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NOTES


I. Gannett AND Richmond Newspapers

One year to the day after its decision in Gannett Co. v. DePasquale,¹ which permitted the closure of pretrial hearings in certain circumstances to members of the press and public, the United States Supreme Court clarified and restricted its holding in the case of Richmond Newspapers, Inc. v. Virginia.² In Richmond Newspapers the Court held that trial courts could not close full trials to members of the press and public except in the most unusual situations. The Court did not expressly alter the Gannett holding, yet its majority opinion and five concurrences sought to clarify some of the ambiguities of the earlier decision and to redirect its emphasis.

Richmond Newspapers must be read in the context of the Gannett decision. The Virginia Supreme Court relied solely on Gannett to uphold the trial court’s closure of a murder trial in the Richmond Newspapers case.

A. Gannett v. DePasquale

The issue presented in Gannett was whether members of the press could be excluded from pretrial hearings on suppression of evidence when the defendant, the prosecutor and the trial judge all agreed to the closure. In resolving this issue, the Court found it necessary to decide whether the press and the public have an independent right to insist on access to such proceedings.³ The Court upheld the decision of a New York court to exclude the press from such a hearing, and concluded that the petitioner, a newspaper publisher, had no constitu-

¹. 443 U.S. 368 (1979).
². 100 S. Ct. 2814 (1980).
³. Unless otherwise noted, references to the press are also presumed to refer to the rights of the general public.
tional right to demand access to the pretrial hearing.

In Gannett, a defense counsel moved that a pretrial suppression hearing prior to a murder trial be closed to the public because “the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial.” The trial court closed the hearing, without objection from the prosecutor and members of the press who were present. Gannett Co., Inc. later moved the court to set aside its exclusionary order. Trial court judge Daniel DePasquale held a hearing on this motion but decided not to grant it. A transcript of the closed hearing was furnished, but only after the defendants had entered guilty pleas. The Appellate Division found the exclusionary order to be an unlawful prior restraint on the press that also transgressed the public interest in open judicial proceedings. The New York Court of Appeals reversed the Appellate Division and upheld the trial court’s ruling.

Writing for the Supreme Court majority that affirmed the court of appeals decision, Justice Stewart first noted that judges have “an affirmative constitutional duty” to minimize the prejudicial effects of pretrial publicity. He then considered whether the sixth amendment, either on its face or by incorporation of common-law rules, gave the press and public a right to insist on access to judicial proceedings even when all participants have agreed to closure.

Justice Stewart asserted that the sixth amendment right to a public trial was a guarantee personal to the accused and not for the public at large. While acknowledging a “strong societal interest in public trials,” Stewart said that interest did not

4. 443 U.S. at 375.
6. 443 U.S. at 378. In support of his point, Justice Stewart cited Sheppard v. Maxwell, 384 U.S. 333 (1966), where the Court held that “trial courts must take strong measures to ensure that the balance is never weighed against the accused.” Id. at 362. Throughout his opinion Justice Stewart frequently cited not only to Sheppard, but also to Estes v. Texas, 381 U.S. 532 (1965). In Sheppard, the Court set standards to regulate the conduct of court reporters who sensationalized the murder trial of Dr. Sam Sheppard. In Estes, the Court set standards governing proper courtroom decorum. Estes’ trial was frequently disrupted by noisy cameras, clumsy cameramen and reporters.
7. The sixth amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial....”
8. 443 U.S. at 383.
amount to a public right.\textsuperscript{9} He said that when closure was ordered, the public's interest would be fully protected by the participants in the litigation.\textsuperscript{10}

Justice Stewart and the other members of the majority were not persuaded by the historical argument that the common-law presumption of open trials had been incorporated into the sixth amendment in the form of a constitutional right.\textsuperscript{11} Even if such a right were found, in the view of the majority, it would not necessarily apply to pretrial proceedings, since at common law such proceedings "were never characterized by the same degree of openness as were actual trials."\textsuperscript{12}

Except in his discussion of the historical argument, Justice Stewart used the words "trial," "pretrial" and "criminal proceeding" interchangeably, even when stating the issue and the rule. For instance, he stated the holding of the case to be that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."\textsuperscript{13} This less than careful use of language led to confusion as to what \textit{Gannett} actually stood for.

In a dissent joined by Justices Brennan, White and Marshall, Justice Blackmun stressed the English and American common-law tradition of public trials.\textsuperscript{14} He argued that a strong societal interest in open judicial proceedings militated against interpreting the sixth amendment solely for the defendant's benefit. He asserted that even if the amendment were so interpreted, the defendant's right to demand a public trial did not give him a right to compel a private trial.\textsuperscript{15} Justice Blackmun concluded that the sixth amendment, as incorporated in the fourteenth, prohibited the states from excluding the public from a proceeding within the sixth amendment's guarantee "without affording full and fair consideration to the

\textsuperscript{9} Id.
\textsuperscript{10} Id. at 384.
\textsuperscript{11} Id. at 385-86.
\textsuperscript{12} Id. at 388.
\textsuperscript{13} Id. at 391.
\textsuperscript{14} Id. at 412.
\textsuperscript{15} Id. at 415-18. The majority took issue with the dissent's approach, on the basis that the issue of defendant's right to compel a private trial was not presented by the case. Id. at 382 n.11.
public's interests in maintaining an open proceeding,"16 even if the accused was the one who wanted closure.

Having decided that the sixth amendment gave no right of access to criminal proceedings, the majority reserved the question whether such a right was created by the first and fourteenth amendments. Justice Stewart found it unnecessary to decide this question because he found the trial judge's actions consistent with any such right the petitioner might have had.17

In a concurring opinion, Justice Powell encouraged an explicit holding that the first amendment gave the press a right of access to judicial proceedings, though this right was not unlimited.18 In contrast, the dissenters denied that the Court had ever found a right of access to governmental proceedings based on the first amendment.19 However, based on the right of access they found to be protected by the sixth amendment, they stated that closure should be permitted only if the accused can show that it is "strictly and inescapably necessary"20 to protect his right to a fair trial.21

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16. Id. at 433. 17. Id. at 392-93. Justice Stewart cited four facts about the Gannett case that prompted the conclusion that no first amendment violation had occurred:
1. None of the spectators objected when the defendants moved for closure;
2. Counsel for the newspaper was given an opportunity to be heard;
3. The trial court believed that the press did have a right of access, but specifically found this right to be outweighed by the defendant's right to a fair trial; and
4. A transcript of the suppression hearing was eventually made available.

18. Id. at 397. Justice Powell saw the press's right of access as deriving from its status as an agent of the public. Limits on the right of access included, according to Powell, "The constitutional right of defendants to a fair trial," id. at 398, and "the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." Id. Justice Powell laid out a number of factors trial courts should consider in deciding whether to close a courtroom, e.g., whether alternative means are available to preserve the fairness of the trial. Id. at 398-401.

19. Id. at 411. In his concurring opinion, Justice Rehnquist agreed with the dissent in this respect. Id. at 404.

20. Id. at 440.

21. The dissenters thought that the accused seeking closure should be required to demonstrate a substantial probability that: (1) irreparable damage to his fair-trial right will result from a public proceeding; (2) alternatives to closure will not adequately protect his chance for a fair trial; (3) closure will be effective in protecting against the perceived harm. Where a member of the public contemporaneously objects to closure, he should be given a reasonable opportunity to state his objections.
Both the dissenters and Chief Justice Burger in his concurrence noted that most cases are disposed of at the pretrial stage. This observation led Burger to conclude that only pre-trial hearings could be closed to the public, and to emphasize that the Court's holding should be limited to such hearings. In contrast, the fact that pretrial hearings often represent the only opportunity for the public to view the judicial process led the dissenters to decide that such hearings must be subject to the same publicity constraints as a full trial.

In a separate concurring opinion, Justice Rehnquist interpreted the majority's holding as being that "the public does not have any Sixth Amendment right of access" to a pretrial hearing or a trial. Therefore, in his (Rehnquist's) opinion, the trial court "is not required . . . to advance any reason whatever" for closing a courtroom.

B. Richmond Newspapers, Inc. v. Virginia

Richmond Newspapers arose out of a murder trial which was closed to the press and public by Richard H.C. Taylor, a Virginia trial judge. When the Supreme Court reviewed the case, it ruled that Gannett could not be applied so as to close a criminal trial. The Court found a first amendment right of the public to attend trials, and concluded that few circumstances would justify closure.

1. The Virginia Courts

Judge Taylor had excluded the press and public from the entire murder trial of defendant John Paul Stevenson, apparently relying on a Virginia statute that permitted closure in some cases. The Virginia Supreme Court affirmed the statute's constitutionality and upheld the closure of the trial by denying Richmond Newspapers' petition for appeal, citing

Id. at 440-46.
22. Id. at 397.
23. Id. at 433-39.
24. Id. at 404 (emphasis added).
25. Id.
26. Va. Code § 19.2-266 which provides in part: "In the trial of all criminal cases, . . . the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."
only *Gannett* in its one-paragraph order. It also published the transcript of the closed deliberations concerning exclusion of the public, which revealed, to the eventual harm of the state, the informal process by which the closure decision was made.

The trial in *Richmond Newspapers* was Stevenson's fourth trial for the same murder charges. Judge Taylor closed the courtroom on the motion of Stevenson's counsel, who expressed concern that information would be "'shuffled back and forth ... as to what — who testified to what.'" The prosecutor and two reporters present at the time did not object to the closure.

Later, Richmond Newspapers moved to vacate the closure order, and Judge Taylor held a closed hearing on the motion. At the hearing, the paper's counsel pointed out that the judge had made no evidentiary findings prior to entering his order, and argued that the Constitution required the court decide before ordering closure that the defendant's rights could be protected in no other way. Stevenson's counsel mentioned that this was the defendant's fourth trial and expressed concern that information would "leak out," be reported by the press, perhaps inaccurately, and be seen by the jurors.

In outlining his rationale for continuing to exclude the press, Judge Taylor emphasized the layout of the courtroom, which he said made the presence of observers distracting to the jury. Regarding protection of the defendant, the judge said: "'I feel that [if] 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

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27. 3 Med. L. Rptr. 1545. The decision of the Virginia Supreme Court, which was not officially reported, only recited the facts of the case and dismissed the appeal in one paragraph, citing *Gannett*.

28. Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814, 2818 (1980). Stevenson was convicted of second-degree murder at his first trial, but the conviction was reversed on the basis that a blood-stained shirt had been improperly admitted into evidence. The second trial ended in a mistrial when a juror asked to be excused and no alternate was available. The third trial also ended in a mistrial, apparently because a prospective juror who had read about the previous trial in the press had told other prospective jurors about the case before the trial began.

29. *Id.* at 2819.

30. *Id.*
I'm inclined to go along with the defendant's motion." The eventual outcome of the closed trial was that the judge found Stevenson not guilty after having granted a defense motion to strike the prosecution's evidence.

2. Supreme Court Majority and Concurrences

On certiorari review, the Supreme Court reversed the Virginia Supreme Court's decision in Richmond Newspapers. Although unable to agree on an opinion, seven members of the Court concurred in the judgment, on the basis that the Virginia court's order violated the right of access to criminal trials guaranteed the public and press by the first and fourteenth amendments. Chief Justice Burger announced the judgment of the Court, in an opinion joined by Justices White and Stevens. The Chief Justice phrased the issue once broadly and once narrowly: (1) "[W]hether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution," and (2) "[W]hether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure."

Chief Justice Burger maintained that Richmond Newspapers presented a question of first impression, since Gannett had held only that the public and press had no affirmative right of access to pretrial hearings. Based on a lengthy historical review, the Chief Justice argued that the decision to close Stevenson's trial ran against the grain of long-established tradition — specifically, the common-law presumption of open criminal trials.

31. Id.
32. Id. at 2818.
33. Id. at 2821.
34. Id. The Chief Justice supported his narrow reading of Gannett by citing his own concurring opinion in that case.
35. Id. at 2821-23. The opinion traced the evolution of open trials from a time when attendance by townspeople was compulsory to when it became voluntary. At no time, however, did the judge have discretion over attendance by the public.
a. Constitutional Bases for a Right of Access

Chief Justice Burger concluded, based on his review of history, that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." Nevertheless, the Chief Justice acknowledged that Virginia was correct in contending that neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees the public a right to attend criminal trials. Burger refused to accept Virginia's conclusion that no such right exists, however. He pointed to a series of Court decisions which accepted certain implied "fundamental rights [which] even though not expressly guaranteed, have been recognized... as indispensable to the enjoyment of rights explicitly defined." The Chief Justice concluded that a right of public access to trials was "implicit in the guarantee of the First Amendment." More specifically, he stated that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."

The right to attend criminal trials was thereby added to the catalogue of implied fundamental rights.

Justice Stevens saw a similar basis for the public right. He called Richmond Newspapers "a watershed case" which for the first time recognized that access to information about the operation of government, as well as communication of information, is a right.

36. Id. at 2825.
37. Id. at 2829.
38. Id.
39. Id. at 2827.
40. The right to travel interstate, the right to privacy and the right to vote in state elections are some of the other rights that have been drawn under the umbrella of constitutional protection because the Court has found them to be "implied" in a specific provision of the Constitution, such as the first amendment or the due process clause of the fourteenth amendment. The Richmond Newspapers majority cited several reasons for finding attendance at open criminal trials to be an implied right: (1) the Bill of Rights was enacted against the backdrop of a long history of trials being presumptively open; (2) free speech carries with it some freedom to listen, and listening is frustrated when courthouse doors are shut; (3) first amendment rights should be read broadly for their "common core purpose of assuring freedom of communication on matters relating to the functioning of government," id. at 2827; and (4) the right of assembly is an equally fundamental right which would be frustrated by closed trials.
41. Id. at 2830.
Justice Stevens stressed that the Court’s holding was consistent with and vindicated his 1978 dissent in *Houchins v. KQED, Inc.*, a case that involved restriction of press access to an area of a jail where a prisoner had committed suicide. In *KQED*, he had argued that such arbitrary restriction of the sources of information violated the first amendment.

Like Justice Stevens, Justice Brennan put criminal trials in the category of “government information.” In his concurring opinion (joined by Justice Marshall), he expressed the view that first amendment public access claims should be resolved based on historical practice and the importance of access to a particular governmental process in terms of the goals of that process. Reviewing the history and functions of open trials, Justice Brennan concluded that: “without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.”

Justice Blackmun, author of the *Gannett* dissent, concurred in the judgment in *Richmond Newspapers*. While continuing to maintain that a right of public access to criminal trials inheres in the sixth amendment, he stated that he was “driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial.”

Justice Stewart, author of the majority opinion in *Gannett*, was the only Justice to assert that the right of access applies to “civil as well as criminal” proceedings. He offered little justification for this position, citing mainly cases involving criminal trials in his concurring opinion.

**b. Gannett Criticized**

Justice Blackmun began his concurring opinion by criticiz-

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42. Id.
44. 100 S. Ct. at 2834.
45. Id. at 2832.
46. Id. at 2842.
47. Id. at 2840.
48. In his footnote to the sentence in which he included civil trials as protected, Justice Stewart discussed only generalities relating to the applicability and significance of the first amendment. *Id.* at 2840 n.2. In only one sentence did Justice Stewart further discuss open civil trials.
ing Gannett for its faulty interpretation of legal history and its ambiguity, which led to confused implementation by lower courts. Justice White also suggested in his concurring opinion that Richmond Newspapers was made necessary by a sloppy Gannett opinion. Noting that the talk of "trials" in Gannett now seemed to have become dicta, Justice Blackmun found the clarified Gannett holding to be "that there is no Sixth Amendment right on the part of the public — or the press — to an open hearing on a motion to suppress."

Justice Stevens argued that the Richmond Newspapers decision was fully consistent with the "perfectly unambiguous holding" in Gannett which he had supported. He stated that "[t]he absence of any articulated reason for the closure order is a sufficient basis for distinguishing this case from Gannett.

c. Limits on the Right of Access

Three Justices discussed limits on the right of access to criminal trials. Chief Justice Burger said criminal trials must remain open to the public "[a]bsent an overriding interest articulated in findings." Without explicitly defining "overriding interest," the Chief Justice drew an analogy to a government's placing "reasonable time, place, and manner restrictions upon the use of its streets." He cited earlier cases, including Gannett, which acknowledged that preferential seating may sometimes be desirable for media representatives. He also listed three criticisms of Judge Taylor's deci-

49. Id. at 2841. He criticized Chief Justice Burger for voting with the majority in Gannett even though he was the only member of the five vote majority to specifically limit the holding to pretrial proceedings. He felt the Chief Justice should have dissented.

50. Id. at 2830.

51. Id. at 2842 (emphasis in original). Justice Blackmun had some criticism of the plurality opinion in Richmond Newspapers as well as of the Gannett opinion. For instance, he noted that the opinion invoked a "veritable potpourri" of constitutional sources for a right of access to trials — the various clauses of the first amendment, the ninth amendment and penumbral guarantees from past cases. Id.

52. Id. at 2831 n.2.

53. Id.

54. Id. at 2830.

55. Id. at 2830 n.18.

56. Id. The members of the plurality agreed that the press should receive no special treatment except on the basis of practical considerations, e.g., guaranteed seats in
sion to close the Richmond trial, which gives some suggestion of factors indicating that closure is not justified: "[T]he trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial."57

Justices Stewart and Brennan agreed that a trial judge may impose reasonable limitations on press use of courtrooms. Justice Stewart noted that while a trial courtroom is a public place, it must be quiet and orderly and has only a limited capacity.58 Justice Brennan stated that the public's first amendment right of access was "subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality."59 He refused to spell out precisely what "countervailing interests" might suffice to "reverse [the] presumption of openness,"60 but suggested "national security concern"61 about state secrets as one possibility. He also expressed the view that the Virginia statute on which the closure was based in Richmond Newspapers was unconstitutional because it allowed closure "at the unfettered discretion of the judge and parties."62

d. Benefits of Open Trials

Chief Justice Burger and Justice Brennan both stressed the many benefits open trials provide. Such trials:

1. Assure the defendant a fair proceeding;
2. Demonstrate the fairness of the trial to the public, encouraging confidence in the judicial system and respect for the law;
3. Educate the public and encourage discussion of governmental affairs;
4. Discourage perjury, misconduct and decisions based on secret bias;

potentially crowded courtrooms to ensure that information gets to the public.

57. Id. at 2829-30.
58. Id. at 2840.
59. Id. at 2833.
60. Id. at 2839.
61. Id. at 2839 n.24.
62. Id. at 2839.
5. Provide an outlet for community concern, hostility and emotion.\textsuperscript{63}

Justice Brennan noted that publicity acts as a "check and balance" against possible abuses of power and attempts to employ the courts as instruments of persecution.\textsuperscript{64} He expressed the view that all other checks are insufficient and insignificant without publicity.\textsuperscript{65}

3. Dissenting Opinion

In the only dissent in the case, Justice Rehnquist ignored most of the arguments in the various opinions supporting the judgment. Finding no "provision in the Constitution [that] may fairly be read to prohibit what the trial judge in the Virginia state court system did in this case,"\textsuperscript{66} he was of the opinion that the trial court's closure order was not subject to further review by the Supreme Court. Justice Rehnquist criticized the Court's growing use of its power to "smother a healthy pluralism"\textsuperscript{67} among the states, and stated that he found it "basically unhealthy"\textsuperscript{68} for such power to be concentrated in "a small group of lawyers who have been appointed to the Supreme Court."\textsuperscript{69}

II. \textit{Richmond Newspapers} AND OTHER DECISIONS AFFECTING ACCESS TO GOVERNMENT INFORMATION

\textit{Richmond Newspapers} marked the first time the Supreme Court had to rule on the specific question of excluding press and public from criminal trials. However, it was not the first time the Court had faced the broader issues of (a) access to information under government control, (b) attempts to prevent the press from publishing information already in its hands and (c) courtroom decorum, reporting of sensitive court proceedings and alternatives to exclusion of the press. The \textit{Richmond Newspapers} authors discussed a number of cases dealing with each of these issues.

\begin{itemize}
  \item \textsuperscript{63} See 100 S. Ct. at 2823-25, 2837-39.
  \item \textsuperscript{64} Id. at 2838.
  \item \textsuperscript{65} Id.
  \item \textsuperscript{66} Id. at 2844.
  \item \textsuperscript{67} Id. at 2843.
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Id.
\end{itemize}
A. Desirability of Unrestricted Press Access to Information

The Supreme Court has consistently rebuffed any attempts at strict government censorship, but a majority has never held that first amendment rights are absolute.

Most courts that have dealt with the specific question of restrictions on reporting of judicial proceedings have held that the right to report deserves the highest protection. The limits placed on the right to report have usually been narrowly drawn. The general thought has been that court proceedings themselves are important, that the public's right to know is strong because of its interest in governmental matters and that the history behind the first amendment, as well as its subsequent construction, bar arbitrary and poorly thought out fetters on the press.

In Landmark Communications, Inc. v. Virginia the Court, in striking down a Virginia statute that prohibited revealing proceedings of the state judicial review commission, noted: "The operations of the courts and the judicial conduct of judges are matters of utmost public concern." The Court continued: "'[T]here is practically universal agreement that a major purpose of that [First] Amendment was to protect the free discussion of governmental affairs.'"

In re Oliver was a 1948 case in which a judge charged, convicted and sentenced for contempt a man giving testimony in a secret "one-man grand jury" investigation being conducted by the judge under Michigan law. The Court stressed that there was not "a single instance" of a closed trial in history and that the judge's decision, made during the course of a secret proceeding, was contrary to "[t]his nation's accepted practice of guaranteeing a public trial to an accused. . . ." The Court said that open trials constitute "a safeguard against any attempt to employ our courts as instru-

72. Id. at 839.
74. 333 U.S. 257 (1948).
75. Id. at 266.
76. Id.
ments of persecution." Although Oliver admitted no limits on press access, it still couched its ruling in terms of the rights of the accused, as did the Gannett majority — explainable in part because the petitioner was the defendant convicted in the closed trial, not the excluded press. The Court concluded that the accused had a right "to have his friends, relatives and counsel present, no matter with what offense he may be charged." 77

Craig v. Harney 79 is another case that is commonly quoted on the value of open trials. There, the Court held that a reporter could not be found in contempt for writing stories that conflicted with the judge's perception of what had occurred. The Court concluded: "A trial is a public event. What transpires in the court room is public property." 80

Despite the fact that its ruling allowed restrictions on the press, the Gannett majority also acknowledged that there is a strong public interest in open trials. 81 The clear consensus of cases dealing with "fair trials — free press" issues is that even though the press can be limited in certain (usually clearly outlined) circumstances, the Court begins with a presumption of maximum protection of the press in its role as conduit of information for the people.

Another type of "access to governmental information" case involves nonjudicial governmental entities. Houchins v. KQED, Inc. 82 synthesized the decisions in this area. In KQED, the Court rejected the argument that, because conditions in jails are matters of public importance, the public must have access to such facilities. 83 The case arose after reporters from television station KQED were refused admittance to a jail for

77. Id. at 270.
78. Id. at 272.
80. Id. at 374.
81. For instance, the Court stated:
There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.
443 U.S. at 383 (citation omitted).
83. Id. at 8-9 (plurality opinion).
the purpose of filming an area where a prisoner had committed suicide. The Court sought to distinguish the right of access and the right to print. It said that the "right to receive ideas and information is not the issue in this case" and that there was no "First Amendment guarantee of a right of access to all sources of information within government control." The Court concluded by stating that the "undoubted right to gather news 'from any source by means within the law' . . . affords no basis for the claim that the First Amendment compels others . . . to supply information."

Justice Stevens dissented in KQED, stating that a "core objective" of the first amendment was to protect the free flow of information. An official prison policy of concealing information about prison conditions from the public "arbitrarily cut[s] off the flow of information at its source" and abridges first amendment freedoms. In his Richmond opinion, Justice Stevens attempted to equate KQED to Richmond Newspapers because, despite the differing circumstances, both cut the press off from the source of information. By preventing the printing of any kind of information, the restrictions in both cases can be seen as analogous to prior restraints.

B. Prior Restraints

A second type of freedom of the press case which the Court has addressed concerns attempts to prevent the press from printing information already in its hands. The major cases decided in this area demonstrate that those attempting to so restrain the press will have to meet a very heavy burden. In Near v. Minnesota, Chief Justice Hughes established the classic censorship test later followed in several cases. The Court in Near held that a Minnesota pamphleteer could not be censored absent proof of direct, immediate and irreparable injury for which there was no alternative solution. Near's

84. Id. at 12 (emphasis in original).
85. Id. at 9.
86. Id. at 11 (citations omitted, emphasis supplied).
87. Id. at 30 (dissenting opinion).
88. Id. at 38.
89. 100 S. Ct. at 2830-31.
90. 283 U.S. 697 (1931).
91. Id.
publications had criticized the enforcement of gambling laws by Minneapolis police in articles replete with anti-Semitic overtones.\textsuperscript{92} Classifying freedom of the press as a privilege and immunity, the Court said press freedom was not absolute but that the nuisance statute under which Near was charged with "scandalous, and defamatory"\textsuperscript{93} speech was unconstitutional. It also required that freedom of the press could only be limited when the press could be proved to be directly hindering a war effort, inciting violence or overthrow of the government or printing obscene matter.\textsuperscript{94}

\textit{New York Times Co. v. United States,}\textsuperscript{95} the "Pentagon Papers" case, protected the right of the press to print any information it obtained — even if, as in the case of the Pentagon Papers, the information was classified and supplied by the one who stole it.\textsuperscript{96} In terms of the \textit{Richmond Newspapers} analysis, the \textit{Times} case is significant in that, so long as access to information is shut off, the government is keeping the press from printing material which it would otherwise have a right to print. Banning reporters from the courtroom presents many of the dangers that arise from classic prior restraints — news managing, self-enforcement of restraints and deception. The major limit on the applicability of the \textit{Times} case to \textit{Richmond Newspapers} is that the former was not decided against the sensitive backdrop of a defendant's rights, but against a claim by the government of danger to national security.

In a case more factually akin to \textit{Richmond Newspapers}, a Nebraska trial judge had "gagged" reporters to prevent them from writing anything about a multiple murder in a small town unless accounts of the proceedings or developments in the case were made directly to the reporters. In striking down the gag order, the Supreme Court in \textit{Nebraska Press Association v. Stuart}\textsuperscript{97} acknowledged limits on the first amendment, but said that "barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of

\begin{itemize}
\item \textsuperscript{92} Id. at 703-04.
\item \textsuperscript{93} Id. at 703.
\item \textsuperscript{94} Id. at 716.
\item \textsuperscript{95} 403 U.S. 713 (1971) (per curiam).
\item \textsuperscript{96} Id.
\item \textsuperscript{97} 427 U.S. 539 (1976).
\end{itemize}
The Court stated that prior restraints "should have particular force as applied to reporting of criminal proceedings" and rejected efforts to have it balance the first and sixth amendments. This case was similar to Richmond Newspapers in that it was a murder trial which the trial court feared would be difficult to try fairly, the court's conclusion as to the impact of the reporting was speculative, and the judge did not take into consideration any alternatives before restricting the press.

The Nebraska Press Court also criticized attempts to justify press exclusions by the argument that they were temporary. It said time was an important element in reporting the news. This emphasis on the time element suggests that furnishing a transcript of the proceedings should not be an adequate substitute for allowing press access to the courtroom — contrary to the approach taken in Gannett, where Judge DePasquale's decision was sustained partly because a transcript was eventually furnished to reporters.

In Richmond Newspapers, the Court sought to distinguish "gag" orders like that in Nebraska Press, where the press is present but forbidden to print what it hears, from outright exclusions of the press and public — where nothing can be printed because nothing is known. Nevertheless, the language of the Times Court was strict: "'Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity.'" The Court placed the "'heavy burden of showing justification for the imposition of such a restraint'" on the government's shoulders. The distinction between limiting access to information and issuing

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98. Id. at 561.
99. Id. at 559.
100. Id. at 561.
101. Id. at 565.
102. Id. at 560-61.
103. In its amicus brief, the Reporters Committee for Freedom of the Press argued that the two are practically indistinguishable because both prevent dissemination of important information — as opposed to allowing publication and then prosecuting (which would make the restraint no longer prior).
“gag” orders lacks substance; in each case the practical result is that timely information does not get to the public.

C. Courtroom Decorum and Alternatives to Closure

Two cases — Estes v. Texas106 and Sheppard v. Maxwell107 — treated poor press conduct in reporting and gathering information from criminal trials. Estes involved the use of television cameras for live broadcasts of a criminal trial. The Court overturned Estes’ conviction because the televising — some of which reached unsequestered jurors — was held to infringe on the defendant’s fundamental right to a fair trial as guaranteed by the fourteenth amendment.108 It urged absolute fairness in jury trials, and held that the purpose of the sixth amendment was to ensure fair treatment for the accused — an argument given great weight in Gannett.109 However, Estes did not bar reporters from the courtroom but simply barred electronic equipment, though construction of a special area for the equipment was later allowed. The Court held that the first amendment was satisfied because reporters remained free to attend and report about court proceedings.110

The Sheppard case involved prolonged and extremely sensational press coverage of a murder trial. The defendant’s elaborate alibi did not prevent conviction by the press, and ultimately, by the court.111 Like Estes, Sheppard focused in part on courtroom decorum. The Court noted that “the courtroom and courthouse premises are subject to the control of the court,”112 indicating that it was a judge’s “duty to protect [a defendant] from . . . inherently prejudicial publicity.”113 The Sheppard Court emphasized two factors later given great

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108. Id. at 538, 542-44.
109. Id. at 538-39.
110. Id. at 541-42.
111. Well before the trial began, Dr. Sheppard had been called a “murderer” in major Ohio newspapers. There were other abuses including the holding of a hearing on the case at which Dr. Sheppard was made to testify in a packed gymnasium without the benefit of counsel.
112. 384 U.S. at 358.
113. Id. at 363. Compare the Gannett Court’s holding that Judge DePasquale properly interpreted his affirmative duty to ensure fairness. Even though Gannett involved a pretrial proceeding rather than a trial, the thought was that taking steps at that stage to protect the defendant’s rights would assure a fair trial later.
weight in *Gannett* and *Richmond Newspapers*. First, *Sheppard* involved flagrant sensationalism by newspapers covering the trial, in contrast to the creditable, restrained reporting in *Gannett* and *Richmond Newspapers*. The other factor given weight by the *Sheppard* Court was that the "judge never considered other means" of reducing prejudice. *Gannett* was the only one of the four major Supreme Court cases (i.e., *Nebraska Press*, *Sheppard*, *Gannett* and *Richmond Newspapers*) in which the trial court was shown to have specifically considered alternatives to closure; it was also the only case in which the trial judge's decision was sustained.

The *Sheppard* and *Nebraska Press* cases suggested the following alternatives to closing trials to the press:

1. Opening instructions to the jury to ignore press coverage during the trial and closing instructions to inadvertently acquired information and decide only on the evidence.\(^{115}\)
2. Enforcement of courtroom decorum by "stricter rules governing the use of the courtroom by newsmen."\(^{116}\)
3. Insulating witnesses.\(^{117}\)
5. Postponement of the trial.
6. Control over courtroom personnel and officers of the court.
7. Use of voir dire.
8. Sequestration of juries.\(^{118}\)

Other sources have suggested other alternatives to closing the courtroom to the public and the press. These include: (1) change of venire (selection of a new jury panel), (2) limited closure to preserve the anonymity of minors or other witnesses and (3) declaration of mistrial, new trial or reversal under the Federal Rules of Criminal Procedure.\(^{119}\)

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114. 384 U.S. at 358.
115. *Id.* at 357-58 (by implication).
116. *Id.* at 358. One of these rules could be restricting the press to certain areas within the court room. One problem in *Sheppard* was that reporters with tape recorders came close enough to hear the defendant's conversations with his attorney, interfering with the attorney-client privilege.
117. *Id.* at 359.
119. Brief of the American Civil Liberties Union and American Civil Liberties Union of Virginia as amici curiae in the *Richmond Newspapers* case, citing United States v. Holovachka, 314 F.2d 345 (7th Cir. 1963); Geise v. United States, 262 F.2d
III. Analysis

Considered in the context of press-related Supreme Court decisions, Richmond Newspapers was a reasoned decision, generally consistent with the mainstream of Court-made law. In contrast, Gannett was an aberration whose many defects in language and foresight exploded shortly after it was decided. As noted by Justices White and Blackmun, Richmond Newspapers was made necessary by Gannett. Analysis of Richmond Newspapers should begin with consideration of the ways in which it clarifies the earlier case and why such clarification was necessary.

When it issued the Gannett decision on the last day of its 1978 term, it is unlikely that the Supreme Court anticipated the number of closures in lower courts that would follow or the ways in which aggressive defense attorneys, acquiescing prosecutors and sympathetic judges would expand the decision. Within six weeks of the decision, the Reporters Committee for Freedom of the Press had counted fifty-one requests to close courtrooms, more than half of which were granted. After one year, the number of closures stood at 272 motions to close, 160 motions granted.

Examination of some of the closures shows that they went far beyond the kind of case the Gannett Court had contemplated. An example is Richmond Newspapers itself. An objective interpretation of Gannett would indicate that pretrial proceedings could be closed under certain circumstances. One such circumstance, present in Gannett, was a finding that undue press attention might threaten the defendants’ rights.

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151 (9th Cir. 1958) and Fed. R. Crim. P. 29, 33, 47, 48.
120. See concurring opinion of Justice White, 100 S. Ct. 2830, and opinion of Justice Blackmun concurring in the judgment, id. at 2841-42.
122. These totals come from an unpublished updating of the Court Watch Study which was appended to the Reporters Committee amicus brief. The totals are not comprehensive but include all the cases of which the Committee was aware.
123. 443 U.S. at 376. The finding that an open hearing would present an unacceptable danger of prejudice was made despite the fact that the press coverage that had occurred was not sensationalized. In his Gannett dissent, Justice Blackmun characterized the coverage as “straightforward reporting,” id. at 407, that was “placid, routine, and innocuous,” id., and comparatively infrequent. He noted that the stories had contained no editorializing and only one picture. The majority did not dispute the dissent’s characterization of the press coverage, at least not explicitly.
In contrast, the court in *Richmond Newspapers* was closed during a trial, and the only justification given was the fear that a third mistrial might result.\(^{124}\)

In the year after it was handed down, other lower courts also extended the *Gannett* decision, to exclude the press but not the public, exclude the public but not the press and exclude the press and public for reasons unrelated to prejudicial publicity.\(^{125}\) Groping for guidance in *Gannett*'s cloudy language and five opinions, the courts fashioned a wide variety of standards for when closure was permissible.\(^{126}\)

Lower courts were encouraged to extend *Gannett* to closure of full trials by the interchanging of the words “pretrial”

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Even press advocates might have trouble with Justice Blackmun's analysis, because his pica-by-pica appraisal seems to indicate that there is some threshold level of sensationalism — or number of pictures — that a newspaper can reach, at which point censorship or some form of official restraint might become acceptable.

124. 5 Med. L. Rptr. at 1548.

125.  See the Reporters Committee amicus brief 13. The *Court Watch Study* included in an appendix to the brief shows that there was no pattern to the kind of circumstances in which disclosure was allowed. Wisconsin stood out as unusual, only one pretrial and no trials being closed out of the twelve cases reported from the state. At the other extreme, no reported requests for closure were denied in the Virginia courts.

126. For example, two federal courts came up with two separate sets of standards for closure. In *United States v. Fiumara*, 605 F.2d 116, 117 (3d Cir. 1979), the court was concerned with the defendant's likelihood of success on the merits of an appeal or petition for mandamus to reverse a district court order requiring that a sentencing hearing stay open. In finding little likelihood of success on the merits, the court looked at a number of features distinguishing the situation from *Gannett*: (1) the prosecutor's agreement to bar the press in *Gannett*; (2) the finding in *Gannett* of a reasonable possibility of prejudice; (3) the fact that *Gannett* involved a pretrial rather than posttrial situation. The court also stressed the existence of alternative ways to protect the defendant's rights.

In *United States v. Powers*, 477 F. Supp. 497 (S.D. Iowa 1979), the court professed itself unwilling to say it had no power to close a criminal trial, since exceptional circumstances might arise that could prevent the defendant from presenting his defenses and thereby deny him a fair trial. Under the circumstances of the particular case, however, the court found that the defendant seeking closure had failed to meet his burden of establishing:

1. By clear and convincing evidence that there was a clear and present danger of actual harm to the life of the defendant or a family member;
2. Consent to closure on the part of the prosecution as in *Gannett* or a compelling reason for not requiring the prosecutor's consent;
3. By clear and convincing evidence that closure would prevent the harm; and
4. By clear and convincing evidence that there were no alternatives to complete closure of the criminal trial.
and "trial" throughout the opinion.¹²⁷ Of all the separate opinions in the case, only Chief Justice Burger's concurrence was specifically limited to pretrials.¹²⁸ This in fact added to the lower courts' confusion by suggesting that the majority opinion must have been broader if the Chief Justice explicitly limited his concurrence in such a way.

Another major defect in Gannett, not dealt with in Richmond Newspapers, was the suggestion that prosecutors and other participants in the litigation would protect the public interest in open trials.¹²⁹ The Reporters Committee study found that in most cases the prosecution took no position at all regarding closure; occasionally the prosecutor supported closure, and only rarely opposed it.¹³⁰ Some commentators took the position that it was unrealistic to expect the prosecutor to act as sole protector of the public interest with respect to closure of courtrooms.¹³¹

At least from the viewpoint of those sympathetic to the press, Gannett caused additional harm by the grudging tone it adopted toward the public interest in open trials. By such statements as "[W]e certainly do not disparage the general desirability of open judicial proceeding,"¹³² the Court seemed almost reluctant in its acknowledgement of the strictures of the Constitution. This carried implications that requests to close courtrooms were to be regarded with leniency rather than suspicion.

One final indication that the Gannett decision was ill considered is the fact that five justices took the unusual step of publicly clarifying it within several weeks of its being issued.

¹²⁷. The majority, dissent, and most of the concurrences interchanged the words at some point. Most harmful and confusing, however, was the majority's statement of the holding: "For these reasons, we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." 443 U.S. at 391.
¹²⁸. 443 U.S. at 394-97.
¹²⁹. See 443 U.S. at 383.
¹³¹. See, e.g., amicus brief of American Civil Liberties Union in Richmond Newspapers, Inc. v. Virginia at 29. See also Kirkpatrick, Public Right Denied When Court Shuts Out Press, Milwaukee J., Sept. 23, 1979, part 1 at col. 3. Kirkpatrick argued: "Deals can be cut, pleas bargained and truthful evidence ruled inadmissible" in pretrials as well as trials. 443 U.S. at 393.
While Justice Stevens chided critics of *Gannett* for "overreacting," Justice Powell explained the decision in detail and Chief Justice Burger said that those who interpreted it more broadly than he did in his concurrence (that is, as applicable only to pretrial proceedings) may have been extending it too far.

*Richmond Newspapers’s* direct effect on *Gannett* consisted of the important clarification that, though pretrials may be closed, trials may hardly ever be closed and certainly not under *Gannett’s* standards. Though limited, this clarification was valuable because it resolved the ambiguous language in *Gannett* in favor of open trials. It established a strong presumption that trials should not be closed and encouraged a similar presumption with respect to governmental institutions in general. Though *Richmond Newspapers*, like *Gannett*, admitted that closure might be permitted in some circumstances, its limiting phrases — Burger’s “overriding interest” and Brennan’s “rare and stringent exceptions” — sounded strict even though no specific standards were proposed.

This stricter language suggests another significant contribution made by *Richmond Newspapers*: a shift in emphasis back toward an embracing of open proceedings rather than a grudging tolerance of them. *Richmond Newspapers* appears to have brought the Court back to the view of *Murphy v. Florida* that publicity does not automatically mean an unfair trial. While there is no proof that *Gannett’s* less-than-supportive attitude toward open proceedings encouraged closure, it certainly did not discourage defense attorneys from taking their chances with motions to close or judges from granting such motions.

Despite its positive contributions, *Richmond Newspapers* did not solve the problem of closure of judicial proceedings. It did not — logically could not — alter *Gannett’s* acceptance of

133. Milwaukee J., Sept. 9, 1979, § 1, at 3, col. 5.
134. Milwaukee J., Aug. 14, 1979, § 1, at 9, col. 5; Milwaukee J., Aug. 9, 1979, § 1, at 3, col. 2.
135. 100 S. Ct. at 2830.
136. Id. at 2832.
138. Id. at 799.
pretrial closure or its standards for closure, unclear as they are. Therefore, much of the confusion that followed *Gannett* remains, except that it is clear that *Gannett* can not be extended to support closing an entire criminal trial to the press.

Both *Gannett* and *Richmond Newspapers* ignored a strong precedent. *Nebraska Press Association v. Stuart* was the most applicable earlier case because it had similar facts — a sensational murder trial and a desire to restrict press coverage to protect a defendant. *Gannett* (and the Virginia courts in *Richmond Newspapers*) allowed closure based solely on publicity, the adverse effect of which was only speculative. *Nebraska Press* specifically prohibited this. *Gannett* also allowed a transcript to be substituted for an open proceeding, which *Nebraska Press* had not allowed, and ignored the alternative to closure set out in the earlier case. While *Richmond Newspapers* suggested that considerations of alternatives was important, the Court did not expressly reaffirm those alternatives given in *Nebraska Press* or synthesize a new list from the alternatives that different decisions have listed. In short, both the *Gannett* and *Richmond Newspapers* Courts could have avoided striking into new areas of the law by relying on *Nebraska Press* as a precedent. Although the earlier case involved a “gag” order rather than a denial of access to a proceeding, both are, in effect, prior restraints on the press, which have the practical result that timely information does not reach the public.

*Gannett* and *Richmond Newspapers* also ignored the *Near* and *New York Times* tests previously set out, acknowledging the general “presumption” against closed proceedings but ignoring the steps the cases set out to determine whether closure should be allowed. Factual differences between the cases were not so great that the two earlier decisions should not...
have been applied.

Richmond Newspapers can be criticized on other counts as well. Those who favor restrictions on the press may dislike its emphasis on open criminal proceedings, yet press advocates may view it as too narrow — a "don’t" decision that outlaws closures in cases of clear abuse but does not set strict, high standards by which future attempts to close criminal trials or to deny the press access to government information can be judged. This failure to establish clear standards is one of the decision's greatest faults.

The Reporters Committee for Freedom of the Press proposed three standards for closure: proof of a direct and immediate injury to justice, proof of irreparable injury and a showing that no other reasonable alternatives were available that could prevent the injury.\footnote{144} A reasonable opportunity to be heard should also be afforded.\footnote{145} While this rule is favorable to reporters, it illustrates the kind of course the Court could have taken. It does not rob the lower courts of the authority to make individual determinations, but it relies on precedent to set standards for review that should eliminate the uncertainty that followed Gannett.

In summary, although Richmond Newspapers' unmistakable emphasis on the openness of trials and its clarifications of Gannett are worthy, it failed to send a sufficiently clear signal to the lower courts regarding standards for closure.\footnote{146} The Chief Justice came closest to implicitly setting standards when he listed the errors at the trial level that made it necessary to overturn the decision: (1) there were no findings to support closure; (2) there was no inquiry as to alternatives; and (3) there was no recognition of the press's right to attend

\footnote{144} Amicus brief of Reporters Committee for Freedom of the Press in Richmond Newspapers, Inc. v. Virginia at 28. These are essentially the Near and New York Times criteria.
\footnote{145} Id.
\footnote{146} Officials affiliated with the Reporters Committee for Freedom of the Press reported that in the six weeks following the Richmond Newspapers decision, they noticed no significant change in the number or kind of closings being reported to them. While the officials cautioned that it was still close to the issuance of the decision, a clear trend in the direction of closing courtrooms had appeared within six weeks of the Gannett decision. Officials also noted cases in which reporters had argued that judges should read Gannett together with Richmond Newspapers and fashion a stricter rule for closing of pretrial proceedings.
criminal trials.\textsuperscript{147}

As the multiple opinions in \textit{Richmond Newspapers} reflect, the Court is sharply divided as to the locus of the right the majority agreed upon. While Justice Blackmun continued to maintain that the right is "explicitly placed"\textsuperscript{148} in the sixth amendment, Justice Stevens based it on the first amendment, asserting that the sixth amendment gave rights only to the accused.\textsuperscript{149} In dissent, Justice Rehnquist denied that the asserted right of access could be found in any provision of the Constitution.\textsuperscript{150}

While Justice Rehnquist's dissent has validity from a strict point of view, it ignores the "implied rights" the Court has added under the constitutional umbrella. Once these implied rights are admitted, other rights are implicitly demeaned when left on lower plateaus. The rights to travel and to abortion, both of which have been found to be "implied" in the Constitution,\textsuperscript{151} should not be given greater constitutional protection than the right of the press to attend criminal trials. The latter comes much closer to being a right explicitly guaranteed by the Constitution.

The source of the right of access to trials can be found in the public's right to receive information, which is protected by the first amendment.\textsuperscript{152} Seen in this light, restrictions on the press — whether in the form of "gag" orders or exclusionary orders — are obviously restrictions on the public's agent for obtaining information. When the press is excluded, it becomes clear how far removed the great mass of the public is from

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\item \textsuperscript{147} 100 S. Ct. at 2829-30. The Chief Justice did not present these factors as a checklist for trial judges, but his stress on them indicates that without at least these three considerations a closure could not be upheld.
\item \textsuperscript{148} \textit{Id.} at 2842. Justice Blackmun said he agreed to base the decision on the first amendment only as a secondary position.
\item \textsuperscript{149} \textit{Id.} at 2831 n.2.
\item \textsuperscript{150} \textit{Id.} at 2843-44.
\item \textsuperscript{151} \textit{See} Aptheker v. Secretary of State, 378 U.S. 500 (1964) (right to international travel); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to interstate travel); Roe v. Wade, 410 U.S. 113, 153 (1973) (right to abortion).
\item \textsuperscript{152} In a dissenting opinion in \textit{Saxbe v. Washington Post}, Justice Powell noted "An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. . . . In seeking out the news, the press therefore acts as an agent of the public at large" and to deny the press right to receive information is to effectively deny that right to the public. 417 U.S. 843, 863 (1975).
\end{itemize}
day-to-day scrutiny of government and how easily news could be managed simply by cutting it off at the source. Whether openness is considered necessary as a check on government abuse or as an educational tool, neither goal can be accomplished when people (through the press) are shut off from observing (and therefore analyzing and criticizing) government functions.

It must be emphasized that it was a responsible, though aggressive, press that was excluded in both Gannett and Richmond Newspapers. While defendants might argue that the simple presence of even a calm and restrained press threatens their fair trial rights, a broad rule that excludes a responsible press on the speculation that its routine reporting might harm a defendant is much more restrictive than the first amendment should admit.

Pretrial closures will continue because Richmond Newspapers could not greatly alter Gannett, but even this is unfortunate for two reasons. First, the Gannett standards remain vague and open to inconsistent trial court interpretation, and second, pretrials often really have become trials. As Chief Justice Burger noted in his Gannett concurrence, in the entire pretrial period, there is no certainty that a trial will take place. With many pretrials becoming de facto trials, the public interest in them is comparable to that in formal trials themselves, and the press should be equally protected in attending them, save for the truly unusual cases in which sensitive material is being treated.

Three other factors will remain significant in judging future cases in this area:

1. Judicial conduct. Without expressly saying so, the Court indicated its disapproval of Judge Taylor in Virginia and its confidence in Judge DePasquale in New York. Judge Taylor’s systemless approach to closing a trial (without even passing acknowledgement of the press’s right to attend) no doubt made it easier to overturn his decision. In contrast, the fact that Judge DePasquale acknowledged a strong right of

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153. As noted earlier, the Nebraska Press case specifically prohibited closure based on publicity, the adverse effect of which was only speculative. 427 U.S. at 565. See note 141 and accompanying text supra.
154. 443 U.S. at 397.
press access, but seemed carefully to weigh conflicting arguments and evidence before ruling, appeared to make the Court less willing to disturb his ruling.

2. Consideration of alternatives. The three judges in major Supreme Court cases who did not consider alternatives to closure have been overruled. The Court seems to think alternatives should be investigated, even if it is reluctant to supply a list of those that should be considered.

3. Reporters' conduct. When the initial motion for closure was made in both Gannett and Richmond Newspapers, the reporters present failed to object. Several Justices spoke of their great reluctance to disturb rulings to which there had been no timely objection. In most cases surveyed by the Reporters Committee for Freedom of the Press, the reporters present did not initially object. Clearly many reporters have not been aware of developments in this area of the law or have been unsure of their standing to object. Although it is unreasonable for courts to expect reporters to have legal knowledge beyond that possessed by lay people who routinely appear in court, reporters can best ensure that courtrooms will not be arbitrarily closed by objecting at the time the closure motion is made and requesting that the judge state a reason for closing the courtroom.

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155. Each of the trial court judges in Sheppard, Nebraska Press and Richmond Newspapers failed to consider alternatives to closure and each was overturned. While the Court did not in Richmond Newspapers specifically point to the failure of Judge Taylor to consider alternatives to closure, there appears to be a pattern that the Court is more lenient when alternatives are considered (e.g., Gannett) than when they are not.