

NOTES AND COMMENTS

PUBLIC ACCESS TO PRETRIAL HEARINGS

INTRODUCTION

The issue of public access to pretrial hearings became an open question following two recent United States Supreme Court decisions.¹ The first, *Gannett Co., Inc. v. DePasquale*,² concerned a challenge to the closure of a pretrial suppression hearing. The public and the press had been excluded from the hearing by the trial judge in order to protect the rights of an accused to a fair trial.³ The United States Supreme Court, by a narrow majority, upheld the closure.⁴ Justice Stewart's majority opinion agreed with the decision of the trial judge that, under the circumstances of the case, an open suppression hearing would pose a "reasonable probability of prejudice" to the accused, and therefore the interest of the public in attending the hearing was outweighed by the defendant's right to a fair trial.⁵

The second case, *Richmond Newspapers, Inc. v. Virginia*,⁶ involved a protest to the closure of an entire criminal trial. The Supreme Court held that closure of a trial, unlike a pretrial hearing, violated the public's constitutional right under the first amendment to attend criminal trials, a right which had never before been articulated by the Court.⁷ Chief Justice Burger, writing a plurality opinion in which only Justice White and Justice Stevens joined,⁸ distinguished *Gannett* as a decision concerned only with pretrial hearings.⁹

Whether the new first amendment right of public access could be asserted to prevent closure of pretrial hearings was a question

1. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979).

2. 443 U.S. 368 (1979).

3. *Id.* at 376.

4. *Id.* at 394. See text accompanying notes 38-52 *infra*.

5. 443 U.S. at 376.

6. 448 U.S. 555 (1980).

7. *Id.* at 580 (Burger, C.J., plurality opinion).

8. For a full discussion of *Richmond Newspapers*, see text accompanying notes 70-80 *infra*.

9. 448 U.S. at 563-64.

left unanswered by *Richmond Newspapers*. Recently, the Vermont Supreme Court confronted this question in the case of *Herald Association, Inc. v. Ellison*.¹⁰ This note will focus on the question of public access to pretrial hearings and its resolution in Vermont.

I. THE PUBLIC TRIAL TRADITION: *Gannett Co., Inc. v. DePasquale*

The idea that trials should be public is expressed in the sixth amendment to the United States Constitution. The amendment provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the . . . district wherein the crime shall have been committed."¹¹ The Vermont Constitution likewise provides for public trial,¹² and the public trial remains a strong Vermont tradition.¹³

The public trial inheres in the nature of our system of government.¹⁴ Public access to trials builds confidence in our government by assuring the public of fair procedure and equal justice in the courts.¹⁵ Access to a criminal trial also satisfies the desire to see justice done,¹⁶ improves the quality of the testimony,¹⁷ and may

10. 138 Vt. 529, 419 A.2d 323 (1980).

11. U.S. CONST. amend VI.

12. VT. CONST., ch. I, art. X.

13. The Vermont Supreme Court has ruled that "in this state public judicial proceedings are the rule and closed ones the exception. Where closed proceedings have occurred they have ordinarily had specific statutory authorization." *Herald Ass'n, Inc. v. Ellison*, 138 Vt. 529, 533-34, 419 A.2d 323, 326 (1980)(citations omitted). Generally, the public trial is a common law tradition that extends back in time beyond memory. *In re Oliver*, 333 U.S. 257, 266 (1948). "One of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial." E. JENKS, *THE BOOK OF ENGLISH LAW* 73-74 (6th ed. 1967). See also F. POLLOCK, *THE EXPANSION OF THE COMMON LAW* 31-32 (1904).

The United States Supreme Court has, through the years, regarded the public character of the criminal trial as fundamental to our system of criminal justice. *E.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-79 (1980); *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966)(Clark, J.); *In re Oliver*, 333 U.S. 257, 266 (1948)(Black, J.); *Craig v. Harney*, 331 U.S. 367, 374 (1947)(Douglas, J.); *Pennekamp v. Florida*, 328 U.S. 331, 361 (1946)(Frankfurter, J., concurring).

14. "One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920 (1950)(Frankfurter, J., dissenting from denial of cert.).

15. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 596 (1980)(Brennan, J., concurring).

16. *Id.* at 571. See *Barker v. Wingo*, 407 U.S. 514, 519 (1972).

17. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979).

induce unknown witnesses to come forward and testify.¹⁸

The right to demand a public trial, however, is among the rights to a fair trial afforded to an accused.¹⁹ In *Gannett Co., Inc. v. DePasquale*²⁰ a majority of the United States Supreme Court held:

The Sixth Amendment, applicable to the States through the Fourteenth, surrounds a criminal trial with guarantees such as the rights to notice, confrontation, and compulsory process that have as their overriding purpose the protection of the accused from prosecutorial and judicial abuses. Among the guarantees that the Amendment provides to a person charged with the commission of a criminal offense, and to him alone, is the "right to a speedy and public trial, by an impartial jury." The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused.²¹

The *Gannett* majority recognized the long tradition of public access to criminal trials, but emphasized that trial and pretrial access had not been expressly guaranteed in the sixth amendment. The majority refused to recognize a tradition of pretrial access,²² and noted that the advent of the exclusionary rule²³ and pretrial motions to suppress evidence had increased the possibilities that pretrial access could jeopardize the rights of an accused to a fair

18. *Estes v. Texas*, 381 U.S. 532, 583 (1965)(Warren, C.J., concurring). The Court in *Estes* rejected the claim that media representatives have a constitutional right to televise a trial. *Estes* has been limited, though apparently not overruled, by the recent decision in *Chandler v. Florida*, 449 U.S. 560 (1981), in which the Court held that states can constitutionally permit the broadcast of criminal trials. Whether the media has a constitutional right to broadcast criminal trials or pretrial hearings is a question which the Court expressly reserved. *Id.* at 569-70.

19. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 (1979); *In re Oliver*, 333 U.S. 257, 270 (1948).

20. 443 U.S. 368 (1979).

21. *Id.* at 379-80 (quoting U.S. CONST. amend. VI)(footnote and citations omitted). Four Justices, Blackmun, Brennan, White, and Marshall, dissented from the majority's sixth amendment interpretation in *Gannett*. 443 U.S. at 406. The dissent argued that the tradition of publicity was not associated with the rights of the accused, but was a separate right of the public, and therefore the sixth amendment right to a public trial prohibited the exclusion of the press and public from judicial proceedings. *Id.* at 406-48. See text accompanying notes 53-57 *infra*.

22. 443 U.S. at 387.

23. The exclusionary rule was developed in *Weeks v. United States*, 232 U.S. 383, 391-92 (1914). The *Weeks* Court held that in a federal prosecution the fourth amendment barred the use of evidence secured through illegal search and seizure. See also *Mapp v. Ohio*, 367 U.S. 643, 654-57 (1961)(illegally seized evidence inadmissible in a state court).

trial. The majority explained that publicity of a pretrial suppression hearing could "influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial."²⁴ Confronted with these special risks of unfairness, the *Gannett* majority concluded that the history of the public trial guarantee "ultimately demonstrates no more than the existence of a common law rule of open civil and criminal proceedings."²⁵

The question of whether members of the public could enforce an independent sixth amendment right of access to a pretrial hearing evoked five separate opinions from the United States Supreme Court in *Gannett Co., Inc. v. DePasquale*.²⁶ The case involved the disappearance of Wayne Clapp, a Rochester, New York man who had last been seen fishing with two other men on his boat in Lake Seneca. Clapp's companions returned in the boat the same day and drove away in his truck. His family notified the police after Clapp had been missing for three days. After finding the boat laced with bullet holes, the police began an intensive search for the two men and simultaneously dragged the lake in an attempt to locate the body. The story attracted considerable attention in the local newspapers.²⁷

The two suspects were soon apprehended in Michigan, where one suspect led Michigan police to the spot where he had buried a revolver belonging to Clapp. The suspects were returned to New York and arraigned on charges of second-degree murder. The defendants moved to suppress confessions made to the police, alleging that they were made involuntarily. The defense then requested that the public and press be excluded from the suppression hearing, and argued that a buildup of adverse publicity was jeopardizing their ability to receive a fair trial. Neither the prosecutor nor any of the reporters present objected at that time. The judge granted the request and the suppression hearing was held *in camera*.

The next day, a reporter from the *Gannett Newspaper Company* (hereinafter referred to as *Gannett*) requested access to the transcript of the suppression hearing and moved the court to set

24. 443 U.S. at 378.

25. *Id.* at 384.

26. 443 U.S. 368 (1979).

27. *Id.* at 371-74.

aside the exclusionary order. The judge responded by granting a hearing, at which he stated that the press had a constitutional right of access, but that, on balance, the constitutional right of the defendant to a fair trial was "weightier."²⁸ The balance had been tipped toward the defendant, stated the judge, because an open suppression hearing would pose "a reasonable probability of prejudice to these defendants."²⁹ On appeal, the New York Court of Appeals upheld the exclusion of the press and the public from the pretrial proceeding.³⁰

The United States Supreme Court granted certiorari.³¹ Justice Stewart, writing for the majority, phrased the question presented as "whether the Constitution *requires* that a pretrial proceeding such as this one be open to the public, even though the participants in the litigation agree that it should be closed to protect the defendants' right to a fair trial."³²

After surveying the history of the public trial guarantee, Justice Stewart concluded that open proceedings were established as a common law rule, but not as a constitutional requirement.³³ Conceding, for the sake of argument, that the sixth amendment guaranteed a right of public access to criminal *trials*, Justice Stewart argued that a right of access to the proceeding in this case was still not required. "[T]here exists no persuasive evidence that at common law members of the public had any right to attend *pretrial* proceedings; indeed, there is substantial evidence to the contrary."³⁴

Justice Stewart reviewed English and American common law and statutory authorities, which demonstrated a distinction between public access to trials (which appeared to be the rule) and public access to pretrial proceedings (which appeared to be an exception). He then confused the issues by stating: "[F]or these reasons, we hold that members of the public have no constitutional right under the sixth and fourteenth amendments to attend criminal *trials*."³⁵ The history presented by Justice Stewart had sup-

28. *Id.* at 376.

29. *Id.*

30. *Gannett Co., Inc. v. DePasquale*, 43 N.Y.2d 370, 372 N.E.2d 544 (1977).

31. *Gannett Co., Inc. v. DePasquale*, 435 U.S. 1006 (1978).

32. 443 U.S. at 385 (emphasis added).

33. *Id.* See notes 20-25 *supra* and accompanying text.

34. 443 U.S. at 387 (emphasis added).

35. *Id.* at 391 (emphasis added). The confusion among commentators and journalists

ported the denial of access to a pretrial procedure, but not to a criminal trial. Nevertheless, an expansive reading of the opinion could fairly lead to the conclusion that Justice Stewart intended his opinion to reach beyond the facts of the pretrial closure in *Gannett* to deny a sixth amendment right of access to trials as well.³⁶

With the sixth amendment foreclosed, *Gannett* asserted an alternative position that the press had a right of access to the pretrial hearing guaranteed by the first amendment.³⁷ Justice Stewart did not find it necessary to decide whether such a right existed, because "even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case."³⁸ Stewart's "appropriate deference" standard was met in *Gannett* because: no objections were made at the time of closure,³⁹ the judge balanced the constitutional rights of the press and public with the defendants' fair trial rights,⁴⁰ and the denial of access was only temporary.⁴¹

caused by Justice Stewart's references to trial closure instead of pretrial closure was noted by Justice Blackmun in his concurring opinion in *Richmond Newspapers* a year later. Blackmun admitted the confusion was "not surprising." 448 U.S. 555, 601-02 (1980)(Blackmun, J., concurring).

36. Indeed, Justice Stewart confirmed this interpretation in his separate concurrence in *Richmond Newspapers*: "In *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, the Court held that the Sixth Amendment, which guarantees 'the accused' the right to a public trial, does not confer upon representatives of the press or members of the general public any right of access to a trial." 448 U.S. 555, 598 (1980)(Stewart, J., concurring)(emphasis added).

The plurality opinion in *Richmond Newspapers*, however, was quick to limit *Gannett* to a pretrial closure ruling: "In *Gannett Co., Inc. v. DePasquale* . . . the Court was not required to decide whether a right of access to trials, as distinguished from hearings on pretrial motions, was constitutionally guaranteed." *Id.* at 564 (emphasis supplied).

37. 443 U.S. 386, 391-92 (1979).

38. *Id.* at 392.

39. *Id.* The "contemporaneous objection" or "speak now or forever hold your peace" requirement seems unusually harsh. First, failure to exercise first amendment rights inside the courtroom should not be an argument for denying public access. Second, the female reporter working for *Gannett* probably disapproved when defense counsel moved for closure, yet she could hardly suspect that voicing her objection in open court was both her right and her obligation.

40. *Id.* The balancing test tilted in the defendants' favor in *Gannett* because the judge found that an open proceeding would pose a "reasonable probability of prejudice" to the defendants. *Id.* at 393.

41. *Id.* at 393. Denial of access is not always temporary. In *Herald Ass'n, Inc. v. Ellison*, 138 Vt. 529, 419 A.2d 323 (1980), there was, in effect, a permanent denial of access to the transcript of a closed hearing. The Vermont Supreme Court emphasized Stewart's distinction between temporary and permanent denials of access in declaring that the transcript

Of the four justices who joined Justice Stewart to form the *Gannett* majority, three concurred in separate opinions. Chief Justice Burger wrote separately to emphasize the special nature of the pretrial hearing. He justified the closure in *Gannett* by deciding that the fair trial rights of the accused are particularly vulnerable at this stage of judicial proceedings since adverse pretrial publicity could easily prejudice a potential jury.⁴²

Justice Powell concurred separately in order to address the first amendment question. He determined that *Gannett* did have a first amendment right to attend the pretrial hearing, but that this right was "adequately respected" by the trial judge.⁴³ The test, according to Powell, in considering a motion to close a pretrial hearing should be "whether a fair trial for the defendant is likely to be jeopardized by publicity"⁴⁴

Justice Rehnquist also concurred separately to address the first amendment issue. Rehnquist argued that because the Court had refused to find a first amendment right of access in the past there should be no recognition of that right in this case.⁴⁵

The dissenters in *Gannett* did not reach the first amendment issue. Rather, the dissent construed the sixth amendment to forbid excluding the public.⁴⁶ The dissent found that the sixth amendment incorporated the public's common law right of access to criminal trials to pretrial proceedings.⁴⁷ The sixth amendment public trial guarantee, according to the dissent, was intended to protect the public's right of access as well as the accused's right to a fair trial.⁴⁸

was a public record. *Id.* at 532, 419 A.2d at 325.

42. 443 U.S. 368, 394-97 (1979)(Burger, C.J., concurring).

43. *Id.* at 401 (Powell, J., concurring). Justice Powell's "adequately respected" standard for first amendment rights mirrors the "appropriate deference" standard of Justice Stewart. See text accompanying notes 37-41 *supra*.

44. 443 U.S. at 400-02 (emphasis added). The test includes the following standards: reasonably available alternatives must be considered; the scope of the exclusion must extend no further than necessary to protect the defendant's fair trial rights and there must be reasonable opportunity for those excluded to show that alternative procedures to closure are available.

45. *Id.* at 404 (Rehnquist, J., concurring). *But see* Note, *A Right of Access to a Criminal Courtroom*, 51 U. COLO. L. REV. 425, 435-37 (1980), in which the author derives an opposite conclusion from the cases cited by Justice Rehnquist.

46. 443 U.S. at 415-16 (Blackmun, J., dissenting). See note 21 *supra*.

47. *Id.* at 446.

48. The main concern of the dissent was that the majority opinion would allow trials and suppression hearings to be closed without ensuring that the public interest in access

The issue, as phrased by the dissent, posed two questions: whether and to what extent the Constitution prohibits the States from excluding, at the request of a defendant, members of the public from a [pretrial] hearing."⁴⁹ The dissent's answer to the first question was that the sixth amendment generally forbids courts to be closed.⁵⁰ The answer to the second question was that closure could take place only if the accused establishes "that it is strictly and inescapably necessary in order to protect the fair-trial guarantee."⁵¹

In summary, the five separate opinions written in *Gannett* represented an extremely fragmented court. Justice Stewart, writing for a narrow majority of five justices, claimed the sixth amendment allowed closure in both trials and pretrial hearings. Chief Justice Burger allowed for pretrial closure if the defendant's fair trial rights were "likely to be jeopardized," but only after the public's first amendment rights were "adequately respected." Justice Rehnquist claimed that no respect for the public's first or sixth amendment rights was necessary before closure. Finally, Justice Blackmun, in a dissent joined by the remaining three justices, would not allow closure of trials or pretrial hearings unless "strictly and inescapably necessary."⁵²

One effect of the Court's performance in *Gannett* was to create confusion among commentators.⁵³ A more important result was that the public interest in access to criminal trials was inadequately protected. In 1980, an entire criminal trial was held in

would be protected. Criticizing the majority ruling as "inflexible", Justice Blackmun stated:

That rule is to the effect that if the defense and the prosecution merely agree to have the public excluded from a suppression hearing, and the trial judge does not resist . . . closure shall take place, and there is nothing in the Sixth Amendment that prevents that happily agreed upon event. The result is that the important interests of the public and the press . . . in open judicial proceedings are rejected and cast aside as of little value or significance.

Id. at 406-07.

49. *Id.* at 411. *Cf.* the majority view at 385. The majority asked: Does the constitution require the hearing to be open? The dissent asked: Does the constitution forbid it to be closed?

50. *Id.* at 439 (Blackmun, J., dissenting).

51. *Id.* at 440.

52. *Id.* The Vermont Supreme Court's final comment on *Gannett* is particularly apt: "Because of the fragmentation of the Court and because of the reservation of the First Amendment issue, *Gannett* left the fair trial—free press controversy almost as unsettled as it found it." *Herald Ass'n, Inc. v. Ellison*, 138 Vt. 529, 532, 419 A.2d 323, 325 (1980).

53. *E.g., The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 65 (1979) ("widespread uncertainty over what the Court held").

camera despite vigorous protest from the press. The United States Supreme Court decided to hear the appeal, and in *Richmond Newspapers, Inc. v. Virginia*,⁵⁴ the Court once again addressed the fair trial — free press controversy.

II. THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS TO A TRIAL: *Richmond Newspapers, Inc. v. Virginia*

In *Richmond Newspapers*, all the Justices, with the exception of Justice Rehnquist, agreed that the first amendment guarantees of free speech and press "implicitly" protect a right of the public to attend criminal trials.⁵⁵ Chief Justice Burger, writing the plurality opinion, held: "[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and the press could be eviscerated."⁵⁶

The decision in *Richmond Newspapers* ended litigation which began in March, 1976, with an indictment for the murder of a hotel manager who had been found stabbed to death. The defendant's conviction for second degree murder was reversed by the Virginia Supreme Court on the grounds that a blood-stained shirt had been improperly admitted into evidence.⁵⁷ Two subsequent attempts at conviction both ended in mistrial.⁵⁸

Before the fourth trial began, defense counsel moved that the public be excluded from the trial. He argued that closure was necessary to prevent dissemination of prejudicial information from the past trials. Neither the prosecutor nor any of the reporters present objected and the judge, exercising his authority under the state

54. 448 U.S. 555 (1980).

55. *Id.* at 580 (emphasis added); *id.* at 584 (Stevens, J., concurring); *id.* at 585 (Brennan and Marshall, J.J., concurring); *id.* at 604 (Blackmun, J., concurring). Justice Powell, who took no part in the decision, previously expressed the view that the first amendment extended a public right of access to pretrial hearings as well as criminal trials. See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 397-403 (1979).

Justice Rehnquist, unable to find an express constitutional provision in either the first or sixth amendments prohibiting trial or pretrial closure, dissented. 448 U.S. at 605.

56. 448 U.S. at 580 (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). See *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

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

58. The second trial ended in mistrial for lack of an available alternate juror; the third ended because prospective jurors were prejudiced by newspaper accounts of the previous trials. 448 U.S. 555, 559 (1980).

statute, ordered closure.⁵⁹

Richmond Newspapers, Inc. (hereinafter referred to as Richmond) later moved to vacate the closure. The judge held a hearing on the motion, but was not persuaded to reopen the trial. The judge ruled that if the rights of the defendant are in any way infringed, and closure does not "completely override all rights of everybody else," then closure is appropriate.⁶⁰

Richmond petitioned the Virginia Supreme Court for writs of mandamus and prohibition and also filed an appeal. The court dismissed the petitions and refused the appeal.⁶¹ Richmond then petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court, foreseeing that the Virginia court's denial of plenary review might operate as an implied sanction of the closure and allow other trials to be similarly closed without adequate demonstration of necessity, granted certiorari.⁶²

Chief Justice Burger began his opinion by distinguishing *Gannett*. The issue in *Gannett*, explained Burger, concerned public access to pretrial hearings, not to trials.⁶³ Furthermore, the *Gannett* decision did not extend to the question of whether the public right of access was guaranteed by the first amendment.⁶⁴ Instead, the *Gannett* Court held that the rights guaranteed by the sixth amendment are rights that may be asserted by the accused rather than members of the public.⁶⁵ In *Richmond Newspapers*, said Burger, the Court would interpret the first amendment.⁶⁶

59. The Virginia Code provides: "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." VA. CODE § 19.2-266 (Supp. 1981).

60. 448 U.S. at 561.

61. *Id.* at 562.

62. *Id.* at 563. The Court's desire to clear up the confusion caused by the fragmented *Gannett* decision also influenced its decision to take the case.

63. 448 U.S. at 563-64 (1980).

64. See text accompanying notes 37-41 *supra*.

65. All the opinions written in *Richmond Newspapers* generally agreed on this interpretation of *Gannett*, thereby consolidating the *Gannett* holding. See 448 U.S. at 564 (Burger, C.J.); *id.*, at 584 (Stevens, J., concurring); *id.* at 584-85 (Brennan and Marshall, J.J., concurring); *id.* at 598 (Stewart, J., concurring); *id.* at 603 (Blackmun, J., concurring); *id.* at 605 (Rehnquist, J., dissenting).

66. Under Chief Justice Burger's analysis, *Gannett* and *Richmond Newspapers* decided different issues. The Court in *Richmond Newspapers* concluded that the first amendment protects against trial closure. The Court in *Gannett* concluded that the sixth amendment sanctioned pretrial closure. But see Goodale, *Gannett is Burned by Richmond's First Amendment "Sunshine Act"*, Nat'l Law J., Sept. 29, 1980 at 24, col. 1 (*Richmond Newspa-*

Conceding that the first amendment does not explicitly address a public right to attend criminal trials, Chief Justice Burger looked to the purpose of the enumerated guarantees of free speech, press and assembly. Their purpose, he argued, was to assure "freedom of communication on matters relating to the functioning of government."⁶⁷ Given that criminal trials are a function of government, and that free communication requires free access to information,⁶⁸ the right of public access to criminal trials must be included among the interests the first amendment was designed to protect.

Chief Justice Burger also found support for a first amendment right of access to trials in its affinity to the first amendment right of assembly. Like a street or sidewalk, "a trial courtroom also is a public place where people generally . . . have a right to be present."⁶⁹ Finally, Burger noted that other implied rights have in the past received constitutional protection. The right of public access, like the rights of association and privacy, is fundamental because it is "indispensable to the enjoyment of rights explicitly defined."⁷⁰

Recognizing the existence of the first amendment right did not dispose of the issue in *Richmond Newspapers*. As Chief Justice Burger remarked: "[O]ur holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute."⁷¹ Several factors, however, led the Court to conclude that the first amendment rights of the public had been violated in this case: 1) the trial judge made no findings to support closure;⁷² 2) no inquiry was made as to whether alternatives to closure were available;⁷³ and 3) there was no recognition of the constitutional rights of the public and press.⁷⁴ Chief Justice Burger

pers impliedly overruled *Gannett*).

67. 448 U.S. at 575.

68. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). Cf. Justice Stevens's concurring opinion in *Richmond Newspapers*, in which he argues that "acquisition of newsworthy matter" had never before received constitutional protection. 448 U.S. at 584 (Stevens, J., concurring).

69. 448 U.S. at 578.

70. *Id.* at 580. See generally *NAACP v. Alabama*, 357 U.S. 449 (1958)(right of association); *Griswold v. Connecticut*, 381 U.S. 479 (1965)(right to privacy).

71. 448 U.S. at 580 n.18.

72. *Id.* at 580. Justice Stevens also found this factor to be determinative: "The absence of any articulated reason for the closure order is a sufficient basis for distinguishing this case from *Gannett v. DePasquale* . . ." *Id.* at 584 n.2 (Stevens, J., concurring).

73. *Id.* at 581.

74. *Id.*

concluded: "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."⁷⁶

The plurality opinion did not specifically address the question of pretrial closure. The Chief Justice did not indicate whether the new first amendment right of public access required a pretrial hearing to remain open to the public. He implied, however, that his first amendment analysis could operate to permit closure in the pretrial setting, as there may be fewer, if any, alternatives to closure which "satisfy the constitutional demands of fairness."⁷⁶

Justice Brennan, in a concurring opinion joined by Justice Marshall, employed a first amendment analysis which, like that of the Chief Justice, did not expressly address the pretrial closure situation. Justice Brennan argued that the first amendment plays an essential role in protecting communication necessary for the survival of democratic government.⁷⁷ He cited *New York Times Co. v. Sullivan*⁷⁸ for the principle that debate on public issues should be uninhibited,⁷⁹ and Justice Powell's dissent in *Saxbe v. Washington Post Co.*⁸⁰ for the antecedent principle that public debate, to be

75. *Id.*

76. *Id.* The Supreme Court has recognized that pretrial closure is sometimes the only viable alternative:

When [prejudicial] information is publicized during a pretrial proceeding . . . it may never be altogether kept from potential jurors. Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun.

Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 378-79 (1979).

The extraordinary alternative of a direct prior restraint—prohibiting members of the press from publishing information already in their possession concerning courtroom proceedings—is presumed to be unconstitutional. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

For disadvantages of other alternatives to pretrial closure, see *Herald Ass'n Inc. v. Ellison*, 138 Vt. 529, 534, 419 A.2d 323, 326 (1980)(change of venue conflicts with Vermont common law right to be tried locally); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 444, 399 N.E.2d 518, 526, 423 N.Y.S.2d 630, 638-39 (1979)(sequestration an impractical alternative for pretrial proceeding; continuance infringes on speedy trial right). See generally Annot., 49 A.L.R.3d 1007, 1013-14 (1973).

77. 448 U.S. at 587-88 (Brennan, J., concurring).

78. 376 U.S. 254, 283 (1964)(first amendment prohibits states from awarding damages to a public official for defamatory falsehood relating to his official conduct unless he proves actual malice).

79. *Id.* at 270.

80. 417 U.S. 843, 850-51 (1974)(Powell, J., dissenting)(first amendment not violated by Federal Bureau of Prisons policy of prohibiting personal interviews between newsmen and selected prisoners of medium and maximum security prisons).

valuable, must be informed. The first amendment, then, must protect the receipt of information at a criminal trial. The standard suggested by Brennan is that absent "sufficiently compelling" countervailing interests, trials are presumed to be open.⁸¹

Justice Brennan suggested at several places in his opinion that the claim for first amendment protection of public access to *pre-trial* hearings is less compelling. He asserted that the right to gather information may be limited by "the opposing interests invaded."⁸² Safeguarding the defendant's fair trial rights is, according to Brennan, a "sufficiently powerful countervailing consideration" which can justify limiting the right of public access.⁸³ Moreover, Brennan specifically noted the distinction between trials and pretrial hearings in terms of the greater danger of pretrial prejudice to a defendant's fair trial rights. Such danger, according to Brennan, can justify "barring the door to pretrial hearings."⁸⁴

Thus, in *Richmond Newspapers*, both Justice Brennan and Chief Justice Burger limited their recognition of a first amendment right of access and indicated that pretrial closure could be an exception. A majority of the Court, arguably, shares this view. Justices Stevens and White joined in the opinion of Justice Burger, while Justice Marshall concurred with Justice Brennan. In addition, Justice Stewart has remarked that pretrial closure is an effective method to ensure fairness.⁸⁵ Justice Rehnquist did not recognize any constitutional right of public access and would support both pretrial and trial closure.⁸⁶ Only Justice Blackmun continued to maintain that the pretrial closure in *Gannett* was in error.⁸⁷

III. PUBLIC ACCESS TO PRETRIAL PROCEEDINGS: *Herald Association, Inc. v. Ellison*

In *Herald Association, Inc. v. Ellison*,⁸⁸ the Vermont Supreme Court was asked to rule that the first amendment right of public access to criminal trials protected pretrial access as well.⁸⁹ The

81. 448 U.S. at 598 (Brennan, J., concurring).

82. *Id.* at 588.

83. *Id.* at 593 n.18 (quotations omitted).

84. *Id.* at 598 n.25.

85. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 379 (1979).

86. 448 U.S. 555, 605 (Rehnquist, J., dissenting).

87. *Id.* at 603 (Blackmun, J., concurring).

88. 138 Vt. 529, 419 A.2d 323 (1980).

89. *See id.* at 531-32, 419 A.2d at 325.

case began with the arraignment of Bernard Morgan on charges including aggravated assault of Peter Stickles, a Vermont Superior Court judge.⁹⁰ Morgan moved to suppress certain statements made at the police station. He also moved for closure of the suppression hearing on the ground that publicity of the potentially inadmissible statements would jeopardize his sixth amendment fair trial rights.⁹¹

As in both *Gannett* and *Richmond Newspapers*, the prosecutor did not oppose the request.⁹² The trial judge granted the motion over the protest of a reporter from the Rutland Herald, and excluded the press and public from the hearing. Herald Association then petitioned the trial court to vacate the closure order.⁹³ The court denied the petition, continued the suppression hearing *in camera*, and directed "that the transcript of the hearing be sealed until after a jury for trial was empanelled."⁹⁴ The case, however, never reached trial.⁹⁵ The order sealing the transcript thereby became permanent.

90. Morgan and the judge were both public figures. The judge was an elected official, and Morgan was well known as a star athlete in high school, and later as a local school-teacher and businessman.

91. 138 Vt. at 530-33, 419 A.2d at 324-25. Prior to the request for the closure order, seven news stories on the case had been published by the only newspaper in Rutland. See Rutland Daily Herald, October 29, 1979, at 15, col. 6; *id.*, October 30, 1979 at 9, col. 3, *id.*, October 31, 1979 at 13, col. 5, *id.*, November 1, 1979 at 17, col. 1; *id.*, November 15, 1979 at 26, col. 2; *id.* January 4, 1980, at 11, col. 1; *id.*, January 5, 1980 at 1, col. 1.

92. Before recognition of the public right of access in *Richmond Newspapers*, the United States Supreme Court had held that the societal interests in an open trial were represented by the prosecutor. *Berger v. United States*, 295 U.S. 78, 88 (1935). *But see* Justice Blackmun's concurrence in *Richmond Newspapers*, in which he argues that the prosecutor's acquiescence to the motion for trial closure demonstrates that the public interest was not fully protected. 448 U.S. at 603 n.3 (Blackmun, J., concurring). The United States Justice Department now takes the following position:

Because of the vital public interest in open judicial proceedings, the Government has a general affirmative duty to oppose their closure. There is, moreover, a strong presumption against closing proceedings or portions thereof, and the Department of Justice foresees very few cases in which closure would be warranted. The Government should move for or consent to closed proceedings only when closure is plainly essential to the interests of justice.

45 Fed. Reg. 52,183 (1980)(to be codified in 28 C.F.R. § 50.9).

93. Timely public objection to a closure motion distinguishes *Herald Association* from both *Gannett* and *Richmond Newspapers*. The precise timing of the objection was considered relevant in *Gannett*, in which the Court noted that the lack of contemporaneous public objection was a factor in its refusal to invalidate the closure order. See text at note 46 *supra*. The Court in *Richmond Newspapers*, however, made nothing of this distinction, and neither did the Vermont Supreme Court in *Herald Association*.

94. 138 Vt. at 531, 419 A.2d at 324.

95. *Id.* Morgan entered a plea of guilty and was sentenced.

The Vermont Supreme Court vacated the order sealing the transcript of the suppression hearing⁹⁶ because it extended "beyond the justification for its imposition."⁹⁷ The court did not decide that the closure order violated the public's first amendment rights. The need to protect Morgan's fair trial rights, which was the original justification for closing the hearing and sealing the transcript, vanished when Morgan pleaded guilty and was sentenced. Accordingly, the Vermont Supreme Court declared the transcript a public record.⁹⁸

The Vermont Supreme Court held that the decision in *Gannett* did not "authoritatively sanction this closure order."⁹⁹ The critical distinction between the two cases was that the closure order in *Herald Association* was permanent.¹⁰⁰ Central to the decision approving closure in *Gannett* was the fact that the denial of public access was only temporary.¹⁰¹ Because the transcript in *Gannett* was made available shortly after the pretrial hearing, the *Gannett* majority reserved the first amendment question, and concluded that "any First and Fourteenth Amendment right of the petitioner to attend a criminal trial was not violated."¹⁰² The permanent effect of the order in *Herald Association*, however, presented a deeper challenge to first amendment interests. The court concluded, therefore, that *Gannett* was not controlling,¹⁰³ and it looked to *Richmond Newspapers* for guidance in analyzing the first amendment challenge.

Although the decision in *Richmond Newspapers* did not expressly determine whether the first amendment right of public access applies to pretrial hearings, Chief Justice Barney, writing for the majority, stated that "it would seem fair to infer that it

96. *Id.* at 535, 419 A.2d at 327.

97. *Id.*

98. *Id.* The United States Justice Department's proposed guidelines regarding open judicial proceedings provide in part: "A Government attorney shall not move for or consent to closure of a proceeding covered by these guidelines unless: . . . [t]ranscripts of the closed proceedings will be unsealed as soon as the interests requiring closure no longer obtain." 45 Fed. Reg. 52,183-84 (1980)(to be codified in 28 C.F.R. § 50.9).

99. 138 Vt. at 532, 419 A.2d at 325.

100. *Id.*

101. See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 393 (1979), in which Justice Stewart states: "Unlike the case of an absolute ban on access . . . the press here had an opportunity to inform the public of details of the pretrial hearing accurately and completely."

102. *Id.* See text accompanying notes 37-40 *supra*.

103. 138 Vt. at 532, 419 A.2d at 325. See also note 58 *supra*.

does."¹⁰⁴ On the other hand, noted Barney, the *Richmond Newspapers* plurality had claimed that the first amendment right was not absolute.¹⁰⁵ Furthermore, Justice Brennan's concurring opinion had added that the first amendment right was to be weighed against other interests.¹⁰⁶ Because of this uncertainty in determining the scope of the right, Justice Barney stated that *Richmond Newspapers* did not require the conclusion that the closure of the pretrial hearing in *Herald Association* violated the first amendment.¹⁰⁷ With both *Gannett* and *Richmond Newspapers* effectively distinguished, Barney turned to Vermont state law to resolve the case.¹⁰⁸

In Vermont, "public judicial proceedings are the rule and closed ones the exception."¹⁰⁹ This rule, according to Justice Barney, derives from Vermont common law.¹¹⁰ Vermont statutes, on the other hand, allow closure, but only in special circumstances.¹¹¹ Furthermore, the 1795 Vermont Constitution provides that "[t]he Courts of Justice shall be open . . ."¹¹² Following these precepts, the majority held that the record must be opened to the public.¹¹³

Justice Barney articulated standards under which closure is allowed in Vermont: "[A]ny pretrial closure order imposed in this jurisdiction must be based on a clear necessity for the protection of the defendant's fair trial rights and must be limited in scope by its justification."¹¹⁴ Barney's standard establishes a two-part test for pretrial closure orders. First, the trial court must find that closure

104. *Id.* at 533, 419 A.2d at 325. See text accompanying note 76 *supra*.

105. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.18 (1980).

106. One such interest, according to Brennan, was safeguarding the the defendant's fair trial rights. See text accompanying notes 82-83 *supra*.

107. 138 Vt. at 533, 419 A.2d at 325-26.

108. The majority thus declined the opportunity to decide the constitutional issues presented. Other jurisdictions have also resolved pretrial closure cases solely on the basis of state law. *E.g.*, *Oneonta Star v. Mogavero*, 77 A.D.2d 376, 378, 434 N.Y.S.2d 781, 782 (1980)(In New York, all proceedings are presumptively open to the public); *Keene Publishing Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 711, 406 A.2d 137, 138 (1979)(The press has a state constitutional right, though not unlimited, to gather news).

109. 138 Vt. at 533, 419 A.2d at 326.

110. See *Sunday v. Stratton Corp.*, 136 Vt. 293, 305-06, 390 A.2d 398, 405 (1978).

111. See Vt. STAT. ANN. tit. 12 § 1901 (1973)(obscene or scandalous cases); Vt. STAT. ANN. tit. 33, § 651(c)(Supp. 1981)(juvenile proceedings); Vt. STAT. ANN. tit. 13, § 5131 (1974)(criminal inquests).

112. Vt. CONST. of 1793, ch. II, § XXVIII.

113. 138 Vt. at 535, 419 A.2d at 327.

114. *Id.* at 534, 419 A.2d at 326.

is clearly necessary.¹¹⁵ This conclusion can be reached only after all the available alternative procedures have been considered and rejected by the trial court as insufficient to protect the fair trial rights of the defendant.¹¹⁶ Second, the closure order must be of limited scope; it should be no more extensive than the circumstances fairly require.¹¹⁷

The court did not decide in *Herald Association* whether closure was necessary because the closure order failed the second part of the test; the scope of the closure was not limited. Since Morgan had admitted guilt and been sentenced, it was no longer necessary for the record of his pretrial suppression hearing to remain closed.

IV. EVALUATION OF THE VERMONT SUPREME COURT'S DECISION

Justices Billings and Hill, in separate opinions, decided that the first amendment does guarantee public access to pretrial hearings.¹¹⁸ Justice Billings cited Justice Brennan's concurrence in *Richmond Newspapers* for the proposition that the first amendment protects the receipt of information on matters of public concern.¹¹⁹ He further noted that adversarial debate on constitutional issues at a pretrial hearing is a subject of public concern.¹²⁰ Hence, he argued, the public's right of access to that debate is protected by the first amendment.

While this application of Justice Brennan's first amendment analysis appears logical, it does not reflect the first amendment limitations recognized by Justice Brennan. Specifically, Justice

115. *Id.* Justice Hill, dissenting in part, would first require the accused to show a "substantial likelihood" of "irreparable damage" to his fair trial rights. *Id.* at 542, 419 A.2d at 331.

The New York courts require a showing of a "strong likelihood" of prejudice. *Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430, 442, 423 N.Y.S.2d 630, 637, 399 N.E.2d 518, 524-26 (1979). In New Hampshire, "clear and present danger to the fairness of the trial" is required before closure. *Keene Publishing Corp. v. Cheshire County Superior Court*, 119 N.H. 710, 711, 406 A.2d 137, 138 (1979).

116. 138 Vt. at 534, 419 A.2d at 326. For a discussion of available alternatives, see *Gannett v. DePasquale*, 443 U.S. 368, 441 (1979)(Blackmun, J., dissenting). The Pennsylvania Supreme Court requires that the procedure of selecting and sequestering the jury before the suppression hearing be considered as an alternative to closure. *Commonwealth v. Hayes*, 414 A.2d 318, 344 (Pa. 1980).

117. 138 Vt. at 534, 419 A.2d at 326.

118. *Id.* at 535, 419 A.2d at 327 (Billings, J., concurring); *id.* at 538, 419 A.2d at 329 (Hill, J., concurring in part).

119. *Id.* at 535, 419 A.2d at 327.

120. *Id.*

Brennan suggested that safeguarding the defendant's fair trial rights from pretrial prejudice can limit the public's right of access.¹²¹ Furthermore, Justice Brennan did not expressly state whether his first amendment analysis applied to pretrial hearings, nor did his opinion attract a plurality of the Court.¹²²

Justice Hill observed that the language in the first amendment did not lend itself to distinctions between trials and pretrial hearings.¹²³ He concluded, therefore, that the first amendment right of access to trials, recognized in *Richmond Newspapers*, must extend to the pretrial hearing in *Herald Association*.¹²⁴ Justice Hill's semantic argument is not persuasive, however. The first amendment nowhere enumerates a right of trial or pretrial access; it could be argued, conversely, that neither trial nor pretrial access is protected by the first amendment.

Justice Hill proposed that in most cases a first amendment right of access could be accommodated with the defendant's constitutional right to a fair trial.¹²⁵ He set forth guidelines, adapted from Justice Blackmun's dissent in *Gannett*, that would aid the trial judge in this endeavor.¹²⁶ These guidelines form a three-part test which the defendant seeking closure must meet. First, the defendant must show "that there is a substantial probability that irreparable damage to his fair-trial rights will result from . . . proceeding in public."¹²⁷ Next, the defendant must show a "substantial probability that alternatives to closure will not protect adequately his right to a fair trial."¹²⁸ Finally, the defendant must show a "substantial probability that closure will be effective in protecting against the perceived harm."¹²⁹ This view would thus require an accused who seeks closure to "establish that it is strictly and inescapably necessary in order to protect the fair trial

121. See text accompanying notes 78-84 *supra*.

122. *Id.*

123. 138 Vt. at 545, 419 A.2d at 332 (Hill, J., dissenting in part).

124. *Id.* at 544-45, 419 A.2d at 332.

125. *Id.* at 541, 419 A.2d at 330.

126. *Id.* at 540, 419 A.2d at 331. The guidelines follow standards proposed by the American Bar Association. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS STANDARD No. 8-3.2 (App. Draft 1978). The 1980 edition of these ABA standards contains significant modifications. See ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS STANDARD No. 8.36 (2nd ed. 1980).

127. 443 U.S. at 441.

128. *Id.*

129. *Id.* at 442.

guarantee."¹³⁰

The three-part test adopted by Justice Hill favors the first amendment interests. In each part of the test the *defendant* shoulders a burden of proof by "substantial probability." Moreover, part one of the test dictates that a showing of substantial probability of damage to the fair trial rights is not enough; the defendant must show likelihood of "irreparable" damage.¹³¹ In other words, likelihood of damage to the sixth amendment right to a fair trial is not enough to warrant closure.

While the United States Supreme Court has recognized that some adverse pretrial publicity does not inevitably lead to an unfair trial¹³² it has also recognized that the United States Constitution does not assign priorities between first and sixth amendment rights.¹³³ By placing the burden on the defendant to prove that his fair trial rights are not only endangered but will probably be irreparably damaged, the three-part test makes the sixth amendment subordinate to the first amendment. Justice Powell, concurring in *Gannett*, criticized this test:

[T]he approach suggested . . . would not adequately safeguard the defendant's right to a fair trial, a right of equal constitutional significance to the right of access. The better course would be a more flexible accommodation between First and Sixth Amendment rights . . . an accommodation under which neither the defendant's rights nor the rights of members of the press and public should be made subordinate.¹³⁴

Favoring a first amendment right of access over the sixth amendment right to a fair trial conflicts with established common law sensitivity to the interests of the accused in receiving a fair trial. This sensitivity is all the more apparent in the pretrial setting. As Justice Stewart stated for the *Gannett* majority:

Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. Publicity con-

130. *Id.* at 440.

131. *Id.* at 441.

132. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 552 (1976); *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

133. 427 U.S. at 561.

134. 443 U.S. at 400 (Powell, J., concurring).

cerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.¹³⁵

The standards proposed by Justice Barney seem more appropriate in consideration of the special risks of unfairness in public pretrial hearings. By requiring closure where "clearly necessary" for the protection of the defendant's fair trial rights, Justice Barney's standard guarantees that the sixth amendment right to a fair and unbiased trial will not be subordinated.

This standard also ensures that the rights of the public will be respected. Most criminal cases at the present time progress only to the pretrial stage.¹³⁶ To exclude the public by application of anything less than Justice Barney's "clear necessity" standard could foster a closed criminal justice system. Furthermore, the "clear necessity" test discourages closure by its requirement that all the alternatives must first be judged inadequate. Where closure can be justified, part two of the test allows a closure order only if it is of limited scope, and thereby limits the denial of public access. Thus, the "clear necessity" test maintains fairness in the judicial process by accommodating first and sixth amendment rights; it allows minimal infringement on the public's legitimate right of access to judicial proceedings only where clearly necessary.

An accused's right to a fair trial and the right of public access both deserve sensitive consideration before applying any limitation. At a pretrial hearing, however, the accused has much more to lose should his motion for closure be denied merely on the basis of a preference for first amendment rights; prejudicial publicity could cost him his liberty. As Justice Wachtler of the New York Court of Appeals has stated:

[T]he true measure of our society will not be judged by the freedom we grant to our great institutions as by the protection we provide for society's lowliest member. And none are more lowly — none more subject to potential abuse — and none with more at stake than those who have been indicted and face criminal prosecution in our courts. For them, freedom and fair trial are not abstractions.¹³⁷

135. 443 U.S. at 378.

136. *Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430, 440, 423 N.Y.S.2d 630, 636, 399 N.E.2d 518, 523 (1979).

137. *Id.* at 444, 423 N.Y.S.2d at 638, 399 N.E.2d at 526.

Appropriately, the Vermont Supreme Court did not adopt a rule which favors first amendment rights over sixth amendment rights. Instead, the court adopted a standard of review which accommodates the public interest in pretrial access while maintaining fairness in the judicial process.

CONCLUSION

The fair trial—free press controversy involves a struggle to accommodate the criminal defendant's right to a fair trial with the right of public access to criminal trials. *Gannett Co., Inc. v. De Pasquale* enforced the defendant's sixth amendment fair trial rights by sanctioning the exclusion of the public from a pretrial hearing. *Richmond Newspapers, Inc. v. Virginia*, on the other hand, elevated the public interest in attending criminal trials to the level of a first amendment right. Neither case, however, articulated a first amendment right of public access to pretrial hearings.

In *Herald Association, Inc. v. Ellison*, the Vermont Supreme Court was asked to extend the scope of the new first amendment right to include public access to pretrial hearings. The majority declined the invitation, in deference to the United States Supreme Court's unclear determination, but formulated a two-part standard designed to accommodate both rights in the pretrial setting. Under this standard, pretrial closures imposed in Vermont must be clearly necessary to protect the defendant's fair trial rights and must be limited in scope according to their justification.

The dissent recognized a first amendment right to attend pretrial hearings, but proposed a standard of review which favors public interests in access and subordinates the defendant's sixth amendment fair trial rights. Although the public now enjoys a constitutional right of access to criminal trials, public attendance at pretrial hearings poses special dangers of prejudicial publicity which dictate that the defendant's fair trial rights not be subordinated. Rather than adopt a rule which favors one right over the other, the majority settled for a standard of review which accommodates the competing interests.

Steven J. Kantor

