

# The Visibility Value of the First Amendment

Brian C. Murchison

---

## Repository Citation

Brian C. Murchison, *The Visibility Value of the First Amendment*, 26 Wm. & Mary Bill Rts. J. 995 (2018), <https://scholarship.law.wm.edu/wmborj/vol26/iss4/4>

## THE VISIBILITY VALUE OF THE FIRST AMENDMENT

Brian C. Murchison\*

At a dark moment in American politics, marked by hyperbole and insult in public discourse, seemingly unlimited special-interest funding of candidates and agendas, and high-speed technology disseminating messages worldwide, a concerned commentator recently asked: “[D]oes anyone believe that the ‘free market-place of ideas’ is functioning?”<sup>1</sup> The question arose from arguments that the hallowed First Amendment protections of speech and press often seem too narrow, yet, at the same time, too broad.<sup>2</sup> They are too narrow, according to the argument, because they overemphasize “negative” liberty—freedom *from* state suppression or punishment of citizens’ expression—and ignore development of “positive” rights—freedom *to* participate meaningfully in public debate as aided in various ways by state intervention.<sup>3</sup> And the same protections are said to be too broad in the sense that they apply neutrally, and hence, universally—not just to protect individual speakers, but to protect speech itself, regardless of source, including expression of corporations, unions, and other artificial entities.<sup>4</sup>

Cataloguing these frustrations, commentators often fail to credit the “access” jurisprudence of the Supreme Court, a line of decisions that in important ways avoid the above critique. Announced in *Richmond Newspapers, Inc. v. Virginia*<sup>5</sup> in 1980,

---

\* Charles S. Rowe Professor of Law, Washington and Lee University School of Law. The author dedicates this Article to his students in Mass Media Law (2016 and 2017), and thanks Charles Knapp for his valuable research assistance, Professor Joan Shaughnessy for her thoughtful comments on an earlier draft, and the Frances Lewis Law Center for supporting the project.

<sup>1</sup> David Cole, *Why Free Speech Is Not Enough*, N.Y. REV. OF BOOKS, Mar. 23, 2017, at 34 (reviewing LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* (2016), and SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* (2016)).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.* For insightful analyses of negative and positive liberties, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981). For a more concise definition of negative and positive rights, see Bryan P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627, 635 (2004).

<sup>4</sup> *See Cole, supra* note 1, at 34–35 (detailing criticisms of mainstream First Amendment theory in the works of Weinrib and Lebovic). *See generally* Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1 (discussing overlooked First Amendment cases on positive rights).

<sup>5</sup> 448 U.S. 555 (1980).

and developed in state and federal courts over the past thirty-eight years,<sup>6</sup> the right of access to government proceedings and information is not precisely a “negative” liberty.<sup>7</sup> Although access proponents attack official courtroom closures and official sealing of documents, the cases characterize access rights positively—as freedom *to* gather and *to* receive information from institutions that have duties to disclose.<sup>8</sup> And although access rights are neutral and universal, they are almost always invoked by citizen groups, the media, or other entities seeking to bring useful information to the public eye and to further the accountability of those in power.<sup>9</sup> Few would disagree that First Amendment access jurisprudence has gone far in forcing U.S. institutions to unveil, for public evaluation, a host of facts and hidden practices in both criminal and civil settings.<sup>10</sup>

In large part, the right of access is a product of Justice William Brennan’s constitutional philosophy; in his *Richmond Newspapers* concurrence<sup>11</sup> and other writings,<sup>12</sup> he explained the right as a “structural” protection in the sense of relating not to expression itself but to “the structure of communications necessary for the existence of our democracy.”<sup>13</sup> Brennan urged attention to the “indispensable conditions of meaningful communication,” those background “processes” that permit speech on matters of public concern to be “informed.”<sup>14</sup> Associating structural protections with what scholars have argued is the “democratic participation” value of the First Amendment,<sup>15</sup>

---

<sup>6</sup> See discussion *infra* Part III.

<sup>7</sup> See Emerson, *supra* note 3, at 831.

<sup>8</sup> *Id.* Discussing *Richmond Newspapers*, Professor Emerson notes that, in one sense, the case “is little more than a negative-interference case, protecting the press against governmental infringement upon a traditional right.” *Id.* However, he is quick to note that “the Supreme Court did hold, for the first time, that the first amendment does compel the government to furnish some information.” *Id.*

<sup>9</sup> See, e.g., Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 716, 725 (2004) (noting various groups that supported an anti-secrecy court rule in South Carolina). See generally Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL’Y 113 (2008).

<sup>10</sup> See, e.g., *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (noting a “tradition of accessibility” with regard to criminal proceedings (citation omitted)).

<sup>11</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587–88 (1980) (Brennan, J., concurring in judgment).

<sup>12</sup> See generally William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Address at the Dedication of the S.I. Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 RUTGERS L. REV. 173 (1979) [hereinafter Brennan, Address].

<sup>13</sup> *Id.* at 176.

<sup>14</sup> See *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring in judgment); Brennan, Address, *supra* note 12, at 176–77.

<sup>15</sup> THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970). See generally Brian C. Murchison, *Speech and the Self-Governance Value*, 14 WM. & MARY BILL RTS. J. 1251 (2006) (discussing how free speech principles, generally, aid citizens in self-governance).

Brennan noted that the conditions and “processes” for disseminating news ultimately made possible the exercise of “self-government” by citizens.<sup>16</sup> And he was convinced that the access cases were of pivotal importance—more important, in his estimation, than other First Amendment cases of the period.<sup>17</sup> For Brennan, the access cases addressed no less an issue than “the kind of government we have set for ourselves in our Constitution,” by asking “whether that government will be visible to the people, who are its authors.”<sup>18</sup> The striking image of citizens as authors and the democratic state as a creative work in progress is a key to this corner of First Amendment law. By stressing the people’s complex project of composing both the form and content of their civic lives, Brennan took seriously a “conception of politics” that informs the U.S. Constitution: “[T]he people, and not the institutions of government, are sovereign.”<sup>19</sup>

To earn and maintain the confidence of citizens, Brennan saw that the courts would need to develop a theory and practice of presumptive openness.<sup>20</sup> Years later, Judge Easterbrook articulated much the same idea when he wrote: “The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.”<sup>21</sup> A “visibility value,” then, considered as a subset of the broader self-governance value of the Speech and Press Clauses, animates the access cases and is directly traceable to Brennan’s understanding of both constitutional design and the First Amendment.

Recent litigation, however, suggests that access rights are at a crossroads, facing resistance from strong forces, public and private alike. In the past three years, high-profile legal battles have been fought over the rationale and scope of the right to receive, as some litigants push to extend the right to new settings and others raise new arguments in opposition.<sup>22</sup> In cases arising in multiple stages of both civil and criminal settings, federal and state courts have confronted an array of scenarios involving questions of what can be hidden and what must be visible.<sup>23</sup>

For example, when must settlement agreements be publicly available? In a products liability case filed in federal court, *Jain v. Abbott Laboratories, Inc.*,<sup>24</sup> the parties engaged in pretrial skirmishes for a year, including a failed motion for summary

---

<sup>16</sup> See Brennan, Address, *supra* note 12, at 175–77.

<sup>17</sup> See *id.* at 181 (remarking that the Court’s decision rejecting access arguments in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), “justif[ie]d far more concern” than a decision of the same term denying a testimonial privilege in libel cases).

<sup>18</sup> *Id.*

<sup>19</sup> Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 376 (1976). See generally Brennan, Address, *supra* note 12.

<sup>20</sup> See generally Brennan, Address, *supra* note 12.

<sup>21</sup> *Hicklin Eng’g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006).

<sup>22</sup> See *infra* notes 24–65 and accompanying text.

<sup>23</sup> See *infra* notes 24–65 and accompanying text.

<sup>24</sup> No. 7:13-cv-00551, 2014 WL 7330805 (W.D. Va. Dec. 19, 2014).

judgment, and then decided to settle.<sup>25</sup> Fearing that the presiding federal judge would require disclosure of the settlement agreement, they obtained approval—and sealing—of the agreement by a state judge with no prior connection to the case.<sup>26</sup> They then went back to federal court to dismiss the case, but the federal judge refused, condemning the effort to keep the settlement under wraps by conducting an “end run around the court where the case was brought.”<sup>27</sup> Although a state law resolved the case in favor of disclosure, the federal judge explicitly invoked the First Amendment as the underlying value in the controversy.<sup>28</sup> Despite this positive conclusion, the case exemplified the surprising ease with which open-court rules can be skirted.

In another recent civil case, a trial was almost entirely shut down from public view, prompting questions about what order of countervailing interest can defeat a presumption of openness.<sup>29</sup> In *Doe v. Public Citizen*,<sup>30</sup> a company sought to enjoin a federal agency from publishing on its website a report that the company’s product had caused the death of a child.<sup>31</sup> Objecting to the accuracy of the report, the company claimed that its reputational concerns justified closure throughout the litigation.<sup>32</sup> The trial judge agreed.<sup>33</sup> Not only did the judge seal his own summary judgment decision, but he closed the trial itself, sealed other documents in the case, and struck any mention of the trial in the court’s docketing sheets.<sup>34</sup> The judge’s apparent basis was a federal law that permitted companies to challenge inaccurate postings on an agency website.<sup>35</sup> In a strong decision to reverse, a panel of the Fourth Circuit laid down what seemed an obvious rule: “When parties ‘call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.’”<sup>36</sup> Despite the shocking near-total closure in the case, a concurring judge comforted the trial judge for having his “heart . . . in the right place” by worrying about the company’s “survival” “[i]n the electronically viral world that we live in today.”<sup>37</sup> The concurring judge also regretted that the author of the Fourth

---

<sup>25</sup> See generally *id.*; Order at 1, *Jain*, No. 7:13-cv-00551.

<sup>26</sup> Order, *supra* note 25, at 1.

<sup>27</sup> *Id.* at 3–4.

<sup>28</sup> See *id.* at 3 & n.2.

<sup>29</sup> Cf. Scott Michelman, *Fourth Circuit Vindicates First Amendment Right to Access Court Proceedings, Rejects Secret Litigation*, ACLU VA. (Apr. 19, 2014), <https://acluva.org/en/news/fourth-circuit-vindicates-first-amendment-right-access-court-proceedings-rejects-secret> [<https://perma.cc/T5TS-VWSW>].

<sup>30</sup> 749 F.3d 246 (4th Cir. 2014).

<sup>31</sup> *Id.* at 252.

<sup>32</sup> See *id.* at 254.

<sup>33</sup> *Id.* at 255 (stating that the lower court “concluded that the Commission’s decision to publish the report of harm was arbitrary and capricious and an abuse of discretion”).

<sup>34</sup> *Id.* at 254–56.

<sup>35</sup> See *id.* at 253–55.

<sup>36</sup> *Id.* at 271 (quoting *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000)).

<sup>37</sup> *Id.* at 276 (Hamilton, J., concurring in the judgment).

Circuit's decision had not acknowledged "the difficult task confronted by the district court" when the decisions to close were made.<sup>38</sup> The comments suggested that the panel was far from unanimous in assessing the strength of access rights.

A third civil case dealt not with efforts of parties to hide settlements or decisions of a trial court to close a courtroom, but with a state statute mandating closed courtrooms for an entire set of business disputes arbitrated by sitting judges.<sup>39</sup> In *Delaware Coalition for Open Government, Inc. v. Strine*,<sup>40</sup> legislation designed to attract businesses to incorporate in Delaware authorized expeditious arbitrations of business disputes worth at least one million dollars by Court of Chancery judges.<sup>41</sup> The problem was that the legislation mandated that all such arbitrations be closed to the press and public—not even a shareholder could attend, much less a reporter or an interested citizen.<sup>42</sup> After a trial judge declared the statute to be a violation of the First Amendment right of access,<sup>43</sup> a panel of the U.S. Court of Appeals for the Third Circuit affirmed, citing access decisions of the U.S. Supreme Court, all of which had arisen in the criminal law setting, and decisions of the lower courts, many of which had extended the right to civil contexts.<sup>44</sup> But the panel was split 2–1, with each of the three judges writing an opinion and signaling considerable uncertainty about the applicable legal doctrine.<sup>45</sup> The decision then drew a published rebuke from Myron T. Steele, the former Chief Justice of the Supreme Court of Delaware, who, now in private practice,<sup>46</sup> declared that the Supreme Court's access cases were inapplicable, that the panel had "overly broadened" the right of access, and that the effect would be to "stifle[] state innovation and misalign[] the constitutional pendulum."<sup>47</sup> A petition for certiorari was filed by the Chancery Judges, and numerous business attorneys and entities urged the Supreme Court to take the case, clarify the relevant doctrine, and reverse.<sup>48</sup> The petition was denied,<sup>49</sup> but the fracas signaled considerable tension

---

<sup>38</sup> *Id.*

<sup>39</sup> See generally *Del. Coal. for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

<sup>40</sup> 733 F. 3d 510 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

<sup>41</sup> See *id.* at 512.

<sup>42</sup> See *id.* at 513.

<sup>43</sup> *Del. Coal. for Open Gov't, Inc. v. Strine*, 894 F. Supp. 2d 493, 494 (D. Del. 2012).

<sup>44</sup> See *Strine*, 733 F.3d at 513–16, 518–19, 521.

<sup>45</sup> See *id.* at 512, 521, 523.

<sup>46</sup> *An Interview with Former Chief Justice Myron Steele*, BUS. L. TODAY, Sept. 2014, at 1, [https://americanbar.org/publications/blt/2014/09/member\\_spotlight.html](https://americanbar.org/publications/blt/2014/09/member_spotlight.html) [<https://perma.cc/6BGM-M2EB>].

<sup>47</sup> Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum*, 77 ALB. L. REV. 1365, 1383 (2014).

<sup>48</sup> Petition for a Writ of Certiorari, *Strine v. Del. Coal. for Open Gov't, Inc.*, 134 S. Ct. 1551 (2014) (No. 13-869). For an example of pro-business groups' support for a grant of certiorari, see Brief of the Chamber of Commerce of the United States of America and Business Roundtable as *Amicus Curiae* in Support of Petitioners, *Strine*, 134 S. Ct. 1551 (No. 13-869).

<sup>49</sup> *Strine*, 134 S. Ct. 1551.

about the definition and strength of the visibility value of the First Amendment in a fairly novel setting.

In another recent civil case, limits on access rights were front and center. Citing the First Amendment, the American Civil Liberties Union moved to have the U.S. Foreign Intelligence Surveillance Court unseal previously redacted material in the Court's opinions on the legal basis for bulk collection of data by the federal government.<sup>50</sup> In a 42-page decision, the court rejected the First Amendment arguments, but on an unexpected basis: that the ACLU lacked standing to bring the suit.<sup>51</sup> The court explained that it considered the access arguments "only as part of the assessment of whether the [ACLU] has standing under Article III."<sup>52</sup> The ACLU lacked standing because the requested material had been redacted by, and was completely within the control of, the Executive Branch.<sup>53</sup> The access arguments, then, fell flat, with the court suggesting (not very persuasively) that Executive Branch classifications could be subject to FOIA requests rather than access petitions under the First Amendment.<sup>54</sup>

Two other hard-fought, recent controversies arose in the context of criminal prosecutions. The cases demonstrated the persistence of access issues despite the greater clarity of case law in the criminal setting. The first, *In re The Wall Street Journal*,<sup>55</sup> arose from a coal mine owner's indictment on federal charges following a 2010 mine explosion that killed 29 people.<sup>56</sup> The day after the indictment, a federal trial judge, without making findings of necessity, issued a sweeping gag order prohibiting public access to most documents filed in the case, and forbidding the parties, their counsel, potential trial participants, and court personnel from discussing the case with the media.<sup>57</sup> This order remained in place for three months, when it was finally

---

<sup>50</sup> *In re Ops. & Orders of this Court Addressing Bulk Collection of Data Under the Foreign Intelligence Surveillance Act*, No. Misc. 13-08, 2017 WL 427591 (FISA Ct. Jan. 25, 2017), *vacated en banc*, No. Misc. 13-08, 2017 WL 5983865 (FISA Ct. Nov. 9, 2017).

<sup>51</sup> *See id.* at \*21 (finding that "[b]ecause the First Amendment qualified right of access does not apply to the FISC proceedings at issue in this matter, the Movants have no legally protected interest" and lack standing). The Court also noted that only one other case involved an issue of third-party standing in a First Amendment-related claim. *Id.* at \*5.

<sup>52</sup> *Id.* at \*21 n.17.

<sup>53</sup> *See id.* at \*1.

<sup>54</sup> *See id.* at \*19.

<sup>55</sup> 601 F. App'x 215 (4th Cir. 2015) (per curiam).

<sup>56</sup> *See id.* at 217; *United States v. Blankenship*, 79 F. Supp. 3d 613, 618 (S.D.W. Va. 2015) (noting that "[m]any of our families depend on coal mining for their livelihood," and "[m]any families and communities within the Southern District of this state were impacted by the deaths of the miners in the Upper Big Branch mine explosion referenced in the indictment"), *vacated sub nom. In re The Wall Street Journal*, 601 F. App'x 215; *see also* David E. Armendariz et al., *Recent Developments in Media, Privacy, Defamation, and Advertising Law*, 51 TORT TRIAL & INS. PRAC. L.J. 543, 559 (2016); Alan Blinder, *Donald Blankenship Sentenced to a Year in Prison in Mine Safety Case*, N.Y. TIMES (Apr. 6, 2016), <https://nyti.ms/2jEppRu>.

<sup>57</sup> *See In re The Wall Street Journal*, 601 F. App'x at 217 & n\* (reproducing the gag order).

vacated by a panel of the Fourth Circuit in a per curiam decision.<sup>58</sup> The brevity of the panel's analysis could well be seen as a strong rebuke of the lower court's decision, but the fact remains that a three-month silence had been achieved by the unconstitutional order.<sup>59</sup>

In a second widely noted criminal case, federal prosecutors brought charges against HSBC Bank, alleging that the bank helped criminal drug cartels launder profits, among much else.<sup>60</sup> The bank and the government subsequently entered into a five-year Deferred Prosecution Agreement (DPA), which included appointment of a corporate compliance monitor and a limited supervisory role for the presiding federal judge.<sup>61</sup> When the monitor issued his first report, the government filed it under seal.<sup>62</sup> Ruling on a motion to unseal, the federal judge agreed that the report should be disclosed, despite the objections from both the bank and the prosecutors.<sup>63</sup> Citing the First Amendment access cases, the trial judge stood by his decision to unseal.<sup>64</sup> On appeal to the Second Circuit, numerous amici urged the court to affirm the report's unsealing as a "judicial record" open to inspection under the First Amendment, but an appellate panel reversed, and the report remains entirely off limits.<sup>65</sup>

As these cases suggest, access law has been marred by uncertainty, not only about its underlying philosophy, but also about its doctrinal content and breadth. Part I of this Article revisits the Supreme Court's debates concerning the right to receive, and argues that Justice Brennan's intellectual contribution has been central.<sup>66</sup> As discussed below, Brennan and Chief Justice Burger engaged in a curious debate in *Richmond Newspapers*.<sup>67</sup> Writing for the plurality, the Chief Justice envisioned access (at least in part) as a communal interest in channeling anxiety about threats to social order.<sup>68</sup>

---

<sup>58</sup> *Id.* at 217–19.

<sup>59</sup> The gag order was issued on January 7, 2015, and was not vacated until March 5, 2015. *See id.* at 215, 219.

<sup>60</sup> *See* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at \*1, \*8–9 (E.D.N.Y. July 1, 2013).

<sup>61</sup> *See* United States v. HSBC Bank USA, N.A., No. 12-CR-763 (JG), 2016 WL 347670, at \*1 (E.D.N.Y. Jan. 28, 2016) (finding that Corporate Monitor's Report is a judicial record and that the public has a First Amendment right of access to the Report).

<sup>62</sup> *Id.* at \*2.

<sup>63</sup> *See id.* at \*6–7 (holding that both parties' interests can be achieved through targeted redactions).

<sup>64</sup> *See id.* at \*4–7.

<sup>65</sup> *See, e.g.*, Brief of *Amici Curiae* the Reporters Committee for Freedom of the Press & 24 News Media Organizations in Support of Appellee at 1–2, United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017) (No. 16-308); *see also* Peter J. Henning, *HSBC Case Tests Transparency of Deferred Prosecution Agreements*, N.Y. TIMES (Feb. 8, 2016), <https://nyti.ms/2mq5uV6>. *See generally* *HSBC Bank USA*, 863 F.3d 125 (holding that the DPA was not a "judicial document" subject to presumptive public access).

<sup>66</sup> *See* discussion *infra* Part I.

<sup>67</sup> *See* 448 U.S. 555 (1980); *see* discussion *infra* Section I.E.

<sup>68</sup> *See Richmond Newspapers*, 448 U.S. at 571 (plurality opinion) ("[T]he open processes



Burger supported the law's interest in peaceful problem-solving, admired the genius of openness in Anglo-American tradition, and hoped it would meet the culture's therapeutic needs.<sup>69</sup> Brennan, on the other hand, emphasized the structural role of access in the design of the federal government and its contribution to the formation of democratic character.<sup>70</sup> As we shall see, he was particularly interested in the role of access in encouraging the internalization of values relating to procedural fairness.<sup>71</sup>

Part II then posits that, in the wake of the foundational Supreme Court cases, which ultimately adopted the Brennan approach, the courts of appeals took charge of doctrinal development.<sup>72</sup> In particular, appellate courts experimented with analogical reasoning in cases involving proceedings that lacked a long historical record of openness but bore some resemblance to proceedings that did claim a relevant background.<sup>73</sup> Arguments over analogy might have taken over the intellectual dynamic as the case law developed, except that the arguments too often broke off in doubt.<sup>74</sup> As a result, access cases depended for resolution more often on functional arguments about the advantages and disadvantages of openness in different contexts.<sup>75</sup> At the heart of these discussions was an emphasis traceable to Justice Brennan and to the premium he placed on preserving the public's confidence in the judicial branch and exposing citizens to the legal values observable in open proceedings.<sup>76</sup>

Part III then discusses a third tier in the creation of access jurisprudence: the trial judges.<sup>77</sup> As they have implemented the Supreme Court's philosophical premises and applied the methodologies of appellate courts, trial judges have left their own distinctive marks. For at least some of them, the educative function of access has been paramount.<sup>78</sup> These judges are closest to the ground, nearest to the population, and they recognize the capacity of access jurisprudence to communicate some of the law's richest values.<sup>79</sup> In three difficult access cases, the Article follows trial judges as they invoke openness to illuminate ideas of due process.<sup>80</sup> One judge reins in attorneys seeking to avoid a law that would force sensitive information into the light;<sup>81</sup>

---

of justice serve as an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.”).

<sup>69</sup> See *id.* at 564–80.

<sup>70</sup> See *id.* at 584–98 (Brennan, J., concurring in judgment).

<sup>71</sup> See *id.*; discussion *infra* Section I.E.

<sup>72</sup> See discussion *infra* Part II.

<sup>73</sup> See discussion *infra* Part II.

<sup>74</sup> See discussion *infra* Part II.

<sup>75</sup> See discussion *infra* Part II.

<sup>76</sup> See discussion *infra* Part II.

<sup>77</sup> See discussion *infra* Part III.

<sup>78</sup> See discussion *infra* Part III.

<sup>79</sup> See discussion *infra* Part III.

<sup>80</sup> See discussion *infra* Part III.

<sup>81</sup> See discussion *infra* Section III.A.

another forbids corporate antagonists from attempting to “own” a lawsuit by redacting the information flow;<sup>82</sup> and a third insists on openness as a way of keeping the Department of Justice honest in its arrangement with a targeted corporation.<sup>83</sup> In each, rules of openness allow judges to maintain their courtrooms as public places and to strengthen their relationships of trust with the community.<sup>84</sup> In the end, it is the trial judges who foster the relationship between courts and citizenry that Justice Brennan first conceived for the law of access.<sup>85</sup> In a troubled time for public institutions generally, perhaps it will be trial judges whose example reawakens the visibility value.

#### I. ARTICULATING THE RELATIONSHIP: COURT AND CITIZEN IN ACCESS CASES

The generative documents in the access cases are two opinions by Justice Brennan—his concurrence in *Richmond Newspapers*<sup>86</sup> and his majority opinion in *Globe Newspaper Co. v. Superior Court*.<sup>87</sup> In both, he suggested philosophical underpinnings of a right of access to criminal proceedings, and he defined a doctrinal framework.<sup>88</sup> The disarray in today’s access jurisprudence may be due to raw neglect of the contours and implications of the Brennan legacy.

Brennan’s earlier writings had laid the groundwork for an approach to informational access; in talks before audiences of law students and the practicing bar, he addressed seemingly disparate topics that he would later connect, producing a distinctive vision of free speech informed by access to information.<sup>89</sup> The topics concerned the relationship of citizen to government.<sup>90</sup> Although he took seriously the formal constitutional theory of a principal-agent relationship between citizens and the branches of government, he took just as seriously the insights of a “sociological jurisprudence” that probed the reality of social conditions and the “actuality of the individual human beings who constitute society in fact.”<sup>91</sup> Combining respect for

---

<sup>82</sup> See discussion *infra* Section III.B.

<sup>83</sup> See discussion *infra* Section III.C.

<sup>84</sup> See discussion *infra* Part III.

<sup>85</sup> See discussion *infra* Part III.

<sup>86</sup> 448 U.S. 555, 584–98 (1980) (Brennan, J., concurring in judgment).

<sup>87</sup> 457 U.S. 596, 597–611 (1982).

<sup>88</sup> See *Globe Newspaper*, 457 U.S. at 604–06; *Richmond Newspapers*, 448 U.S. at 586–88 (Brennan, J., concurring in judgment).

<sup>89</sup> See, e.g., Brennan, Address, *supra* note 12, at 174–77 (discussing the impact First Amendment Court decisions have on the press and social interests).

<sup>90</sup> See generally William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, Alexander Meiklejohn Lecture at Brown University (Apr. 14, 1965), in 79 HARV. L. REV. 1 (1965) [hereinafter Brennan, Meiklejohn Interpretation] (discussing differing theories of the First Amendment’s scope in relation to conflicting desires of citizens and government).

<sup>91</sup> William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Centennial Address at the

formal structure with clear-eyed attention to present-day conditions, Brennan's focus was the content of values, their place in legal thought, and their creation through a complex process of debate and education.

### A. *Sovereignty and Structure*

A primary strand of Justice Brennan's thought—part of a web of considerations that arguably underlay his opinions on access<sup>92</sup>—was a structural conception of sovereignty lodged in “the people.”<sup>93</sup> But who were “the people?” Speculating on Brennan's formative experiences, his biographers cite his father's union organizing in Newark, New Jersey.<sup>94</sup> “What got me interested in people's rights and liberties,” Brennan later said, “was the kind of family and the kind of neighborhood I was brought up in. I saw all kinds of suffering—people had to struggle.”<sup>95</sup> He came of age in the era of *Lochner's* “spirit of hostility to social change,”<sup>96</sup> the period in which “the industrial system [was put] on trial” in the federal prosecution of members of the Industrial Workers of the World for sedition.<sup>97</sup> His structural conception was therefore grounded, at least partially, in labor controversies of the early twentieth century and was anything but abstract. Later, as a young justice of the New Jersey Supreme Court, he was attentive to issues in the criminal justice system and dissented memorably from a decision of the Chief Justice that upheld the state's denial of a criminal defendant's request to review his own confession before trial.<sup>98</sup> “We must remember,” Brennan wrote in the case,

---

Centennial Convocation of the George Washington Law School (Oct. 12, 1965), in 34 GEO. WASH. L. REV. 189, 190 (1965) (citation omitted) [hereinafter Brennan, Centennial Address].

<sup>92</sup> Cf. DANIEL A. FARBER, *THE FIRST AMENDMENT* 84–85 (3d ed. 2010) (commenting on Brennan's judicial style and noting that, in his majority opinion for the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Justice “did not rest his malice test on any single constitutional foundation” but “built a web supporting his legal test from many sides”).

<sup>93</sup> William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, Speech at the Columbia Law School Bicentennial Celebration (Nov. 20, 1987), in 15 NOVA L. REV. 1, 2–3 (1991) [hereinafter Brennan, *Worldwide Influence*].

<sup>94</sup> See Nat Hentoff, *The Constitutionalist*, NEW YORKER (Mar. 12, 1990), <https://www.newyorker.com/magazine/1990/03/12/the-constitutionalist> [<https://perma.cc/9JLA-MVYJ>].

<sup>95</sup> *Id.* Brennan himself did not suffer the poverty that would later figure into *Goldberg v. Kelly*, 397 U.S. 254 (1970), but his opinion for the Court in that case “comported with the economic worldview of Brennan's father, what Brennan himself had seen in Depression-era Newark, and the importance he placed on protecting people's human dignity.” SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 342 (2010).

<sup>96</sup> ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 104 (Sanford Levinson ed., 6th ed. 2016).

<sup>97</sup> LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* 83 (2016).

<sup>98</sup> *State v. Tune*, 96 A.2d 881, 894–98 (N.J. 1953) (Brennan, J., dissenting).

that society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape.

. . . .

. . . It shocks my sense of justice that . . . counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied.<sup>99</sup>

The same blend of eloquence and realism could be heard in his much later references to citizens, not as cogs in a machinelike apparatus of government, but as “authors” of constitutional life, “well-springs” of a republic possessing a “revolutionary character”—assignors of duties to three distinct units of government.<sup>100</sup> This was a description of “the people” as descendants and implementers of the Enlightenment, whose mission was to define a new conception of “the relationship of the individual and the state.”<sup>101</sup> And for Brennan, the people’s own “choice of democratic self-governance” in the Constitution was an early manifestation of a “vision of the supremacy of the human dignity of every individual.”<sup>102</sup>

In the relationship between citizen and state, “the people” were more than originators of authority; Brennan saw them as engaged overseers of the actions of their agents, possessing the power of the vote to control government actors, as well as the power of speech to influence and hold those actors to account.<sup>103</sup> Besides providing for executive, legislative, and judicial agents of the people, the Constitution provided for an institution that would serve as surrogate—the press—and be instrumental in enforcing accountability of each institution of government.<sup>104</sup> But Brennan recognized—and embraced—the fact that the constitutional design was even more complex in its

---

<sup>99</sup> *Id.* at 895–96.

<sup>100</sup> Brennan, Address, *supra* note 12, at 181 (referring to “the people” as “authors”); *id.* at 192 (referring to individuals as “well-springs”); Brennan, Worldwide Influence, *supra* note 93, at 2 (describing the Constitution’s “revolutionary character”).

<sup>101</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *JUDGES ON JUDGING: VIEWS FROM THE BENCH* 230, 235 (David M. O’Brien ed., 5th ed. 2017) [hereinafter Brennan, *The Constitution*].

<sup>102</sup> *Id.* at 236.

<sup>103</sup> See Brennan, Meiklejohn Interpretation, *supra* note 90, at 11, 14–15 (discussing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and the influence of Alexander Meiklejohn, who believed “the people created a form of government” based on a “basic decision . . . to govern themselves rather than to be governed by others,” and James Madison, who stated “that the censorial power is in the people over the Government, and not in the Government over the people” (citation omitted)).

<sup>104</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592–93 (1980) (Brennan, J., concurring in judgment) (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975), for its recognition of “the function of the press” in facilitating public awareness of the administration of justice).

ambition; the people's surrogate, in turn, would be aided by the federal courts, which would work to guarantee the rights of citizens and surrogates alike.<sup>105</sup> Thus, one of the primary duties of the federal courts was to safeguard the ability of all to engage in "uninhibited, robust, and wide-open" expression about the significant issues of the day.<sup>106</sup> *New York Times Co. v. Sullivan*<sup>107</sup> embodied the idea that the "central meaning of the First Amendment" was to facilitate the power to evaluate and, if necessary, strongly criticize the exercise of governmental power.<sup>108</sup>

But in order to perform this essential safeguarding role, the courts themselves had to be structurally independent, free of political control by the other branches.<sup>109</sup> In this context, it is perhaps not surprising that Brennan was something of a separation of powers purist, at least in cases in which he feared that the political branches had enacted laws undermining the independence of the federal judiciary. Thus, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>110</sup> and in *Commodity Futures Trading Commission v. Schor*,<sup>111</sup> he voted to strike down statutes that, in his view, diluted the power of the federal courts in certain adjudicatory contexts.<sup>112</sup> His concern was that the statutes in question deprived citizens of protection from "majoritarian pressures"—essentially that erosion of Article III courts, even if incremental and well-intentioned, could not be tolerated.<sup>113</sup> As a principle of order, constitutional design was paramount; Brennan held true to structure, even the eighteenth-century design that permeated the rhetoric of separation of powers, for a simple reason: individual liberty depended on a strong, even fearless, judiciary.<sup>114</sup> In the face of mocking criticism from fellow Justices, who castigated Brennan for his "inexplicably heavy hand" and for "grossly" oversimplifying the meaning of the Constitution,<sup>115</sup> Brennan maintained a belief in the importance of fidelity to separated powers and judicial review.<sup>116</sup>

---

<sup>105</sup> *Cf. id.* at 592–97.

<sup>106</sup> *New York Times Co.*, 376 U.S. at 270.

<sup>107</sup> 376 U.S. 254 (1964).

<sup>108</sup> *Id.* at 273.

<sup>109</sup> *See generally, e.g.,* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859–67 (1986) (Brennan, J., dissenting); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion).

<sup>110</sup> 458 U.S. 50 (1982) (plurality opinion).

<sup>111</sup> 478 U.S. 833, 859–67 (1986) (Brennan, J., dissenting).

<sup>112</sup> *See generally, e.g., id.* at 859; *N. Pipeline Constr. Co.*, 458 U.S. at 87–89 (plurality opinion).

<sup>113</sup> *Schor*, 478 U.S. at 859–60 (Brennan, J., dissenting).

<sup>114</sup> *See id.* at 867 ("It is our obligation zealously to guard [judicial] independence so that our tripartite system of government remains strong and that individuals continue to be protected against decisionmakers subject to majoritarian pressures. Unfortunately, today the Court forsakes that obligation for expediency.")

<sup>115</sup> *N. Pipeline Constr. Co.*, 458 U.S. at 95, 103 (White, J., dissenting).

<sup>116</sup> *See, e.g., Schor*, 478 U.S. at 860 (Brennan, J., dissenting).

*B. Sociological Jurisprudence*

The other Justices' criticism might have stuck if Justice Brennan's structural concerns had been the sum total of his outlook, but they were not. Brennan's thought was capacious enough not only to capture the dynamic of constitutional design, but also to bring searching eyes to the pressing cultural, racial, and geopolitical struggles of the nation in the mid-1960s—real struggles within the structure of the state.<sup>117</sup> Along with his appreciation for constitutional design was a similarly vital sense of what he called (in 1965) a “new jurisprudence” that incorporated the strides of legal realism but sought to move “further still,” beyond an emphasis on “property and power priorities of society,” and towards a focus on human experience.<sup>118</sup> This jurisprudence prompted an entirely new set of questions. Brennan approvingly cited questions posed by an ABA Report on Comparative Jurisprudence and Legal Philosophy: “[W]hat is the nature of man, and what is the nature of the universe with which he is confronted. . . . Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice?”<sup>119</sup>

As Mark Greif masterfully describes in a recent book,<sup>120</sup> these questions were pervasive in American culture at mid-twentieth century, precisely the time Brennan raised them himself.<sup>121</sup> As Greif states: “For a long period in the mid-twentieth century, fundamental anthropology—the problematic nature of ‘man’—became a main rhetorical and contemplative current in the streams of thought and writing that shape a public philosophy.”<sup>122</sup> Greif's book helps to situate Brennan in a particular time and place. With the rise of fascism and Nazism in Europe, and the advent and massive experience of World War II, the pre-1930s pragmatism and progressivism of John Dewey seemed incapable of addressing a mid-century “perception of danger” that liberalism and capitalism were under “civilizational threat” and that humanist thought about the nature of man was obsolete.<sup>123</sup> In works of art, theology, literary criticism, anthropology, fiction, and philosophy, a range of thinkers “asked what man was, in what part of himself he should have a steady faith, and how he had come to this pass.”<sup>124</sup>

Greif explores the range of answers that were offered by philosophers, novelists, and many others; many kept the focus on “the self” and “man” and explored the idea

---

<sup>117</sup> Cf. Brennan, Centennial Address, *supra* note 91, at 190–91.

<sup>118</sup> *See id.*

<sup>119</sup> *Id.* at 191 (quoting ABA, REPORT OF COMMITTEE ON COMPARATIVE JURISPRUDENCE AND LEGAL PHILOSOPHY 195, 198–99 (1964)).

<sup>120</sup> MARK GREIF, THE AGE OF THE CRISIS OF MAN: THOUGHT AND FICTION IN AMERICA 1933–1973 (2015).

<sup>121</sup> *See id.* at xi; *see also* Brennan, Centennial Address, *supra* note 91, at 191.

<sup>122</sup> GREIF, *supra* note 120, at xi.

<sup>123</sup> *See id.* at x, 3, 54.

<sup>124</sup> *Id.* at 7.

of a universal human nature, referencing a vision of man, drawn from the Enlightenment, as a “spiritual guardian and rational proprietor of our planet.”<sup>125</sup> This was the model of human beings as “choosing and loving and suffering and growing.”<sup>126</sup> Was this model of humanity descriptively accurate, and were its concerns relevant? The humanists insisted yes.<sup>127</sup> For others, though, especially the critical theorists of the late 1950s and 1960s, this perspective on the self and its processes of growth was outmoded and wrong.<sup>128</sup> The anti-humanists flatly rejected the notion of a common essence or foundation, insisting that, among other limitations, the discourse of “man” glaringly omitted concerns for outliers, particularly minorities and women, and neglected the possibility that “appeals to universal brotherhood were often a screen for white privilege.”<sup>129</sup> The Enlightenment itself was problematic; its “impulse to liberation” had “invariably bec[o]me the means of domination.”<sup>130</sup> More deeply, the anti-humanists rejected the idea that “individual consciousness” held the key to “its own behavior, social practices, and beliefs.”<sup>131</sup> Their preferred mode of thought was “[s]ociety-level analysis,” with its focus on institutions and structure.<sup>132</sup> Meanwhile, novelists like Ralph Ellison and Saul Bellow took a third path, producing fictions that traced the progress of characters toward individuality without worrying about universals and without denying the reality of the person.<sup>133</sup>

Because Greif’s book does not delve into legal thought, he offers no analysis of jurists or the “sociological jurisprudence” that was clearly part of the “crisis of man” conversation in the latter part of the twentieth century.<sup>134</sup> But if he had looked at legal figures, Greif likely would have recognized Justice Brennan as drawing on all three strands of the thought he identifies: the Enlightenment focus on human rationality and choice; the concern about domination by unresponsive institutions; and the persistence of belief in the possibility of individuals finding their own meaning and character.<sup>135</sup> These were all elements of Brennan’s sociological

---

<sup>125</sup> Brian Dillon, *The Age of the Crisis of Man: Thought and Fiction in America, 1933–1973* by Mark Greif—Review, THE GUARDIAN (Aug. 21, 2015, 11:02 EDT), <https://www.theguardian.com/books/2015/aug/21/age-of-crisis-of-man-mark-greif-review> [<https://perma.cc/RMS7-M2FE>] (reviewing Greif’s book).

<sup>126</sup> Anthony Domestico, *The Age of the Crisis of the Man: Thought and Fiction in America, 1933–1973*, COMMONWEAL (June 1, 2015), <https://www.commonwealmagazine.org/age-crisis-man> [<https://perma.cc/QQW2-UWE4>] (reviewing GREIF, *supra* note 120).

<sup>127</sup> *See id.*

<sup>128</sup> *See id.*

<sup>129</sup> *Id.*

<sup>130</sup> GREIF, *supra* note 120, at 59.

<sup>131</sup> *Id.* at 286.

<sup>132</sup> *Id.* at 303.

<sup>133</sup> *See generally id.* at 145–203 (discussing the works of Ellison and Bellow).

<sup>134</sup> *See generally id.*

<sup>135</sup> Compare *supra* notes 89–116 and accompanying text (discussing Justice Brennan’s constitutional philosophy), with *supra* notes 120–33 (outlining the modes of philosophical thought that Greif discusses in his book).

jurisprudence.<sup>136</sup> As noted above, Justice Brennan, using humanist vocabulary, engaged the period's questions about man and his fate; he did not shy away from identifying an essence that he considered universal.<sup>137</sup> This was human dignity, the constant theme of his out-of-court speeches and the cited concern in many of his later judicial opinions.<sup>138</sup> For Brennan, dignity was a term that captured the irreducible "worth and respect due each individual."<sup>139</sup> As early as 1961, he called it the "supreme value of our American democracy."<sup>140</sup> Biographers speculate that his identification with the phrase "human dignity" was traceable to Catholic social thought, or the possible influence of a fellow Irish-American Justice, Frank Murphy, who used the terminology in several cases, including his dissent in *Korematsu v. United States*,<sup>141</sup> condemning the subjugation of an entire population as a sure way to "destroy the dignity of the individual."<sup>142</sup> Others point to the thought of Alexander Meiklejohn, whose work on freedom of expression extolled "the dignity of a governing citizen."<sup>143</sup> Twenty years after the *New York Times Co.* case, Brennan himself drew a connection between dignity and the First Amendment, stating that "[r]ecognition of broad and deep rights of expression and conscience reaffirm the vision of human dignity" by facilitating public discussion and encouraging development of political ideas.<sup>144</sup>

Dignity was also connected to Brennan's concern for social power and the modern state's capacity and effort "to control the understanding of the present."<sup>145</sup> Brennan

---

<sup>136</sup> See, e.g., *supra* notes 89–116 and accompanying text. For additional perspectives on Brennan's approach to judging, see DAVID E. MARION, *THE JURISPRUDENCE OF WILLIAM J. BRENNAN, JR.: THE LAW AND POLITICS OF "LIBERTARIAN DIGNITY"* (1997), and Ruggero J. Aldisert, *The Brennan Legacy: The Art of Judging*, 32 *LOY. L.A. L. REV.* 673 (1999). For a discussion of the role in decision-making of a judge's "tacit underlying assumptions of legal culture," see Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive Right to Know*, 72 *MD. L. REV.* 1, 67 (2012).

<sup>137</sup> See *supra* notes 89–116 and accompanying text.

<sup>138</sup> See generally Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 *WM. & MARY BILL RTS. J.* 223 (1998).

<sup>139</sup> William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Reason, Passion, and "The Progress of the Law," Forty-Second Annual Benjamin N. Cardozo Lecture (Sept. 17, 1987), in 10 *CARDOZO L. REV.* 3, 17 (1988) [hereinafter Brennan, Reason, Passion].

<sup>140</sup> See STERN & WERMIEL, *supra* note 95, at 418 (quoting a speech by Brennan entitled "The Essential Dignity of Man").

<sup>141</sup> 323 U.S. 214 (1944).

<sup>142</sup> *Id.* at 240 (Murphy, J., dissenting); see STERN & WERMIEL, *supra* note 95, at 418–19 (referencing *Korematsu* and the internment of Japanese Americans during World War II).

<sup>143</sup> Brian C. Murchison, *Revisiting the American Action for Public Disclosure of Private Facts*, in *NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 32, 41 (Andrew T. Kenyon & Megan Richardson eds., 2006) (citation omitted).

<sup>144</sup> *Id.* at 41–42 (citation omitted).

<sup>145</sup> David Bromwich, *Literature and Theory: Notes on the Research Programs of the 1980s*, in *THEORY'S EMPIRE: AN ANTHOLOGY OF DISSENT* 590, 602 (Daphne Patai & Will H. Corral eds., 2005).



discussed the threat posed by governmental institutions as crucially affecting, yet ignoring the lives of, citizens.<sup>146</sup> Like the anti-humanists profiled by Greif—theoreticians of structure who condemned what they saw as the complacency of humanists with their fixity on “man” rather than “the system”<sup>147</sup>—Brennan noted the dehumanizing potential of state power.<sup>148</sup> The difference was that as a Justice of the Supreme Court, he could do something to effectuate change, even if incremental or temporary. Thus, in a momentous 1965 decision, *Dombrowski v. Pfister*,<sup>149</sup> Brennan wrote for the Court in allowing civil rights workers who had been indicted under a Louisiana criminal law aimed at “subversive activities” to seek injunctive relief from state prosecution and possible prosecution in federal court.<sup>150</sup> The decision required a “dramatic and profound” departure from “the established legal order”<sup>151</sup>—a federal statute forbade such interference with most state enforcement actions—and became a “source of conscience” in later civil rights initiatives.<sup>152</sup> A dissent accurately pointed out that Brennan’s majority decision was animated by an understanding “that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively.”<sup>153</sup> As Brennan was later to write, human dignity necessitates the “constant vigilance” of courts when government activity collides with individual rights.<sup>154</sup> But matters of racial harassment and discrimination in the civil rights era were hardly the sole issues that required a “sociological jurisprudence”; other issues did as well, particularly those arising in the federal bureaucracy.<sup>155</sup> Brennan was particularly concerned about the “impersonal form” of administrative justice and the potential for arbitrary action.<sup>156</sup> In describing the federal bureaucracy, he decried “the ability of bureaucracy to hide responsibility,” and he cited works of Max Weber expressing concern about the power of institutions to dehumanize social welfare programs.<sup>157</sup> Thus, in writing for the Court in *Goldberg v. Kelly*,<sup>158</sup> he reasoned that welfare recipients were owed personalized procedures by public officials before benefits providing

---

<sup>146</sup> See generally, e.g., Brennan, Reason, Passion, *supra* note 139.

<sup>147</sup> GREIF, *supra* note 120, at 285–86.

<sup>148</sup> See generally, e.g., Brennan, Reason, Passion, *supra* note 139.

<sup>149</sup> 380 U.S. 479 (1965).

<sup>150</sup> *Id.* at 481–92.

<sup>151</sup> Owen M. Fiss, *Dombrowski*, 86 YALE L. J. 1103, 1103 (1977).

<sup>152</sup> *Id.* at 1108–10, 1164. The impact of *Dombrowski* was short-lived. In the 1970s and 1980s, “opinions by Brennan that helped make federal courts the primary forum for protecting federal rights, were deprived of all operative significance” by subsequent decisions. OWEN FISS, PILLARS OF JUSTICE: LAWYERS AND THE LIBERAL TRADITION 40 (2017).

<sup>153</sup> See STERN & WERMIEL, *supra* note 95, at 228 (quoting *Dombrowski*, 380 U.S. at 499 (Harlan, J., dissenting)).

<sup>154</sup> Brennan, *The Constitution*, *supra* note 101, at 237.

<sup>155</sup> See Brennan, Reason, Passion, *supra* note 139, at 18–19.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 19.

<sup>158</sup> 397 U.S. 254 (1970).

basic sustenance could be terminated.<sup>159</sup> He explicitly cited “the Nation’s basic commitment . . . to foster the dignity and well-being of all persons within its borders.”<sup>160</sup>

Justice Brennan stood with the novelists of a “third way” examined by Greif as well. For Ellison and Bellow, the ultimate focus was not on universal components of mankind or on systemic dominance, but on the dealings of individuals with “the sheer contingency of individual existence,”<sup>161</sup> experiences arising from a web of relations, and the capacity of persons to overcome narratives imposed on them by others and construct their own accounts of their place in the world.<sup>162</sup> As Ellison wrote in *Invisible Man*, the self seeks to create “the uncreated features of his face.”<sup>163</sup> Brennan recognized the value of focusing on specific facts that provoked individuals to seek redress in the courts.<sup>164</sup> The plaintiffs in *Dombrowski* and *Goldberg* were not simply representatives of “man,” nor were they simply victims of a state power or of a bureaucratic leveling process; they were persons with unique histories and claims. For example, in *Goldberg*, Brennan spoke of two by name,<sup>165</sup> and later in *Mathews v. Eldridge*<sup>166</sup> he detailed the predicament of a named disability benefits recipient.<sup>167</sup>

In sum, if Greif is right that mid-century anxieties were expressed in distinct voices from starkly varying perspectives, Brennan displayed an acute awareness of that multiplicity and an ability to appreciate the truth that each possessed.

### C. Value Awareness: Worrying and Thinking

So far, we have examined Justice Brennan’s emphasis on (a) constitutional structure as capturing the core function of citizens as “authors” of governance, and (b) sociological jurisprudence as based on actual conditions affecting the dignity of citizens. A further element of his thought, comparably important, completes the picture: the imperative of citizen awareness of the values animating American law. For Brennan, the legal order and its pursuit of justice were not simply functions of good

---

<sup>159</sup> *Id.* at 263–64.

<sup>160</sup> *Id.* at 264–65.

<sup>161</sup> See RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 26 (1989).

<sup>162</sup> GREIF, *supra* note 120, at 149, 161, 177 (Ellison’s novel, addressing the meaning of “humanity,” insists “on the priority of distinct and individual persons, before any group consciousness or its greater manifestation, a ‘culture’”); cf. Richard Rorty, *Freud and Moral Reflection*, in PRAGMATISM’S FREUD: THE MORAL DISPOSITION OF PSYCHOANALYSIS 1, 19 (Joseph H. Smith & William Kerrigan eds., 1986) (defining Freud’s concept of dignity as “the ability of each of us to tailor a coherent self-image for ourselves and then use it to tinker with our behavior”).

<sup>163</sup> RALPH ELLISON, INVISIBLE MAN 268 (1952) (emphasis removed).

<sup>164</sup> See, e.g., *Goldberg*, 397 U.S. at 263–65.

<sup>165</sup> *Id.* at 256 n.2.

<sup>166</sup> 424 U.S. 319 (1976).

<sup>167</sup> *Id.* at 349–50 (Brennan, J., dissenting).

judging; they were also functions of informed citizenship.<sup>168</sup> In a speech in late 1964, against the backdrop of the Kennedy assassination and a summer of “extreme tensions in human affairs”—including “riots in Harlem, Rochester, Dixmoor, [and] North Philadelphia”—the Justice argued that the post-war United States had undergone a “serious fundamental change in . . . intellectual outlook,” but that citizens’ knowledge of the content of American values had lagged far behind.<sup>169</sup> Speaking specifically of young people but implying a more general critique of American culture, Brennan stated that the country was suffering from “gaps, perhaps tragic gaps” in students’ knowledge of the meaning of the Bill of Rights and consequently in their “respect” for constitutional principles.<sup>170</sup> He posed the possibility that “those institutions whose task it is to inculcate values have somehow failed,” and he suggested that the problem was sufficiently serious to warrant reformulation of “the basic objectives of liberal education.”<sup>171</sup> He then went deeper, suggesting that citizens must grasp both the “rights and responsibilities” contemplated by the Bill of Rights—not simply a self-congratulatory list of such rights, but an understanding of “the conflicts in values that often make the Bill of Rights much harder to apply than to recite.”<sup>172</sup> U.S. society was committed, he said, “to the constitutional idea of libertarian dignity protected through law,” and its people, particularly but not exclusively its young people, should be part of civic “worrying and thinking about the values and interests at stake” in difficult cases.<sup>173</sup> In a different speech from the same period, addressing legal education, Brennan stated that one objective of legal education should be “a greater recognition of the place of human dignity,” with the clear implication that “human dignity” itself had a complexity that would require additional worry and additional thought.<sup>174</sup>

These addresses show the Justice’s concern with actively encouraging and facilitating public awareness of U.S. law and its underlying values, and more specifically, an understanding of the complexity involved in determining the proper resolution of a hard case.<sup>175</sup> For Brennan, the citizen’s authorship of governance was more than conceptual, and sociological jurisprudence involved more than guarantees of negative liberty.<sup>176</sup> Citizens must witness values in action, including values in

---

<sup>168</sup> See generally, e.g., William J. Brennan, Jr., Comment, *Education and the Bill of Rights*, 113 U. PA. L. REV. 219 (1964) [hereinafter Brennan, *Education*].

<sup>169</sup> *Id.* at 219–22.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 221.

<sup>172</sup> *Id.* at 221–22.

<sup>173</sup> *Id.* at 223–24; cf. SCOTT BUCHANAN, SO REASON CAN RULE: REFLECTIONS ON LAW AND POLITICS 20–21 (1982) (positing that “self-government is a self-educative process,” that political thought benefits from acknowledging that “the laws are the teachers,” and that “the making, obeying, and remaking of law is the essence of collective self-education”).

<sup>174</sup> See Brennan, Centennial Address, *supra* note 91, at 194.

<sup>175</sup> See, e.g., Brennan, *Education*, *supra* note 168, at 223.

<sup>176</sup> See discussion *supra* Sections I.A–B.

conflict.<sup>177</sup> Citizens must evaluate how values function and compete, and they must assess what values can and do achieve.<sup>178</sup> Incultation, if it happens, can only happen through such a process.<sup>179</sup>

#### *D. The Road to Richmond Newspapers*

Recognition of a First Amendment–based right of access occurred after four false starts—press defeats in *Branzburg v. Hayes*,<sup>180</sup> *Pell v. Procunier*,<sup>181</sup> *Saxbe v. Washington Post Co.*,<sup>182</sup> and *Houchins v. KQED, Inc.*<sup>183</sup> The underlying question in those cases was whether the First Amendment provided significant protection for newsgathering, and the Supreme Court offered no clear answer.<sup>184</sup> The Court had already established strong protections for publication itself,<sup>185</sup> but the prepublication process of acquiring information was unknown territory.

Was newsgathering best considered tangential to publication in First Amendment theory, or was it an integral part of a speech dynamic that required strong judicial vigilance? As the Court struggled to conceptualize access and to define a framework, it was distracted by two initial problems. One was whether newsgathering protections (if any) involved “positive rights,” which some of the Justices would find to be a stumbling block.<sup>186</sup> If that issue could be resolved in favor of the press, a second problem involved identifying the source of access rights to a specific venue: criminal proceedings.<sup>187</sup> Would any such rights derive from the Public Trial guarantee of the Sixth Amendment or from the Speech and Press Clauses of the First Amendment?

The Court’s struggles with these queries caused frustrating delays on the road to *Richmond Newspapers*. However, although four preliminary cases were losses for the press, they yielded a few small but important benefits. They clearly introduced the topic of press access, familiarized the Justices with values associated with newsgathering—particularly the educative effect of access—and drew from the Justices a statement that, although it seemed at first no more than a grudging concession, was

---

<sup>177</sup> See discussion *supra* Sections I.A–B.

<sup>178</sup> See discussion *supra* Sections I.A–B.

<sup>179</sup> See discussion *supra* Sections I.A–B.

<sup>180</sup> 408 U.S. 665 (1972).

<sup>181</sup> 417 U.S. 817 (1974).

<sup>182</sup> 417 U.S. 843 (1974).

<sup>183</sup> 438 U.S. 1 (1978).

<sup>184</sup> See, e.g., *Houchins*, 438 U.S. at 7–12 (plurality opinion) (discussing the Court’s case law and indicating there is a limited press right to a public trial).

<sup>185</sup> See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (ruling that the *New York Times* and *Washington Post* could publish classified government documents).

<sup>186</sup> See *supra* notes 1–3 and accompanying text.

<sup>187</sup> See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584–98 (1980) (Brennan, J., concurring in judgment).

a seed from which much would grow: that journalists' pursuit of news was "not without its First Amendment protections."<sup>188</sup>

*Branzburg v. Hayes*, argued in early 1972, had the bad luck of poor timing.<sup>189</sup> The mainstream press had won a landmark decision just eight months before, when the Supreme Court invalidated injunctions ordering the *New York Times* and other newspapers not to publish the Pentagon Papers.<sup>190</sup> And less than a decade earlier, the press had won *New York Times Co. v. Sullivan*,<sup>191</sup> which rewrote the libel tort in cases brought by public officials against critics of their official behavior.<sup>192</sup> A number of cases in the wake of *Sullivan* had continued the redefinition of libel.<sup>193</sup> By the time of *Branzburg*, retrenchment may have begun, as a number of the Justices balked at embarking on another major project related to the press.<sup>194</sup> To be sure, the issue in *Branzburg* was complex, involving not a direct restriction on publication, but an impediment to information gathering.<sup>195</sup> The question was whether the First Amendment guaranteed journalists a privilege "not to respond to [grand jury] questions about criminal activity they had witnessed, notwithstanding that a pledge of confidentiality had been given by the journalists to their sources."<sup>196</sup> The case reviewed judgments from several jurisdictions, all involving reporters who had conducted investigative journalism about timely topics, including drug use and radical political action.<sup>197</sup> Prosecutors had subpoenaed the reporters to appear before state or federal grand juries and testify about whom and what they had seen.<sup>198</sup> In each case, prosecutors invoked "the ancient role of the grand jury" to seek "every man's evidence," including the knowledge of reporters, in the course of inquiring into whether a crime had been committed.<sup>199</sup> The journalists, on the other hand, argued that a privilege rooted in the First Amendment should be recognized, preventing their "annexation" by law enforcement and exempting them from compliance with the subpoenas.<sup>200</sup> For the reporters, the issue was ultimately about access to information and "the free flow of

---

<sup>188</sup> *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

<sup>189</sup> *See id.* at 665.

<sup>190</sup> *See New York Times Co.*, 403 U.S. at 714.

<sup>191</sup> 376 U.S. 254, 283 (1964).

<sup>192</sup> *Id.* at 256–64, 283–84.

<sup>193</sup> *See, e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30–31 (1971); *Associated Press v. Walker*, 389 U.S. 28 (1967) (per curiam); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 133–34 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 67–68 (1964).

<sup>194</sup> *See generally Branzburg*, 408 U.S. at 665–83.

<sup>195</sup> *See* FLOYD ABRAMS, *FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT* 124 (2013).

<sup>196</sup> *Id.*

<sup>197</sup> *Branzburg*, 408 U.S. at 667–79.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 686, 688.

<sup>200</sup> *Id.* at 725 (Stewart, J., dissenting).

information” to the public.<sup>201</sup> They argued that confidential sources were crucial to news reporting, and that, with no constitutional privilege for the press to refrain from answering a grand jury’s questions, sources would dry up, newsgathering would stall, and the flow of information on public matters would be seriously curtailed.<sup>202</sup>

In a 5–4 decision, the Supreme Court rejected the reporters’ arguments and found no such privilege in the Constitution.<sup>203</sup> The closeness of the case was underscored by the fact that the split among Justices took place at the very center of the Court; writing for the majority was Justice White, and writing for the dissent was Justice Stewart, both of whom were considered centrists in the realm of the First Amendment.<sup>204</sup> But the majority opinion could not have been bleaker for the reporters advocating a constitutional testimonial privilege. Justice White stressed the law enforcement backdrop of the case and the nature of the grand jury rule, noting that it was a generally applicable law in the sense that the public and the press alike were bound to comply.<sup>205</sup> Because the rule did not single out the press, White insisted that First Amendment scrutiny was not required at all<sup>206</sup>—although he did acknowledge that “news gathering is not without its First Amendment protections,”<sup>207</sup> specifically protections from prosecutorial harassment and bad-faith criminal investigations.<sup>208</sup> Aside from whether or how much the First Amendment figured in the case, the majority believed that the rule’s “burden” on the press was empirically uncertain—there was little evidence that grand jury testimony of this kind had the effect of impeding the flow of news.<sup>209</sup> Finally, and perhaps most importantly for the majority, the case raised institutional-competence questions of how courts would administer the privilege; White wrote that he could envision “practical and conceptual difficulties of a high order,” including the problem of defining who would qualify for the privilege, the problem of applying the fact-intensive three-prong test proposed by the dissent, and ultimately the larger worry of embroiling the courts in disputes over which statutes to enforce.<sup>210</sup>

Justice Stewart’s dissent rejected the majority’s equivocations about the First Amendment.<sup>211</sup> Noting the “societal” interest in maximizing the people’s receipt of

---

<sup>201</sup> *Id.* at 679–80 (majority opinion).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 667, 708–09.

<sup>204</sup> *Id.* at 667; *id.* at 725 (Stewart, J., dissenting); *cf.* ABRAMS, *supra* note 195, at 157.

<sup>205</sup> *Branzburg*, 408 U.S. at 682–83.

<sup>206</sup> *Id.* at 690. For a discussion of White’s later use of the same rule in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), see LEE LEVINE & STEPHEN WERMIEL, *THE PROGENY: JUSTICE WILLIAM J. BRENNAN’S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN* 350–51 (2014).

<sup>207</sup> *Branzburg*, 408 U.S. at 707.

<sup>208</sup> *Id.* at 706–08.

<sup>209</sup> *Id.* at 693–94.

<sup>210</sup> *See id.* at 703–06; *cf. id.* at 713 n.1 (Douglas, J., dissenting); *id.* at 743 (Stewart, J., dissenting).

<sup>211</sup> *Id.* at 725, 727–36 (Stewart, J., dissenting).

information, Stewart flatly declared that a “corollary of the right to publish must be the right to gather news.”<sup>212</sup> On this view, newsgathering was part of publication, and the First Amendment protected the reporter’s newsgathering choices as much as the publication itself.<sup>213</sup> Moreover, confidentiality made possible news accounts of great social value for an age of “widespread protest and dissent”<sup>214</sup>—accounts dealing with “sensitive areas involving government officials, financial affairs, political figures, dissidents, or minority groups that require in-depth, investigative reporting.”<sup>215</sup> This discussion amounted to the first clear recognition of the educative effect of a strong right of access. As if in answer to White’s concern about intruding into the work of another branch, Stewart suggested that a reporter’s privilege could have the salutary effect of checking a prosecutor’s “unbridled subpoena power.”<sup>216</sup> While White’s hands-off approach to doctrinal innovation when cause-and-effect of legal rules was less than certain, Stewart answered that protections for newsgathering and publication were crucial, and that a qualified privilege would accommodate the interests in a reasonable way.<sup>217</sup>

In the end, *Branzburg* was more about questions than answers. The Justices were clearly divided over characterizing newsgathering. Was it a potentially unaccountable “system of informers operated by the press to report on criminal conduct,” as the majority glumly put it,<sup>218</sup> or a “corollary” of speech, as the dissent maintained?<sup>219</sup> The Justices differed as well in defining the governmental action in *Branzburg* and stating the proper test. Did the “ancient” obligation to appear and testify amount to a law of general applicability with only an “incidental” impact on expression, thus reviewable under intermediate scrutiny or perhaps not reviewable at all, as Justice White stated?<sup>220</sup> Or was it a generally applicable law affecting “relationships,” such as reporter-source, that are “vital to the free flow of information,” and therefore reviewable under a much more searching standard, as Justice Stewart maintained?<sup>221</sup> Finally, the Justices were divided on the question of the judiciary’s competence in this context, with Justice White taking a wary separation-of-powers approach<sup>222</sup> and Justice Stewart assuming a more aggressive checks-and-balances stance.<sup>223</sup> On these

---

<sup>212</sup> *Id.* at 725–27.

<sup>213</sup> *Id.* at 728.

<sup>214</sup> *Id.* at 729 n.5 (quoting the Ninth Circuit’s decision in *Caldwell v. United States*, 434 F.2d 1081, 1084–85 (9th Cir. 1970)).

<sup>215</sup> *Id.* at 733.

<sup>216</sup> *Id.* at 732–33.

<sup>217</sup> *Id.* at 733–34, 741–43.

<sup>218</sup> *Id.* at 697 (majority opinion).

<sup>219</sup> *Id.* at 727 (Stewart, J., dissenting).

<sup>220</sup> *See id.* at 682–83, 686–87 (majority opinion).

<sup>221</sup> *See generally id.* at 725–52 (Stewart, J., dissenting).

<sup>222</sup> *Id.* at 706 (majority opinion).

<sup>223</sup> *Id.* at 727–28 (Stewart, J., dissenting).

questions, the case showed stark differences of understanding about access and its appropriate place in First Amendment thought.

And besides access itself, what of the educative concern that Justice Brennan had addressed in his 1964 speech? On one level, the *Branzburg* dissent argued that a privilege would facilitate access to the sort of sources that would yield high-profile stories involved in the case—stories about undeniably compelling political and cultural issues.<sup>224</sup> The educative effect of such news coverage was clear. But if Brennan had seen a need to spur “worrying and thinking” about U.S. institutions and the desirability of inculcating constitutional values, then even the coverage in *Branzburg* could fall short.<sup>225</sup> To make possible the “worrying and thinking” that Brennan had in mind, it would be necessary to ensure wide access to governmental institutions themselves—and mainly courts.<sup>226</sup> *Branzburg* had offered only the vague assurance that “news gathering is not without its First Amendment protections.”<sup>227</sup>

Two years later, reporters brought two cases addressing newsgathering issues that were different from those in *Branzburg*; in *Pell v. Procunier*<sup>228</sup> and *Saxbe v. Washington Post Co.*,<sup>229</sup> reporters were beating on the door of the government itself for information.<sup>230</sup> Whereas *Branzburg* had addressed reporters’ strategies for obtaining facts from private actors in private settings, *Pell* and *Saxbe* involved reporters seeking information that was literally under the lock and key of the government.<sup>231</sup> And whereas the reporters in *Branzburg* had already published the fruits of their newsgathering and sought protections to ensure future use of sources for reports of newsworthy information, the reporters in *Pell* and *Saxbe* had yet to publish and needed cooperation from the government itself in order to cover what they wanted to cover.<sup>232</sup> The reporters sought access to prisons.<sup>233</sup> They wanted to interview inmates, and they wanted to select the inmates, not leave the selection to the wardens’ discretion.<sup>234</sup>

---

<sup>224</sup> *Id.* at 732–33.

<sup>225</sup> *Cf. supra* notes 168–79 and accompanying text.

<sup>226</sup> *See supra* notes 168–79 and accompanying text.

<sup>227</sup> 408 U.S. at 707.

<sup>228</sup> 417 U.S. 817 (1974).

<sup>229</sup> 417 U.S. 843 (1974).

<sup>230</sup> *See Pell*, 417 U.S. at 820; *Saxbe*, 417 U.S. at 844.

<sup>231</sup> *Compare Branzburg*, 408 U.S. at 679–80 (discussing reporters’ claims justifying interview confidentiality), *with Pell*, 417 U.S. at 826 (introducing security concerns for face-to-face communication with inmates), *and Saxbe*, 417 U.S. at 844 (noting a general prohibition on press interviews with inmates).

<sup>232</sup> *Compare Branzburg*, 408 U.S. at 669–70 (recounting the published news story), *with Pell*, 417 U.S. at 819–26 (detailing obstacles and concerns surrounding reports’ face-to-face communications with inmates), *and Saxbe*, 417 U.S. at 844 (explaining that reporters were denied permission to interview inmates).

<sup>233</sup> *See Pell*, 417 U.S. at 819–23; *Saxbe*, 417 U.S. at 844.

<sup>234</sup> *See Pell*, 417 U.S. at 820–22, 820 n.3; *Saxbe*, 417 U.S. at 848–50.



In *Pell*, the California prison bureaucracy rebuffed the requested interviews in no uncertain terms, citing a state regulation forbidding “[p]ress and other media interviews with specific individual inmates.”<sup>235</sup> California justified the regulation on security grounds.<sup>236</sup> Previous experience with press-initiated interviews had made “prison celebrities” of selected inmates, and the prison had suffered disruption.<sup>237</sup> Arguing that a flat ban was nevertheless too broad a response to the state’s concern, reporters challenged the regulation as a violation of a First Amendment–based “right to gather news without governmental interference.”<sup>238</sup> The second case, *Saxbe*, involved a regulation imposing the same ban in federal prisons: “Press representatives will not be permitted to interview individual inmates.”<sup>239</sup>

In both instances, the Supreme Court, in 5–4 decisions, upheld the bans.<sup>240</sup> The Court in *Pell* held that “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”<sup>241</sup> Unfortunately, the Court gave no reasons for using the public’s rights as the constitutional baseline.<sup>242</sup> Moreover, it was not clear why that baseline was consistent with the Constitution when similar reasoning was used in *Saxbe*.<sup>243</sup> Adding to the puzzle was the fact that Justice Stewart, the advocate for press newsgathering rights in *Branzburg*,<sup>244</sup> wrote the *Pell* and *Saxbe* majority opinions, which were undeniable setbacks for the press.<sup>245</sup> What had happened? The answer is important for what it reveals about early judicial misgivings about access rights. If *Branzburg* featured a defeat of access rights by a venerable institution—the grand jury—*Pell* and *Saxbe* featured hostility to access rights based on reservations about “positive” rights.

For Stewart, it seemed that the right of newsgathering invoked in *Branzburg* was a familiar, unexceptionable negative liberty, whereas the right to gather invoked in the prison cases required action by the government, and so was essentially a positive liberty.<sup>246</sup> Stewart was quite clear that, besides the impracticality of a press right of

<sup>235</sup> 417 U.S. at 819 (alteration in original) (citation omitted).

<sup>236</sup> *See id.* at 831.

<sup>237</sup> *Id.* at 831–32.

<sup>238</sup> *Id.* at 829.

<sup>239</sup> 417 U.S. at 844 n.1.

<sup>240</sup> *See Pell*, 417 U.S. at 818, 835; *Saxbe*, 417 U.S. at 843, 850.

<sup>241</sup> 417 U.S. at 833–34 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972)); *accord Saxbe*, 417 U.S. at 850.

<sup>242</sup> *See generally, e.g., Pell*, 417 U.S. 817.

<sup>243</sup> *See Saxbe*, 417 U.S. at 857 (Powell, J., dissenting) (“I cannot follow the Court in concluding that *any* government restriction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern.”).

<sup>244</sup> *Branzburg*, 408 U.S. at 725–26 (Stewart, J., dissenting).

<sup>245</sup> *See generally Pell*, 417 U.S. 817; *Saxbe*, 417 U.S. 843.

<sup>246</sup> *Compare Branzburg*, 408 U.S. at 727–28 (Stewart, J., dissenting) (discussing the importance of a right to gather news), *with Pell*, 417 U.S. at 829–32 (juxtaposing the right to gather news with the need for prison security).

access to prisons and the seeming lack of a limiting principle if such a right were recognized, the positive right invoked in *Pell* and *Saxbe* was too conceptually problematic.<sup>247</sup> As he wrote in *Pell*:

It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, and that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.<sup>248</sup>

But why was an affirmative duty on the government's part such a stumbling block?

Justice Stewart's opinion implied that "affirmative duties" carried the specter of augmenting, even distorting, the role of courts, thereby disturbing the distribution of powers among the branches.<sup>249</sup> In a famous article from the same period,<sup>250</sup> he characterized the American press as the "Fourth Estate"; in his view, its constitutional role was to check the branches of government.<sup>251</sup> This was not a surprising view (although it meant that he saw the Speech and Press Clauses as having independent significance), but Stewart added a twist: that a checking power, such as that of the press, had definite limits, and that the Constitution allowed politics itself a large role in resolving interbranch struggles over governance.<sup>252</sup> As he wrote, "[s]o far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can," but "[t]he Constitution . . . establishes the contest, not its resolution."<sup>253</sup> On this view, the press's checking power extended as far as made possible by a negative liberty to gather what could be gathered without outright governmental intervention and to publish whatever the press decided to publish.<sup>254</sup> But a line was drawn at court-enforceable positive rights of the press; Stewart appeared

---

<sup>247</sup> See, e.g., *Saxbe*, 417 U.S. at 850.

<sup>248</sup> *Pell*, 417 U.S. at 834–35 (internal citations omitted).

<sup>249</sup> See *id.* There is a slight echo here of Justice White's separation-of-powers concern in *Branzburg*, although Justice White's worry was about the legislature designing a privilege, whereas Justice Stewart's worry was about judicial power to order the executive branch to provide information to a third party. Compare *id.*, with *Branzburg*, 408 U.S. at 706.

<sup>250</sup> Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975).

<sup>251</sup> *Id.* at 634.

<sup>252</sup> See *id.* at 633–36.

<sup>253</sup> *Id.* at 636.

<sup>254</sup> *Id.* at 635–36.

to argue that the Court's approval of a positive right of access would unduly increase the press's position in the balance of power.<sup>255</sup> Such a right would lead to enforcement by federal courts in the form of orders compelling the executive branch to turn over information to reporters, with no clear limiting principle.<sup>256</sup> This power of the press would stack the "contest."

Justice Stewart's outlook, seemingly shared by a majority of the Justices in the prison cases,<sup>257</sup> echoed an understanding of the Constitution voiced by Judge Posner in a decision several years later: "[T]he Constitution is a charter of negative rather than positive liberties [and that t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."<sup>258</sup> But both Posner and Stewart were forgetting that "positive rights are a longstanding feature of American legal traditions,"<sup>259</sup> at least in the sense that some cherished negative liberties have been thought to contain limited affirmative obligations of the government, particularly in circumstances in which such duties are "indispensable" to the functioning of the negative liberties.<sup>260</sup> As Professor Currie noted, "[f]rom the beginning there have been cases in which the Supreme Court, sometimes very persuasively, has found in negatively phrased provisions constitutional duties that can in some sense be described as positive."<sup>261</sup>

In this light, another reading of the majority opinions in the prison cases is surely possible—that Justice Stewart had not forgotten that affirmative duties play a limited role in connection with some negative liberties, but had determined that recognizing such a duty in *Pell* and *Saxbe*, where the press was seeking a right not shared with the public, and where there was no record showing the workability of such a right, would be inappropriate.<sup>262</sup> In a different setting, with a shared right and a record of usefulness,

---

<sup>255</sup> See *id.* at 636.

<sup>256</sup> See *id.* at 631, 633–34, 636.

<sup>257</sup> See, e.g., *Saxbe*, 417 U.S. at 850 (concluding the Constitution does not provide any special affirmative duty to provide journalists with information not available to the public).

<sup>258</sup> *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). Currie, *supra* note 3, at 864–65, discusses this passage at length.

<sup>259</sup> Eugene Volokh, *Positive Rights, the Constitution, and Conservatives and Moderate Libertarians*, VOLOKH CONSPIRACY (May 7, 2013, 4:21 PM), <http://volokh.com/2013/05/07/positive-rights-the-constitution-and-conservatives-and-moderate-libertarians/> [<https://perma.cc/D5J7-UUQ3>]. Professor Volokh listed examples of positive rights under our Constitution: "the Contracts Clause, which bars states from impairing the obligation of contracts"; the Takings Clause, which "bars the government from interfering with my right to exclude others from my property"; the right of holders of U.S. debt to be paid back under Article VI; the Seventh Amendment, which "might also be seen as securing a positive right to have lawsuits that one brings in federal court be decided by a jury," assuming jurisdiction. *Id.*

<sup>260</sup> See Currie, *supra* note 3, at 875.

<sup>261</sup> *Id.* at 886.

<sup>262</sup> See, e.g., *Saxbe*, 417 U.S. at 850 (citing *Pell* to establish that the press have no constitutional right beyond the rights of the general public).

perhaps the affirmative duty embedded in the negative liberty of speech could make sense even to Justice Stewart and others in the *Pell* and *Saxbe* majorities.

Dissenting in *Saxbe*, Justice Powell was unconcerned with the nature of the right—only with its workability.<sup>263</sup> Convinced that American prisons had to be more accountable to the public, and that the press could play a useful role, he sought to strike a balance between the prison's interests in security and avoidance of the burden of case-by-case resolution of access requests, on the one hand, and the public's interest in monitoring conditions in the country's prisons, on the other.<sup>264</sup> But besides imagining a workable right of access in a prison setting, Powell commented on what would be gained from the interviews sought by the reporters: "facts" rather than rhetoric, and information about "real grievance[s]" rather than stories concocted out of pressure by fellow inmates.<sup>265</sup> Justice Powell was voicing the educative dimension of access, affirming that "worrying and thinking" about a multitude of prison issues could constructively take place.<sup>266</sup>

In a third prison case decided a few years later, *Houchins v. KQED, Inc.*,<sup>267</sup> the Court again found no First Amendment right of access, this time, to enter and film portions of a county jail where an inmate had committed suicide.<sup>268</sup> The Court split 4–3, with Chief Justice Burger writing the prevailing opinion in favor of the state.<sup>269</sup> Again, the Court relied on the fact the press had not been singled out for treatment other than that afforded to the public.<sup>270</sup> In addition, the Chief Justice, echoing Justice Stewart's doubts about positive rights, maintained that the Court had no role "in what is clearly a legislative task which the Constitution has left to the political processes."<sup>271</sup> Burger rejected any notion that freedom of the press could have an affirmative component: "Whether the government should open penal institutions in the manner sought by [the press] is a question of policy which a legislative body might appropriately resolve one way or the other."<sup>272</sup> A forceful dissent by Justice Stevens, joined by Justices Brennan and Powell, took the opposite position, insisting that "[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."<sup>273</sup> Stevens enlisted the support of James Madison's much-quoted statement: "A popular Government, without popular

---

<sup>263</sup> *Id.* at 858–60 (Powell, J., dissenting).

<sup>264</sup> *See id.* at 872–73.

<sup>265</sup> *See id.* at 855–56, 855 n.6.

<sup>266</sup> *See id.* at 872–74.

<sup>267</sup> 438 U.S. 1 (1978) (plurality opinion).

<sup>268</sup> *Id.* at 3–4.

<sup>269</sup> *Id.* at 2, 15–16.

<sup>270</sup> *See id.* at 11.

<sup>271</sup> *Id.* at 12.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 32 (Stevens, J., dissenting).

information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."<sup>274</sup> But neither side of the debate pressed its own analysis very far; the Justices in *Houchins* confined their thoughts to the connection between gathering and publishing without much regard for the next step in the speech dynamic—the connection between publication and its teaching function.<sup>275</sup>

In the next access case, *Gannett Co. v. DePasquale*,<sup>276</sup> the question of positive rights receded somewhat from the Court's attention; the press was not seeking access to an institution that was governed by another branch of government and that had a long history of closure, but to a judicial branch proceeding—a suppression hearing in a criminal case—that presented entirely different historical questions of public participation.<sup>277</sup> The controversy was therefore not about the nature of the right, but about its source.<sup>278</sup> *Gannett* had based its theory of access on the “public trial” language of the Sixth Amendment and only secondarily on the First Amendment.<sup>279</sup> In a majority opinion written by Justice Stewart, the Court ruled that the Sixth Amendment right was personal to the accused and unavailable to the press and public as a basis for access.<sup>280</sup> The Court deferred the question of whether a right of access to a pretrial suppression hearing could be grounded in the First Amendment.<sup>281</sup> In a dissent by Justice Blackmun, four Justices noted that access to a pretrial suppression hearing could be an important means of informing the public about issues “beyond their importance to the outcome of a particular prosecution.”<sup>282</sup> Access could illuminate “police and prosecutorial conduct, and about allegations that those responsible to the public for the enforcement of laws themselves are breaking it.”<sup>283</sup> The dissent thus touched on, without developing, the idea that values transcending a particular case could be the subject of education and debate.

In sum, the four cases produced no clear doctrinal path and little theoretical clarity. The concern about positive rights was more confused than clarifying and seemed unlikely to assume great importance. As for the basis of an access right, the Sixth Amendment was ruled out, and the First Amendment's candidacy was left for another day. At the same time, the Court had voiced at least some constitutional

---

<sup>274</sup> *Id.* at 31–32 (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910)).

<sup>275</sup> *See, e.g., id.* at 32 (noting gathering is entitled to some constitutional protection).

<sup>276</sup> 443 U.S. 368 (1979).

<sup>277</sup> *Id.* at 370–71, 374–79.

<sup>278</sup> *See id.* at 376, 382–93.

<sup>279</sup> *Id.* at 379–80, 391.

<sup>280</sup> *Id.* at 379–80.

<sup>281</sup> *Id.* at 392.

<sup>282</sup> *Id.* at 435 (Blackmun, J., concurring in part and dissenting in part).

<sup>283</sup> *Id.*

support for newsgathering protections, and a number of the Justices had recognized the educative effect that such protections could yield. And the likeliest site for an access right was the judicial branch itself.

*E. Richmond Newspapers: The Clash over a Rationale*

Finally in 1980, the Court seized an opportunity to address access comprehensively in *Richmond Newspapers, Inc. v. Virginia*,<sup>284</sup> which involved a criminal trial that a trial judge closed to the press and public, citing a state law that accorded judges wide discretion to close their courtrooms.<sup>285</sup> A newspaper challenging the closure order argued that the First Amendment entitled the press and public the right to attend criminal trials.<sup>286</sup> In a 7–1 decision, the Court answered the question affirmatively, with six opinions supporting the judgment and one dissent.<sup>287</sup> Despite the number of opinions, a majority of the Justices recognized a qualified First Amendment–based right of access to criminal trials,<sup>288</sup> accorded little importance to any distinction between negative and positive liberties,<sup>289</sup> and set forth a framework for deciding future access cases within the judicial branch.<sup>290</sup> Forty years after the decision, it may be difficult to understand why this seemingly straightforward question prompted seven opinions. Perhaps an effort to reconcile and accommodate the problems encountered in the previous cases accounts for the Court’s voluminous output in *Richmond Newspapers*.

The principal clash was within the seven-Justice majority, specifically between Chief Justice Burger, whose opinion was joined by two others (Justices White and Stevens), and Justice Brennan, who was joined by Justice Marshall.<sup>291</sup> Both Burger and Brennan agreed on the outcome—that the First Amendment includes a qualified right of access on the part of the press and public to attend a criminal trial.<sup>292</sup> And both agreed that the correct framework for access questions involved two inquiries: (1) whether the proceeding in question had a significant history of openness; and (2) whether openness played a positive role generally in the functioning of the

---

<sup>284</sup> 448 U.S. 555 (1980) (plurality opinion).

<sup>285</sup> *Id.* at 559–60.

<sup>286</sup> *Id.* at 560–63.

<sup>287</sup> *Id.* at 558; *id.* at 581 (White, J., concurring); *id.* at 582 (Stevens, J., concurring); *id.* at 584 (Brennan, J., concurring in judgment); *id.* at 598 (Stewart, J., concurring in judgment); *id.* at 601 (Blackmun, J., concurring in judgment); *id.* at 604 (Rehnquist, J., dissenting).

<sup>288</sup> *Id.* at 573–80 (plurality opinion).

<sup>289</sup> *Cf. id.* at 576 (citing *Branzburg* for the broad proposition that the First Amendment covers newsgathering, distinguishing *Pell* and *Saxbe* as involving institutions lacking a history of openness, and not addressing the question of positive versus negative liberties).

<sup>290</sup> *See id.* at 564–73 (identifying the history and function framework).

<sup>291</sup> *Id.* at 558; *id.* at 584 (Brennan, J., concurring in judgment).

<sup>292</sup> *See id.* at 576–77 (plurality opinion); *id.* at 597–98 (Brennan, J., concurring in judgment).

proceeding.<sup>293</sup> It was on the elucidation of this second inquiry that Burger and Brennan differed.

The Chief Justice wrote that openness had been recognized for centuries as important “to the proper functioning of a trial.”<sup>294</sup> Openness “gave assurance that the proceedings were conducted fairly to all concerned.”<sup>295</sup> It also “discouraged perjury, misconduct of participants, and decisions based on secret bias or partiality.”<sup>296</sup> These practical contributions to positive functioning of criminal trials were well understood.<sup>297</sup> Burger added that a related advantage of openness was what John Henry Wigmore had called its “educative effect”; openness gave citizens “acquaintance” with “the methods of government” and a consequent “strong confidence in judicial remedies.”<sup>298</sup> Not delving deeply into “the methods of government,”<sup>299</sup> the Chief Justice’s assumption was that citizens would have the intellectual resources to evaluate trials against a standard of fairness, and that in all likelihood the trial would pass the test with flying colors.<sup>300</sup> In his own opinion in *Richmond Newspapers*, Brennan agreed with much of this, although he provided his own theoretical framework and his own account of the “methods of government” that a citizen could learn under a rule of openness.<sup>301</sup>

But before getting to Brennan’s view, it is important to note that Chief Justice Burger stressed an additional functional advantage of openness: its “therapeutic value.”<sup>302</sup> Here, he appeared to change the topic; no longer discussing tangible ways in which openness aids the functioning of a trial, he shifted to a description of how openness aids the functioning of a community by calming it down.<sup>303</sup> The Chief Justice explained that “open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion.”<sup>304</sup> Simply by putting the public on notice “that society’s responses to criminal conduct are underway,” a rule of openness discourages “natural human reactions of outrage and protest,” including possible violent retribution.<sup>305</sup> The knowledge that trial proceedings will be open gives members of the public a chance “to restore the imbalance which was created by the offense,” and may even “satisfy that latent ‘urge to punish.’”<sup>306</sup> Burger

<sup>293</sup> *Id.* at 573–74 (plurality opinion); *id.* at 589 (Brennan, J., concurring in judgment).

<sup>294</sup> *Id.* at 569 (plurality opinion).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *See, e.g., id.*

<sup>298</sup> *Id.* at 572 (citation omitted).

<sup>299</sup> *Id.* (citation omitted).

<sup>300</sup> For a discussion of this thesis, see, for example, Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 414 (1987).

<sup>301</sup> 448 U.S. at 585–89 (Brennan, J., concurring in judgment).

<sup>302</sup> *Id.* at 570 (plurality opinion).

<sup>303</sup> *See id.* at 570–71.

<sup>304</sup> *Id.* at 571.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* (quoting Gerhard O. W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961)).

concluded that openness can produce “community catharsis,” even if members of the community dislike the result and find it “untoward.”<sup>307</sup> Openness, then, was ultimately about securing acceptance.

This discussion of therapeutic value was consistent with the Burger’s contemporaneous interest in the idea of law’s healing function; in 1982, in remarks to the American Bar Association (ABA), he stated that “[t]he obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts.”<sup>308</sup> In a talk the following year, asking “What is the role of lawyers?” he suggested an answer: “In their highest role, lawyers should be the healers of conflicts and, as such, should help the diverse parts of a complex, pluralistic social order function with a minimum of friction.”<sup>309</sup> In 1984, he again addressed the ABA, asking, “Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?”<sup>310</sup> With these and similar queries, the Chief Justice became something of a precursor of the movement for “therapeutic jurisprudence,” which regards law “as a social force that has considerable impact on people’s emotional lives and psychological well-being.”<sup>311</sup> From this perspective, decisionmakers fashioning legal rules or examining legal processes and practices are advised to take into account the therapeutic impact of their work on the behavior of all involved.<sup>312</sup> The Chief Justice’s references to a “significant community therapeutic value”<sup>313</sup> can be seen as his effort to contribute to the conversation about the nature of access rights. Just as he urged the legal profession to consider a healing role, and thus to transcend the strictly legal problem-solving nature of lawyering, his discussion in *Richmond Newspapers* suggests the relevance of a non-legal factor in recognizing the First Amendment’s implied right of access.<sup>314</sup>

Some scholars have questioned the Chief Justice’s introduction of therapeutic considerations to this area of law. Judith Resnik, for example, suggests that since “much of the style, pace, and manner of a trial seems designed to rein in and to control emotions,” therefore the possibility of an attendee’s experiencing “psychic relief” of a cathartic nature is remote.<sup>315</sup> In addition, the passage of time between a potentially criminal event and the resulting trial can be lengthy, reducing the chance

---

<sup>307</sup> *Id.* at 571–72.

<sup>308</sup> Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274, 274 (1982).

<sup>309</sup> Warren E. Burger, Chief Justice, U.S. Supreme Court, *The Role of the Lawyer Today*, Remarks at the Dedication of Notre Dame London Law Centre (July 29, 1983), in 59 NOTRE DAME L. REV. 1, 2 (1983).

<sup>310</sup> Charity Scott, *Doctors as Advocates, Lawyers as Healers*, 29 HAMLIN J. PUB. L. & POL’Y 331, 359 (2008).

<sup>311</sup> Charity Scott, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, 25 J. LEGAL MED. 377, 379 (2004) (reviewing *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., 2003)).

<sup>312</sup> *See generally id.*

<sup>313</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570 (1980) (plurality opinion).

<sup>314</sup> *Id.* at 570–71.

<sup>315</sup> Resnik, *supra* note 300, at 412–13.



that a trial could serve as a genuine emotional outlet. Professor Resnik thinks it more likely that trials provide occasions for “generating potentially powerful narratives” that can capture the public’s interest and possibly link citizens “across social and ethnic boundaries,”<sup>316</sup> but there is no guarantee that such narratives are accurate and it is hard to see how the narrative effect relates to positive functioning of the trial itself.<sup>317</sup>

The Chief Justice’s comments can be questioned on additional grounds. First, a focus on catharsis could narrow the reach of *Richmond Newspapers*. If the Chief Justice’s meaning was that access was appropriate for proceedings capable of providing a collective emotional outlet, perhaps the right would not extend to proceedings that generally lack that quality. Therapeutic relief might not be expected, for example, in pretrial suppression hearings or other preliminary proceedings in which only one part of a criminal case is on view and in which testimony could add to, rather than reduce or subdue, the public’s “concern, hostility, and emotion.”<sup>318</sup> Would this possibility counsel against a finding of presumptive access? Another question concerns what should happen when a criminal trial involves a high risk of negative emotional impact on a victim or a witness. Should the therapeutic value of openness outweigh the therapeutic value of closure when a negative impact is feared?

In a 1982 case, *Globe Newspaper Co. v. Superior Court*,<sup>319</sup> the Chief Justice voted *against* a First Amendment requirement of public access to a state rape trial involving a minor victim.<sup>320</sup> Although he did not cite (or distinguish) his comments in *Richmond Newspapers* concerning the positive therapeutic value of open trials, Burger, in *Globe Newspaper*, made much of the *negative* psychological effects of access on minor victims of sex offenses who testify in open court.<sup>321</sup> None of the Justices in *Globe Newspaper* commented on how dueling therapeutic arguments should be handled, if at all—they may have thought that the question was a morass to be avoided.<sup>322</sup> In any event, a legitimate criticism of Burger’s discussion in *Richmond Newspapers* is that it presented “therapeutic value” as relevant to the question of access but was silent on whether it should be a required consideration. In addition, its proponent offered scant guidance as to how courts should measure such an interest, and did not address how to proceed if therapeutic concerns appeared on both sides of an access controversy.<sup>323</sup>

---

<sup>316</sup> See *id.* at 413–14.

<sup>317</sup> Cf. *id.*

<sup>318</sup> *Richmond Newspapers*, 448 U.S. at 571 (discussing how public anger occurs regardless of what stage the criminal proceeding is in).

<sup>319</sup> 457 U.S. 596 (1982).

<sup>320</sup> *Id.* at 612–20 (Burger, C.J., dissenting).

<sup>321</sup> E.g., *id.* at 613, 619–20 (“Many will find it difficult to reconcile the concern so often expressed for the rights of the accused with the callous indifference exhibited today for children who, having suffered the trauma of rape or other sexual abuse, are denied the modest protection the Massachusetts Legislature provided.”).

<sup>322</sup> See generally *id.* at 598–611 (majority opinion); *id.* at 611 (O’Connor, J., concurring in judgment); *id.* at 612 (Burger, C.J., dissenting); *id.* at 620–23 (Stevens, J., dissenting).

<sup>323</sup> Cf. *id.* at 612–20 (Burger, C.J., dissenting).

A second criticism is that in using the “healing” potential of openness as an element of analysis in *Richmond Newspapers*, Burger paradoxically may have undermined access as a presumptive right. The criticism is not that therapeutic considerations are irrelevant to policy discussion or wrongheaded on psychological grounds, but that they alter the topic of discussion. Once courts start talking about collective catharsis as a means of dealing with trauma, and once they give weight to community psychology, the conversation about access to information is no longer a rights-oriented one about the legal relationship of citizens to government but is a harm-oriented conversation about injured citizens and how to spare them from further harm. The conversation becomes “procedural” in the sense of envisaging a process of trauma and healing. By elevating therapeutic considerations to a primary functional consideration, the Court risks underemphasizing the idea of access as a right.<sup>324</sup>

Writing for himself and Justice Marshall in *Richmond Newspapers*, Brennan said nothing about Burger’s functional arguments for access to a criminal trial.<sup>325</sup> Although he steered clear of therapeutic jurisprudence, Brennan’s analysis of functionality began (as did the Chief Justice’s) with the question of “whether access to a particular government process is important in terms of that very process.”<sup>326</sup> His answer with respect to criminal trials was an unqualified yes.<sup>327</sup> He began by noting that openness furthers the judicial system’s effort “to assure the criminal defendant a fair and accurate adjudication of guilt or innocence.”<sup>328</sup> Because these accepted benefits of openness needed little elaboration, he proceeded to “other, broadly political, interests” that openness advanced—specifically, interests of structure.<sup>329</sup> The first interest was relational: the construction and maintenance of a trust relationship between the judiciary and the citizen.<sup>330</sup> On this view, openness demonstrated “that procedural rights are respected, and that justice is afforded equally.”<sup>331</sup> The second interest was evaluative. Through no less than fifteen citations to a 1948 due process case, *In re Oliver*,<sup>332</sup> Brennan stressed that openness, like other constitutional checks, subjects trials to “contemporaneous review in the forum of public opinion,” thereby serving as “an effective restraint on possible abuse of judicial power.”<sup>333</sup>

The thrust of the concurrence was that constitutional openness contemplates a certain kind of citizen: one who senses, discerns, and ultimately learns and practices

---

<sup>324</sup> *Contra id.*

<sup>325</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584–98 (1980) (Brennan, J., concurring in judgment).

<sup>326</sup> *Id.* at 589.

<sup>327</sup> *See id.* at 592–93.

<sup>328</sup> *Id.* at 593.

<sup>329</sup> *Id.* at 594.

<sup>330</sup> *See id.*

<sup>331</sup> *Id.* at 595.

<sup>332</sup> 333 U.S. 257 (1948).

<sup>333</sup> *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring in judgment) (quoting *In re Oliver*, 333 U.S. at 270).

political virtue.<sup>334</sup> This individual grasps that traditions of democratic respect offer a promise of protection from arbitrary governance.<sup>335</sup> Over time, he or she finds opportunities to learn about that promise in depth and to experience it personally through a sustained interplay of participation, attention, and reflection.<sup>336</sup> For Brennan, the assumption of a right to attend a criminal trial was that citizens would form a responsible standard with which to evaluate the content of such proceedings.<sup>337</sup> Openness was not merely a symbolic construct of republican government, but rather a necessary condition for the growth of civic judgment based on ever-deepening knowledge of and allegiance to legal values.<sup>338</sup> And the values he hoped would be part of this picture were those of due process.<sup>339</sup> In a 1988 talk for the Forty-Second Annual Benjamin N. Cardozo Lecture, Justice Brennan stated that the American notion of due process underscores “the essential dignity and worth of each individual,” and specifically guarantees “fairness between the State and the individual dealing with the state.”<sup>340</sup> Perhaps his lifetime focus on dignity—rather than on any psychological vulnerability of the individual—marked the difference between Justice Brennan and the Chief Justice in *Richmond Newspapers*, and perhaps the purpose of access from Brennan’s perspective was not simply to monitor broadly the fidelity of powerful institutions to due process norms but to help the citizen internalize those norms and apply them in some form in life more generally.

*Oliver* seemed to have been Justice Brennan’s touchstone for due process. With a majority opinion penned by Justice Black, *Oliver* held that an individual’s procedural due process rights were violated when a state judge acting as a “one-man grand jury” charged the individual with contempt of court, convicted him of the crime in a closed courtroom, and sentenced him to jail.<sup>341</sup> The Supreme Court, observing that “no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches,” found the secret trial to be a violation of the Due Process Clause of the Fourteenth Amendment.<sup>342</sup> Black’s opinion traced the history of open trials, cited Voltaire and other Enlightenment thinkers, and referenced various authorities on the purposes of access, including the expectation that “spectators

---

<sup>334</sup> See *id.* at 584–98.

<sup>335</sup> See *id.*

<sup>336</sup> See *id.*; see also, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 22 (1948) (discussing the “town hall,” where citizens can take part in open government).

<sup>337</sup> See *Richmond Newspapers*, 448 U.S. at 594–96 (Brennan, J., concurring in judgment).

<sup>338</sup> See *id.* at 587, 594.

<sup>339</sup> See *id.* at 590–94.

<sup>340</sup> Brennan, Reason, Passion, *supra* note 139, at 15 (quoting *Ross v. Moffitt*, 417 U.S. 600, 609 (1974)).

<sup>341</sup> 333 U.S. 257, 261, 273 (1948).

<sup>342</sup> *Id.* at 271–73.

learn about their government and acquire confidence in judicial remedies,<sup>343</sup> and that they keep the “triers [of an accused] keenly alive to a sense of their responsibility and to the importance of their functions.”<sup>344</sup> Justice Brennan’s plentiful citations to *Oliver in Richmond Newspapers* suggest that, in his view of access, the Speech and Press Clauses of the Constitution serve the Due Process Clauses. Among the “conditions” that access rights make possible is the freedom to examine government proceedings for compliance with procedural justice.<sup>345</sup>

But what more does it mean for citizens to have that freedom, and to undertake that responsibility? Brennan’s Cardozo speech advocated that judges and citizens internalize a combination of reason and empathy in developing and monitoring the law’s pursuit of procedural justice.<sup>346</sup> In his view, “the greatest threat to due process principles is formal reason severed from the insights of passion,”<sup>347</sup> and in his lexicon, passion meant empathy—the attempt to grasp “the uneven fabric of social life”<sup>348</sup> and to give “attention to the concrete human realities at stake” in a given situation.<sup>349</sup> Admittedly, these phrases have the ring of abstractions, but in a 1970 case, he had the opportunity to apply them. In *Goldberg v. Kelly*,<sup>350</sup> discussed in his Cardozo speech, Brennan faced the question of defining due process for individuals who had been receiving welfare checks but learned that the government bureaucracy thought them no longer eligible and removed them from the list of recipients.<sup>351</sup> For Brennan and the Court, the challenge was to recognize the “drastic consequences” faced by the individuals and to determine, as a Court, “the responsibilities of the bureaucratic state to its citizens.”<sup>352</sup> Practically speaking, the question involved whether a hearing was required, and if so, at what stage of the process it should take place.<sup>353</sup> Brennan did not claim that he and the Court had reached a perfect outcome in mandating a pretermination hearing under the Fourteenth Amendment; in fact, he conceded that the decision “may have even contributed in some ways to the formality of the welfare system.”<sup>354</sup> He also thought that questions of due process “admit of no static solution” and considerations can change over time.<sup>355</sup> His conclusion: “Each age must seek its own way to the unstable balance of those qualities that make us human, and must contend anew with the questions of power and accountability with which the

---

<sup>343</sup> *Id.* at 266–70, 269 n.23, 270 n.24 (citation omitted).

<sup>344</sup> *See id.* at 270 n.25 (citation omitted).

<sup>345</sup> *See, e.g., id.* at 270 & n.25 (citation omitted).

<sup>346</sup> Brennan, Reason, Passion, *supra* note 139, at 16.

<sup>347</sup> *Id.* at 17.

<sup>348</sup> *Id.* at 16.

<sup>349</sup> *Id.* at 20.

<sup>350</sup> 397 U.S. 254 (1970).

<sup>351</sup> *See id.* at 255–57.

<sup>352</sup> Brennan, Reason, Passion, *supra* note 139, at 20, 22.

<sup>353</sup> *Goldberg*, 397 U.S. at 255.

<sup>354</sup> Brennan, Reason, Passion, *supra* note 139, at 22.

<sup>355</sup> *Id.*

Constitution is concerned.”<sup>356</sup> At the same time, he found value in the fact that decisions like *Goldberg* “opened a dialogue” about the interaction of bureaucracies and citizens.<sup>357</sup> In allowing his audience to hear his reflections on how the decision was reached, Brennan signaled the sort of reflection and dialogue that citizen access to government proceedings would ideally make possible.

#### F. Conclusion

The Supreme Court’s access cases made one basic decision: that speech about matters of public concern makes a particular contribution to democratic discussion when it is “informed,”<sup>358</sup> and therefore that a right to become informed—to gather or receive information about a broad range of topics—needs the same constitutional protection as communication itself.<sup>359</sup> The negative liberties of speech and press could reach their potential only with the aid of positive liberties to gather and receive information of public concern.<sup>360</sup> Justice Brennan’s role was central in articulating an access right derived from a dynamic constitutional relationship between citizens and the government.<sup>361</sup>

The implicit aspiration of Justice Brennan’s concurrence in *Richmond Newspapers* and his majority opinion in *Globe Newspaper* was that both sides of the citizen-government relationship benefit from a strong access rule. First, through the citizens’ freedom to witness, inspect, and argue with each other about the concrete workings of basic values in judicial proceedings, the judiciary’s legitimacy benefits over time, even if there are instances of failures of justice and difficulties in fashioning rules for changing conditions.<sup>362</sup> Second, as citizens witness, inspect, and argue about trials or other proceedings, they have the opportunity to increase their knowledge of constitutional values, subject those values to skeptical thought, and develop their republican character, even if slowly and not always comprehensively or straightforwardly.<sup>363</sup>

Arriving at the recognition of an access right was no easy task. It involved a lengthy process of airing issues, eliminating false fears, setting limits, and announcing a workable framework: if certain elements are true about a governmental proceeding (that it has a history of openness and that openness plays an overall positive functional role), a presumption of access arises, rebuttable only by a compelling state interest served by a narrowly tailored means.<sup>364</sup> Although the framework sounds clear,

---

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring in judgment).

<sup>359</sup> See discussion *supra* Section I.E.

<sup>360</sup> See discussion *supra* Section I.E.

<sup>361</sup> See discussion *supra* Section I.E.

<sup>362</sup> See discussion *supra* Section I.E.

<sup>363</sup> See discussion *supra* Section I.E.

<sup>364</sup> See discussion *supra* Section I.E.

it was actually vague from the start. Neither the Chief Justice nor Justice Brennan formulated the history-plus-function framework as a mandate; instead, the Chief Justice discussed the two considerations as relevant to the question of presumptive openness in the case before the Court, and Justice Brennan called the two considerations “helpful principles” that give “special force” to a case involving access to a criminal trial.<sup>365</sup> Even if the history and function inquiries were in fact mandatory, the content of the first of those inquiries—whether there was a tradition of accessibility—was particularly uncertain. For one thing, the requisite “level of generality” was cloudy: should a court focus simply on whether the proceeding is a criminal trial, or should the court inspect the particular segment or aspect of a criminal trial?<sup>366</sup> The Supreme Court also left unanswered the question of “what ‘history’ is relevant”—was it required that the origins of the proceedings be traceable to early English history, or at least to early American history, or at least to early twentieth-century American history?<sup>367</sup> If there are both positive and negative functional effects, how should a court resolve the conflict? If a court finds the presumption rebutted, how detailed and explanatory must a judge’s findings be, and how safe are they from appellate review? Having left doctrinal elaboration of these and other issues to the lower courts, the Supreme Court decided no more major access cases after 1993.

## II. MANAGING THE RELATIONSHIP: CORE VARIABLES IN THE COURTS OF APPEALS

As traced by scholars,<sup>368</sup> appellate courts have produced varying answers to the doctrinal questions left open by the Supreme Court. This Part does not chronicle those doctrinal developments, but considers the contributions of appellate courts to access jurisprudence from another vantage point. In exploring two Third Circuit cases in depth, one a criminal case,<sup>369</sup> the other a civil case,<sup>370</sup> this Part proposes an “anatomy” of appellate reasoning in cases about access.<sup>371</sup> As shown below, the “experience and logic” framework turns out to be a surprisingly supple tool in the hands of careful appellate judges as they work through difficult cases about access. The cases demonstrate that

---

<sup>365</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 573, 589 (1980) (Brennan, J., concurring in judgment). However, courts tend to interpret the two-part framework as a requirement. See, e.g., *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 514 (3d Cir. 2013) (stating that “[i]n order to qualify for public access, both experience and logic must counsel in favor of opening the proceeding to the public”).

<sup>366</sup> See, e.g., *Dhiab v. Trump*, 852 F.3d 1087, 1104 (D.C. Cir. 2017) (Williams, J., concurring in part and concurring in judgment).

<sup>367</sup> See, e.g., *id.* at 1105.

<sup>368</sup> See generally, e.g., David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835 (2017); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991).

<sup>369</sup> See *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994).

<sup>370</sup> See *Strine*, 733 F.3d 510.

<sup>371</sup> See discussion *infra* Sections II.A–C.

key analytic variables made possible by the framework are analogy, relationship, and function. In both cases, we see judges differing over the choice of analogies to guide the inquiry into historical practice; we see them differing over how a particular access decision may affect the citizens' trust of courts; and we see them turning to functional considerations mainly to bolster their initial conclusions about the citizen-court relationship.<sup>372</sup> The goal of this Part is to show that, once the Supreme Court made the essential choice of a First Amendment qualified access right, the appellate courts found ways to make the framework meaningful, all the while keeping central Justice Brennan's original focus.

A. *United States v. Simone*<sup>373</sup>

In *Simone*, decided in 1994, the U.S. Court of Appeals for the Third Circuit examined whether the First Amendment required access to posttrial inquiries into possible juror misconduct in a criminal case.<sup>374</sup> Federal prosecutors had brought racketeering and extortion charges against Robert F. Simone, a criminal defense attorney thought to be associated with organized crime figures.<sup>375</sup> After a lengthy trial, which the press covered in detail, the jury deliberated for nine days and found Simone guilty on five counts.<sup>376</sup> Shortly after the case concluded, the *Philadelphia Inquirer* reported that one juror regretted the verdict and had said that several jurors disobeyed the trial judge by reading newspaper accounts of the trial while it was in progress.<sup>377</sup> The convicted defendant moved the court to conduct an examination of the jurors to determine whether they had violated the bench's instructions.<sup>378</sup> The trial judge granted the motion and scheduled a closed examination of the jurors.<sup>379</sup> The *Inquirer* learned that the examination was scheduled to take place, showed up at the courthouse, and moved the court for leave to attend.<sup>380</sup> At a brief hearing, the trial judge refused the newspaper's request and declined to stay the proceeding pending the newspaper's appeal to the appellate court.<sup>381</sup> The trial judge then conducted the examination of jurors in a closed courtroom.<sup>382</sup> Soon after, he denied the defendant's posttrial motions and released a redacted transcript of the juror examination.<sup>383</sup>

---

<sup>372</sup> See discussion *infra* Sections II.A–B.

<sup>373</sup> 14 F.3d 833 (3d Cir. 1994).

<sup>374</sup> See *id.* at 835.

<sup>375</sup> See *id.*

<sup>376</sup> See *id.* at 835–36; Gary Cohn, *Judge Queries Jury from Simone Trial*, PHILA. INQUIRER, Mar. 23, 1993, at B1.

<sup>377</sup> See Gary Cohn & Julia Cass, *Simone Juror Regrets the Verdict; He Says He Caved Under Pressure*, PHILA. INQUIRER, Dec. 17, 1992, at A1.

<sup>378</sup> *Simone*, 14 F.3d at 835.

<sup>379</sup> See *id.*

<sup>380</sup> See *id.*

<sup>381</sup> See *id.* at 835–36.

<sup>382</sup> See *id.*

<sup>383</sup> See *id.* at 835.

The *Inquirer* took its access arguments to the Third Circuit.<sup>384</sup> In a split decision, two judges found that the newspaper had a First Amendment–based right of access to the post-verdict juror examination.<sup>385</sup> A dissenting judge maintained that no such right applied and that, even if it did, the trial judge’s release of the transcript was sufficient to meet any constitutional requirements.<sup>386</sup> The three different approaches in the case illustrate issues faced by courts seeking to implement the Supreme Court’s access jurisprudence.

First, in justifying closure, the trial judge, Judge Giles, listed reasons from the bench, stressing three main considerations: analogy, relationship of citizens to the court, and function.<sup>387</sup> He began by analogizing posttrial juror examinations to mid-trial juror examinations, noting that precedent permitted trial judges to close the latter.<sup>388</sup> This use of analogy allowed him to take a short-cut: he bypassed an in-depth application of the “experience and logic” framework, apparently on the theory that the analysis had already been done for the analogous proceeding and that a prior court had found closure of that proceeding justified.<sup>389</sup> Judge Giles supported his decision to close the proceeding by opining that the relationship in this instance between the public and the court was negligible.<sup>390</sup> “To the extent that there is an interest at this point in the proceedings,” he stated, “it is the Government’s interest and the defense interest. The public has no outcome interest.”<sup>391</sup> The clear message was that a citizen-court relationship of the sort Justice Brennan contemplated in *Richmond Newspapers*—a relationship that benefits the court by securing public confidence in its workings, and that benefits citizens by educating them as to legal values of procedural justice—simply did not exist in the setting of a posttrial examination of jurors.<sup>392</sup> On this view, the relationship that had existed during pretrial proceedings and had continued during the trial itself had reduced to nothing once the verdict was rendered—no matter what the posttrial juror examination would reveal. Thus, the public interest was not a factor for consideration.

Finally, Judge Giles stated that even if there were a “public interest” in the sense of a presumptive right of access, functional considerations dictated closure.<sup>393</sup> Any presumptive access right in this setting was “far outweighed by the need of the Court and

---

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at 834–35, 840.

<sup>386</sup> *Id.* at 847 (Garth, J., dissenting).

<sup>387</sup> Transcript of Hearing on Press Motion to Intervene at 4–6, 8–10, *United States v. Simone*, No. CR 91-569, 1993 WL 106478 (E.D. Pa. Mar. 31, 1993) (copy on file with the author). The transcript of the short hearing in Judge Giles’s courtroom on whether to open the post-verdict voir dire is appended to the brief for the media appellants.

<sup>388</sup> *Id.* at 5.

<sup>389</sup> *See id.*

<sup>390</sup> *See id.*

<sup>391</sup> *Id.*

<sup>392</sup> *See id.*

<sup>393</sup> *Id.* at 8.



the interest of justice to conduct a hearing in the least coercive atmosphere.”<sup>394</sup> The judge’s explanation, then, was that the case was outside the *Richmond Newspapers* framework, but that even if a presumptive access right existed, it was outweighed by a functional interest in emptying out the courtroom—particularly the press—to ensure juror candor and due process for the criminal defendant.<sup>395</sup>

Writing the majority opinion for the panel that reversed the trial judge’s decision,<sup>396</sup> Judge Roth had far different views on these points, but emphasized the same variables—analogy, relationship, and function.<sup>397</sup> She flatly rejected the analogy that likened posttrial juror examinations to those that take place during the trial.<sup>398</sup> The two were not remotely similar, in her thinking, because the mid-trial proceeding concerned a deliberative body in the midst of hearing a case, whereas the posttrial proceeding concerned former jurors who had completed deliberations and had rendered a verdict.<sup>399</sup> In the former, access by the press and public would quite likely impede the functioning of the jury and the jurors’ deliberative role, whereas in the latter, access simply could not have the same negative effects.<sup>400</sup> Thus, the relationship between courts and citizens strongly favored a presumptive right of access to a post-verdict proceeding that inquired into possible juror misconduct.<sup>401</sup> Moreover, access would enhance the functioning of the process itself by promoting “informed discussion of governmental affairs,” facilitating greater “understanding of the judicial system,” discouraging perjury, and allowing the testing of the jury system’s integrity.<sup>402</sup>

Having found a presumptive right of access, Judge Roth asked whether the right was outweighed by an “overriding interest” justifying closure.<sup>403</sup> The answer was no.<sup>404</sup> The trial judge had been concerned about two things: (1) that the presence of the press would be detrimental to the truthfulness of the ex-jurors, and (2) that the ex-jurors might “inadvertently reveal information concerning the jury’s deliberative processes.”<sup>405</sup> Judge Roth thought that the first concern was deficient, amounting to a “generic concern” for veracity that “proved too much in that it could be used in favor of almost any limitation on access.”<sup>406</sup> And the second concern was easily managed, Judge Roth wrote, by admonitions to the jurors during the posttrial voir dire.<sup>407</sup> More

---

<sup>394</sup> *Id.*

<sup>395</sup> *See id.* at 4–6, 8–10.

<sup>396</sup> *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994).

<sup>397</sup> *See id.* at 835.

<sup>398</sup> *Id.* at 839–40.

<sup>399</sup> *Id.*

<sup>400</sup> *See id.*

<sup>401</sup> *Id.* at 840.

<sup>402</sup> *Id.* at 839 (citations omitted).

<sup>403</sup> *Id.* at 840 (citations omitted).

<sup>404</sup> *Id.* at 840–42.

<sup>405</sup> *Id.* at 841.

<sup>406</sup> *Id.*

<sup>407</sup> *See id.*

importantly, in rejecting the trial court's fears that the presence of the press would be "coercive" in affecting the ex-jurors' veracity, Judge Roth underscored the lack of evidence for those fears, implying that a trial judge should close only after proactively developing a record specifically supporting such a decision.<sup>408</sup> Thus, in his efforts to protect the jurors and the rights of the defendant, the trial judge in *Simone* had completely ignored the court's relationship with the public.<sup>409</sup>

Judge Garth's dissent, that the trial judge's timely release of a transcript of the closed posttrial examination satisfied the demands of the First Amendment, provided a third perspective.<sup>410</sup> Using the same variables as his fellow judges, Garth wrote that the most persuasive analogy was between the posttrial examination of jurors, on the one hand, and "evidentiary rulings made during sidebars or chamber conferences," on the other.<sup>411</sup> For the latter circumstances, even the Brennan concurrence in *Richmond Newspapers* had suggested limitations on the reach of the First Amendment.<sup>412</sup> Moreover, Garth thought that First Amendment access rights diminished after a criminal verdict had been reached, because "no issue of innocence or guilt is hanging in the balance."<sup>413</sup> The idea, apparently, was that the court-citizen relationship became less dependent on transparency after completion of a trial, although the reason for this was hardly clear in the context of allegations of juror misconduct.<sup>414</sup> Garth also disparaged the court-citizen relationship when he wrote that press complaints about the insufficiency of "cold transcripts" were "lame," and when he suggested that in posttrial settings, the media's "zeal" might center on "a desire for human-interest accounts of deliberative proceedings as ends in themselves, written to sell papers."<sup>415</sup>

*Simone*, then, illustrates the kinds of arguments made in access cases, particularly the functionalist reasoning of an appellate panel in implementing *Richmond Newspapers*. The Brennan emphasis on public participation and the educative effect permeates the majority opinion, with its close attention to the inadequacies of the trial court's analogy, its emphasis on the strength of the presumption of openness, and its doctrinal instruction to trial courts on the importance of making records.<sup>416</sup> The dissent resists the Brennan solicitude for public participation.<sup>417</sup> In isolation, each of the dissent's arguments has merit, but its skepticism about the benefits of openness goes against the grain of *Richmond Newspapers*.

---

<sup>408</sup> See *id.*

<sup>409</sup> See *id.* at 840–41.

<sup>410</sup> *Id.* at 842–43 (Garth, J., dissenting).

<sup>411</sup> *Id.* at 845.

<sup>412</sup> See 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring in judgment) (addressing interchanges at the bench, although not specifying the subject matter).

<sup>413</sup> *Simone*, 14 F.3d at 843 (Garth, J., dissenting).

<sup>414</sup> See *id.* at 846–47.

<sup>415</sup> *Id.* at 844, 846 (citation omitted).

<sup>416</sup> See *id.* at 835–42 (majority opinion).

<sup>417</sup> See generally *id.* at 842–47 (Garth, J., dissenting).

*B. Delaware Coalition for Open Government, Inc. v. Strine*<sup>418</sup>

In a much-noted 2013 case, the question of constitutional access involved a statute authorizing state-sponsored arbitration in Delaware.<sup>419</sup> With the goal of keeping Delaware attractive to businesses deciding where to incorporate, the Delaware legislature enacted a law that created a confidential, closed adjudicatory procedure for speedy, highly professional arbitration of corporate disputes.<sup>420</sup> The statute authorized the judges of Delaware’s Chancery Court to arbitrate disputes involving an amount-in-controversy of no less than one million dollars.<sup>421</sup> At least one of the parties had to be a “‘business entity formed or organized’ under Delaware law,” and no party could be a “consumer.”<sup>422</sup> The statute permitted judges to “grant any remedy or relief that [s/he] deems just and equitable and within the scope of any applicable agreement of the parties,” with review in the Delaware Supreme Court under the “deferential standard outlined in the Federal Arbitration Act.”<sup>423</sup> Most importantly for our purposes, the statute barred attendance by any member of the public, all “materials and communications” in the arbitration process were confidential, and the proceedings were to be kept off “the public docketing system.”<sup>424</sup> Documents and petitions remained confidential on appeal unless the Delaware Supreme Court provided otherwise in its Rules.<sup>425</sup> The case arose when a public interest group challenged the statute on First Amendment grounds.<sup>426</sup> A split panel of the Third Circuit agreed that the statute unconstitutionally barred the public from attending the judge-adjudicated arbitrations.<sup>427</sup> As in *Simone*, the case featured separate opinions, each illustrating a key aspect of litigation in First Amendment access cases.<sup>428</sup>

The trial judge in *Strine*, Judge McLaughlin, found the statute unconstitutional.<sup>429</sup> Like the judges in *Simone*, she proceeded by focusing on the variables of analogy, relationship, and function—and analogy provided the key inquiry.<sup>430</sup> In *Publicker Industries, Inc. v. Cohen*,<sup>431</sup> decided in 1984, a panel of the Third Circuit recognized civil trials as presumptively open to press and public under the “experience and logic”

<sup>418</sup> 733 F.3d 510 (3d Cir. 2013).

<sup>419</sup> *Id.* at 512.

<sup>420</sup> *Id.* at 512–13.

<sup>421</sup> *Id.* at 512.

<sup>422</sup> *Id.* (citation omitted).

<sup>423</sup> *Id.* at 513 (alteration in original) (citation omitted).

<sup>424</sup> *Id.* (citation omitted).

<sup>425</sup> *See id.*

<sup>426</sup> *Id.* at 512.

<sup>427</sup> *Id.* at 512, 521.

<sup>428</sup> *See id.* at 512–21; *id.* at 521–23 (Fuentes, J., concurring); *id.* at 523–26 (Roth, J., dissenting). *See generally* United States v. Simone, 14 F.3d 833 (3d Cir. 1994).

<sup>429</sup> Del. Coal. for Open Gov’t v. Strine, 894 F. Supp. 2d 493, 494 (D. Del. 2012) (mem.).

<sup>430</sup> *See generally id.*

<sup>431</sup> 733 F.2d 1059 (3d Cir. 1984).

framework.<sup>432</sup> Judge McLaughlin chose to see the question in *Strine* as whether the Delaware arbitration scheme so resembled a civil trial that *Publicker* applied, with openness presumptively required.<sup>433</sup> This approach allowed the Judge to skip the “experience and logic” analysis aimed specifically at state-sponsored arbitration.<sup>434</sup> Of course, skipping the “experience and logic” analysis meant that the Judge could avoid dealing with the fact that state-sponsored arbitration lacked a long history of openness and might not qualify for a presumption of openness.<sup>435</sup> The focus on analogy, then, allowed the Judge to bring to bear a more functional, rather than historical, consideration of a novel proceeding, at the same time tying the court’s consideration to precedent.<sup>436</sup>

Having framed the issue as a question of analogy, the Judge compared the functioning of civil trials to the functioning of the arbitration scheme, and decided that the resemblance was compelling.<sup>437</sup> As she put it, “the parties submit their dispute to a sitting judge acting pursuant to state authority, paid by the state, and using state personnel and facilities; the judge finds facts, applies the relevant law, determines the obligations of the parties, and the judge then issues an enforceable order.”<sup>438</sup> The conclusion was that the “procedure is sufficiently like a civil trial that *Publicker Industries* governs.”<sup>439</sup>

But the Judge emphasized more than analogy; she also emphasized the court-citizen relationship, the fact that the relationship depends on public confidence achievable in part by judicial transparency, and the promise that openness will facilitate not only civic awareness of how judicial institutions operate but also informed debate about how institutions *should* operate.<sup>440</sup> She affirmed the teaching of *Publicker* that openness of civil proceedings can produce the same positive functional benefits associated with openness of criminal trials.<sup>441</sup> Judge McLaughlin then went further in delineating the public nature of judging and how that task relates to access.<sup>442</sup> She stressed that judicial power itself derives from “appointment to a public office” and service to the public, and that “the actions of those charged with administering justice through the judiciary is always a public matter.”<sup>443</sup> Although these sentences

---

<sup>432</sup> *Id.* at 1068, 1071.

<sup>433</sup> *Strine*, 894 F. Supp. 2d at 500–04.

<sup>434</sup> *See id.* at 503–04 (engaging in a minimal analysis of “experience and logic” following thorough analysis of the civil trial analogy).

<sup>435</sup> *See id.* (using an analysis rendering an experience and logic framework moot).

<sup>436</sup> *See id.* at 502–04.

<sup>437</sup> *Id.* at 502 (determining that “[t]he Delaware proceeding, although bearing the label arbitration, is essentially a civil trial”).

<sup>438</sup> *Id.* at 503.

<sup>439</sup> *Id.*

<sup>440</sup> *See id.* at 498–99.

<sup>441</sup> *Id.* at 498.

<sup>442</sup> *Id.* at 501–02.

<sup>443</sup> *Id.* at 498, 501.

were written as if simply describing civil courts, they were surely making a normative point—that only civil judges can awkwardly wear the two hats assigned to them by the Delaware statute.<sup>444</sup> “A judge bears a special responsibility to serve the public interest,” she wrote.<sup>445</sup> “That obligation, and the public role of that job, is undermined when a judge acts as an arbitrator bound only by the parties’ agreement.”<sup>446</sup> Summarizing her constitutional, functional, and precedential reflections, she concluded that “the judiciary as a whole is strengthened by the public knowledge that its courthouses are open and judicial officers are not adjudicating in secret.”<sup>447</sup>

The appellate panel in *Strine* affirmed Judge McLaughlin’s result—although not her methodology.<sup>448</sup> Writing for the majority, Judge Sloviter stated that the trial judge had erred in foregoing the “experience and logic” analysis required by *Richmond Newspapers*.<sup>449</sup> According to the court, Supreme Court precedent permitted avoidance of that analysis only if the challenged proceeding were “identical” to a proceeding that had already been analyzed under the “experience and logic” framework.<sup>450</sup> In the panel’s view, “[a]lthough Delaware’s arbitration proceeding shares a number of features with a civil trial, the two are not so identical as to fit within the narrow exception” created by precedent.<sup>451</sup>

Thus, the majority opinion fully engaged the “experience and logic” framework.<sup>452</sup> On its face, the court’s reason for this approach was unexceptionable. The relevant precedent does seem to prefer the panel’s approach, although it is by no means explicitly required.<sup>453</sup> But, aside from guarding the panel’s opinion from any appealable error on this issue, it may be that the majority found the “experience and logic” framework not only more “appropriate” under precedent, but also more conducive to a thorough and persuasive ventilation of the issues than even Judge McLaughlin’s remarkable blend of considerations. Judge Sloviter’s opinion for the panel recognized and made use of the fact that both “experience” and “logic” essentially call for functionalist analysis, and that more, not less, of this kind of analysis was necessary in a case involving a novel proceeding backed by strong policy justifications, not to mention strong political forces within the state.<sup>454</sup>

Addressing the “experience” prong, the majority decided to forego the trial court’s question of analogy and to look more broadly at the “type” of proceeding at

---

<sup>444</sup> See *id.* at 501–04.

<sup>445</sup> *Id.* at 502.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* at 504.

<sup>448</sup> See generally *Del. Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013).

<sup>449</sup> *Id.* at 515.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* (discussing *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam)).

<sup>452</sup> See *id.* at 515–21.

<sup>453</sup> See generally *El Vocero*, 508 U.S. 147.

<sup>454</sup> See generally *Strine*, 733 F.3d 510.

issue.<sup>455</sup> This “broad historical approach” consisted of tracing the history of openness of the “place and process” of both proceedings that the Delaware scheme seemed to resemble: civil trials and arbitrations.<sup>456</sup> Because the history of a proceeding includes the history of reasons for its longevity, the court’s analysis included much detail about the rise of civil trials and arbitrations and the role of access.<sup>457</sup> The court unsurprisingly found a centuries-long history of access to civil trials and noted that “[t]he courthouse, courtroom, and trial remain essential to the way the public conceives of and interacts with the judicial system.”<sup>458</sup> As for arbitrations, there was an early (fifteenth century) history of openness, a sparse record in the American colonies and, thereafter, and a twentieth century record of “distinctly private” proceedings adjudicated by paid professional arbitrators in private venues, due to the preference for non-adversarial and confidential resolution for matters of a “private nature.”<sup>459</sup> The court’s presentation of these histories—of proceedings, personnel, locations, and justifications—led to its conclusion that “[p]roceedings in front of judges in courthouses have been presumptively open to the public for centuries.”<sup>460</sup>

Analysis of the “logic” prong included consideration of both positive and negative impacts of openness on the Delaware proceeding. Again, the framework invited more functional reflection than Judge McLaughlin’s focus on analogy to civil trials. The panel enumerated the same benefits of openness mentioned by Judge McLaughlin—benefits springing from the court-citizen relationship and the value it places on informed discussion and public perception of fairness.<sup>461</sup> But the court added an additional benefit of openness that underscored a concern about the non-egalitarian thrust of the statute: “Opening the proceedings would also allay the public’s concerns about a process only accessible to litigants in business disputes who are able to afford the expense of arbitration.”<sup>462</sup> The court’s choice of the “experience and logic” framework, cumbersome as it might be, also made possible this sort of frank observation about how access could serve the public good.<sup>463</sup> In effect, the “logic prong” reminded the court of the visibility value of the First Amendment—the freedom to witness and discuss potential incursions on norms of equality and other social values.<sup>464</sup>

The court then turned to Delaware’s arguments about the negative impacts of access and answered each one—to rather devastating effect. Here, the court was able

---

<sup>455</sup> *See id.* at 515–16.

<sup>456</sup> *Id.* at 515–16, 518.

<sup>457</sup> *Id.* at 515–18.

<sup>458</sup> *Id.* at 516.

<sup>459</sup> *Id.* at 517–18.

<sup>460</sup> *Id.* at 518.

<sup>461</sup> *See id.* at 519.

<sup>462</sup> *Id.*

<sup>463</sup> *See id.* at 518–19.

<sup>464</sup> *See id.*

to catalogue the state's chief defenses of the statute and either question them or let their weaknesses speak for themselves.<sup>465</sup> Thus, the state's concern that openness would compromise trade secrets or other closely held information was easily answered, said the court, by the availability of protective orders and other devices commonly used in civil cases.<sup>466</sup> A second concern—that “loss of prestige and goodwill” could result from press coverage of the arbitrated business disputes—was deemed irrelevant, with the court stating that these effects “would not hinder the functioning of the proceeding nor impair the public good.”<sup>467</sup> The court deflected a third concern—that “privacy encourages a ‘less hostile, more conciliatory approach’”—by citing works suggesting that arbitrations themselves can be quite contentious and that collegial arbitrations are usually due to informality of rules rather than to privacy.<sup>468</sup> A final official concern was that openness would defeat the state's interest in attracting businesses to Delaware.<sup>469</sup> The court rejected the argument out of hand, first by declaring that the First Amendment would forbid a law that was intended to create a “secret civil trial,”<sup>470</sup> and then by noting other features of the statute that could still attract businesses to the state.<sup>471</sup> The court also resurrected the equality issue by questioning the state's interest in a statute that was not available to “businesspersons with less than a million dollars in dispute.”<sup>472</sup> And the court raised a final point: that the state's interest included not simply attracting businesses to Delaware but also allowing public vigilance over “proceedings [that] derive a great deal of legitimacy and authority” from the use of state judges and state courtrooms.<sup>473</sup> The thrust of the opinion was that the positive contributions of access derived from the citizen-court relationship deserved great weight, and that the impacts proffered by the state as negative—particularly the alleged detriment to the state's corporate climate—were comparatively weak.<sup>474</sup>

Judge Roth dissented, and her opinion arguably echoed Judge Giles's trial-level opinion in *Simone*, where he had discerned no public interest in the post-verdict proceeding and hence no role for public access.<sup>475</sup> In a similar way, Judge Roth's dissent stressed that “a judge serving as an arbitrator derives her authority from the

---

<sup>465</sup> See *id.* at 519–20.

<sup>466</sup> See *id.* at 519.

<sup>467</sup> *Id.* (citation omitted).

<sup>468</sup> *Id.* at 519–20 (citation omitted).

<sup>469</sup> See *id.* at 520.

<sup>470</sup> *Id.*

<sup>471</sup> See *id.* at 520 & n.3.

<sup>472</sup> *Id.* at 520.

<sup>473</sup> *Id.*

<sup>474</sup> See *id.* at 515–21 (outlining the court's reasoning).

<sup>475</sup> Compare *id.* at 523–26 (Roth, J., dissenting), with *United States v. Simone*, 14 F.3d 833, 843 n.1 (3d Cir. 1994) (Garth, J., dissenting) (providing excerpts from Judge Giles' district court decision).

consent of the parties,” rather than “from the coercive power of the state.”<sup>476</sup> From this premise, it was not hard to conclude that the Chancery Court judges presiding in state-sponsored arbitration were outside their constitutional relationship to the people and therefore that public access had no role to play. Applying the “experience and logic” framework nonetheless, the dissent rejected Judge McLaughlin’s focus on analogy and the majority’s approach of looking broadly at the “type” of proceeding.<sup>477</sup> The dissent confined its examination to private arbitrations, with no attention at all to features shared with civil trials.<sup>478</sup> The dissent concluded that arbitrations had historically been private, and that public access could play no positive role in the process.<sup>479</sup>

### C. Conclusion

In the wake of the Supreme Court decisions recognizing a right of access to criminal trials and various components of those trials, the appellate courts took up the role of applying and elaborating the Court’s “experience and logic” framework.<sup>480</sup> *Simone* and *Strine* illustrate the range of proceedings in which access issues can arise.<sup>481</sup> The cases also demonstrate how appellate judges in different contexts articulate the court-citizen relationship that drove recognition of access rights in the first place, and how panels address issues of analogy and function. These three considerations enable judges to take into account the Constitution’s vision of popular sovereignty, the role of precedent, and the practical effects of public disclosure in widely differing settings in an open society.

*Simone* and *Strine* demonstrate that functional analysis is the heart of the access right and that the citizen-court relationship is its soul. Analogy also figures prominently but requires persuasive justification to carry the day. The trial judge’s underexplained use of analogy in *Simone* led to reversal; although a mid-trial voir dire might resemble a posttrial voir dire in part, the similarities were simply not strong enough for the Court of Appeals.<sup>482</sup> In *Strine*, the trial judge’s use of analogy ran into a different problem on appeal; although an arbitration might resemble a civil trial, the trial judge’s use of the analogy in place of the “experience and logic” framework limited the number of functional considerations that the trial judge could discuss.<sup>483</sup>

Finally, these cases show how appellate panels contribute to access doctrine. *Simone* and *Strine* strongly suggested a proactive role for trial courts in developing substantial records on functional questions. In each case, the panel’s use of the

---

<sup>476</sup> *Strine*, 733 F.3d at 525 n.4 (Roth, J., dissenting).

<sup>477</sup> *Id.* at 525–26.

<sup>478</sup> *Id.*

<sup>479</sup> *Id.*

<sup>480</sup> See discussion *supra* Sections II.A–B.

<sup>481</sup> See discussion *supra* Sections II.A–B.

<sup>482</sup> See generally *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994).

<sup>483</sup> See *Strine*, 733 F.3d at 514–15.



“experience and logic” framework demonstrated the dominance of functional analysis, and how comprehensive the “experience and logic” framework allows—and even invites—that analysis to be. In this way, both panels “managed” the court-citizen relationship set in motion years before, particularly by Justice Brennan.

### III. SAFEGUARDING THE RELATIONSHIP: VIGILANCE OF TRIAL JUDGES

If the Supreme Court’s role was to announce a philosophy of access, and if the appellate courts’ mission has been to translate that philosophy into workable doctrine and to demand careful, functionalist reasoning, a distinctive additional role has been played by trial judges in implementing the right to access. In recent cases, three judges breathed life into the court-citizen relationship by raising access questions in circumstances where neither of the opposing parties seemed to care that an access question was implicated.<sup>484</sup> As suggested by a recent book on challenges faced by trial judges, these solitary decisionmakers often express a sense of closeness to their communities, feel a duty to explain their decisions to the public in understandable terms, and compose opinions out of a desire to inform and educate.<sup>485</sup> A similar commitment to the teaching function of openness clearly motivated the jurists described in this Part: Judge Michael Urbanski, presiding in wrongful death litigation between a victim’s family and a product manufacturer in a federal courthouse in southwest Virginia; Vice Chancellor Sam Glasscock, hearing a contract dispute between two powerful media corporations in Delaware’s Court of Chancery; and Judge John Gleeson, encountering a deferred criminal prosecution in the Eastern District of New York.<sup>486</sup> In each situation, the access philosophy of Justice Brennan and the doctrinal contributions of appellate panels were aided and abetted by a trial judge’s stubborn commitment to the educative benefits of visibility.<sup>487</sup>

Brennan’s writings again shed light on the judicial mind. At the Columbia Law School Bicentennial Celebration in 1987, he delivered a speech on the federal judiciary as chief protector of constitutional rights, Brennan stated that a “meaningful implementation” of U.S. rights would have three hallmarks: stability, in the sense of “resistance to abrogation”; enforceability, in the sense of capacity to force compliance; and adaptability, in the sense of flexibility in responding intelligently to changing circumstances.<sup>488</sup> As shown in this Part, Judge Urbanski bolstered stability of the

---

<sup>484</sup> See discussion *infra* Sections III.A–C.

<sup>485</sup> See generally JOEL COHEN, BLINDFOLDS OFF: JUDGES ON HOW THEY DECIDE (2014) (surveying several prominent judges on how they decided complex cases).

<sup>486</sup> See discussion *infra* Sections III.A–C.

<sup>487</sup> See discussion *infra* Sections III.A–C.

<sup>488</sup> Brennan, *Worldwide Influence*, *supra* note 93, at 4–7. For a challenging critique of adaptability in the sense of supporting a “living Constitution,” see generally J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012).

access right in rejecting its almost casual abuse;<sup>489</sup> Vice Chancellor Glasscock demanded its enforceability in refusing to let two parties essentially litigate in private;<sup>490</sup> and Judge Gleeson demonstrated its adaptability in applying *Richmond Newspapers* in a new context.<sup>491</sup> Their actions took place in a period when notorious closure orders by other trial judges had attracted significant attention, such as the decision of the trial judge in *Doe v. Public Citizen*<sup>492</sup> to close an entire civil case out of outsized deference to a statute that seemingly protected manufacturers from internet criticism,<sup>493</sup> and the decision of the judge in *United States v. Blankenship*<sup>494</sup> to impose an across-the-board gag on virtually anyone<sup>495</sup> involved with the criminal prosecution of a powerful mine owner in West Virginia. Both orders were overturned by the Fourth Circuit,<sup>496</sup> but they signaled the pressures on trial judges to close access in high-profile cases.

A. *Jain v. Abbott Laboratories, Inc.*<sup>497</sup>

When a well-known public radio host died unexpectedly in a Virginia hospital following hernia surgery, his daughters explored options to sue.<sup>498</sup> A potential claim against the hospital was for negligent programming of a pain pump and negligent monitoring of its use in the care of the decedent.<sup>499</sup> A second possible claim was against the pump's manufacturers, Abbott Laboratories and Hospira, Inc., for defective instructions.<sup>500</sup> When the hospital settled with the family in state court, the family brought suit against the manufacturing defendants in federal court.<sup>501</sup> After a year of procedural battles before Judge Urbanski in the Western District of Virginia, those defendants and the family chose to settle.<sup>502</sup>

---

<sup>489</sup> See generally *Jain v. Abbott Labs., Inc.*, No. 7:13-cv-00551, 2014 WL 7330805 (W.D. Va. Feb. 24, 2015) (denying defendants' motion for summary judgment).

<sup>490</sup> *Al Jazeera Am., LLC v. AT & T Servs., Inc.*, No. 8823-VCG, 2013 WL 5614284, at \*7 (Del. Ch. Oct. 14, 2013).

<sup>491</sup> See *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (JG), 2016 WL 347670, at \*1 (E.D.N.Y. Jan. 28, 2016) (finding that Corporate Monitor's Report is a judicial record and the public has a First Amendment right of access to the Report).

<sup>492</sup> 749 F.3d 246 (4th Cir. 2014).

<sup>493</sup> *Id.* at 252–55 (providing a brief summary of the proceedings at the trial court level).

<sup>494</sup> 79 F. Supp. 3d 613 (S.D.W. Va. 2015).

<sup>495</sup> See generally *id.*

<sup>496</sup> *In re The Wall Street Journal*, 601 F. App'x 215, 218 (4th Cir. 2015) (overturning *Blankenship*, 79 F. Supp. 3d 613); *Public Citizen*, 749 F.3d at 253.

<sup>497</sup> No. 7:13-cv-00551, 2014 WL 7330805 (W.D. Va. Feb. 24, 2015).

<sup>498</sup> See Jeff Sturgeon, *Seth Williamson's Daughters Collect \$500,000 in Lawsuit Settlement*, ROANOKE TIMES (Feb. 20, 2015), [https://www.roanoke.com/news/seth-williamson-s-daughters-collect-in-lawsuit-settlement/article\\_67963890-f61b-5ff4-845e-5d6179bcbeb5.html](https://www.roanoke.com/news/seth-williamson-s-daughters-collect-in-lawsuit-settlement/article_67963890-f61b-5ff4-845e-5d6179bcbeb5.html) [<https://perma.cc/SM6Q-MZE7>].

<sup>499</sup> See *id.*

<sup>500</sup> See *id.*

<sup>501</sup> See *id.*

<sup>502</sup> See *id.*; see also Laurence Hammack, *Lawsuit Moves Forward in Roanoke Broadcaster Seth Williamson's Death*, ROANOKE TIMES (Dec. 29, 2014), <http://www.roanoke.com/news>

Abbott and Hospira wanted terms of the settlement to be confidential, specifically their pledge to “conduct a review, to be directed by a Vice President–level medical official within Hospira,” of the adequacy of instructions and warnings accompanying the pain pump.<sup>503</sup> The agreement required that this investigation include review of the dozens of reported incidents of deficient programming of the pump—incidents that the family had gleaned from “adverse event reports and related complaint files” obtained in discovery, each designated by number.<sup>504</sup> It is probable that Hospira and Abbott wanted to keep the public from learning about repeated incidents involving their highly touted pump and the companies’ apparent slowness to fix or sufficiently warn about the product. The companies also pledged in the agreement to review the opinion of one of the family’s experts, a human factors engineer who had specific criticisms about the pump’s warnings and instructions.<sup>505</sup> These terms, explicitly laid out in the confidential settlement, made clear that the family sought not simply financial compensation but also a promise that the companies would take a hard look at their product and make changes to preserve the lives of future patients.<sup>506</sup> The family secured these results by agreeing to confidentiality of the settlement.<sup>507</sup>

The desire for an off-the-record settlement led the parties to a fateful next step. Section 8.01-55 of the Virginia Code provides that settlement of wrongful death cases must have “the approval of the court in which the action was brought, or if an action has not been brought, with the consent of any circuit court.”<sup>508</sup> The statute also states that a petition for court approval “shall state the compromise, its terms and the reason therefor.”<sup>509</sup> Despite the clarity of these provisions, Abbott’s attorney apparently thought it would be acceptable under the Code to seek approval—and sealing—of the settlement not from Judge Urbanski, in whose courtroom the case had been filed, but from a state court judge who had approved the earlier settlement between the family and the hospital.<sup>510</sup> The plan was questionable at best: the state judge had had no prior connection to the federal case.<sup>511</sup> Perhaps the lawyers for Abbott and Hospira thought that their chances of keeping the terms confidential

---

/virginia/lawsuit-moves-forward-in-roanoke-broadcaster-seth-williamson-s-death/article\_a2533125-9d03-5a7e-b42b-f61c229fb39a.html [https://perma.cc/9NDH-7UWK].

<sup>503</sup> See Confidential Release of All Claims at 8, *Jain v. Abbott Labs.*, No. 7:13-cv-00551, 2014 WL 7330805 (W.D. Va. Feb. 24, 2015) (copy on file with author); Sturgeon, *supra* note 498.

<sup>504</sup> Confidential Release of All Claims, *supra* note 503, at 8.

<sup>505</sup> *Id.*; Plaintiff’s Memorandum in Opposition of Defendants’ Motion to Exclude Plaintiffs’ Expert Kenneth R. Laughery, Ph.D. at 7, *Jain*, No. 7:13-cv-00551.

<sup>506</sup> See Sturgeon, *supra* note 498.

<sup>507</sup> See generally Confidential Release of All Claims, *supra* note 503.

<sup>508</sup> VA. CODE ANN. § 8.01-55 (2018).

<sup>509</sup> *Id.* See generally *Perreault v. Free Lance-Star*, 666 S.E.2d 352 (Va. 2008) (interpreting Section 8.01-50 of the Virginia Code).

<sup>510</sup> See Order, *supra* note 25, at 1–2.

<sup>511</sup> See *id.*

were greater if they sought approval of the settlement in state, rather than federal, court. And indeed, a judge of the state court in Patrick County approved the settlement and its sealing, apparently without asking any questions about where the action had actually been filed, and without weighing the parties' sealing request against a presumption of access recognized by the Supreme Court of Virginia in 2008.<sup>512</sup>

Having achieved secrecy of the settlement, the parties returned to the federal courtroom to seek dismissal of the suit, only to find a chagrined Judge Urbanski.<sup>513</sup> In his pointed exchange with the parties, we see a trial court's vivid concern for informing the public and guarding the reputation of the court: "You're telling me that the settlement in this case has already been approved by a [state] circuit court judge?" he asked.<sup>514</sup> "You did it under seal so the public doesn't know about this case? . . . I'm appalled by what is going on."<sup>515</sup> He continued:

I just don't see how you can hide this settlement by running down to Patrick County. You filed it in federal court, you've got to deal with it according to the rules that apply to open court . . . . I think there's a strong public interest in these matters, and I don't see how you can avoid the public interest associated with this case . . . .<sup>516</sup>

When Abbott's attorney defended the parties' actions with his interpretation of Section 8.01-55, the Judge responded, "Your reading of that statute is nonsense."<sup>517</sup> He refused to grant the dismissal without having been petitioned to approve the settlement.<sup>518</sup>

The Judge made his points in open court but also in a written decision.<sup>519</sup> He relied on precedent authorizing judges to refuse a voluntary dismissal when it was necessary "to avoid short-circuiting the judicial process, or to safeguard interests of persons entitled to the court's special protection."<sup>520</sup> This "safeguarding" role hearkened back to Justice Brennan's concept of the citizen-court relationship. Judge Urbanski essentially allowed the public interest to re-enter the case—after the parties themselves had disregarded it and after the Patrick County court had given it short shrift.<sup>521</sup> Invoking "inherent power," the Judge took back control, spelling out the wisdom of assigning

---

<sup>512</sup> See *id.* See generally *Perreault*, 666 S.E.2d 352.

<sup>513</sup> Peter Vieth, *Judge Blasts Lawyers for Attempt to Seal Settlement*, VA. LAW. WKLY., Jan. 29, 2015, 2015 WLNR 39722342.

<sup>514</sup> *Id.*

<sup>515</sup> *Id.*

<sup>516</sup> *Id.*

<sup>517</sup> *Id.*

<sup>518</sup> *Id.*; Order, *supra* note 25, at 2–4.

<sup>519</sup> See generally Order, *supra* note 25, at 2–4.

<sup>520</sup> *Id.* at 2 (citation omitted).

<sup>521</sup> See *id.* at 1–4.

settlement approval to the court in which a case had actually been filed.<sup>522</sup> “[T]his court understands what this case is about,” he wrote, signaling that the public would learn from the exercise of the court’s evaluative role.<sup>523</sup> The educative function of access was thus central to his thought. The judge then addressed “why the parties have taken this course of action,” and bluntly stated that the parties had sought “to make an end run around the court” in order to keep the public ignorant.<sup>524</sup> Citing nearly contemporaneous Fourth Circuit precedent, the Judge noted “[t]he right of public access springs from the First Amendment and the common-law tradition that court proceedings are open to public scrutiny.”<sup>525</sup> The ultimate effect of the decision was to tell the truth and clean house, thereby increasing what Justice Brennan had called the access right’s “stability.”<sup>526</sup> The right had been treated as flimsy, discretionary, and unimportant, until the court quite powerfully said otherwise. The parties were ordered to “bring a settlement to [the judge] or pick a trial date.”<sup>527</sup>

But once the settlement issue was before Judge Urbanski, the parties moved for permanent redaction of the provisions requiring the companies to investigate the past complaints and incidents involving the pump.<sup>528</sup> Openness versus closure was still the debate. The companies phrased the argument not in terms of bad publicity but in commercial terms: competitors could gain an edge, they claimed, from information in the settlement.<sup>529</sup> Finding no merit in the argument, the Judge reiterated, “This is a public court. This is public business. . . . Unless there are unusual circumstances, [the settlement] should be public.”<sup>530</sup> It was indeed made public. Continuous media coverage led to a final step in the saga: the family’s first settlement—with the hospital—was made public by the hospital itself.<sup>531</sup> How much of this would have happened without a vigilant court concerned for “stability” of the access right?

The Judge’s primary objective in *Jain* was to follow the law of access and thus make the settlement public. The educative effect was to add to the facts that the public already had and to shed light on the larger dynamics of marketplace behavior and personal injury litigation. But the public learned even more than that. When the parties sought to hide the settlement in another court, a key concern was to hold the

---

<sup>522</sup> *Id.* at 2–3.

<sup>523</sup> *See id.* at 3.

<sup>524</sup> *Id.* at 3 & n.2.

<sup>525</sup> *Id.* at 3 n.2 (citation omitted).

<sup>526</sup> Brennan, *Worldwide Influence*, *supra* note 93, at 4.

<sup>527</sup> Peter Vieth, *Pain Pump Case Mediated, Maker Will Pay \$900K*, VA. LAW. WKLY., Feb. 24, 2015, 2015 WLNR 39721689 [hereinafter Vieth, *Pain Pump*].

<sup>528</sup> *See* Peter Vieth, *Lawyers Continue to Seek Sealed Settlement in Death Case*, VA. LAW. WKLY., Feb. 3, 2015, 2015 WLNR 39721745 [hereinafter Vieth, *Lawyers Continue*].

<sup>529</sup> *See id.*

<sup>530</sup> Vieth, *Pain Pump*, *supra* note 527.

<sup>531</sup> Peter Vieth, *Hospital Paid \$1M to Settle in Death of Broadcaster*, VA. LAW. WKLY., Mar. 18, 2015, 2015 WLNR 39718820.

parties to the requirements of the Virginia Code.<sup>532</sup> Judge Urbanski allowed the public to see two things: that he was doing his job (and thus respecting the court's relationship with the citizens), and that litigants in his courtroom would not be allowed to "end run" the law. The case allowed the public to see how settlement is an accepted component of due process and also that the access rules are not self-executing: it sometimes takes a judge to prop open the doors himself, usher the parties inside, and signal to the public what is happening and why.

#### B. *Al Jazeera v. AT & T*

In 2013, a contractual dispute between two high-profile corporations led to a lawsuit in the Delaware Court of Chancery,<sup>533</sup> but news media eager to cover the case had no idea what the suit was about.<sup>534</sup> Both parties to the suit—plaintiff Al Jazeera America, LLC, a programming network owned by the Al Jazeera Media Network, and defendant AT & T Services, Inc., the American telecommunications giant and distributor of cable television to subscribers—had redacted large amounts of information from their respective public pleadings, prompting news reporters to intervene and object under Rule 5.1(f) of the Court of Chancery.<sup>535</sup> The news reporters complained that the parties' redactions completely shrouded the nature of the dispute, preventing the press and public from knowing the facts and issues the Court had been asked to adjudicate.<sup>536</sup>

Few saw the lawsuit coming. With ambitious plans to enter the U.S. communications market, Al Jazeera had hoped to reach 48 million households through its partnership with AT & T's U-Verse TV service.<sup>537</sup> However, in the summer of 2013, shortly before the launch of Al Jazeera America, AT & T backed out of their agreement.<sup>538</sup> Al Jazeera responded by suing for breach of contract, seeking declaratory relief, specific performance, and damages.<sup>539</sup> Its complaint, however, redacted information about "the nature of the dispute and information about the parties' contractual relationship, including the terms of the [agreement] underlying th[e] dispute and the parties' dealings under th[e] agreement."<sup>540</sup> And AT & T's answer redacted information about such things as the parties' negotiations, discussion of terms, payment

---

<sup>532</sup> See, e.g., Vieth, *Lawyers Continue*, *supra* note 528.

<sup>533</sup> *Al Jazeera Am., LLC v. AT & T Servs., Inc.*, No. 8823-VCG, 2013 WL 5614284 (Del. Ch. Oct. 14, 2013).

<sup>534</sup> See *id.* at \*1.

<sup>535</sup> *Id.* at \*1–2.

<sup>536</sup> *Id.* at \*1.

<sup>537</sup> See Brian Stelter, *Al Jazeera Makes Limited American Debut*, N.Y. TIMES (Aug. 20, 2013), <https://nyti.ms/2GIPJMz>.

<sup>538</sup> *Id.*

<sup>539</sup> *Al Jazeera*, 2013 WL 5614284, at \*2.

<sup>540</sup> *Id.*

obligations, pricing, subscribers, and “other commercially sensitive provisions.”<sup>541</sup> News organizations and reporters invoked Rule 5.1, which permits “any person [to] challenge the Confidential Treatment of a Confidential Filing.”<sup>542</sup> They argued that the parties’ redactions violated the Rule’s premise that “most information presented to the Court should be made available to the public.”<sup>543</sup> In addition, they insisted that the parties failed to carry their burden of showing that “the public interest in access to Court proceedings” was outweighed by a “harm that public disclosure of sensitive, non-public information would cause.”<sup>544</sup>

The case came before Vice Chancellor Sam Glasscock III, who explained Rule 5.1(f) in terms of the court-citizen relationship.<sup>545</sup> The Rule had taken effect a few months before, replacing one that had permitted “too much information [to be] deemed confidential” and had distorted the public’s understanding of the Court’s cases.<sup>546</sup> In contrast, Rule 5.1(f) was designed to “clarify—and narrow—the information deemed confidential,” and thus strengthen “the public’s right of access to court documents.”<sup>547</sup> Explaining this history, the Vice Chancellor cited precedent tracing the Rule to its roots in the First Amendment and common law.<sup>548</sup> He stressed the understanding of access as “fundamental to a democratic state and necessary in the long run so that the public can judge the product of the courts in a given case.”<sup>549</sup> This view, of course, assumed two things: (1) that access makes it possible to acquire the knowledge and judgment needed to evaluate, even in part, what government does; and (2) that access provides the occasions for putting such knowledge and judgment to work—in the evaluation of claims, arguments, cases, issues, outcomes, and in the exchange of ideas about these things in dialogue and debate.<sup>550</sup>

But the *Al Jazeera* case posed a difficult question: how far did Rule 5.1 go? Certainly it contemplated that some information could be kept confidential,<sup>551</sup> but what kind and how much? Vice Chancellor Glasscock was quick to say that trade secrets, price terms, other sensitive proprietary or financial information, and personal information such as medical records could be guarded under the Rule.<sup>552</sup> But

---

<sup>541</sup> *Id.* (citation omitted).

<sup>542</sup> *Id.* at \*1, \*3 (citation omitted).

<sup>543</sup> *See id.* at \*3 (emphasis removed) (citation omitted).

<sup>544</sup> *See id.* at \*1, \*3 (citation omitted).

<sup>545</sup> *Id.* at \*3.

<sup>546</sup> *Id.* at \*1, \*3.

<sup>547</sup> *Id.* at \*3.

<sup>548</sup> *See id.* at \*3 & n.29 (citing Court of Chancery precedent in *Horres v. Chick-fil-A, Inc.*, No. 5530-VCL, 2013 WL 1223605, at \*1–2 (Del. Ch. Mar. 27, 2013), that describes Rule 5.1 as reflecting the Court’s “commitment” to the First Amendment and common-law “principles” of access).

<sup>549</sup> *Id.* at \*3 (citation omitted).

<sup>550</sup> *Cf. id.*

<sup>551</sup> *Cf. id.* at \*3–4.

<sup>552</sup> *Id.*

Al Jazeera and AT & T were making an argument for more sweeping rights under the Rule: that information about the very “nature of the dispute” between them should be kept confidential as well.<sup>553</sup> Their point was that such disclosure could have the same economic impact as the disclosure of price terms.<sup>554</sup> As justification, they described the telecommunications industries as particularly susceptible to losses or gains caused by the smallest of marketplace rumors or tips.<sup>555</sup> Moreover, arguing that it was almost impossible for a new network to obtain carriage, Al Jazeera said that details of carriage agreements or disputes could be gravely compromising.<sup>556</sup> Meanwhile, AT & T stressed that leaks about the terms it had negotiated with one network would easily disrupt its deals with others.<sup>557</sup> Building on these claims, both parties argued that substantial sealing of the pleadings was required under Rule 5.1.<sup>558</sup>

The Vice Chancellor rejected the argument.<sup>559</sup> The heart of his approach was his sense of responsibility, not simply for the public’s interest in open processes, but for the public’s need to understand the substantive issues in cases coming before the court.<sup>560</sup> In his view, the necessity of basic knowledge about the nature of the dispute outweighed “the economic harm to the parties that disclosure may cause.”<sup>561</sup> For the Vice Chancellor, the lawsuit at its core involved “the ‘circumstances under which a journalistic enterprise can be denied entry to the American broadcast market by a provider with millions of viewers.’”<sup>562</sup> This is what the case was about, yet the parties had deliberately and systematically erased the “circumstances”<sup>563</sup> from public view. The court balked: if information about the central question in a filed case could be redacted from the pleadings, the matter essentially would be placed beyond public understanding—and its adjudication would more clearly resemble a “private arbitration,” regardless of venue.<sup>564</sup> The Vice Chancellor drove his point home by concluding that parties seeking “the benefits of litigating in a public court” must shoulder “accompanying responsibilities,” including a duty to make their disputes comprehensible to the public, even if doing so results in economic harm.<sup>565</sup>

The Vice Chancellor’s concern ultimately was that the parties had disregarded a core truth about litigation in the U.S.—that the battle between opposing parties was not private in nature at all but had a public dimension that could not be so blithely

---

<sup>553</sup> *Id.* at \*5.

<sup>554</sup> *Id.*

<sup>555</sup> *See id.* at \*4 & n.32.

<sup>556</sup> *Id.* at \*4.

<sup>557</sup> *Id.*

<sup>558</sup> *See id.*

<sup>559</sup> *Id.* at \*5.

<sup>560</sup> *See id.*

<sup>561</sup> *Id.*

<sup>562</sup> *Id.* (citation omitted).

<sup>563</sup> *Id.* (citation omitted).

<sup>564</sup> *Id.*

<sup>565</sup> *Id.* at \*7.



swept aside.<sup>566</sup> Protecting their own economic positions, the parties had shrugged off the idea of “public justice”; they had ignored that a contract suit like their own was not defined by its adversarial structure but had a larger, political, even cultural, dimension that the trial judge had a duty to preserve.<sup>567</sup> By pruning away the essential arguments and issues of the case, the parties had made it impossible for a news story to be written, a television viewer to form an opinion, a social scientist to take note, or a political argument to burst out.<sup>568</sup> The parties treated their case as private property, as if the work of a public institution was of no interest to citizens, and the ideas of the dispute were of no concern to the culture.<sup>569</sup>

The Vice Chancellor’s accomplishment was to bolster Justice Brennan’s concern for “enforceability” of rights, here the right of access.<sup>570</sup> Enforceability entailed the interpretation of a rule, the creation of a doctrinal framework, and the unflinching application of the doctrine to a matter in which neither party wanted it applied.<sup>571</sup> Enforceability also entailed the clear expression of a background policy—in this case, that private law is often “public law in disguise,”<sup>572</sup> and that the business of courts includes making it possible for citizens to grasp a controversy, even think it through, or ask what its larger significance might be.<sup>573</sup> Why did the deal between the mammoth American distributor and the burgeoning offshoot of a Qatar-based programmer come undone at the last minute? Only if the access right is enforceable might the answer slowly emerge.

### C. United States v. HSBC Bank USA, N.A.

In late 2012, after a four-year investigation, Loretta Lynch, then U.S. Attorney for the Eastern District of New York, announced that the government had filed an Information bringing “criminal charges against HSBC, one of the largest financial institutions in the world.”<sup>574</sup> The government alleged violations of the Bank Secrecy Act, including “willfully failing to maintain an effective anti-money laundering . . . program,” and violations of the International Emergency Economic Powers Act and the Trading with the Enemy Act, including “facilitating financial transactions on behalf of sanctioned entities” in Iran, Libya, Sudan, Burma, and Cuba.<sup>575</sup> On the same

---

<sup>566</sup> *See id.*

<sup>567</sup> *See id.*

<sup>568</sup> *See id.* at \*1, \*3, \*5, \*7.

<sup>569</sup> *See id.* at \*7.

<sup>570</sup> Brennan, *Worldwide Influence*, *supra* note 93, at 5–6.

<sup>571</sup> *See id.*; *see also, e.g., Al Jazeera*, 2013 WL 5614284, at \*1.

<sup>572</sup> Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 1–2 (1959) (arguing that the public is interested in every lawsuit, even suits between private parties).

<sup>573</sup> *See id.*

<sup>574</sup> *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161, at \*1, \*5 n.8 (E.D.N.Y. July 1, 2013).

<sup>575</sup> *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (JG), 2016 WL 347670, at \*1 (E.D.N.Y. Jan. 28, 2016); *HSBC Bank USA*, 2013 WL 3306161, at \*9.

day, Lynch wrote to Judge John Gleeson of the Eastern District, asking him to hold the case in abeyance for five years pursuant to a Deferred Prosecution Agreement (DPA) and a Corporate Compliance Monitor agreement between the Bank and the government.<sup>576</sup> The DPA required HSBC to forfeit \$1.2 billion to the U.S., agree to a stipulated statement of facts detailing its misconduct, cooperate fully with the government, set up substantial remedial measures, and retain an independent compliance monitor who would produce periodic reports.<sup>577</sup> “[I]f after five years,” stated the DPA, “HSBC has complied with the terms and provisions of the DPA, the government will seek to dismiss the Information with prejudice; if not, the government may prosecute HSBC ‘for any federal criminal violation of which [the government] has knowledge.’”<sup>578</sup>

In her announcement, Lynch stated: “Today’s historic agreement, which imposes the largest penalty in any [Bank Secrecy Act] prosecution to date, makes it clear that all corporate citizens, no matter how large, must be held accountable for their actions.”<sup>579</sup> A different view of the plan, however, soon emerged. One U.S. Senator complained: “The Department has not prosecuted a single employee of HSBC—no executives, no directors, no [anti-money laundering] compliance staff members, no one. By allowing these individuals to walk away without any real punishment, the Department [of Justice] is declaring that crime actually does pay.”<sup>580</sup> Judge Gleeson invited the U.S. and HSBC to comment on whether he should approve the DPA pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A) and U.S. Sentencing Guideline Section 6B1.2.<sup>581</sup> While the parties argued that the Judge’s authority respecting the DPA was limited, the Judge’s reading of the law was that “the Court’s authority in this setting is not nearly as cabined as the parties contend it is.”<sup>582</sup> In a decision invoking the court’s supervisory power over criminal cases, the Judge approved the DPA and noted—reluctantly, it seemed—that the Court’s role could not end there.<sup>583</sup> “[F]or whatever reason or reasons, the contracting parties have chosen to implicate the Court in their resolution of this matter,” he wrote.<sup>584</sup> “By placing a criminal matter on the docket of a federal court,” he continued, “the parties have subjected their DPA to the legitimate exercise of that court’s authority.”<sup>585</sup> He stressed that “[t]he parties have asked the Court to lend . . . a judicial imprimatur to

---

<sup>576</sup> See *HSBC Bank USA*, 2016 WL 347670, at \*1.

<sup>577</sup> *HSBC Bank USA*, 2013 WL 3306161, at \*6, \*10–11.

<sup>578</sup> *HSBC Bank USA*, 2016 WL 34670, at \*1 (alteration in original) (citation omitted); see also Henning, *supra* note 65.

<sup>579</sup> *HSBC Bank USA*, 2013 WL 3306161, at \*5 n.8 (citation omitted).

<sup>580</sup> Brief for *Amicus Curiae* Professor Brandon L. Garrett in Support of Appellee at 7, *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125 (2d Cir. 2017) (No. 16-308) (citation omitted).

<sup>581</sup> *HSBC Bank USA*, 2013 WL 3306161, at \*1.

<sup>582</sup> *Id.* at \*5.

<sup>583</sup> *Id.* at \*11.

<sup>584</sup> *Id.* at \*5.

<sup>585</sup> *Id.*

the DPA, by arranging for its implementation within the confines of a pending case. The Court will therefore exercise its supervisory authority over the DPA.”<sup>586</sup> Like Judge Urbanski and Vice Chancellor Glasscock, Judge Gleeson found himself on novel terrain, sought to measure his legal authority, and found that he had a duty that he had not asked for but was obliged to meet.<sup>587</sup> Federal law enforcement had chosen a certain strategy for dealing with HSBC and had assumed that it could use the good offices of the court, at the same time indicating that the court’s oversight should be minimal.<sup>588</sup> But at least with respect to Judge Gleeson, the prosecution miscalculated, forgetting that by involving the court, it was involving an institution that had a complex bond with the public—a bond expressed in substantial part by the access right.<sup>589</sup> Stating bluntly that “a pending federal criminal case is not window dressing” and that the court is not “a potted plant.”<sup>590</sup> Judge Gleeson signaled his awareness that judicial oversight, even if limited, would not likely be welcomed by the prosecution or Bank.<sup>591</sup>

For our purposes, the key legal moment occurred after HSBC’s first year under the DPA. The corporate compliance monitor, former prosecutor Mike Cherkasky, issued a First Annual Follow-Up Review Report, detailing HSBC’s performance on the measures that the U.S. had laid out.<sup>592</sup> Judge Gleeson ordered the government to file the Report with the court, and the government complied, filing it under seal.<sup>593</sup> Later, Judge Gleeson received a letter from a member of the public who had a mortgage-related complaint against HSBC and asked Judge Gleeson about the findings of the Report.<sup>594</sup> When the Judge interpreted the letter as a motion to unseal the Report, the access issue was joined: Did the public have a right under the First Amendment to see the monitor’s Report?<sup>595</sup>

The threshold question was whether the report amounted to a “judicial document,” and both the U.S. and the Bank insisted that it did not.<sup>596</sup> Second Circuit case law defined “judicial document” as a document that is “relevant to the performance of the judicial function and useful in the judicial process.”<sup>597</sup> The government argued that

---

<sup>586</sup> *Id.* at \*6.

<sup>587</sup> *Id.* at \*6–7.

<sup>588</sup> *See id.* at \*3–5.

<sup>589</sup> *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (JG), 2016 WL 347670, at \*1 (E.D.N.Y. Jan. 28, 2016).

<sup>590</sup> *HSBC Bank USA*, 2013 WL 3306161, at \*5.

<sup>591</sup> *See id.*

<sup>592</sup> *HSBC Bank USA*, 2016 WL 347670, at \*2; *see also* Brett Wolf, *U.S. Justice Department Chooses Former Prosecutor to Be HSBC Compliance Monitor*, REUTERS (June 6, 2013), <http://blogs.reuters.com/financial-regulatory-forum/2013/06/06/u-s-justice-department-chooses-former-prosecutor-to-be-hsbc-compliance-monitor/> [<https://perma.cc/E5U6-QLU2>].

<sup>593</sup> *HSBC Bank USA*, 2016 WL 347670, at \*2.

<sup>594</sup> *Id.*

<sup>595</sup> *Id.*

<sup>596</sup> *See id.* at \*1–7.

<sup>597</sup> *Id.* at \*2 (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)).

Mr. Cherkasky's Report had nothing to do with the court's appropriate function—approving the DPA—because the Report had not existed when that approval took place.<sup>598</sup> And, because the court lacked any power over Mr. Cherkasky, the Report could have no bearing on judicial function.<sup>599</sup> Judge Gleeson, however, rejected these arguments as misreading the duties of the court and impeding the court's proper role, thereby damaging the court's credibility with the public.<sup>600</sup> He related the Report to his duty to supervise the DPA's implementation over its protected five-year span.<sup>601</sup> As he saw it, his job was to “oversee the unfolding of the criminal case that the government chose to file in my court.”<sup>602</sup> This oversight required inspection of the Report. If, for example, the Report disclosed that the Bank had continued to engage in criminal behavior, “it would demean th[e] institution” of the court if the government did nothing and the court simply stood by.<sup>603</sup> In addition, the court had a clearly marked, if limited, role in each possible scenario under the DPA: if the prosecution determined that the bank had breached the agreement and commenced a criminal adjudication, the court would preside in the case; alternatively, if the prosecution decided to dismiss the charges at the end of the five-year term, the court had a statutory duty to decide whether to grant leave to dismiss under Rule 48.<sup>604</sup> The thrust of the Judge's analysis was that the Report was a tool for his supervisory role, even though the role would be small. As such, the Report was a judicial document.<sup>605</sup>

The next question was whether the public had a First Amendment right to see it.<sup>606</sup> As expected, the “experience and logic” framework applied, and the “experience” prong predictably involved a clash of analogies.<sup>607</sup> Was the Report more like a document supporting a charging decision (and hence “typically non-public”), or was it more like a document supporting a plea agreement or summary judgment (and hence typically “public” because it related to a proceeding that substituted for a public trial)?<sup>608</sup> Ultimately, Judge Gleeson relied on the latter analogy—that the DPA was better viewed as a substitute for a trial, like summary judgment, and that the historical “experience” supporting openness of documents related to summary judgment strongly suggested the propriety of openness of DPA-related documents, such as the Report.<sup>609</sup> Turning next to the “logic” prong, Judge Gleeson emphasized that the HSBC case involved “public institutions” and “matters of great public concern” which

---

<sup>598</sup> *Id.* at \*3.

<sup>599</sup> *Id.*

<sup>600</sup> *See id.* at \*3–4.

<sup>601</sup> *Id.*

<sup>602</sup> *Id.* at \*3.

<sup>603</sup> *Id.*

<sup>604</sup> *Id.*

<sup>605</sup> *Id.* at \*4.

<sup>606</sup> *Id.*

<sup>607</sup> *Id.*

<sup>608</sup> *See id.*

<sup>609</sup> *Id.*

“the public has an interest in overseeing.”<sup>610</sup> The conduct and oversight of “one of the worlds’ largest banking and financial services organizations” gave the monitor’s Report special significance.<sup>611</sup> Even more important were two other factors: first, that openness of the Report would alert the public to the “progress of the arrangement between DOJ and HSBC that the government chose to make the centerpiece of a federal criminal case,” and second, that openness of the Report would assist the public in discerning whether (in the Judge’s words) “I am doing my job of monitoring the execution and implementation of that arrangement.”<sup>612</sup> Armed with functional rationales, Judge Gleeson concluded that the Report was presumptively open.<sup>613</sup> Although the countervailing arguments of the U.S. and HSBC led the Judge to agree to certain redactions, the Report was otherwise deemed accessible to the public.<sup>614</sup>

Judge Gleeson’s opinion was notable for three main reasons. First, it extolled access as a tool for the public to evaluate his own performance as supervisor of the DPA; in effect he said the Report should be open so that the people can know whether HSBC is making progress and whether I am being an effective player in this process.<sup>615</sup> As such, the case harkens back to *Richmond Newspapers*, where the Supreme Court recognized a right of the public to monitor courts—not some other branch or institution—in criminal cases.<sup>616</sup> The Justices viewed access as serving multiple purposes, including the strengthening of the bond between the judiciary and the citizen, and more broadly, familiarizing citizens with judicial values, their workings, their virtues and infirmities, with the goal of a stronger civic culture.<sup>617</sup>

Second, the court recognized the value of shining a light on the executive branch and law enforcement; the implicit theme of Judge Gleeson’s opinion was that the public had a serious interest in being informed about the “arrangement” made by federal prosecutors with targeted corporations.<sup>618</sup> To be sure, access to the monitor’s Report would allow review of Judge Gleeson’s own oversight of the DPA, but just as crucially it would spotlight the workings of a major decision of the Department of Justice to defer prosecution of a worldwide firm of the size and power of HSBC.<sup>619</sup> Access could bring the public into a little-known world of prosecutorial choices and devices to attack corporate criminality.

A third reason relates to the “adaptability” factor of Justice Brennan’s concept of meaningful rights implementation.<sup>620</sup> Justice Brennan defined adaptability as

---

<sup>610</sup> *Id.* at \*5 (citation omitted).

<sup>611</sup> *Id.* (citation omitted).

<sup>612</sup> *Id.*

<sup>613</sup> *Id.* at \*5–7.

<sup>614</sup> *Id.*

<sup>615</sup> *See id.*

<sup>616</sup> *See generally* 448 U.S. 555 (1980).

<sup>617</sup> *See generally id.*

<sup>618</sup> *HSBC Bank USA*, 2016 WL 347670, at \*5.

<sup>619</sup> *See id.*

<sup>620</sup> *See* Brennan, *Worldwide Influence*, *supra* note 93, at 4–8.

“flexibility in the face of changing times,” and he was referring to the Constitution’s deliberate “choice of general language” in fashioning principles “for the illimitable future.”<sup>621</sup> Those words may strike us today as prosaic, but perhaps they too are “adaptable.” If he were writing today, Brennan might have defined adaptability with greater precision: as the capacity of a right to fit conditions that are new and unfamiliar, or to fit conditions that are familiar but whose meaning is now understood in a new way, based on changes in culture or context. As Brennan’s successor on the Court, Justice David Souter, would state: “Meaning comes from the capacity to see what is not in some simple, objective sense there on the printed page.”<sup>622</sup> In the HSBC case, the access question arose in the context of a relatively new device, the DPA; the remedial measures to be adopted by the company over the five-year period were extraordinary in scope; and the roles of government players in the process were unforged and controversial.<sup>623</sup> Was the access right adaptable to this setting? Although a tradition of openness was unavailable due to the newness of the proceeding, and analogies were at best imperfect, Judge Gleeson could rely on two strong considerations: the functional benefits of public awareness in ensuring accountability during the five-year deferral period, and the practical benefits of partial redaction.<sup>624</sup> Part of the appeal of Judge Gleeson’s decision was the sensible meaning he attributed to the facts of the case: that the court’s oversight role allowed for useful checking of both bank and prosecution—all within the eye and informed commentary of the public.

But the HSBC saga did not end there. As this Article neared completion, a panel of the U.S. Court of Appeals for the Second Circuit reversed Judge Gleeson, finding an abuse of discretion in his order unsealing the Report.<sup>625</sup> Holding that the Report was not a judicial document and thus was not presumptively subject to disclosure under the First Amendment, the panel concluded that Judge Gleeson had misconceived the district court’s supervisory role in the DPA context.<sup>626</sup> That court’s inherent supervisory power, the panel explained, should be considered “extraordinary” and not simply limited but “extremely limited,” typically implicated only after a defendant requests judicial intervention based on a claim of prosecutorial abuse or executive misconduct.<sup>627</sup> The mere possibility that a district court might be asked to intervene on such grounds in the course of a five-year DPA was considered speculative and

---

<sup>621</sup> *Id.* at 7.

<sup>622</sup> David H. Souter, Assoc. Justice, U.S. Supreme Court, Harvard Commencement Remarks, in *HARV. GAZETTE* (May 27, 2010), <https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/> [<https://perma.cc/EFF4-39H2>].

<sup>623</sup> See generally *HSBC Bank USA*, 2016 WL 347670; *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

<sup>624</sup> See *HSBC Bank USA*, 2016 WL 347670, at \*2–6.

<sup>625</sup> *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 142 (2d Cir. 2017).

<sup>626</sup> *Id.* at 128–29.

<sup>627</sup> *Id.* at 136 (citation omitted).

thus insufficient to establish the relevance of the Report to any supervisory power claimed by Judge Gleeson.<sup>628</sup>

The panel's opinion reversing Judge Gleeson arguably faltered in distinguishing two prior cases in which panels of the same court had *not* required a specific request or present need for judicial intervention in order for documents to be termed judicial records, but had found relevance in needs that could arise later.<sup>629</sup> In addition, the panel in *HSBC* did not address how specific requests for intervention could arise if the likeliest source of such information—the Report—were sealed from the public's eye.<sup>630</sup>

The panel went on to discredit Judge Gleeson's reliance on the Speedy Trial Act's provision for district court approval of agreements to defer prosecution, and denied that the district court's potential role under Rule 48 furnished present supervisory authority.<sup>631</sup> In light of all these limitations, Judge Gleeson's decision that the Report was judicial in nature amounted to a separation of powers violation: an infringement of the prosecution's federal constitutional authority "to 'take Care that the Laws be faithfully executed.'"<sup>632</sup> But in reaching that conclusion, the *HSBC* panel omitted any statement of a particular separation of powers test and therefore offered no discussion of how the limited judicial authority claimed by Judge Gleeson, as further narrowed by his redactions, could actually result in a constitutional violation.<sup>633</sup>

Concurring in the panel's opinion, Judge Pooler wrote separately to underscore that the case raised important policy questions about DPAs.<sup>634</sup> They "allow[] the prosecution to act as prosecutor, jury, and judge," she wrote, "enforc[ing] legal theories without such theories ever being tested in a court proceeding."<sup>635</sup> While the use of DPAs was "neither improper nor undesirable," added Pooler, "the law governing

---

<sup>628</sup> *See id.*

<sup>629</sup> *See* United States v. Erie County, 763 F.3d 235, 240 (2d Cir. 2014) (reasoning that consultants' reports filed pursuant to settlement agreement were judicial records because they "would be considered by the Court" in ruling on enforcement motions that might be brought by "either of the parties," and "could form the basis" for the court's reinstating civil proceedings "if the Court believes that the substance of [a] stipulated order of dismissal is not being fulfilled"); United States v. Amodeo, 44 F.3d 141, 146 (2d Cir. 1995) (finding that progress report of court officer appointed pursuant to consent decree was a judicial document, and that the report "certainly would be germane in assessing" any possible application for assistance made by the court officer to the court, and that in any party's possible request for enforcement of or relief from the consent decree, the "record to be considered surely would include" matters in the report). The panel in *HSBC* found these cases distinguishable, stating that in both instances the district court's responsibilities were immediate and were contemplated by the consent decree or settlement. *HSBC Bank USA*, 863 F.3d at 139–41. The distinctions drawn by the court are weak at best. *Cf. id.*

<sup>630</sup> *See generally HSBC Bank USA*, 863 F.3d 125.

<sup>631</sup> *Id.* at 137–42.

<sup>632</sup> *Id.* at 128–29 (quoting U.S. CONST. art. II, § 3).

<sup>633</sup> *See id.*

<sup>634</sup> *Id.* at 142–44 (Pooler, J., concurring).

<sup>635</sup> *Id.* at 143.

DPA” permits prosecutors to “exercise[] the core judicial functions of adjudicating guilt and imposing sentence with no meaningful oversight from the courts.”<sup>636</sup> Thus, while the majority characterized Judge Gleeson’s decision as a trespass into executive power, the concurrence implied that a DPA could amount to a separation of powers problem in usurping judicial power.

Most importantly, neither the majority nor concurrence addressed Judge Gleeson’s central concerns: the need to preserve the integrity of the court in the eyes of the public, and the duty to permit the public itself to monitor the bank’s five-year period of obligation and change.<sup>637</sup> A crucial opportunity for citizens to watch and learn from public values in action was sadly lost.

### CONCLUSION

A three-tiered structure tells the story of the right of access under the First Amendment.

At the top, the Supreme Court early on identified a philosophy of public access to major workings of courts, thus facilitating self-governance, connecting citizens to the courts, and allowing “the people” to understand and evaluate legal values, especially the priorities associated with due process.

In the middle tier, appellate courts have converted philosophy into flexible doctrine, with the result that legal analysis in access cases usually centers on a choice of analogies and practical assessment of how institutions operate under public scrutiny.

Finally, trial judges on the low rung have contributed high value, making public oversight possible and public education an often unseen benefit. In three cases of particular note, solitary judges resisted end runs by lawyers, rejected redactions of core meaning by powerful litigants, and balked when federal prosecutors sought their imprimaturs but neglected their bonds to the community. These cases exemplify the ongoing challenges to access at ground zero and illustrate the visibility value’s ultimate reliance on the public—or, as Justice Brennan might say, the people.

---

<sup>636</sup> *Id.*

<sup>637</sup> *See generally id.* at 142–44; *id.* at 128–42 (majority opinion); *United States v. HSBC Bank USA, N.A.*, No. 12-CR-763 (JG), 2016 WL 347670, at \*2–5 (E.D.N.Y. Jan. 28, 2016).