

1981

Public Trials and a First Amendment Right of Access: A Presumption of Openness: *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980)

Robert F. Copple

University of Nebraska College of Law, rfc@copplelaw.com

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

Robert F. Copple, *Public Trials and a First Amendment Right of Access: A Presumption of Openness: Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980), 60 Neb. L. Rev. (1981)

Available at: <https://digitalcommons.unl.edu/nlr/vol60/iss1/8>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Public Trials and a First Amendment Right of Access: A Presumption of Openness

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

I. INTRODUCTION

The first amendment¹ freedoms of speech and press, and the sixth amendment² right to a fair trial are considered to occupy a special place in the constitutional hierarchy.³ When these rights collide, rarely is the resulting fair trial-free press conflict easily resolved.⁴ In *Gannett Co. v. DePasquale*,⁵ the Supreme Court added

-
1. U.S. CONST. amend. I reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The first amendment is made applicable to the states by section one of the fourteenth amendment, which reads, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

2. U.S. CONST. amend. VI reads:

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The sixth amendment is made applicable to the states by section one of the fourteenth amendment. The due process clause of the fourteenth amendment has special application in providing for the right to a fair trial. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

3. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); *Bridges v. California*, 314 U.S. 252, 260 (1941).
4. For a discussion of the fair trial-free press conflict, see § III-A of text *infra*.
5. 443 U.S. 368 (1979). For a discussion of *Gannett*, see § III-C of text *infra*.

one more facet to the conflict by holding that the sixth amendment right to a public trial was personal to the accused, and that the public trial right did not confer upon the public a right of access to pretrial suppression hearings. The Court's ambiguous opinion was viewed by some lower courts as allowing the closure of criminal trials, as well as pretrial suppression hearings.⁶

In order to "wash away at least some of the graffiti that marred" *Gannett*,⁷ the Court agreed to hear *Richmond Newspapers, Inc. v. Virginia*⁸ and held that trials are presumptively open to the public. In reaching its decision, the Court recognized a first amendment public right of access to governmental institutions and information. This note will analyze *Richmond*, focusing on its precedential bases, its qualification of *Gannett*, and on the source and scope of the newly recognized public right to access.

II. THE FACTS

In July, 1976, John Paul Stevenson, a Baltimore man,⁹ was convicted of second degree murder¹⁰ in the Circuit Court of Hanover County, Virginia for the 1975 stabbing death of a Hanover County hotel manager.¹¹ However, in October, 1977, the Virginia Supreme Court found that a bloodstained shirt, purportedly belonging to Stevenson, had been improperly admitted into evidence.¹² Consequently, the conviction was reversed, and the case was remanded to the circuit court.¹³ Two subsequent attempts to try Stevenson were no more successful. The second ended in a mistrial in May, 1978, when a juror was excused because of illness.¹⁴ In June, 1978, a third trial also ended in a mistrial because a prospective juror had been influenced by the publicity surrounding the case and, in turn, may have influenced other jurors.¹⁵

At the beginning of the fourth trial in September, 1978, counsel for the defendant entered a motion to close the trial to the public.¹⁶

6. See notes 112-13 & accompanying text *infra*.

7. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2841 (1980) (Blackmun, J., concurring).

8. 100 S. Ct. 2814 (1980).

9. *THE NEWS MEDIA & THE LAW*, Aug.-Sept. 1980, at 2.

10. 100 S. Ct. at 2818.

11. *Id.*; *THE NEWS MEDIA & THE LAW*, Aug.-Sept. 1980, at 2.

12. *Stevenson v. Commonwealth*, 218 Va. 462, 237 S.E.2d 779 (1977).

13. *Id.*

14. 100 S. Ct. at 2818.

15. *Id.*

16. *Id.* at 2819. See *Richmond Newspapers, Inc. v. Virginia*, 5 MEDIA L. REP. 1545 (1979) (full transcript of the subsequent hearing on the closure order); *THE NEWS MEDIA & THE LAW*, Aug.-Sept. 1980, at 2.

The prosecutor had no objection. The court granted the motion without a hearing, and ordered¹⁷ that the courtroom be kept clear of all parties except the witnesses when testifying,¹⁸ thus planting the seed that became *Richmond*. Appellants Timothy Wheeler and Kevin McCarthy, reporters for appellant Richmond Newspapers, Inc., were present during the closure motion but apparently registered no objection at that time. However, later that same day they sought and received a hearing on a motion to vacate the order.¹⁹

Counsel for the appellants²⁰ argued, first, that the closure order was, in substance, the equivalent of a prior restraint and, as a result, the appellants' first amendment rights had been infringed.²¹ Secondly, counsel argued that the defendant's sixth amendment right to a fair trial must be balanced against the public's interest in open criminal proceedings "to ensure that the integrity of the judicial process remains intact."²² Finally, it was argued that before the court could issue a closure order it was constitutionally mandated to consider other less drastic means of protecting the defendant's fair trial right, such as sequestration of the jury.²³

On the other hand, Stevenson's counsel described the problems that had been encountered in trying the defendant in a small town where it was difficult to impanel and maintain an impartial jury.²⁴ He argued that Stevenson's right to a fair trial superseded all other rights and that it was the court's responsibility to insure that right.²⁵ The court denied the motion to vacate the order and stated that in any balancing of rights, the fair trial right of the defendant must be given the greater weight.²⁶ The trial resumed the next day

17. The order was presumably under the authority of VA. CODE § 19.2-266 (1950), which provides in part:

In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

18. 100 S. Ct. at 2819.

19. *Id.*

20. Appellants Wheeler and McCarthy were also excluded from the hearing on the motion to vacate the closure order. The court concluded that the hearing was to be treated as part of the original trial and, therefore, subject to the closure order. 5 MEDIA L. REP. at 1546.

21. *Id.*

22. *Id.* at 1547.

23. *Id.*; 100 S. Ct. at 2819. In making this argument counsel for the appellants cited *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). For a discussion of *Nebraska Press*, see notes 55-66 & accompanying text *infra*.

24. 100 S. Ct. at 2819; 5 MEDIA L. REP. at 1548.

25. 5 MEDIA L. REP. at 1548.

26. The trial judge concluded by stating:

with the public excluded. At the conclusion of the Commonwealth's evidence, the court granted the defense counsel's motion to dismiss the case because of insufficient evidence, and found Stevenson not guilty.²⁷

In September, 1978, immediately following the day-long trial, the appellants petitioned the Virginia Supreme Court for writs of mandamus and prohibition, and filed an appeal from the closure order. The court dismissed the mandamus and prohibition petitions,²⁸ and, finding no reversible error, denied the petition for appeal, citing *Gannett*.²⁹ Appellants next sought review by the United States Supreme Court. The Court granted review under its certiorari jurisdiction³⁰ and then reversed the decision of the Virginia Supreme Court.

III. THE PRECEDENTIAL BASES

Richmond and *Gannett* both address the question of whether there is a public right of access to judicial proceedings. Viewed in this light, they represent the convergence of two lines of Supreme Court decisions. The first line is made up of those decisions which have involved the recurring conflict between the first and sixth amendments—commonly called the fair trial-free press conflict.³¹ In the second line are those cases which have wrestled with the

I'm inclined to agree with [defense counsel] that, if I feel that the rights of the defendant are infringed in any way, [when] he makes the motion to do something and it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion.

Id. at 1548-49. The court also commented that the layout of the courtroom played a part in its decision in that it was "distracting" to the jury. "When we get into our new Court Building people can sit in the audience so the jury can't see them. The rule of the Court may be different under those circumstances" *Id.* at 1548.

After ruling against the motion to vacate the closure order, the court discussed whether it should "put a gag rule" on the counsel for the appellants to prevent him from divulging any information about the hearing to his clients. The court concluded that such a gag order would be purposeless because if the appellants are not allowed into court the next day, they will know what occurred in the hearing. *Id.* at 1549.

27. 100 S. Ct. at 2820; *THE NEWS MEDIA & THE LAW*, Aug.-Sept. 1980, at 2.

28. 100 S. Ct. at 2820.

29. *Id.*; *THE NEWS MEDIA & THE LAW*, Aug.-Sept. 1980, at 2.

30. The appellants sought review in the United States Supreme Court under both appellate and certiorari jurisdiction. However, appellate jurisdiction was denied because the appellants had not explicitly challenged the validity of the closure statute, VA. CODE § 19.2-266 (1950), in the state courts. 100 S. Ct. at 2820 n.4.

31. See generally Stephenson, *Fair Trial-Free Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39 (1979); Wright, *Fair Trial-Free Press*, 38 F.R.D. 435 (1965).

question of a public right of access to governmental institutions and information. In order to properly analyze the *Richmond* decision and gauge its legal impact, it is first necessary to examine these two lines of constitutional thought.³²

A. The Fair Trial-Free Press Conflict

The conflicting functions of the first and sixth amendments often result in an adversary relationship.³³ The difficulty of resolving this conflict is increased because the freedom of speech and press, and the right to a fair trial are said to occupy preferred positions in a constitutional hierarchy.³⁴ As Justice Black stated, "free

32. While a brief discussion of the fair trial-free press conflict and the public right of access serves as a background for a study of the *Richmond* decision, a more comprehensive analysis of either line of cases is beyond the scope of this note. The two issues have been the subjects of a voluminous amount of material. For a discussion of the fair trial-free press conflict, see Kaplan, *Free Press/Fair Trial Rights in Conflict: Freedom of the Press and the Rights of the Individual*, 29 OKLA. L. REV. 361 (1976); Stephenson, *supra* note 31; Wright, *supra* note 31; Note, *The Free Press-Fair Trial Dilemma: New Dimensions in a Continuing Struggle*, 6 HOFSTRA L. REV. 1013 (1978). For a discussion of the question of a public right of access, see Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974); Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977).

33. Although still adversarial, the relationship has sometimes been viewed as symbiotic. For example, in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court observed:

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Id. at 350.

34. The principle that the rights enumerated by the Bill of Rights occupy a preferred position was first announced by the Court in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), where Justice Stone stated: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 152 n.4 (citations omitted).

A few years later the "preferred position" language was applied explicitly to the freedoms of press, speech and religion in *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). Although not the subject of a specific decision, the Court has implicitly recognized the right to a fair trial as a fundamental right. *Cf.* *Douglas v. California*, 372 U.S. 353 (1963) (right of an indigent to counsel). Justice Frankfurter criticized the use of the "preferred position" terminology in *Kovacs v. Cooper*, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring). For a more detailed discussion of the first amendment as a preferred right, see Van

speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."³⁵

It has been suggested that the conflict was either planned by the framers of the Constitution or, at least, represented such a natural and inherent tension that its constitutional resolution was not possible.³⁶ Nevertheless, whatever the source of the conflict, it has often been the responsibility of the Supreme Court to make a choice between a commitment to an "uninhibited, robust, and wide open"³⁷ debate of public issues, and a commitment to a criminal process in which "conclusions . . . reached in a case will be induced only by evidence and argument in open court."³⁸ The Court's decisions have done little to settle the conflict and have, instead, resulted in a state of law which resembles an ill-defined and often-violated truce.

The fair trial-free press conflict cases are connected by a common concern that publicity may endanger the defendant's sixth amendment right to a fair trial.³⁹ The question usually arises within the context of pretrial publicity and its effect on the impartiality of potential jurors. In this context, the concern is that jurors or potential jurors will be prejudiced by pretrial publicity and will be unable to render an impartial verdict based only on the evidence presented at trial.⁴⁰ However, both publicity during the

Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 *HASTINGS L.J.* 761 (1977).

35. *Bridges v. California*, 314 U.S. 252, 260 (1941).

36. "[I]f the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

37. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

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

39. It is unclear whether publicity really does have a prejudicial effect on jurors and potential jurors. Results of a number of empirical studies of the problem do not dictate the conclusion that no prejudice results from publication. See Kline & Jess, *Prejudicial Publicity: Its Effect on Law School Mock Juries*, 43 *JOURNALISM Q.* 113 (1966); Riley, *Pretrial Publicity: A Field Study*, 50 *JOURNALISM Q.* 17 (1973); Simon, *Murder, Juries, and the Press*, *TRANS-ACTION*, May-June 1966, at 40; Tans & Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 *JOURNALISM Q.* 647 (1966). For a general discussion of the problem, see Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decision-making*, 86 *HARV. L. REV.* 386 (1972); Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial; A Plea for Reform*, 38 *S. CAL. L. REV.* 672 (1965).

40. *Irvin v. Dowd*, 366 U.S. 717 (1961). In *Irvin*, the Supreme Court also noted that "the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, [is not sufficient to] rebut the presump-

trial⁴¹ and methods of news gathering at trial⁴² have been found to have a prejudicial effect on the defendant's right to a fair trial.

The Supreme Court's current interest in the problems presented by publicity began in 1950.⁴³ Since then, the Court has reversed or set aside a number of criminal convictions which possibly were tainted by prejudicial publicity.⁴⁴ Thus, a trial judge who is presented with a question of prejudicial publicity will find himself within the eye of the fair trial-free press hurricane. An improper balancing of first and sixth amendment rights can sweep his decision into reversal. In achieving a proper constitutional balance, three questions must be asked:⁴⁵ (1) How far must the trial court go in order to protect the defendant's fair trial rights? (2) What procedures are available to neutralize the effect of the prejudicial publicity? (3) How far can the trial court go in protecting the defendant's fair trial right without infringing on the first amendment freedoms of the press and public?

In *Sheppard v. Maxwell*,⁴⁶ the Supreme Court attempted to answer the first two questions. Dr. Sam Sheppard was convicted of murdering his wife after a trial which the Court described as having a "carnival atmosphere."⁴⁷ The murder apparently had

tion of a prospective juror's impartiality . . ." [To require complete impartiality] would be to establish an impossible standard." *Id.* at 723.

41. *E.g.*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966). It should be noted that in *Richmond* it was the fear of the effect of prejudicial publicity during trial which motivated the closure order. See note 24 & accompanying text *supra*.
42. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965). In *Estes*, the Court held, in a five-to-four decision, that the presence of television cameras in the courtroom to record the trial proceedings for later broadcast was deemed to have prejudiced the defendant's fair trial right. The Court stated: "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.* at 542-43.
43. See *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950). In *Baltimore Radio*, Justice Frankfurter filed a separate opinion to the Court's denial of certiorari to comment on the presence of pretrial publicity in the case.
44. See, *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Marshall v. United States*, 360 U.S. 310 (1959); *Shepherd v. Florida*, 341 U.S. 50 (1951) (Jackson, J., concurring).
45. As part of the analysis, the trial judge will also want to pinpoint the type of publicity in question (pretrial, during trial, or methods of news gathering) in order to determine the protective procedures that are available and that might be effective.
46. 384 U.S. 333 (1966). For a more detailed discussion of *Sheppard*, see Note, *Prejudicial Publicity in Criminal Proceedings*, 45 N.C. L. REV. 183 (1966); Note, *Sheppard v. Maxwell—Duty of Trial Judge to Protect Accused From Prejudice*, 62 NW. U. L. REV. 89 (1967).
47. 384 U.S. at 358. The Court described the situation, stating:
The fact is that bedlam reigned at the courthouse during the trial and

shocked the community and, as a result, Sheppard's conviction was marred by all three types of prejudicial publicity (*i.e.*, pretrial, during trial, and methods of news gathering).

In reversing Sheppard's conviction, the Supreme Court held that the trial judge had failed to properly protect the defendant, jurors, and witnesses from the intensity of publicity.⁴⁸ The Court stated that the trial judge had at his disposal more than adequate procedural safeguards to protect the defendant's fair trial right.⁴⁹ These procedures included: (1) intensive *voir dire* examination to assure the presumption of juror impartiality had not been eroded by pretrial publicity; (2) sequestration of the jury; (3) control of members of the press within the courtroom by limiting their number and controlling their conduct; (4) proscribing extrajudicial statements by police, witnesses, court officials and counsel;⁵⁰ (5) continuance; and (6) change of venue. In conclusion, the Court stated that "reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."⁵¹

In the subsequent ten years, the *Sheppard* mandate that "[t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences"⁵² was heartily followed by trial courts.⁵³ Trial judges made increasing use of protective orders to neutralize the effect of prejudicial pub-

newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. . . . Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial.

Id. at 355.

48. *Id.*

49. *Id.* at 357-63.

50. The Supreme Court affirmed the power of trial judges to restrain statements by counsel, court officials, witnesses and defendants in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976); *id.* at 601 n.27 (Brennan, J., concurring). However, a criminal defendant may have a strong interest in gaining media attention to counteract the stigma of guilt produced by a criminal charge. "A bare denial and a possible reminder that a charged person is presumed to be innocent until proved guilty is often insufficient to balance the scales." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). As a result, the propriety of orders restraining statements by a defendant and his counsel is subject to question. See Note, *Silence Orders—Preserving Political Expression by Defendants and their Lawyers*, 6 HARV. C.R.-C.L. L. REV. 595 (1971).

51. 384 U.S. at 363.

52. *Id.*

53. For a discussion of protective orders prior to *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), see Landau, *Fair Trial and Free Press: A Due Process Proposal—The Challenge of the Communications Media*, 62 A.B.A. J. 55 (1976); Roney, *The Bar Answers the Challenge*, 62 A.B.A. J. 60 (1976); Comment, *Sequestration: A Possible Solution to the Free Press-Fair Trial Di-*

licity on the defendant's fair trial right. However, during that period the constitutional outer limits of the protective order remained undefined.⁵⁴ The Supreme Court had not yet answered the question of how far a protective order could reach before it infringed upon the first amendment freedoms of the press and public.

*Nebraska Press Association v. Stuart*⁵⁵ represented the first time the Supreme Court squarely confronted the conflict between the first and sixth amendments.⁵⁶ In *Nebraska Press*, the Court examined the constitutionality of a protective order which prohibited the press from publishing the existence or nature of any confessions or other facts "strongly implicative" of an accused mass murderer.⁵⁷ The order was to stay in effect until the jury was impaneled.⁵⁸ The crime, which occurred in the small town of Sutherland, Nebraska, soon drew nationwide publicity.⁵⁹

The Court unanimously held the order invalid. The opinion of the Court,⁶⁰ written by Chief Justice Burger, characterized the order as a prior restraint,⁶¹ which is "the most serious and the least tolerable infringement on First Amendment rights."⁶² While stating that a prior restraint only postpones publication, the Chief Justice recognized that such a postponement can destroy the timeliness required by the news media, and, in essence, freezes first amendment freedoms at least for the time.⁶³

In determining the validity of the order, the Chief Justice

lemma, 23 AM. U. L. REV. 923 (1974); Comment, *Gagging the Press in Criminal Trials*, 10 HARV. C.R.-C.L. L. REV. 608 (1975).

54. *E.g.*, *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1308 (1974).

55. 427 U.S. 539 (1976). For a more detailed discussion of *Nebraska Press*, see *Symposium—Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 383 (1977); Larson, *Free Press v. Fair Trial in Nebraska: A Position Paper*, 55 NEB. L. REV. 543 (1976).

56. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 625 (1978).

57. 427 U.S. at 541.

58. *Id.* at 543.

59. *Id.* at 542.

60. The decision consisted of five separate opinions. Justices White, Blackmun, Powell and Rehnquist joined the Chief Justice in the majority opinion. Justice Brennan (joined by Justices Stewart and Marshall) and Justices White, Powell, and Stevens all wrote separate concurring opinions.

61. Basically, a prior restraint is a governmental order which restricts or prohibits speech prior to its publication. For a discussion of prior restraints, remedies to prior restraints, and prior restraints as distinguished from subsequent punishments, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 503-12 (1970); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 741-48 (1978); L. TRIBE, *supra* note 56, at 724-32; Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 543-44 (1970).

62. 427 U.S. at 559.

63. *Id.* at 559-61.

presented a test which, within the context of the evidence before the trial judge, examined: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."⁶⁴

While not foreclosing the possibility that circumstances could occur which would justify a prior restraint, the Chief Justice emphasized that "the barriers to prior restraint remain high and the presumption against its use continues intact."⁶⁵ Despite the Chief Justice' statement that prior restraints could conceivably be constitutionally acceptable, it has been suggested that *Nebraska Press* implicitly holds that "prior orders restraining the publication of news prejudicial to a criminal defendant are never permissible."⁶⁶

The combination of *Sheppard* and *Nebraska Press* help to de-

64. *Id.* at 562.

65. *Id.* at 570.

66. L. TRIBE, *supra* note 56, at 627. In coming to this conclusion, Professor Tribe reasoned that:

Given the inevitably speculative nature of any "finding" that such alternatives would have failed, the Court's admonition must mean that the alternatives must at least be tried before a restraint on publication may issue. And the Supreme Court's apparent confidence that the alternatives would prove adequate suggests that the Court has gone further and announced a virtual bar to prior restraints on reporting of news about crime.

Id. (footnotes omitted). See *Prettyman, Nebraska Press Association v. Stuart: Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?*, 20 ST. LOUIS U. L.J. 654 (1976).

A careful reading of the separate opinions in *Nebraska Press* reveals that in the future, there may be five Justices willing to hold that prior restraints directed at the publication of news prejudicial to a criminal defendant are never permissible. Justice Brennan, joined by Justices Stewart and Marshall, took an absolutist position that "prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing" the defendant's fair trial right. 427 U.S. at 572 (Brennan, J., concurring, joined by Stewart, J. & Marshall, J.). Justice Stevens generally subscribed to Justice Brennan's views. *Id.* at 617 (Stevens, J., concurring). And Justice White, although joining Chief Justice Burger's opinion, emphasized that he had a "grave doubt. . . whether orders with respect to the press such as were entered in this case would ever be justifiable." *Id.* at 570-71 (White, J., concurring). See L. TRIBE, *supra* note 56, at 627 n.25.

Justice Brennan listed several "practical reasons" supporting his position against a system which would allow the use of prior restraints. *Id.* at 604-09 (Brennan, J., concurring, joined by Stewart, J. & Marshall, J.). First, such a system would place judges "into censorship roles that are simply inappropriate and impermissible under the First Amendment." *Id.* at 607. Second, in such a role, judges might be inclined to restrain publication of information which reflected on "their competence, integrity, or general performance on the bench." *Id.* Third, prior restraints are difficult to challenge, and that could lead to overuse. *Id.* at 607-08. Finally, the burden to challenge prior

fine the responsibilities and limitations imposed upon a trial judge in dealing with a fair trial-free press conflict. However, the fair trial-free press cases do not provide a complete basis for the examination of a closure order.⁶⁷ Although a closure order arises within the context of the conflict, the real substance of the closure problem lies within the Court's "right of access" decisions.

B. A Question of Access

The Court has discussed the existence of a right of access in at least three different theoretical contexts. First, "right of access" has been used to describe a right to *receive* information from a willing source.⁶⁸ Secondly, the phrase has been defined as a right of access to a forum in order to *transmit* a message.⁶⁹ Finally, "right of access," as discussed in *Gannett* and *Richmond*, has been used to describe a right to *gather* information, particularly from a governmental source.

Much of the present controversy concerning the existence of a public right of access to governmental institutions or processes began with *Branzburg v. Hayes*.⁷⁰ The Court in *Branzburg* rejected the claim of a reporter's privilege to protect confidential sources and held that "newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation."⁷¹ In support of the principle that the

restraints would be on the press. Because of the difficulty involved, many improper prior restraints would go unchallenged. *Id.* at 610-11.

It is arguable that all of Justice Brennan's practical arguments against prior restraints could also apply to court closures.

67. For a discussion distinguishing prior restraints from closure orders, see § IV-A of text *infra*.

68. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969). See also *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (the Court held unconstitutional a statute permitting the government to require that the addressee of unrequested "communist political propaganda" affirmatively request postal delivery in writing).

69. See *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367 (1969), where the Court upheld the Federal Communications Commission's "fairness doctrine" which requires broadcasters to allow time to reply to personal attacks and political editorials. But see *Miami Herald Publishing Co., Inc. v. Tornillo*, 418 U.S. 241 (1974), where the Court struck down a state statute that required newspaper publishers to allow free reply space to political candidates that they had attacked in the newspaper.

70. 408 U.S. 665 (1972). For a more in-depth discussion of *Branzburg*, see Comment, *Has Branzburg Buried the Underground Press?*, 8 HARV. C.R.-C.L. L. REV. 181 (1973); Note, *No Testimonial Privilege for Newsmen*, 51 N.C. L. REV. 562 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 137 (1972).

71. 408 U.S. at 685.

press and the public are equal under the law,⁷² the Court noted that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."⁷³ Finally, in what appeared to be an offhand and contradictory remark, the Court added that "news gathering is not without its First Amendment protections"⁷⁴

The precise holding of *Branzburg*, which rejected a testimonial privilege for reporters, has been substantially eroded by subsequent lower court decisions⁷⁵ and state shield laws.⁷⁶ Moreover, although the case did not squarely address the question of a public right of access to governmental institutions and processes, its assertions have fueled the continued debate over the existence of the right. Those assertions were that: (1) the press and public are equal; (2) the first amendment does not guarantee the press a constitutional right of access to information not available to the public; and (3) news gathering may be subject to some first amendment protection.

72. In terms of a theory of the first amendment, there is sound reasoning for the principle that the press and public are equal. To do otherwise would force the development of arbitrary distinctions which could eventually result in different degrees of first amendment rights for the metropolitan newspaper publisher and for the lonely pamphleteer. *See id.* at 704.

However, for a particularly offensive application of this principle, see *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), where the Supreme Court held that the first and fourth amendments permit searches of press offices pursuant to a valid warrant and do not require use of the less intrusive subpoena duces tecum where practicable. In *Zurcher*, the newspaper was not suspected of committing a crime, but of having within its possession photographic evidence of the identity of demonstrators who had beaten police officers. *Id.* at 551.

73. 408 U.S. at 684.

74. *Id.* at 707.

75. *See Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (identity of a confidential source sought and refused); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975) (disclosure of unpublished background materials sought and refused); *Democratic Nat'l Comm. v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973) (disclosure of unpublished background materials sought and refused). *But see Lewis v. United States*, 501 F.2d 418 (9th Cir. 1974), *cert. denied*, 420 U.S. 913 (1975) (rejected claim of privilege by radio station manager to withhold original document of Weather Underground and tape recording of Symbionese Liberation Army from federal grand jury). For further discussion of the judicial development of a reporter's privilege, see Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829 (1974).

76. *See Note, Reporter's Privilege—Guardian of the People's Right to Know?*, 11 NEW ENG. L. REV. 405 (1976).

In *Pell v. Procunier*⁷⁷ and *Saxbe v. Washington Post Co.*,⁷⁸ the Supreme Court again tangentially addressed the issue of a first amendment right of access. In opinions authored by Justice Stewart,⁷⁹ the Court rejected claims by the press that it has a right of access to interview specific individual inmates and that prison regulations which prohibited such interviews infringed on the petitioner's first amendment rights.⁸⁰ The reasoning in both cases was substantially similar.⁸¹ The Court based its holdings, in part, on the fact that the prison policies in question allowed the press, under prison supervision and restrictions, to observe prison conditions and to carry on limited interviews with random prisoners. This, the Court said, allowed the press to fulfill its watchdog function over public institutions.⁸² More importantly, in both cases the Court reemphasized the *Branzburg* reasoning that the press has no greater right of access than that of the general public.⁸³ How-

77. 417 U.S. 817 (1974). For further discussion of *Pell* and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), see Note, *Prison Regulation Prohibiting Interviews Between Newsmen and Inmates Held Constitutional*, 60 CORNELL L. REV. 446 (1975); Note, *A Giant Step Backwards: The Supreme Court Speaks Out on Prisoners' First Amendment Rights*, 70 NW. U. L. REV. 352 (1975).

78. 417 U.S. 843 (1974).

79. In *Pell*, Justice Stewart was joined by Chief Justice Burger and Justices White, Blackmun and Rehnquist. Justice Powell filed a separate opinion in which he concurred with the majority that the prison regulations had not infringed on the first amendment rights of the inmates. However, he dissented on the question of a right of access for the press, stating: "I would hold that California's absolute ban against prisoner-press interviews impermissibly restrains the ability of the press to perform its constitutionally established function of informing the people on the conduct of their government." 417 U.S. at 835 (Powell, J., dissenting in part). Justice Douglas, joined by Justices Brennan and Marshall, filed a dissenting opinion.

In *Saxbe*, Justices Stewart, White, Blackmun, Rehnquist, and Chief Justice Burger again made up the majority. Justice Douglas dissented and simply referred to his dissent in *Pell*. Justice Powell filed a strong dissent and was joined by Justices Brennan and Marshall.

80. *Pell* challenged § 415.071 of the California Department of Corrections Manual (1971) which reads: "Press and other media interviews with specific individual inmates will not be permitted." 417 U.S. at 819. In *Saxbe*, the Washington Post challenged Policy Statement 1220.1A ¶ 4b(6) of the Federal Bureau of Prisons (1972) which reads:

Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

417 U.S. at 844 n.1.

81. However, in *Pell* the Court addressed the additional question of the constitutional right of inmates to seek individual interviews with members of the press. 417 U.S. at 821-28.

82. *Id.* at 830-31; *Saxbe v. Washington Post Co.*, 417 U.S. at 847-49.

83. *Pell v. Procunier*, 417 U.S. at 834; *Saxbe v. Washington Post Co.*, 417 U.S. 849-50.

ever, in *Pell*, the Court once again fueled the access debate by acknowledging that "news gathering is not without its First Amendment protections" ⁸⁴

Finally, in *Houchins v. KQED, Inc.*,⁸⁵ the Supreme Court squarely confronted the issue of whether the public and press have an affirmative right of access to information controlled by the government. In a four-to-three vote⁸⁶ the Court reversed a lower court injunction which ordered prison officials to grant the press access to certain prison facilities which had previously been closed to public and press inspection. However, there was no clear-cut majority holding. Three members of the plurality found no first amendment right of access to information or sources of information within the government's control.⁸⁷ Justice Stewart concurred on somewhat narrower grounds, restating his argument in *Pell* and *Saxbe* that the press has no right of access "superior to that of the public generally."⁸⁸

The dissenters distinguished *Pell* and *Saxbe* as cases where substantial access had already existed.⁸⁹ However, *Houchins* demonstrated "[a]n official prison policy [of concealment] by arbitrarily cutting off the flow of information at its source" ⁹⁰ The dissenters agreed with the majority that the press had no greater right of access than the public, but concluded that "[w]ithout some protection for the acquisition of information about the operation of public institutions . . . the process of self-governance contemplated by the Framers would be stripped of its substance."⁹¹

After *Houchins*, the Court's theory of a right of access was best summarized by an extrajudicial statement by Justice Stewart where he concluded:

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 par-

84. 417 U.S. at 833 (quoting *Branzburg v. Hayes*, 408 U.S. at 707).

85. 438 U.S. 1 (1978). For further discussion of *Houchins* and the issue of a right to access, see Cairney, *Sunlight in the County Jail: Houchins v. KQED, Inc. and Constitutional Protection For Newsgathering*, 6 HASTINGS CONST. L.Q. 933 (1979).

86. Chief Justice Burger was joined by Justices White and Rehnquist in the judgment of the Court. Justice Stewart filed a separate opinion concurring in the judgment. Justice Stevens, joined by Justices Brennan and Powell, filed the dissenting opinion. Justices Marshall and Blackmun took no part in the decision.

87. 438 U.S. at 9.

88. *Id.* at 16 (Stewart, J., concurring). Justice Stewart modified this statement somewhat by suggesting that the concept of equal access must be flexible enough to "accommodate the practical distinctions between the press and the general public." *Id.* at 16.

89. *Id.* at 24-30 (Stevens, J., dissenting, joined by Brennan, J. & Powell, J.).

90. *Id.* at 38.

91. *Id.* at 32.

ticular government information, or to require openness from the bureaucracy. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution.⁹²

Justice Powell, in his dissent in *Saxbe*, quite correctly pointed out the implications of this view by stating:

From all that appears in the Court's opinion, one would think that any governmental restriction on access to information, no matter how severe, would be constitutionally acceptable to the majority so long as it does not single out the media for special disabilities not applicable to the public at large.⁹³

In conclusion, the Court's theory of a right of access for the public and press might be best summarized as one of equal treatment rather than equal rights.⁹⁴

C. *Gannett Co. v. DePasquale*

*Gannett Co. v. DePasquale*⁹⁵ represents the first time the Supreme Court addressed the question of access within the context of a fair trial-free press conflict. In a five-to-four decision,⁹⁶ the Court held that the sixth amendment right to a public trial is personal to the accused and does not give the public or the press a right of access to a pretrial suppression hearing, if the accused, the prosecutor and the trial judge all agree that the proceeding should be closed in order to assure a fair trial.⁹⁷ In reaching its decision, the Court cited *Sheppard* for the proposition that "a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity,"⁹⁸ and that pretrial suppression hearings present special risks of unfairness.⁹⁹

92. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) (footnote omitted) (excerpted from an address delivered on November 2, 1974, at Yale Law School).

93. 417 U.S. at 857 (Powell, J., dissenting).

94. P. Tosh, *Equal Rights*, "Equal Rights," Side 2 BL 643740 (CBS 1977).

95. 443 U.S. 368 (1979).

96. *Id.* The majority consisted of Justice Stewart, joined by Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Justice Blackmun, joined by Justices Brennan, White and Marshall, concurred in part and dissented in part. *Id.* at 406.

97. *Id.* at 394. However, the Court emphasized that "[w]hile the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial." *Id.* at 382.

98. 443 U.S. at 378.

99. *Id.* The Court stated that the danger that prejudice will result from publication of a pretrial suppression hearing is particularly acute since the purpose of a suppression hearing is to screen inadmissible evidence which will not be presented at trial. Therefore, the publication of inadmissible evidence could

In concluding that the sixth amendment guarantee of a public trial is personal to the accused, the Court acknowledged that "there is a strong societal interest in public trials."¹⁰⁰ However, that interest is not elevated to constitutional stature. Therefore, the sixth amendment does not provide a public right of access.¹⁰¹ The Court added that any public interest is fully protected by the "participants in the litigation."¹⁰² The Court declined to decide whether the public had a first amendment right of access to criminal proceedings,¹⁰³ stating that even if such a right existed, it was given "all appropriate deference" by the trial court.¹⁰⁴

Justice Powell was the only member of either the majority or dissent to recognize a first amendment right of public access. Although concurring with the majority, he would have held that the press, as an agent of the public, has a first amendment right to be present at the hearing.¹⁰⁵ Nevertheless, he added that the right of access is not absolute and is subject to limitation by the defendant's right to a fair trial.¹⁰⁶

The scope of *Gannett* immediately became the subject of widespread confusion among both journalists¹⁰⁷ and commentators.¹⁰⁸

have a prejudicial effect on potential jurors. However, the Court noted that "[a]fter the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means." *Id.*

100. *Id.* at 383.

101. *Id.*

102. *Id.* However, Justice Blackmun, in his dissent, suggested that the public's interest needs to be protected from the trial participants. *Id.* at 438 (Blackmun, J., dissenting in part).

103. 443 U.S. at 392.

104. *Id.* It should be noted that the trial court's treatment of the closure order and subsequent hearing on the motion to vacate the order was substantially similar in *Gannett* and *Richmond*. In both cases the defendant, prosecutor and trial judge agreed to close the proceeding, no objection was made by the press at the time of the closure motion and order, and a subsequent hearing was granted to argue the validity of the closure order. *Id.* at 375-77. For a discussion of the procedure in *Richmond*, see notes 17-19 & accompanying text *supra*.

105. 443 U.S. at 397-98 (Powell, J., concurring).

106. *Id.* at 398.

107. See *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2841 n.2 (1980) (Blackmun, J., concurring).

108. For a sampling of the reaction to *Gannett*, see Borow & Kruth, *Closed Preliminary Hearings: The Constitutionality of Penal Code Section 868 in the Aftermath of Gannett v. DePasquale*, 55 CAL. ST. B. J. 18 (1980); Densford, *Courthouse Doors Slam Shut Behind Gannett*, NAT'L L. J., Aug. 13, 1979, at 8; Goodale, *Gannett Means What It Says; But Who Knows What It Says?*, NAT'L L. J., Oct. 15, 1979, at 20; Keefe, *The Boner Called Gannett*, 66 A.B.A. J. 227 (1980); Paul, *Gannett v. DePasquale—What To Do About It?*, COM. L. 21 (1979); Stephenson, *supra* note 31; Comment, *Public Access to Pretrial Criminal Hearings: The Use of Closure Orders After Gannett v. DePasquale*, 44 ALB. L. REV. 455 (1980); Note, *A Right of Access to a Criminal Courtroom*:

The controversy centered around the question of whether the decision was limited to pretrial suppression hearings or also applied to other court proceedings, including trials. The confusion was understandable. *Gannett* can only be described as ambiguous. This ambiguity resulted from the fact that "[n]o less than 12 times in the primary opinion . . . the Court . . . observed that its Sixth Amendment closure ruling applied to the trial itself."¹⁰⁹ The puzzle of interpretation was compounded by the Chief Justice who explicitly stated that in his view the decision only applied to pretrial suppression hearings, yet nonetheless joined the Court's opinion.¹¹⁰ In subsequent extrajudicial statements, several of the participating Justices made it clear that they still did not agree on just what the Court had decided.¹¹¹

Considering this ambiguity, it is not surprising that the lower courts began closing trials as well as pretrial suppression hearings.¹¹² The lower courts simply had reacted as Justice Blackmun had predicted.¹¹³ However, this rash of closure orders required the Court to once again examine the question of a public right of access to judicial proceedings.

IV. ANALYSIS

Like its predecessor in *Gannett*, the plurality opinion in *Richmond*¹¹⁴ presents a problem of interpretation which turns on subtle semantics. The majority¹¹⁵ unquestionably held that "a presumption of openness inheres in the very nature of a criminal

Gannett Co. v. DePasquale, 51 COLO. L. REV. 425 (1980); *The Supreme Court*, 1978 Term, 93 HARV. L. REV. 1, 60 (1979).

109. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2841 (1980) (Blackmun, J., concurring).

110. 443 U.S. at 394-97 (Burger, C.J., concurring).

111. THE NEWS MEDIA & THE LAW, Nov.-Dec. 1979, at 5.

112. For a comprehensive list of court closures and closure motions see Paul, *supra* note 108, at 40-70; THE NEWS MEDIA & THE LAW, Aug.-Sept. 1980, at 4.

113. "Under this analysis, the defendant—so long as the prosecution and the judge agree—may surely close a full trial on the merits as well as a pretrial suppression hearing." 443 U.S. at 438 (Blackmun, J., dissenting in part).

114. Since the *Stevenson* trial had long since ended, there was a suggestion that the case was moot. However, as in *Gannett* and *Nebraska Press*, the dispute was deemed "capable of repetition, yet evading review" and, therefore, not moot. 100 S. Ct. at 2820-21 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

115. In *Richmond*, there were five separate opinions and two concurrences filed. The four separate majority opinions were authored by: the Chief Justice (joined by Justices White and Stevens), *id.* at 2818, Justice Brennan (joined by Justice Marshall), *id.* at 2832, and Justices Stewart, *id.* at 2839, and Blackmun, *id.* at 2841. Justice Rehnquist filed the only dissenting opinion. *Id.* at 2842. Justice Powell, a former Richmond, Virginia resident, took no part in the decision. *Id.* at 2818.

trial . . . ”¹¹⁶ that, without more, the agreement of the trial participants is not enough to justify closure, and that the public and press have a first amendment right of access to criminal trials.¹¹⁷ The majority also basically agreed that *Gannett* held only that “the Sixth Amendment’s guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a pretrial suppression hearing,”¹¹⁸ leaving open the question of whether a right of access might be guaranteed by another constitutional provision. However, after this initial consonance, opinions of the plurality present a myriad of rationales and qualifications as to the source and the scope of the public right of access to criminal trials.

A. The Characterization of the Issue

In *Richmond*, the Court was correct in characterizing the closure of a trial as a question of access within the fair trial-free press conflict rather than merely treating the issue as an extension of *Sheppard* and *Nebraska Press*. Although the Court did not specifically state its reasons for this characterization, the point is worth discussing in order to demonstrate the precedential pressures

116. 100 S. Ct. at 2825 (Burger, C.J., joined by White, J. & Stevens, J.).

117. Although not directly at issue, the majority generally agreed that the presumption of openness also applied to civil trials. 100 S. Ct. at 2829 n.17.

118. *Id.* at 2821 (Burger, C.J., joined by White, J. & Stevens, J.). Even so, the scope of *Gannett* is not entirely clear. Justice Stewart, in his separate opinion in *Richmond* stated that the sixth amendment “does not confer . . . any right of access to a trial.” *Id.* at 2839 (Stewart, J., concurring) (emphasis added). However, Chief Justice Burger, and Justices White, Stevens, Brennan, Marshall and Blackmun adopted or concurred with the limitations of *Gannett* to pretrial suppression hearings.

Justices White and Blackmun, apparently refusing to lay down the swords of their dissent in *Gannett*, attempted to strike one more blow in *Richmond*. Justice White stated his view in a succinct concurrence with Chief Justice Burger’s opinion:

This case would have been unnecessary had *Gannett Co. v. DePasquale* . . . construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus requiring that the First Amendment issue involved here be addressed. On this issue, I concur in the opinion of
THE CHIEF JUSTICE.

Id. at 2830 (White, J., concurring) (citations omitted).

Justice Blackmun, in his separate opinion, stated that he still believes that *Gannett* was incorrectly decided and remains “convinced that the right to a public trial is to be found where the Constitution explicitly placed it—in the Sixth Amendment.” *Id.* at 2842 (Blackmun, J.). However, after reconciling himself to the fact that the scope of the sixth amendment had been defined, he concluded “as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial.” *Id.*

which helped to shape the Court's decision. The closure of a court proceeding, as in *Richmond* and *Gannett*, seems to present a novel question which falls outside of the scope of the Court's previous fair trial-free press cases. The use of closure to protect a defendant's right to a fair trial¹¹⁹ is neither listed among the *Sheppard* alternatives nor specifically proscribed by the *Nebraska Press* limitations on prior restraints.¹²⁰

At first glance, a court closure may appear to be analogous to a prior restraint. They are similar in effect, and both are *ex parte* orders which prevent or postpone the publication of news concerning a court proceeding. However, upon closer examination, there appear to be three major distinctions between prior restraints and court closures. First, a prior restraint may be variable in its scope, while a closure order is limited to that proceeding or proceedings covered in the order. More specifically, a prior restraint, such as the order at issue in *Nebraska Press*,¹²¹ may apply to information received both in and out of the proceeding. A closure order, on the other hand, only limits publication of information presented within the proceeding.¹²²

In addition, the two orders differ, from the news media's point of view, in the probable benefits of their violation. A prior restraint is an order not to publish, while a closure order is an order not to attend. Since a prior restraint allows attendance at a court proceeding, the press, for the sake of reporting the news, may make an informed choice to violate the order, publish the restricted information, and, thereby, face a possible contempt citation.¹²³ A clo-

119. The lower courts have approved limited closures for reasons other than protecting a criminal defendant's right to a fair trial. See, e.g., *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir. 1975), *cert. denied*, 423 U.S. 937 (1975) (protecting young complaining witness in a rape case); *Stamcarbon v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974) (avoiding disclosure of corporate trade secrets); *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972) (preserving confidentiality of skyjacker profile); *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959) (protecting identity of an undercover agent).

120. However, in *Nebraska Press*, Chief Justice Burger did imply that closure of a preliminary hearing possibly was an acceptable alternative. He stated: "The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law . . ." 427 U.S. at 568.

121. See note 57 & accompanying text *supra*.

122. However, what constitutes the proceeding appears to be somewhat within the discretion of the trial judge. For example, the closure order which was the subject of *Richmond* was deemed by the trial judge to encompass the hearing on the motion to vacate the closure order. See note 20 *supra*.

123. For a discussion of contempt citations arising from the violation of a prior restraint, see Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 YALE L.J. 342 (1977).

sure order, however, eliminates any choice.¹²⁴ Practically speaking, any attempt to invade a closed court probably would be fruitless in terms of news gathering. The trial simply would stop until the invader was cited for contempt and ejected.

The final and most important distinction between a prior restraint and a closure order is in the methods by which they restrict the publication of the news. As mentioned above, a prior restraint restricts the press from publishing information presented at trial, but not from attending the trial. In essence, a prior restraint allows the public and press to gather news, but prevents them from publishing the news. On the other hand, a closure order prevents the public and press from attending trial in order to prevent the publication of the news by preventing access to the news. Thus, the major distinction between a prior restraint and a closure order is that a prior restraint prevents publication of information while a closure order prevents access to information.

This distinction between proscriptions on publication and proscriptions on access has been a major pressure point in the development of the Supreme Court's theory of the first amendment.¹²⁵ Because *Nebraska Press* virtually eliminated prior restraints on the publication of information presented at trial,¹²⁶ it can be argued that the first amendment gives the press a right to publish the news it has gathered. However, this does not mean that the press has an unconditional right to gather news. Until *Richmond*, a majority of the Court had never recognized a first amendment right of access. As Justice Stevens stated, it is the recognition of a right of access which makes *Richmond* a "watershed case."¹²⁷

B. The Source of the Right

The characterization of *Richmond* as an access question was only the first problem faced by the Court in reaching its decision.

124. First amendment rights tend to be personal to the individual. The existence of first amendment rights most often comes into issue when the individual has challenged a majoritarian opinion or the order of a governmental authority. Considering the sheer power and chilling effect of this sort of opposition, in order for the individual to practice his first amendment rights, he must be willing to vigorously assert those rights. Thus, it could be said that the practice and principles of the first amendment require that the individual be strong enough to assert his rights. Therefore, it is arguable that a closure order is more offensive than a prior restraint. The individual faced with a prior restraint at least has the choice to be strong, violate the order and test his rights. However, a closure order, which prohibits access to information, does not allow the individual a choice to violate the order and, therefore, does not allow him a choice to be strong.

125. See § III of text *infra*.

126. See note 66 & accompanying text *supra*.

127. 100 S. Ct. at 2830 (Stevens, J., concurring).

More importantly, the Court had to clarify *Gannett* and find a way to keep trials open. Avoiding either part of the problem could have resulted in turning the nation's courts into a system of secret justice.¹²⁸ However, in constructing a method to meet these problems, the Court was confronted with two major stumbling blocks. The first was *Gannett* itself. The Court's vague holding in *Gannett* that the sixth amendment public trial right was personal to the accused was the very reasoning used by the lower courts to justify trial closures.¹²⁹ Unless the Court was willing to substantially overrule *Gannett*, it was foreclosed from finding a public right of access to criminal trials in the sixth amendment.¹³⁰

The second precedential problem faced by the Court was its prior treatment of the first amendment public right of access question. In this area, the *Houchins* holding that there was no first amendment right of access to information or sources of information within the government's control was particularly troublesome.¹³¹ A trial courtroom is certainly a government institution, and a rule which allows the closure of that courtroom certainly puts trial information within governmental control. Therefore, it could easily have been argued that a closed trial was the same as a closed prison facility, and that there was no first amendment right of access to either.

As a result, in order to open trials the Court basically had two options: It could overrule its entire line of access cases, which would have resulted in subjecting almost all governmental institutions and information to public scrutiny under a broad right of access; or, it could have created a limited right of access, which would have been sufficient to open trials and still be somewhat congruent with its prior cases. This option would have allowed the Court a substantial degree of control over the future development of a public right of access to governmental institutions.

After clarifying and limiting *Gannett*, the Court chose the second alternative and set to work structuring a limited right of public access to criminal trials. *Richmond* contains two primary theories of the source of the right. The first is authored by Chief Justice Burger and the second by Justice Brennan.

Chief Justice Burger, joined by Justices White and Stevens, found the source of the public access right to criminal trials in the Anglo-American history of the judicial process and in the speech, press and assembly clauses of the first amendment. The Chief

128. See *id.* at 2837-39 (Brennan, J., concurring, joined by Marshall, J.).

129. *Gannett* was cited by the Virginia Supreme Court in upholding the closure order at issue. See note 29 & accompanying text *supra*.

130. See 100 S. Ct. at 2841-42 (Blackmun, J., concurring).

131. For a discussion of *Houchins*, see notes 85-91 & accompanying text *supra*.

Justice' historical analysis¹³² served as a policy statement in support of his decision. He stated that in the long tradition of Anglo-American justice, criminal trials were presumptively open to the public.¹³³ Attendance was encouraged so the public could "satisfy themselves that justice was in fact being done."¹³⁴ This policy of openness helped assure that the proceedings were conducted fairly, and protected the judge and other trial participants from unfounded accusations of impropriety and dishonesty.¹³⁵ Throughout history, he stated, the public trial has had a "therapeutic value" as a safety valve for an angry public.¹³⁶ When a particularly shocking crime has enraged a community, a public trial helped to satisfy the appearance of justice, explain an unpopular result, and prevent vigilante retribution. Finally, he noted that, historically, public unruliness in the courtroom has been controlled by rules of conduct rather than closure.¹³⁷

Like the rest of the majority, the Chief Justice found the constitutional basis for the public right of access to criminal trials within the first amendment. However, in his view, access is essentially a penumbra right,¹³⁸ born within the context of the Court's self-government theory¹³⁹ and fashioned from the speech, press and assembly clauses. As the Chief Justice stated:

132. See 100 S. Ct. at 2821-26. A detailed discussion of the historical bases of the open criminal trial is beyond the scope of this note. For such a discussion and further authority, see *Gannett v. De Pasquale*, 443 U.S. 368, 406 (1979) (Blackmun, J., dissenting in part); 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 522-27 (1827); 3 W. BLACKSTONE, *COMMENTARIES* *373; M. HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* (6th ed. 1820); F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 30 (1951); Radin, *The Right to a Public Trial*, 6 *TEMPLE L.Q.* 81 (1931).

133. 100 S. Ct. at 2823.

134. *Id.* at 2825.

135. *Id.* at 2824.

136. *Id.*

137. *Id.* at 2822-23.

138. See *id.* at 2829 n.16. The Chief Justice did not explicitly refer to the public right of access as a penumbra. However, in supporting his construction of the right, he did cite to recognized penumbra decisions such as *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *NAACP v. Alabama*, 357 U.S. 449 (1959) (right of association). 100 S. Ct. at 2829 n.16.

139. Essentially, the self-government theory states that the purpose of free speech is to help the people govern themselves in a democratic society. Therefore, speech which serves this purpose is considered to be of particular value and subject to a higher degree of protection. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* 18-19, 22-27 (1948); J. MILL, *ESSAYS ON GOVERNMENT, JURISPRUDENCE, LIBERTY OF THE PRESS AND LAW OF NATIONS* 19, 28 (1825).

These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted¹⁴⁰

In explaining his reasoning behind the construction of the public right of access, the Chief Justice pointed out that the freedoms of speech and press are not limited to the protection of the speaker or writer. The first amendment also protects the right of the listener to receive information and ideas.¹⁴¹ This broad right to speak and listen, combined with the right to assemble in public places,¹⁴² creates a public right of access to criminal trial courtrooms, which traditionally are public places.¹⁴³

The Chief Justice simply distinguished *Pell* and *Saxbe* as cases dealing with penal institutions which do not have this tradition of openness and, therefore, are not subject to the application of the new right of access.¹⁴⁴ The task of paying heed to precedent fell to Justice Stevens, a proponent of a public right of access and the author of the dissenting opinion in *Houchins*.¹⁴⁵ He applauded the *Richmond* decision, but wrote to point out the incongruity of the Chief Justice' theory, which opens the trials to public inspection but does not allow the same type of public oversight of the subse-

140. 100 S. Ct. at 2826-27.

141. *Id.* See *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 390 (1969); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1962).

142. "People assemble in public places not only to speak or to take action, but also to listen, observe, and learn . . ." 100 S. Ct. at 2828.

143. One commentator has suggested a similar formula for creating a first amendment public right of access to criminal trials. See Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899 (1978). This right

is grounded in the rights of public discussion and personal autonomy embraced by the constitutional guarantee of free speech rather than a concern for just results in particular cases.

. . . The Supreme Court has therefore recognized that the 'right to receive information and ideas . . . is fundamental to our free society.' The duty to provide some means for the dissemination of speech is reflected in the minimum access interpretation of the public forum doctrine.

Id. at 1902-03 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

144. 100 S. Ct. at 2828 n.13. The Chief Justice seemed somewhat reluctant to explicitly label the right to attend criminal trials as right of access. He stated:

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a 'right of access,' . . . or a 'right to gather information,' for we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'

Id. at 2827 (citations omitted).

145. See 438 U.S. at 19 (Stevens, J., dissenting, joined by Brennan, J. & Powell, J.); notes 89-91 & accompanying text *supra*.

quent step in the criminal justice system.¹⁴⁶ Such a limitation is all the more serious, he explained, because cases such as *Houchins* involve "the plight of a segment of society least able to protect itself" ¹⁴⁷

Justice Brennan, joined by Justice Marshall, disagreed with the Chief Justice on two primary points. First, Justice Brennan stated that the public right of access is not new to constitutional law.¹⁴⁸ The right has always existed, but until *Richmond* has never been asserted in a circumstance which commanded recognition by a majority of the Court. Prior decisions, such as *Pell*, *Houchins*, and *Saxbe*, only held that "any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security and confidentiality."¹⁴⁹

Furthermore, Justice Brennan disagreed with the Chief Justice concerning the structure of the right. He acknowledged that the first amendment embodies more than the rights to speak and listen. However, instead of constructing the public right of access out of a conglomeration of first amendment clauses, Justice Brennan began his analysis by pointing out that the first amendment has a "structural role to play" in securing and fostering self-government.¹⁵⁰ This "structural model links the First Amendment to that process of communication necessary for a democracy to survive" ¹⁵¹ Thus, Justice Brennan's model of the first amendment and the right of access protects both wide-open debate and the processes by which information is gathered to fuel the debate.¹⁵²

Despite this broad language, Justice Brennan apparently was not ready to subject all of government to an unconditional public right of access.¹⁵³ In order to determine when access to a governmental institution or process should be allowed, he proposed a two-tiered test. The governmental institution or process in question should be examined to determine: (1) whether it represents

146. 100 S. Ct. at 2830-31 (Stevens, J., concurring). Justice Stevens viewed the *Richmond* decision as recognizing a broad right of access. He stated: "Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 2831.

147. *Id.*

148. *Id.* at 2832 (Brennan, J., concurring, joined by Marshall, J.).

149. *Id.* at 2833.

150. *Id.*

151. *Id.*

152. *Id.* at 2834.

153. "An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded." *Id.*

an area of traditional openness; and (2) whether access to that institution or process is important to the function of that process.¹⁵⁴

The first tier is basically a historical question. Applied to the issue of closure orders, Justice Brennan determined, upon the basis of a historical analysis similar to that of the Chief Justice, that "criminal proceedings" are an area of traditional openness.¹⁵⁵

In the second tier of his analysis, he noted that "[p]ublicity serves to advance several of the particular purposes of [the] trial . . . process," such as helping to protect a criminal defendant's fair trial right.¹⁵⁶ In addition, he pointed out that the trial process serves other political interests which are advanced by public access. First, "justice must satisfy the appearance of justice" to demonstrate to the members of society that "they are governed equitably."¹⁵⁷ Secondly, he stated that because the courts are responsible for "construing and securing constitutional rights" they are, in essence, part of the lawmaking process.¹⁵⁸ Because trial courts are making law which will later be interpreted to affect individuals not involved in the particular litigation, trials are "preeminently a matter of public interest."¹⁵⁹ Therefore, just as in the legislative process, public access to trials acts as a check on the courts' lawmaking function. Finally, Justice Brennan explained that public access assists the factfinding process of trials by bringing unknown witnesses forward and by encouraging those witnesses who are already present to be more candid.¹⁶⁰

In conclusion, Justice Brennan found that trials are a traditional area of openness and that "public access is an indispensable element of the trial process itself."¹⁶¹ Therefore, both tiers of his public access test had been satisfied, tipping "the balance strongly toward the rule that trials be open."¹⁶²

A comparison of the two theories offered by the Chief Justice and Justice Brennan, presents two points of disagreement. The first concerns the existence of a right of access prior to *Richmond*. The Chief Justice states that the right is a new penumbral discovery, while Justice Brennan maintains that the right has always existed but has never received an affirmative treatment until

154. *Id.* at 2834-36.

155. *Id.*

156. *Id.* at 2837.

157. *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). See also *United States v. Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971).

158. 100 S. Ct. at 2838 (Brennan, J., concurring, joined by Marshall, J.).

159. *Id.*

160. *Id.* See 6 J. WIGMORE, EVIDENCE IN TRIALS IN COMMON LAWS § 1834 (Chadbourn rev. 1976); Radin, *supra* note 132, at 384.

161. 100 S. Ct. at 2839 (Brennan, J., concurring, joined by Marshall, J.).

162. *Id.*

Richmond. Much of the resolution of this disagreement turns on the philosophies expressed by individual members of the Court in *Branzburg*, *Pell*, *Saxbe*, and *Houchins*.¹⁶³

Chief Justice Burger is correct in two respects: (1) No majority of the Court has ever held a right of access to exist,¹⁶⁴ and (2) in his *Houchins* opinion, the Chief Justice made it quite clear he did not recognize "a right of access to government information or sources of information within the government's control."¹⁶⁵ However, Justice Brennan's view—backed by strong dissents,¹⁶⁶ the arguments of commentators,¹⁶⁷ and an occasional peace-saving phrase in a majority opinion¹⁶⁸—demonstrates that the right of access has been, and will continue to be, a hotly contested issue. In the future development of the public right of access, it is quite likely that Justice Brennan's view will be favored. The Court will not be allowed to forget its previous theory of access which spawned such irritating offspring as *Pell*, *Saxbe* and *Houchins*.

The second point of disagreement concerns the structure of the right. The basic terms of the two theories of access appear to be quite similar. Both chart the right of access as radiating from somewhere within the first amendment, and both place a good deal of weight on traditional openness.¹⁶⁹ However, the two theories are not simply the same rule expressed in the terms of different constitutional philosophies.¹⁷⁰ The Chief Justice' penumbra theory and Justice Brennan's structural model each present distinct implications for the future definition and scope of the right of ac-

163. See § III-B of text *supra*.

164. *Id.*

165. 438 U.S. at 15.

166. See § III-B of text *supra*.

167. See note 32 *supra*.

168. See, e.g., notes 74, 84 & accompanying text *supra*.

169. The Court's reliance on tradition as part of the test to determine whether there exists a first amendment right of access presents some interesting questions. For example, it is questionable whether tradition should play any part in a first amendment analysis. First amendment problems are probably more accurately solved by applying the ever changing, yet still constant, principles of free expression. Furthermore, if the Court does choose to make historical study part of its first amendment theory, what is the result when the tradition, itself, proves to be unconstitutional? Finally, the Court's use of tradition appears to be more akin to due process analysis than it does to first amendment theory. See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Palko v. Connecticut*, 302 U.S. 319 (1937). If the Court has indeed adopted a due process analysis to determine the scope of the right of access, then it is possible that a closure order could be challenged, alternatively, on first amendment and on due process grounds.

170. It could be argued that Chief Justice Burger's penumbra might have been the result of his strict constructionist method of solving constitutional problems, while Justice Brennan's structural model seems to show his theoretical leanings in the application of the first amendment.

cess. The Chief Justice' penumbra theory emphasizes a strong reliance on a "public places" requirement.¹⁷¹ It appears that his view of the public right of access might best be described as the maintenance of the status quo. That is, those institutions which are open *will* remain open and those which are closed *may* remain closed.

On the other hand, Justice Brennan's structural model sets up a method by which some closed governmental institutions and those institutions which allow limited access might be opened to the sunlight of public inspection. Although Justice Brennan relied on the requirement of traditional openness,¹⁷² historical analysis is just as subject to argument and disagreement as is any purely conceptual legal principle. But more importantly, the structural model is completely in line with what many commentators have referred to as the larger role of the first amendment in the governing of a democratic society.¹⁷³ This view emphasizes that the people are the governmental decision makers. In such a system of self-governance, access to governmental institutions and processes is strongly favored in order to allow the people the information they need to make their own decisions. Justice Brennan's structural model, although somewhat limited by his traditional openness requirement, could become the basis for a new onslaught against the barriers of access.

C. The Right of Access to Criminal Trials—Its Limits

Despite the efforts of Chief Justice Burger and Justice Brennan to construct a constitutional basis for a right of access, the parameters of its application to criminal trials are far from clear. All the members of the majority agreed that the right is not absolute. However, beyond this initial observation, "uncertainty marks the nature . . . of the standard of closure the Court adopts."¹⁷⁴ Nonetheless, some general guidelines can be isolated.

The majority emphasized the dominion of a trial judge over the

171. The Chief Justice listed streets, sidewalks, and parks as places which are "traditionally open" and "where First Amendment rights may be exercised." 100 S. Ct. at 2828.

172. It is possible that Justice Brennan included the historical requirement as a part of his public access test in order to create a precedent which could later be used in a reexamination of closures of pretrial proceedings like the proceeding in *Gannett*.

173. For a discussion of the larger role of the first amendment, see ELY, *DEMOCRACY AND DISTRUST* 93-94 (1980); T. EMERSON, *supra* note 61, at 7; A. MEIKLEJOHN, *supra* note 139, *passim*; L. TRIBE, *supra* note 56, at 576-79; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

174. 100 S. Ct. at 2842 (Blackmun, J., concurring).

atmosphere in the courtroom, even though the imposition of decorum may somewhat limit access.¹⁷⁵ This dominion includes time, place and manner restrictions to assure that trials are conducted in a "quiet and orderly setting."¹⁷⁶ Furthermore, *Richmond* preserves the validity of the *Sheppard* alternatives,¹⁷⁷ and it appears that these alternatives must, at least, be considered before a closure order may be issued.¹⁷⁸ Finally, the majority generally agreed that some justification is required in order to close a trial. However, in attempting to define what is sufficient justification, the *Richmond* plurality did not provide a clear answer. Nevertheless, it does appear that four members of the Court would require at least "an overriding interest articulated in the findings" to reverse the presumption of openness.¹⁷⁹ These four votes, along with the vote of Justice Blackmun, who insisted that trials are open to the public,¹⁸⁰ might be sufficient to provide a degree of guidance to the lower courts. However, any more definite standard will have to be forged by subsequent decisions. But no matter how it is subsequently phrased, it is clear that the standard which must be met in order to close a trial is substantially less demanding than the *Nebraska Press* prior restraint test.¹⁸¹ Such inconsistency is hard to justify. The practical effect of both orders is to prevent or postpone the publication of news of court proceedings. Therefore, the

175. *Id.* at 2830 n.18 (Burger, C.J., joined by White, J. & Stevens, J.); *id.* at 2839 n.23 (Brennan, J., concurring, joined by Marshall, J.) ("reasonable restrictions imposed upon courtroom behavior in the interests of decorum"); *id.* at 2840 (Stewart, J., concurring) ("reasonable limitations upon the unrestricted occupation of a courtroom").

Both Chief Justice Burger and Justice Brennan accepted the view of the press as an agent of the public. Furthermore, although the press and public are equal, the press might be allowed special access or treatment in the courtroom. *Id.* at 2825 (Burger, C.J., joined by White, J. & Stevens, J.); *id.* at 2831 n.2 (Brennan, J., concurring, joined by Marshall, J.).

176. *Id.* at 2830 n.18 (Burger, C.J., joined by White, J. & Stevens, J.).

177. See note 49 & accompanying text *supra*.

178. 100 S. Ct. at 2830 (Burger, C.J., joined by White, J. & Stevens, J.); *id.* at 2839 n.25 (Brennan, J., concurring, joined by Marshall, J.); *id.* at 2840 (Stewart, J., concurring).

179. *Id.* at 2830 (Burger, C.J., joined by White, J. & Stevens, J.). The Chief Justice and Justice White appeared to agree on this language. However, Justice Stevens, who concurred with the Chief Justice, seemed to hedge on this standard and probably would require a lesser standard. *Id.* at 2831 n.2, 2832 (Stevens, J., concurring). Justice Brennan, joined by Justice Marshall, seemed to require "compelling" justification. However, he explicitly refused to discuss what fact situations would meet his standard. *Id.* at 2839 (Brennan, J., concurring, joined by Marshall, J.).

180. It appears that Justice Blackmun is determined to keep trials open on whatever theory the court may adopt. See *id.* at 2841-42 (Blackmun, J., concurring).

181. See notes 64-66 & accompanying text *supra*.

Court's reasoning for prescribing different standards for the two orders must center around how each order prevents or postpones publication.¹⁸²

A prior restraint restricts publication by proscribing firsthand observers from publishing what they see or hear. In essence, under a prior restraint, the press and public are told they may attend the court proceeding, but they may not communicate their observations to others. However, although they may not communicate what they have learned, their personal access to the information has not been proscribed. A closure order, on the other hand, restricts publication by proscribing access to the court proceeding. Therefore, in addition to restricting publication, a closure order also prevents the press and public from learning firsthand about the trial activities. It prevents their personal access to the information.

In light of this distinction, it could certainly be argued that a closure order represents the more severe infringement of first amendment rights since it does not even allow the interested citizen to learn, by personal observation, what transpires in the courtroom. Nevertheless, the Court has not accepted this reasoning. Under the Court's theory of the first amendment, it is apparently a greater infringement to prevent an individual from communicating what he knows or believes than it is to prevent access to the source which provides the basis for the individual's knowledge or beliefs. This less stringent standard for a closure order may stem from an attitude that a closure order is less of an infringement because an individual cannot be prevented from communicating what he does not know.

D. The Impact of *Richmond*

I was hopeful of victory but fearful that the court might shrink from the sweeping implications of recognizing, for the first time, an affirmative right of access and newsgathering under the First Amendment. All who cherish an open society are profoundly grateful that the court was not so timid. The full reach of the right established in *Richmond* may not be clear for decades. Efforts to establish the right of access in contexts other than criminal trials will not always succeed. But the right will not be easily confined, and its broad affirmation in *Richmond Newspapers* marks a milestone.¹⁸³

There is little question that *Richmond* will be primarily remembered as the decision which recognized a first amendment public right of access, and it is in the area of access where its im-

182. See § IV-A of text *supra*.

183. PRESSTIME, Aug. 1980, at 10 (quoting Professor Laurence H. Tribe who argued the case for *Richmond Newspapers, Inc.*).

pact will be felt. Since a total of eight members of the Court¹⁸⁴ have recognized the right, future opponents of access are going to be hard pressed to deny its existence.

Arguments over the scope of the right are far from over. And the precise positions of the individual members of the Court are not certain. However, because of the strong recognition of the right by *Richmond*, future questions of the scope of access must be met with careful examination and a balancing of interests rather than flat denial.

It must be emphasized that the public right of access is by no means absolute. After the existence of the right had been denied for so long, the *Richmond* Court was not about to turn around and recognize a broad right which would subject all governmental institutions and information to public access. As demonstrated by the primary theories offered in *Richmond*,¹⁸⁵ the Court's attitude toward the right in the future undoubtedly will be one of controlled development. Nevertheless, although the right of access will be controlled, it is unlikely that its scope will be limited to the status quo interpretation offered by the Chief Justice.¹⁸⁶ The potential of the right is simply too powerful and far-reaching to be limited to maintaining things as they are.

Without a doubt, one of the first questions presented will be whether the public has a first amendment right of access to pre-trial suppression hearings.¹⁸⁷ At the time *Gannett* was decided,¹⁸⁸ the majority of the Court had not recognized the first amendment right of access.¹⁸⁹ Therefore, it could be argued that as a result of *Richmond* a judge now will be required to weigh the first amendment public right of access before closing pretrial proceedings to the public and press. It is unlikely that such closures will be allowed without some justification. The real question is how much?

V. CONCLUSION

The *Richmond* Court should be applauded for its recognition of a first amendment right of public access. It is a right too long denied the people of a self-governed nation. However, in its recogni-

184. In *Richmond*, seven members of the Court recognized a right of access. However, Justice Powell, who did not participate in the *Richmond* decision, had previously recognized the right in *Saxbe, Pell, Houchins* and *Gannett*. See § III-B & -C of text *supra*.

185. See § IV-B of text *supra*.

186. See note 171 & accompanying text *supra*.

187. In *Richmond*, Justice Stewart recognized this question, but declined to comment further. 100 S. Ct. at 2841 (Stewart, J., concurring).

188. See § III-C of text *supra*.

189. Justice Powell was the only member of the Court to recognize a first amendment right of access in *Gannett*. See notes 105-06 & accompanying text *supra*.

tion of the new right, the Court failed to satisfactorily answer the narrower question of the requirements and standards for the right of access to criminal trials. The multitude of opinions will undoubtedly leave the lower courts in a state of confusion and require them to decide the issue again and again.

Such a divergence of theory and rationale has been the norm in the Court's fair trial-free press and access decisions. Certainly, wide-open debate and differences of opinion are at the core of the first amendment. However, the highest Court in the land has a responsibility to decide constitutional questions in a manner which produces relatively firm and understandable results.

The *Richmond* decision is the product of a fractionalized Court, which, either because of unreconcilable differences or philosophical rigidity, was unable to agree upon a clear and workable standard. Regardless of the reason for the ambiguity in *Richmond*, there is more than a little truth in Justice Rehnquist's dissent, where he quoted the Lord Chancellor in the Gilbert & Sullivan operetta, *Iolanthe*: "The Law is the true embodiment of everything that's excellent. It has no kind of fault or flaw. And I, my lords, embody the law."¹⁹⁰

Robert F. Copple '81

190. 100 S. Ct. at 2843 (Rehnquist, J., dissenting).