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). In *Branzburg* the Court held that the first amendment afforded no special protection to a reporter who refused to obey a grand jury subpoena. While recognizing that news gathering may qualify for some first amendment protection, the Court also maintained that this first amendment protection did not give the press a right of special access to information not available to the general public. *Id.* at 681-84. Six years later, in *Houchins v. KQED, Inc.*, the Court denied the press the right of access to prison facilities. 438 U.S. 1 (1978). The Court maintained that it had "never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Id.* at 9. Consequently, the Court held that the news media had no greater constitutional right of access to government controlled information than other members of the general public. *Id.* at 16. See generally Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899 (1978). See also *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974).

60. Judge Musmanno, in *In re Mack*, most clearly expressed the need for a right to gather: Freedom of the press is not restricted to the operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure.

Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water.

386 Pa. 251, 273, 126 A.2d 679, 689 (1956) (Musmanno, J., dissenting).

61. Although most cases find no special right of access, commentators have supported a spe-

A court's balancing of the first and sixth amendments implicates the subsidiary issue of alternatives to closure.⁶² These alternatives often ensure the defendant a fair trial without interfering with the function of the press. At the trial stage the court has a battery of alternatives to closure. Careful *voir dire* can effectively screen out prejudiced jurors.⁶³ If all jurors in the pool appear prejudiced, the court can call a new panel of prospective jurors. Under most state statutes the court can move the trial to an adjoining county⁶⁴ or can continue the trial until the threat of prejudice abates.⁶⁵ The judge can instruct the jury against

cial right for the press. Without a special right of access, press publication is indirectly restrained. See 53 TULANE L. REV. 629, 640 (1979) (After *Houchins* "restraints on press publication, which have so long and steadfastly been guarded against, can now be accomplished by prohibiting the . . . press access"). Secondly, limited press access affects the public's right to know. See Note, *The Right of the Press to Gather Information Under the First Amendment*, 12 LOY. L.A. L. REV. 357, 382 (1978) ("When the press is denied the right to gather information, it is the public which remains ill-informed, contrary to the goal of a free flow of information . . ."). Thus, commentators have suggested a stringent test to be met before access is denied. See Note, *supra* note 34, at 110 (right of access should be limited only when necessary to further compelling state interest); Comment, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440 (1975) ("Courts should find a sufficiently compelling interest [to deny access] only when press access would create a 'clear and present danger' either to national security or to the personal safety of others.").

62. Ranney, *Remedies for Prejudicial Publicity: A Brief Review*, 21 VILL. L. REV. 819, 830 (1976); Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 WM. & MARY L. REV. 1, 23-29 (1971); Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 354-70 (1960); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, *supra* note 59, at 1916. Several courts advocate the use of alternatives before issuing any order against the press. *E.g.*, *United States v. Dickinson*, 465 F.2d 496, 508-09 (5th Cir. 1972); *Oliver v. Postel*, 30 N.Y.2d 171, 182, 282 N.E.2d 306, 311, 331 N.Y.S.2d 407, 414-15 (1972); *Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 468-69, 351 N.E.2d 127, 134-35 (1976).

63. Some commentators believe that properly performed *voir dire*, coupled with additional peremptory challenges, is an effective method to dispel prejudice. See Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975); Note, *The Discretionary Power to Grant Additional Peremptory Challenges in Highly Publicized Criminal Trials: Securing a Fair and Impartial Jury*, 25 BUFFALO L. REV. 545 (1976); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, *supra* note 59. See also *Beck v. Washington*, 369 U.S. 541, 556 (1962). Much of the effectiveness of this method, however, depends on the skill of the attorney. See Zeisel, *THE AMERICAN JURY SYSTEM, FINAL REPORT OF THE ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES* 65, 76-92 (1977).

64. A change of venue can be effective only when the publicity is local and will not follow the defendant to a new trial location. See Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAW. 925, 941-42 (1967) ("effectiveness depends not upon its ability to prevent publicity . . . , but upon its ability to remove a defendant from a poisoned atmosphere").

65. A continuance will be effective only if new publicity does not start up with the new trial.

considering prejudicial information⁶⁶ or, if instructions are insufficient, may sequester the jury throughout the trial.⁶⁷ The trial judge may require the media and the public to follow certain rules in the courtroom. The judge also may control the conduct of courtroom personnel and officers.⁶⁸ The court's use of one of these alternatives normally leaves inviolate both the first and sixth amendments.⁶⁹

C. *Scope of the Protection Afforded the Press: Pretrial v. Trial*

Some courts have argued that even if the press has a first or sixth amendment right of access to trials, this right does not extend to the pretrial suppression hearing.⁷⁰ While trials traditionally have been

See Note, Fair Trial and Free Press: Preliminary Hearing—Gateway to Prejudice, 1973 LAW & SOC. ORD. 903, 915 ("news media may simply rekindle the publicity").

66. Although jury instructions are often considered effective to combat prejudice, some publicity is so pervasive that instructions become useless. *See, e.g.*, *Bruton v. United States*, 391 U.S. 123, 135 (1968) (sometimes the risk is so great that "the jury will not, or cannot, follow instructions"); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction"). *But see* note 104 *infra*.

67. Sequestration provides "the best method available to protect the conflicting rights of freedom of press and fair trial . . ." Note, *Sequestration: A Possible Solution to the Free Press-Fair Trial Dilemma*, 23 AM. U.L. REV. 923, 955 (1974). Sequestration can cause problems, however.

It has been hypothesized that the unhappy juror who has been separated from his home, business, and family for any amount of time might well feel resentment against the party who has requested the procedure. This state of mind could, therefore, destroy the impartiality of the jury, undermine the very purpose of the "lockup" procedure, and result in an unfair trial.

Id. at 934-35 (footnotes omitted).

68. *See Sheppard v. Maxwell*, 384 U.S. 333 (1969).

69. Subsequent release of a trial transcript also has been suggested as an alternative. Release of the trial transcript supposedly minimizes any first amendment infringement. Although the transcript provides a detailed account of the trial, many contend the transcript is a poor substitute for actual courtroom presence of the press. In *Kleindienst v. Mandel* the Court held that the public has a right to have an alien who advocated communism enter the country, even though the public already had access to his books and taped speeches. The Court maintained that it was "loath to hold . . . that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access." 408 U.S. 753, 765 (1972).

In addition, delayed transcripts are of little value to the press because information not received immediately probably will never be published. Brief of Petitioner at 20, *Gannett Co. v. DePascuale*, 443 U.S. 368 (1979). Petitioners in *Gannett* relied on *Bridges v. California*, in which the Court maintained that "public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian . . ." 314 U.S. 252, 268 (1941). Moreover, transcripts are cold records, lacking the tones, inflections and gestures that are crucial to a complete understanding of the proceeding. The transcript minimizes the first amendment infringement but may not be adequate protection for the freedom of the press in all circumstances.

70. *E.g.*, *State v. Meek*, 9 Ariz. App. 149, 450 P.2d 115, *cert. denied*, 396 U.S. 847 (1969)

open, the same is not true for pretrial proceedings.⁷¹ The Third Circuit noted that the suppression hearing and the trial can have substantial differences. The pretrial hearing does not determine the guilt or innocence of the defendant. The purpose of the pretrial hearing is to prohibit inadmissible evidence from reaching the jury.⁷² Widespread publicity of a pretrial proceeding can completely frustrate this purpose.⁷³ Conversely, other courts have found that since decisions made in suppression hearings can be crucial to the outcome of the entire criminal case, the policies supporting the open trial also support opening pretrial proceedings.⁷⁴ Approximately eighty-five percent of all

(pretrial proceeding is a screening procedure to stop unjustifiable claims); *Azbill v. Fisher*, 84 Nev. 414, 442 P.2d 916 (1968) (preliminary hearing is a "creature of statute"). See generally Note, *supra* note 2, at 893-904.

71. "It must, of course, be remembered, that the principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefatory stages of the proceedings . . ." E. JENKS, *THE BOOK OF ENGLISH LAW* 75 (6th ed. 1967), quoted in *Gannett Co. v. DePasquale*, 443 U.S. 368, 389 (1979). See Radin, *supra* note 1, at 383-84.

72. *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 607 (3d Cir. 1969) (en banc). Despite the differences, however, the court decided the suppression hearing was part of the guaranteed public trial. The court found that "[s]uch a hearing, with conflicting credibility in issue and factual findings of the judge the ultimate outcome, is in every respect equivalent to a trial proceeding except that the jury necessarily must be excluded . . ." *Id.* at 605.

73. See, e.g., *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. ___, 387 A.2d 425 (1978). The court found that:

[T]he most damaging of all information from outside the courtroom comes from the pre-trial suppression hearing. A trial court's ability to afford the accused a fair trial is substantially threatened where challenged inculpatory statements, testimony of the accused bearing on such statements, or other information considered at the suppression hearing becomes public knowledge prematurely.

Id. at ___, 387 A.2d at 436 (footnotes omitted).

74. Two circuit courts have expressly found that the policies underlying a public trial would also support an open pretrial hearing. The third circuit, in *United States v. Cianfrani*, found that "the need to make the trial accessible to unknown parties who might have important knowledge to bring to light, the need to subject the judiciary to public scrutiny in the performance of its duties, and the need to provide the 'appearance of justice' in order to foster confidence in the judicial system" all support open pretrial proceedings. 573 F.2d 835, 850 (3d Cir. 1978). Eight years earlier, the third circuit had maintained that:

The desirability of the public exposure of the claims and denials of coerced confessions, the policy that judicial proceedings be under the scrutiny of the general public in order to avoid judicial oppression and to discourage perjury, and the provision for the possibility that one who has valuable information might stray into the courtroom . . . are as relevant to a . . . hearing as to a full trial.

United States ex rel. Bennett v. Rundle, 419 F.2d 599, 606 (3d Cir. 1969) (en banc). The second circuit also has confronted the issue. In *United States v. Clark* the court held that "because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned, the right to public trial should extend to suppression hearings rather than permit such crucial steps in the criminal process to become associated with secrecy." 475 F.2d 240, 246-47 (2d Cir. 1973).

criminal proceedings never reach the trial stage.⁷⁵ The disposition of the motion to suppress "may require entry of a judgment of acquittal for lack of other proof sufficient to convict."⁷⁶ In many cases police conduct is scrutinized only at the suppression hearing. Courts generally agree, therefore, that the pretrial suppression hearing is a crucial step in the criminal justice process. The courts, however, have drawn conflicting inferences from this proposition.

II. *GANNETT CO. V. DEPASQUALE*

A. *The Gannett Decision*

Before *Gannett*, the press' right of access to criminal proceedings remained unclear, despite extensive case law directly or indirectly discussing the issue. The Supreme Court's decision in *Gannett* contributed little toward a final resolution of this crucial question. Only one Justice joined Stewart's majority opinion. Three Justices wrote separate opinions and the remaining four Justices dissented on sixth amendment grounds.⁷⁷

In *Gannett* the trial court closed a pretrial suppression hearing⁷⁸ in the murder trial of defendants Greathouse and Jones. The defendants were charged with the murder of their fishing partner. The petitioner, Gannett Co., published two Rochester, New York newspapers. Each

The new American Bar Association standards also support the proposition that the pretrial suppression hearing is included within the sixth amendment public trial provision. See ABA, *supra* note 24, Standard 8-3.2, at 15 n.1. *Accord*, United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971); United States v. American Radiator and Standard San. Corp., 274 F. Supp. 790, 794 (W.D. Pa.), *cert. denied*, 390 U.S. 922 (1968). *Cf.* United States v. Sorrentino, 175 F.2d 721, 722 (3d Cir.), *cert. denied*, 338 U.S. 868 (1949) (jury selection included within sixth amendment public trial provision).

75. See generally National Institute of Law Enforcement and Criminal Justice, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, PLEA BARGAINING IN THE UNITED STATES (appendix A) (1978).

76. United States v. Clark, 475 F.2d 240, 247 (2d Cir. 1973).

77. *Gannett* was a 5-4 decision. Justice Stewart delivered the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Chief Justice Burger and Justices Powell and Rehnquist wrote concurring opinions. Justice Blackmun wrote the dissent, in which Justices Brennan, White, and Marshall joined.

78. The defendant has a constitutional right to a fair hearing on motion to exclude an involuntary confession. Jackson v. Denno, 378 U.S. 368 (1964). Involuntary confessions are excluded because their procurement violated the defendant's fifth amendment privilege against self-incrimination. See Miranda v. Arizona, 384 U.S. 436 (1966). For a discussion of the exclusionary rule, which provides that all evidence obtained in violation of the Constitution is inadmissible, see Mapp v. Ohio, 367 U.S. 643 (1961).

newspaper carried several articles on the search, capture, and arraignment of defendants.⁷⁹ At a suppression hearing defense attorneys requested that the court exclude the public and press. The prosecutor did not oppose the motion, and petitioner's reporter did not object. The trial judge granted the motion. The next day, the reporter wrote a letter asking for either a hearing on the suppression motion or access to the transcript. The trial judge granted a hearing, but reserved the question on access to the transcript.⁸⁰ At the hearing the trial judge ruled that the press had a constitutional right of access, but that this right was outweighed by a "reasonable probability of prejudice" to the defendants' trial. The Supreme Court of New York vacated the order,⁸¹ which was reinstated by the New York Court of Appeals.⁸² The United States Supreme Court sustained the closure and held that members of the public do not have a sixth amendment right to attend a pretrial

79. 443 U.S. at 371-74. On July 20 each paper carried its first story on Clapp's disappearance. Each reported known details and stated the police's theory that Clapp had been shot in his boat and his body dumped overboard. One paper mentioned Greathouse and Jones as companions who had accompanied Clapp on his boat. On July 22 the newspapers reported that police had captured Greathouse and Jones. The stories also stated that the police theorized that Clapp was shot with his own pistol, robbed, and thrown into the lake. On July 23 articles revealed that Jones had waived extradition but that there were "legalities" involved in Greathouse's extradition because he was a juvenile. On July 24 the *Democrat & Chronicle* reported that Greathouse had led police to Clapp's revolver. On July 25 the *Democrat & Chronicle* reported that the two men had been arraigned. On August 3 the papers reported the filing of indictments with background details. On August 6 each paper carried the details of the arraignment, again reporting the accusations. *Id.*

80. *Id.* at 375. Before the Appellate Division decision the defendants pleaded guilty to lesser included crimes and the hearing transcripts were made available. *Gannett Co. v. DePasquale*, 43 N.Y.2d 370, 376 n.1, 372 N.E.2d 544, 547 n.1, 401 N.Y.S.2d 756, 759 n.1 (1977), *aff'd*, 443 U.S. 368 (1979). Despite the mootness of the issue, the Appellate Division, the New York Court of Appeals, and the United States Supreme Court reached the substantive issue. *See* 443 U.S. at 376-77. The Supreme Court found (1) the order closing a pretrial hearing too short in duration to allow review and, (2) a reasonable expectation *Gannett Co.* would be subjected to similar suits. *Id.*

81. 55 A.D.2d 107, 389 N.Y.S.2d 719 (1976), *rev'd*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 443 U.S. 368 (1979).

82. 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 443 U.S. 368 (1979). The Gannett newspapers brought an original prohibition and mandamus challenging the closure order on first, sixth, and fourteenth amendment grounds. 443 U.S. at 376. The Supreme Court of New York, Appellate Division, vacated the trial court's order because the order could not withstand the clear and present danger test of *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). *See* 55 A.D.2d 107, 389 N.Y.S.2d 719 (1976). *See* note 155 *infra* for a discussion of the clear and present danger test. The New York Court of Appeals held that criminal trials are presumptively open to the public, including the press, but that in this case the presumption was overcome by the danger posed to the defendants' ability to receive a fair trial. 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).

suppression hearing that can be asserted independently of the parties in the litigation.⁸³

The majority opinion distinguished between the trial and pretrial stages of criminal proceedings. The Court found that the common-law norm of open proceedings existed only at trial. It decided that the right of public access to criminal trials should not extend to the pretrial suppression hearing because the hearing poses special risks of unfairness to the accused's right to a fair trial.⁸⁴ Closure of the hearing is the "most effective" method of ensuring that inadmissible prejudicial evidence never reaches the attention of potential jurors. The Court suggested that although less restrictive alternatives might suffice to assure impartiality at trial, these methods would be ineffective at the pretrial stage.⁸⁵ The Court held, therefore, that the public has no sixth amendment right of access to a pretrial suppression hearing.⁸⁶

The dictum in the majority opinion is much broader than the holding. The Court suggested that the public has no sixth amendment right of access to either the pretrial hearing or the actual trial⁸⁷ because the sixth amendment assures only the accused's right to demand a public trial. Because the parties to the litigation protect the societal interest in public trials, members of the public have no independent sixth amendment right to attend a criminal trial.⁸⁸ The Court reserved decision on whether the first amendment affords any right of access.⁸⁹

Chief Justice Burger and Justices Powell and Rehnquist concurred with the majority but wrote separate opinions. Chief Justice Burger interpreted the majority opinion to apply solely to pretrial proceedings. The Chief Justice concluded that the public trial provision of the sixth amendment does not extend to pretrial suppression hearings.⁹⁰ Justice Powell agreed with the majority's interpretation of the sixth amendment but decided the first amendment issue reserved by the majority. He found the first amendment protects the press' interest in being pres-

83. 443 U.S. 368 (1979). The Court said that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee . . . is personal to the accused." *Id.* at 379-80.

84. *Id.* at 378-79.

85. *Id.*

86. *Id.* at 384-91.

87. *Id.* at 383.

88. *Id.* at 384.

89. *Id.* at 392.

90. *Id.* at 394 (Burger, C.J., concurring).

ent at the pretrial hearing.⁹¹ This interest is not absolute and must be balanced against the accused's right to a fair trial. Justice Powell suggested that the court give press representatives a hearing prior to any possible exclusion from the courtroom. At this hearing the accused would have the responsibility of showing that public access would prejudice the trial. Members of the press would then demonstrate that alternative procedures would adequately protect the defendant's rights.⁹² Justice Powell concluded that the trial judge's actions comported with this requirement.

Justice Rehnquist, concurring with the majority's sixth amendment interpretation, found that the public has no enforceable right to attend either the pretrial hearing or the actual trial. Justice Rehnquist's concurrence extended the majority opinion by finding that the press has no first amendment right of access.⁹³ The trial court, therefore, can close the pretrial proceeding at defendant's request without any showing of possible prejudice.⁹⁴

Justice Blackmun, in dissent, also reserved the first amendment issue but found an enforceable sixth amendment public interest in attending criminal proceedings.⁹⁵ An interpretation of other sixth amendment provisions,⁹⁶ policy considerations, and the common law support an in-

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

92. *Id.* at 401.

93. *Id.* at 403 (Rehnquist, J., concurring). Justice Rehnquist previously recognized that limiting the press' right of access is a form of censorship. He found that "censorship . . . as often as not is exercised not merely by forbidding the printing of information in the possession of the correspondent, but in denying him access to places where he might obtain such information." Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 GONZ. L. REV. 1, 17 (1976).

94. 443 U.S. at 404 (Rehnquist, J., concurring).

95. *Id.* at 432-33 (Blackmun, J., dissenting). The American Bar Association also supports the view that there is a public interest in open trials. The standard states that:

The sixth amendment speaks in terms of the right of the accused to a public trial, but this right does not belong solely to the accused to assert or forego as he or she desires. . . . The defendant's interest, primarily, is to ensure fair treatment in his or her particular case. While the public's more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. The transcendent reason for public trials is to ensure efficiency, competence, and integrity in the overall operation of the judicial system. Thus, the defendant's willingness to waive the right to a public trial in a criminal case cannot be the deciding factor. . . . It is just as important to the public to guard against undue harshness or discrimination.

See ABA, *supra* note 30, Standard 8-3.2, at 15 (citations omitted).

96. 443 U.S. at 415-18 (Blackmun, J., dissenting). Blackmun relied on *Barker v. Wingo*, 407 U.S. 514 (1972), and *Singer v. United States*, 380 U.S. 24 (1965). See note 28 *supra*.

dependent public right of access to ensure judicial integrity.⁹⁷ Justice Blackmun argued that individual members of the press and public must have standing to assert their right of access, not only to trials, but also to pretrial proceedings. Although pretrial proceedings were closed routinely at common law, Justice Blackmun maintained that these common-law hearings differed substantially from modern suppression hearings.⁹⁸ Justice Blackmun found that the pretrial suppression hearing is procedurally similar to a trial; the hearing is a crucial,⁹⁹ often decisive,¹⁰⁰ stage in the criminal proceeding. He proposed that the public's right of access be balanced against the accused's right to a fair trial. The accused has the burden of proving a "substantial probability" of prejudice, the lack of adequate alternatives, and the effectiveness of closure.¹⁰¹ The trial judge did not follow these procedures, and thus Justice Blackmun called for reversal.

B. *Implications of Gannett*

Gannett confused the issue of trial closure. The majority's analysis left major points ambiguous. First, the majority did not explicitly clarify whether the decision should apply only to pretrial proceedings or whether it is equally applicable to actual trials.¹⁰² Chief Justice Burger and Justice Rehnquist, concurring in the majority opinion, expressed conflicting views on this issue.¹⁰³ Chief Justice Burger limited the decision to pretrial proceedings; Justice Rehnquist maintained that the pre-

97. 443 U.S. at 412-14 (Blackmun, J., dissenting). Reliance on history, however, is not always dispositive. See P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 121 (1975); Note, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 157, 162-64 (1939); *The Supreme Court—1978 Term*, 93 HARV. L. REV. 62, 67-68 (1979). Justice Blackmun repudiated the historical approach to the sixth amendment as inconclusive in *Faretta v. California*, 422 U.S. 806, 850 (1975) (Blackmun, J., dissenting).

98. 433 U.S. at 437 (Blackmun, J., dissenting). Justice Blackmun maintains that the pretrial hearings closed at common law were probable cause hearings. He finds that "the modern suppression hearing, unknown at common law, is a type of objection to evidence such as took place at common law . . . in *open court* during trial." *Id.* (emphasis in original).

99. It should be noted, however, that the grand jury and discovery processes also are crucial to criminal justice administration, but both traditionally have been closed to the public. See *generally* Note, *supra* note 65, at 906; 92 HARV. L. REV. 1550 (1979).

100. Justice Blackmun noted that in 1976 every felony prosecution in Seneca County—where this case took place—was terminated without a trial on the merits. 443 U.S. at 435 n.14 (Blackmun, J., dissenting).

101. *Id.* at 441-42.

102. See notes 87-89 *supra* and accompanying text.

103. See notes 90, 93-94 *supra* and accompanying text.

trial/trial distinction was superfluous to the decision. Secondly, the Court did not formulate a standard of prejudice requisite for closure. Although the reporting in *Gannett* was not “sensational,” prejudice could have arisen from publication of the confessions,¹⁰⁴ which were to be examined at the pretrial suppression hearing. The majority did not clarify whether a showing of prejudice is necessary before a trial judge orders closure.¹⁰⁵

Justice Rehnquist, in concurrence, maintained that no showing of prejudice is necessary. He interpreted the majority to require only a waiver by the accused, with the consent of the prosecutor and judge.¹⁰⁶ *Gannett*'s majority, therefore, did not specify the standard a trial judge should apply to order closure or when this standard should be implemented.

The majority and dissent, in their interpretation of the sixth amendment, agreed that there is a public interest in open criminal proceedings.¹⁰⁷ The majority held that this interest is unenforceable by independent members of the public. The dissent argued that the majority's holding thereby recognized an accused's right to compel a closed trial; a position that is inconsistent with the interpretation of other sixth amendment provisions. The dissent's conclusion is inaccurate, however, because it ignores the crucial role of prosecutor and judge in a closure proceeding.¹⁰⁸ The majority does not allow defendant to compel closure. The majority simply maintains that prosecutor and judge can adequately protect the public interest. The majority apparently requires consent by all parties to the litigation for any closure.

The majority also failed to deal with the first amendment issue. The Court left unclear what, if any, protection that amendment affords. The Court, however, implicitly established some guidelines for first amendment protection. The Court found that the trial judge's actions

104. The police report of a confession by the suspect is the single most damaging element in a news article. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515, 520-27 (1977). Simon found that jurors were influenced by what they read and that sensational stories had more impact than sober accounts. *Id.* at 522. Simon's study also demonstrated, however, that jurors took the judge's instructions very seriously and were able to ignore the prejudicial material they had read and reach a verdict solely on the basis of what they heard at trial. *Id.* at 523.

105. See notes 88-89 *supra* and accompanying text.

106. See notes 93-94 *supra* and accompanying text.

107. See notes 87-88 *supra* and accompanying text.

108. The majority addressed only the situation in which the prosecutor and judge concur in the defendant's motion to close. 443 U.S. at 371.

satisfied any first amendment requirement.¹⁰⁹ In *Gannett* the trial judge held a hearing even though there was no objection when the closure motion was made. At this hearing the judge considered the nature of the evidence to be exposed, the defendants' ages, and the extent of previous publicity.¹¹⁰ He found a "reasonable probability" of prejudice.¹¹¹ The prosecutor did not object to closure and the press did not advance any alternatives. The Supreme Court implied that the defendant must prove only a "reasonable probability" of prejudice for closure, at least at the pretrial stage. There is no mention that the accused must show lack of alternatives or even effectiveness of closure.

The *Gannett* Court, however, did not explicitly address the first amendment issue. Justices Powell and Rehnquist both expressly addressed this issue but reached opposite conclusions. Justice Powell found that the press had a first amendment right of access to pretrial proceedings but that the trial judge's actions comported with the requirement.¹¹² Conversely, Justice Rehnquist found no first amendment right of access. He concluded that the court need advance no reason to grant a closure motion because the public has no enforceable sixth or first amendment right of access.¹¹³

109. *Id.* at 391-93.

110. *Id.* at 402 (Powell, J., concurring).

111. *Id.* at 393.

112. See notes 91-92 *supra* and accompanying text.

113. The *Gannett* decision created widespread confusion in the press and in the courts. Several courts have addressed the issue of closure since *Gannett*. See, e.g., *United States v. Powers*, 477 F. Supp. 497, 499 (S.D. Iowa 1979) (adopted clear and present danger test for trial closure, but found it unnecessary to retroactively determine whether defendant had sustained his burden); *Shires v. Britt*, ___ Ark. ___, 589 S.W.2d 18,19 (1979) (closure of pretrial hearing prohibited by state statute which provides "sitting of every court shall be public"); *Connecticut v. Castonguay*, 5 MEDIA L. REP. (BNA) 1628 (Conn. Super. Ct. Aug. 28, 1979) (motion to close all pretrial proceedings denied because too broad); *Gannett Pac. Corp. v. Richardson*, 59 Hawaii 224, 233, 580 P.2d 49, 56 (1978) (closure of pretrial probable cause hearing allowed when judge determines there is a substantial likelihood evidence introduced at the hearing will interfere with the defendant's right to a fair trial); *Keene Publishing Corp. v. Superior Court*, ___ N.H. ___, 406 A.2d 137, 138 (1979) (dicta that pretrial hearing can be closed only on a showing of clear and present danger to the defendant's trial); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 443, 399 N.E.2d 518, 525, 423 N.Y.S.2d 630, 637-38 (1979) (ordinary competency hearing does not generate the type of adverse publicity that would enable judge to close the hearing to protect the defendant's right to a fair trial); *Merola v. Bell*, 47 N.Y.2d 985, 987, 393 N.E.2d 1038, 1039, 419 N.Y.S.2d 965, 966 (1979), *cert. denied*, 100 S. Ct. 3055 (1980) (upheld closure of pretrial suppression hearing in murder prosecution of thirteen-year-old juvenile); *New York v. Biggs*, 5 MEDIA L. REP. (BNA) 1518, 1523-24 (N.Y. Suffolk County Ct. Aug. 15, 1979) (insufficient showing of possible prejudice to close pretrial hearing in murder prosecution); *Rapid City Journal Co. v. Brandenburg*, ___ S.D. ___, 286 N.W.2d 125, 126 (1979) (parties objecting to closure must be allowed hearing before

III. *RICHMOND NEWSPAPERS, INC. v. VIRGINIA*

A. *The Richmond Decision*

In *Richmond*¹¹⁴ the trial judge closed the two day murder trial of John Paul Stevenson. The defendant moved for a closed trial because the defense did not “want any information being shuffled back and forth.”¹¹⁵ The prosecution made no objection and the trial judge found that the state closure statute gave him specific power to close the courtroom. Two reporters from Richmond Newspapers, Inc., ousted from the proceedings, sought a hearing. The trial court ruled that because three previous attempts to try the defendant had failed, every step should be taken to assure that defendant did not have his rights abridged.¹¹⁶ The court upheld the closure motion and found the defendant not guilty of murder.¹¹⁷

In a seven to one decision the Supreme Court held that the right of the press and the public to attend criminal trials is guaranteed by the first and fourteenth amendments.¹¹⁸ Although the Court explicitly refused to overrule *Gannett*, the intended scope of the *Richmond* ruling is uncertain because there are seven separate opinions without a majority opinion.¹¹⁹

Chief Justice Burger, writing for the Court, found that *Gannett* held only that the sixth amendment does not guarantee the public a right of access to pretrial suppression hearings.¹²⁰ Chief Justice Burger, however, did not find a sixth amendment right of access to actual trials, but,

closure); *Rapid City Journal Co. v. Tice*, __ S.D. __, __, 283 N.W.2d 563, 567 (1979) (closure of *voir dire* upheld because “defendant’s right to a fair trial will be jeopardized if [closure] motion denied”); *Williams v. Stafford*, 589 P.2d 322, 326 (Wyo. 1979) (adopted clear and present danger test for closure of bail hearing).

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

115. Brief for Appellants at 5, *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

116. Brief for Appellants at 7-8, *id.*

117. The court released a one page order that indicated that the prosecution’s evidence was excluded. Because the transcript was not released, it is unknown why the evidence was inadmissible. Brief for Appellants at 8-9, *id.*

118. 100 S. Ct. at 2829.

119. Only Justices White and Stevens joined in Burger’s opinion. 100 S. Ct. at 2818.

120. One of the media-appellant’s arguments focused on the pretrial-trial distinction. The appellant contended that *Gannett* did not address the issue of trial closure. The appellant asserted that pretrial and trial proceedings are “poles apart.” “The aim of the [suppression hearing] is to keep *inadmissible* information *from* the jury; [the aim of the trial is] to present *admissible* information *to* the jury—and to the community that the jury represents.” Brief for Appellants at 11, *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980). Thus, the appellant concluded that it is only in the context of the pretrial suppression hearing that openness and fairness are in

instead, based his decision solely on the first amendment. He reviewed the history of the trial process and concluded that "a presumption of openness inheres in the very nature of a criminal trial."¹²¹ Chief Justice Burger found that an open proceeding not only is educative, but also enhances the integrity and quality of the trial process and provides a significant "community therapeutic value."¹²² He concluded that without the appearance of justice, public confidence in the judicial system is undermined, spawning a public reaction that the "system at best has failed and at worst has been corrupted."¹²³

Chief Justice Burger found that the first amendment, in conjunction with the fourteenth amendment, explicitly prohibits abridgment of freedom of speech or press. These expressly guaranteed freedoms share a common purpose of assuring freedom of communication. Thus, he held that the first and fourteenth amendments implicitly prohibit trial closure on the unopposed request of a defendant when there is no evidence that defendant's right to a fair trial requires closure.¹²⁴

Chief Justice Burger found that the trial judge in *Richmond* did not consider any alternatives to closure. Distinguishing the *Gannett* pre-trial proceeding, he stated that at trial there are "tested alternatives to satisfy the constitutional demands of fairness."¹²⁵ He suggested excluding witnesses from the courtroom or sequestering the jury. Thus, the first and fourteenth amendments prohibited trial closure because reasonable alternatives were available to protect the defendant's right to a fair trial.

Justice White agreed with Chief Justice Burger's first amendment analysis. Justice White said that the *Richmond* decision was unnecessary, however, because the sixth amendment precluded public exclusion from criminal proceedings except in narrowly defined circumstances.¹²⁶ Justice Stevens, while joining the Chief Justice's opinion,

tension. At trial, alternatives to closure will almost inevitably suffice, and therefore, closure of a criminal trial is seldom justified.

121. 100 S. Ct. at 2825.

122. *Id.* at 2824. The Court stated that "[e]ven without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Id.*

123. *Id.* at 2825.

124. *Id.* at 2829.

125. *Id.* at 2830. For a further discussion of alternatives, see notes 68-72 *supra*.

126. 100 S. Ct. at 2830.

would extend first amendment protection to places not customarily public.¹²⁷ Justice Stevens concluded that the first amendment guarantees the public and press a right of access not only to criminal trials, but also to all government operations.¹²⁸

Justice Brennan, joined by Justice Marshall, concurred, finding the Virginia statute unconstitutional.¹²⁹ Justice Brennan found that the valid purposes served by an open trial tipped the balance strongly toward public access.¹³⁰ Because the statute gave the judge full discretion to close a trial, Justice Brennan did not decide what countervailing interests, if any, would compel trial closure.

Justice Stewart, also concurring, asserted that the Court in *Gannett* had held that the sixth amendment does not protect public access to pretrial proceedings or actual trials.¹³¹ Thus, he did not limit the *Gannett* holding strictly to pretrial stages of a proceeding. Additionally, he emphasized that the *Richmond* decision applied only to actual trials.¹³² Thus, Justice Stewart inferred that there may be no first amendment protection at the pretrial stage, and that *Richmond*'s application to actual trials was subject to reasonable limitations.

Justice Blackmun, who wrote the dissent in *Gannett*, found that the *Richmond* Court clarified *Gannett* by demonstrating that *Gannett* applied only to pretrial proceedings.¹³³ Thus, he read *Gannett* to hold only that there is no sixth amendment right of public access to a pretrial suppression hearing—an interpretation directly opposed to Justice Stewart's. Justice Blackmun stated that *Gannett* was an erroneous decision, and that the first amendment public right of access to trials is "troublesome." He looked to the first amendment to conclude finally

127. *Id.* at 2831. In a previous decision, *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), Justice Stevens advocated that public access to prisons is guaranteed by the first and fourteenth amendments. See note 59 *supra*.

128. 100 S. Ct. at 2831.

129. *Id.* at 2839. VA. CODE § 19.2-266 (1975) provides in part: "In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

130. 100 S. Ct. at 2832 (Brennan, J., concurring).

131. *Id.* at 2839 (Stewart, J., concurring).

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

133. *Id.* at 2841 (Blackmun, J., concurring). Blackmun stated that it was gratifying "to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett*. No less than 12 times in the primary opinion in that case, the court (albeit in what seems now to have become clear dicta) observed that its Sixth Amendment closure ruling applied to the trial itself." *Id.*

that the first amendment did provide some measure of protection and that the trial judge in *Richmond* clearly abridged the first amendment interests of the public.¹³⁴

Justice Rehnquist authored the only dissent. Relying on his *Gannett* opinion, he rejected any first or sixth amendment public right of access to a pretrial or trial proceeding.¹³⁵ Additionally, he concluded that the Supreme Court has no power to review closure orders of state trial judges.

B. *Implications of Richmond*

The ambiguities in *Richmond* may intensify rather than resolve the fair trial-free press conflict. The Court failed to clarify whether *Gannett's* sixth amendment analysis applied only to pretrial suppression hearings or was equally applicable to actual trials. Chief Justice Burger's opinion, as well as the opinion of Justice Blackmun, stressed that *Gannett* applied only to pretrial proceedings.¹³⁶ Conversely, the opinion of Justice Stewart indicated that *Gannett's* analysis extended to actual trials.¹³⁷ It is unclear, therefore, whether a sixth amendment right of public access to trials exists.

The first amendment analysis is equally ambiguous. The Court concluded that a first amendment right of access to trials did exist. The Court did not resolve, however, whether this first amendment right extended to the pretrial stage of a trial.¹³⁸ Thus, the Court failed to address the protection that a *Gannett* proceeding requires. Recognition of a first amendment right of access poses certain dangers.¹³⁹ A right of access to all government institutions could severely obstruct the administration of justice. Adoption of a first amendment right of access applies only to institutions traditionally open to the public could alleviate this danger. This would provide a public right of access for trials,

134. *Id.* at 2842 (Blackmun, J., concurring).

135. *Id.* at 2843 (Rehnquist, J., dissenting).

136. *Id.* at 2821, 2832.

137. *Id.* at 2839 (Stewart, J., concurring).

138. *Id.* at 2830, n.18.

139. One commentator has suggested that the closure problem could better be solved by exercise of the Supreme Court's supervisory power over federal courts. The Court would be able to invoke a strict standard without straining the language of the sixth amendment or creating a first amendment right that would be difficult to limit. *The Supreme Court—1978 Term, supra* note 97. This solution would not solve cases, such as *Gannett*, that come to the Supreme Court from the state court. One could only hope the state courts would follow the Supreme Court's example in closure cases.

which are traditionally open events,¹⁴⁰ but not for pretrial suppression hearings, which are often closed.¹⁴¹ The Court emphasized that the trial courtroom was a public place, which indicates that areas traditionally closed to the public might not receive equal, or any, first amendment protection.¹⁴² Justice Stevens, however, advocated extending this first amendment protection to private places, such as prisons.¹⁴³ Thus, the scope of the first amendment right of access remains unclear.

The Court also did not formulate an appropriate standard for closure. Clearly the Court intended some balancing between defendant's right to a fair trial and the public's right of access to trials. No first amendment right of access is absolute. Courts must strike a balance between the first amendment right of access and the sixth amendment right to a fair trial. In *Richmond* the Justices weighed several standards in this balance.¹⁴⁴ Chief Justice Burger found that the courtroom must remain open "absent an overriding interest articulated in findings."¹⁴⁵ Justice Stewart found that the first amendment right of access was subject to "reasonable limitations."¹⁴⁶ Justice White found that closure was acceptable only in "narrowly defined circumstances."¹⁴⁷ Justice

140. See note 9 *supra*.

141. See note 71 *supra*.

142. 100 S. Ct. at 2828.

143. *Id.* at 2831.

144. In August of 1978 the American Bar Association changed its standard for closure of pretrial proceedings, adopting the clear and present danger test. The new standard provides:

The presiding officer may close a preliminary hearing . . . including a motion to suppress . . . if: (i) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and (ii) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.

ABA, *supra* note 24, Standard 8-3.2. The standard does not list possible alternatives, but the commentary suggests continuance, severance, change of venue, change of venire, intensive *voir dire*, and jury instructions. *Id.* The predecessor to this standard advocated a less strenuous test for closure. Standard 3.1 provided:

In any preliminary hearing . . . including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference.

ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, *Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press* (1968 draft).

145. 100 S. Ct. at 2830.

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

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

Blackmun decided only that "the First Amendment must provide some measure of protection."¹⁴⁸ Justices Stevens, Brennan, and Marshall did not balance first and sixth amendment interests because in *Richmond* the lower court asserted no justification for closure.¹⁴⁹ Justice Rehnquist did not address the issue because he continued to advocate, as he had in *Gannett*, that no first amendment right of public access exists.¹⁵⁰ Thus, the Justices did not agree on any standard for closure, which leaves trial judges once again to wrestle with this perplexing problem without Court guidance.

Although closure is similar to a prior restraint, the Supreme Court did not advocate the "clear and present danger" test the Court has adopted for prior restraints.¹⁵¹ Arguably, court closure raises problems similar to those inherent in prior restraints. Before a first amendment right to gather information was recognized, some commentators predicted that the closed courtroom would become a "serious backdoor threat to first amendment interests."¹⁵² The closed trial "prevents communication from occurring at all,"¹⁵³ and potentially does more damage than a prior restraint. Under one view, therefore, court closure can be viewed as an indirect prior restraint¹⁵⁴ that prevents free exercise of guaranteed first amendment rights.

There is a critical distinction, however, that makes closure a more tolerable infringement of the first amendment than prior restraints. When a court issues a prior restraint, the press is forbidden to print any information about the trial, regardless of where or how it obtains this information. When the court closes a trial, it denies the press one source of information. The press is free to publish any news that it gathers from alternative sources.

148. *Id.* at 2842 (Blackmun, J., concurring).

149. *Id.* at 2831, 2839 (Stevens, J., concurring).

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

151. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (prior restraint order issued only when intense and pervasive publicity presenting a clear danger that defendant's right to a fair trial could be impinged).

152. STAFF OF THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, REPORT ON FREE PRESS AND FAIR TRIAL, 94th Cong., 2d Sess. (1976). See also Fenner & Koley, *supra* note 34, at 443; Franklin, *Untested Assumptions and Unanswered Questions*, 29 STAN. L. REV. 387, 391 (1977); Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 471-72 (1977); Schmidt & Volner, *Nebraska Press Association: An Open or Shut Decision?*, 29 STAN. L. REV. 529, 530 (1977).

153. See Fenner & Koley, *supra* note 34, at 464.

154. *Id.* at 475.

Justice Blackmun in *Gannett* suggested one test to balance the interests of a defendant and those of the public. Under this test the defendant must prove, (1) a substantial probability of irreparable damage to a fair trial, (2) the lack of alternatives, and (3) a substantial probability that closure will be effective.¹⁵⁵ In addition, the press must have an opportunity to be heard on the closure motion at an appropriate hearing.¹⁵⁶

The availability of alternatives plays an important role in this test. In *Richmond* Chief Justice Burger found that the exclusion of witnesses from the courtroom or the sequestration of the jury would be effective alternatives.¹⁵⁷ Even though these alternatives present difficulties for the trial court, the court found them manageable. The Court gave no further indication of other alternatives or when an alternative would be unmanageable.

In *Richmond* sequestration of the jury was a logical alternative to closure. The anticipated length of the trial was only two days. Thus, jurors would suffer the inconvenience of sequestration for only one night. This inconvenience obviously was not sufficient to sacrifice either the accused's sixth amendment right to a fair trial or the first amendment freedom of the press.¹⁵⁸

V. CONCLUSION

Although *Richmond* is a landmark decision in the first amendment area, it certainly has not resolved the fair trial-free press dilemma. The resolution of a courtroom closure case will remain a perplexing prob-

155. Many commentators believe that it is impossible for the defendant to meet the burden of the clear and present danger test. See Shellow, *The Voice of the Press: Erwin Charles Simants' Efforts to Secure a Fair Trial*, 29 STAN. L. REV. 477, 484 (1977) (unfair trials may be the "price we pay for a free press and a free society"); Note, *supra* note 19, at 1330 (prior restraints "unavailable even in those few cases which require it"); *The Supreme Court—1978 Term*, *supra* note 97, at 72 (clear and present danger test "would rarely allow closure and would therefore inadequately protect the defendant's right to a fair trial").

156. *Id.*

157. 443 U.S. at 441-43.

158. In lengthier, more complex cases, the administration of alternatives could place a heavy burden on the trial judge. The trial judge also must consider that certain alternatives may endanger defendant's interests. The Court has ruled that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Jury sequestration is not always adequate because it can arouse jury hostility toward the defendant. In addition, fewer alternatives are available at pretrial proceedings than at trial.

lem for trial judges. *Gannett* implies that there is no public right to attend criminal pretrial proceedings guaranteed by the sixth amendment. In *Richmond* the Court chose not to decide whether its sixth amendment analysis also applies to actual trial proceedings.

In addition to refusing to clarify its position on the sixth amendment, the *Richmond* Court failed to enunciate adequately its position on the first amendment. *Richmond* holds that the first and fourteenth amendments implicitly prohibit the closure of a criminal trial on defendant's unopposed request when there is no evidence that closure will protect the defendant's right to a fair trial.

Two issues remain unresolved, however, after *Richmond* and *Gannett*. First, the *Richmond* Court failed to formulate an appropriate standard for closure. It is unclear how the Court will balance first amendment protection against the accused's sixth amendment right to a fair trial. A court certainly will require the defendant to demonstrate some danger of prejudice to his right to a fair trial before granting closure. The degree of danger required, however, is difficult to predict. Additionally, the exact role that alternatives to closure will play in this balancing process remains unresolved.

Secondly, the *Richmond* Court failed to apply its analysis to a *Gannett* situation. Thus, it is unclear whether the first amendment prevents closure of criminal pretrial proceedings. Approximately eighty-five percent of all criminal cases are resolved before trial. Thus, if neither the first nor the sixth amendments afford any protection for pretrial proceedings, many of the courtrooms closed after *Gannett* may not be opened by *Richmond*. Clearly, the Court should resolve these issues to ensure full constitutional protection for defendant's fair trial rights and for freedom of the press.

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