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The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases†

PAUL MARCUS*

[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.¹

Americans have always been fascinated by the criminal trial,² as demonstrated by the enormously successful novels,³ plays,⁴ films,⁵ and television shows⁶ based on these trials. Criminal trials, however, are not only the subject of popular forms of entertainment; they are news. Whether the public is involved nationally in a case, such as the Patty Hearst or Richard Speck trial, or only locally, the public's interest in the criminal trial is great.⁷ As Justice Douglas stated: "A trial is a public

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¹ *Bridges v. California*, 314 U.S. 252, 260 (1941).

² While the public may well be quite concerned with the criminal trial, most criminal cases do not go to trial. As has been consistently pointed out, the vast majority of criminal cases are disposed of either through dismissal by the prosecution or through a guilty plea arrangement. See Stephenson, *Fair Trial, Fair Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39, 39 n.5 (1979). Still, when one thinks of the criminal justice system, it is the trials of people such as Charles Manson, Jean Harris, or the ABSCAM defendants which immediately come to mind.

³ *E.g.*, J. D. VOELKER, *ANATOMY OF A MURDER* (1958), an intense account of a murder trial.

⁴ *E.g.*, M. LEVIN, *COMPULSION* (1957) (based upon Leopold and Loeb trial).

⁵ *E.g.*, *INHERIT THE WIND* (1960), *AND JUSTICE FOR ALL* (1979).

⁶ Television has perhaps been the most widely used medium. Films appearing on television have ranged from stories of nationally known trials, *e.g.* *HELTER-SKELTER* (Charles Manson Family case), to cases involving particularly violent crimes such as rapes, to proceedings concerning incompetent defendants, *e.g.*, *DUMMY* (story of Donald Lang).

⁷ This interest can remain for considerable periods of time. It would appear that the interest in the Bruno Hauptmann case has never died. The defendant there was convicted of kidnapping and murdering the Lindbergh child. Questions are still being raised as to whether the defendant received a fair trial and whether he actually committed the crimes as charged. On October 6, 1981, Governor Brendan T. Byrne of New Jersey announced that secret files maintained on the case would be opened in response to claims that an innocent man was executed in the "crime of the century." Sullivan, *Byrne to Release Lindbergh Files, 49 Years After the Kidnapping*, N.Y. Times, Oct. 7, 1981, § B, at 1, col. 4. For good discussions of the Hauptmann case, see Portman, *The Defense of Fair Trial from Shepard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29

event. What transpires in the court room is public property."⁸

The interest of the media in criminal trials is among the "purest" in the press or speech arena. In such trials one need not be concerned with reporting which tends to incite,⁹ is offensive to the general public,¹⁰ may unfairly injure reputation,¹¹ or involves purely private activities.¹² The reporting of the criminal trial is factual, usually timely, and invariably newsworthy. As a result, the courts have taken great pains to ensure that any interference with media reporting of the criminal trial is minimal. The difficulty is that the public interest—albeit entitled to great weight—may not be the only interest present when a person stands to be deprived of his or her liberty through the criminal justice system. There are also interests in a fair trial, the rehabilitation of the accused, and the privacy of the witnesses and victims.

While consistently recognizing the news content of criminal trials, courts have been faced in recent years with a barrage of claims asking for limitation of media coverage of criminal trials. The Supreme Court has explored the claims in some detail in three principle areas: first, the reporting of certain facts in a trial, such as the names of the defendants or witnesses; second, the proposed limitation of attendance by media representatives at pretrial or trial proceedings; and third, the electronic broadcasting of criminal trials to the public. In this article I will initially explore the strong first amendment basis for media coverage of criminal trials. I will then consider these three areas as they converge with the first amendment interest in news gathering. My conclusion is that by recognizing this strong first amendment interest, the Supreme Court has treated the media with great deference, perhaps too much deference vis-à-vis certain defendants as well as witnesses and victims.

THE FIRST AMENDMENT INTEREST

Few would argue with Thomas Jefferson's famous remark, "Our liberty depends on freedom of the press, and that cannot be limited without being lost."¹³ As the Supreme Court said in one of the most famous first amendment cases ever decided, the United States has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ."¹⁴ The first amendment principle

STAN L. REV. 393 (1977); Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case that "Will Not Die"*, 66 GEO. L.J. 1 (1977).

⁸ *Craig v. Harney*, 331 U.S. 367, 374 (1947).

⁹ See generally *Dennis v. United States*, 341 U.S. 494 (1951) (conspiracy); *Terminiello v. Chicago*, 337 U.S. 1 (1949) ("fighting words").

¹⁰ See generally *Miller v. California*, 413 U.S. 15 (1973) (obscenity).

¹¹ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation).

¹² See *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (invasion of privacy).

¹³ 9 THE PAPERS OF THOMAS JEFFERSON 239 (J. Boyd ed. 1954).

¹⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In *Sullivan* the Court held

of free and open speech is readily accepted, and few restrictions will generally be allowed.¹⁵ The difficulty of applying this basic notion in the criminal context is that the criminal defendant often vigorously argues that the principles of free speech conflict with his own personal right to a fair trial attended by due process. Such a claim has been with this country from its earliest roots. The defense lawyer for Aaron Burr claimed that jurors could not properly decide the 1807 case because of prejudicial articles carried in numerous newspapers.¹⁶ Chief Justice Marshall was careful to consider the defendant's claims: "The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions."¹⁷

While understanding the potential dangers to the workings of the criminal justice system, the courts have been consistently vigilant in upholding press rights when arguably in conflict with the rights of the defendant. Judges have stressed the great values served by media reporting of criminal trials. The Supreme Court has stated: "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."¹⁸ Similarly, Justice Brennan has written:

Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.¹⁹

In spite of continued media criticism and skepticism concerning the judiciary's view of the so-called free press versus fair trial issue,²⁰ the

that the Constitution requires public officials in defamation cases to prove that the statement of the defendant had been published with actual malice—knowledge of the falsity or reckless disregard for the truth. The doctrine was later expanded to cover public figures as well. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁵ For excellent discussions of the first amendment policy considerations, see Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968).

¹⁶ *United States v. Burr*, 25 F. Cas. 49, 49 (C.C.D. Va. 1807) (No. 14,692g).

¹⁷ *Id.* at 50. See *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 394 n.2 (1968).

¹⁸ *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

¹⁹ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan J., concurring).

²⁰ Consider for instance, the comments of well-known journalist Bob Woodward as quoted

record of the courts in this regard has generally been impressive. A good example of the courts' attention to this matter is the ABSCAM cases.²¹ In several of these cases, media representatives have asked that the tapes, which were shown to the jury,²² be turned over to the media so that they could be shown on television news. The defendants have argued strenuously that the tapes, if shown to the public, could prejudice jury pools available for the cases or for retrials, and have contended that a delay in showing them on television would not seriously infringe first amendment rights. The courts have consistently rejected the defendants' claims.²³ Judges in these cases have recognized the defendants' interests, yet have stressed that these interests must be balanced against the public interest in immediately seeing matters of such great import.²⁴

This is not to suggest that courts do not restrict the media in the reporting of criminal trials. There have been numerous instances of restrictions. Nevertheless, these have been in relatively narrow and unusual circumstances. For instance, hearings on pretrial evidentiary matters may

in Stephenson, *supra* note 2, at 66: "[T]here is an intense perception within the Court that the press is operating outside the public interest, that it is the big guy, the bully.' If the press will not police itself . . . 'then somebody else will, and the . . . Supreme Court is poised and anxious to do so.'"

²¹ "'ABSCAM' [is] a coined word from the first two letters of Abdul Enterprises, Ltd. and the word 'scam' . . ." *In re Application of Nat'l Broadcasting Co.*, 635 F.2d 945, 947 (2d Cir. 1980). Abdul Enterprises was the fictional business used in the FBI's "sting" operation. *Id.*

²² Or in some cases, which were to be shown to the jury at a later time.

²³ *In re Application of Nat'l Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981); *In re Application of Nat'l Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980).

²⁴ The trial judge in the District of Columbia Circuit case had rejected the broadcasters' position:

In denying the broadcasters' application the court relied primarily upon the defendants' interest in securing a fair and impartial jury should their cases be retried. The court noted that several defense motions were pending before it which the court characterized as "not frivolous." If new trials were granted, the court stated, release of the tapes would jeopardize the defendants' rights because (1) the broadcasters probably would play portions of the tapes at or near the beginning of any retrial, accompanied by references to the prior verdicts and the court's rulings on the defendants' motions and (2) the broadcasters probably would not play the tapes in their entirety, due to time restrictions, but would air only selected portions of the tapes in a manner presenting the defendants in the most unfavorable light.

In re Application of Nat'l Broadcasting Co., 653 F.2d 609, 614-15 (D.C. Cir. 1981) (footnotes omitted). The appeals court disagreed:

Although the trial court characterized the motions filed . . . as "nonfrivolous", the prospect of a retrial remains speculative. We accordingly still remain wary of sanctioning denial of a posttrial application to copy and inspect judicial records based on the pendency of new trial requests that may ultimately be denied, although they cannot be dismissed at the threshold as frivolous. This is not a case where the court has indicated it is inclined to grant a new trial.

Furthermore, should the presently hypothetical second trial become a reality, we find nothing in the record to indicate that there would be significant difficulty in assembling a panel of the "impartial, 'indifferent' jurors" to which

be closed to the press and the public.²⁵ Moreover, in contrast to the ABSCAM cases, some trial judges refuse the media physical access to items of evidence. In *United States v. Gurney*,²⁶ the widely publicized trial of the former United States Senator, the media were denied access to "(1) exhibits not yet admitted into evidence; (2) transcripts of bench conferences held *in camera*; (3) written communications between the jury and the judge; (4) list of names and addresses of jurors; and (5) Mr. Gurney's grand jury testimony."²⁷ Recognizing that the trial judge could not restrain news coverage of the public trial or deny the media access to any information already within the public domain, the court of appeals affirmed the district judge's ruling since he had "merely refused to allow the appellants to inspect documents not a matter of public record."²⁸ Quoting from Chief Justice Warren's concurring opinion in the Billie Sol Estes case,²⁹ the court noted that "[w]hen representatives of the communications media attend trials they have no greater rights than other members of the public."³⁰ The basic notion of *Gurney* was established in the Richard Nixon tapes case, *Nixon v. Warner Communications, Inc.*³¹ There, too, the media had asked to be able to make copies of items which had never been made physically available to the public. The Court specifically reaffirmed its first amendment holdings in the area of the criminal trial and repeated the words of Justice Black that the public trial is "'a safeguard against any attempt to employ our courts as instruments of persecution.'"³² Nevertheless, the Court refused the media access to the tapes:

[T]he press . . . was permitted to listen to the tapes and report on

the defendants would be constitutionally entitled. . . . We . . . think it likely . . . that a significant percentage of the potential jury pool will not see or hear the tapes, or if they do, will quickly forget much of what they saw. In the words of the Second Circuit, we think there is somewhat of a tendency to "frequently overestimate the extent of the public's awareness of news".

Id. at 616 (footnotes omitted). But see *In re Application of KSTP Television*, 504 F. Supp. 360 (D. Minn. 1980). In *KSTP*, the judge refused to release to television stations videotape recordings of the kidnapper and his victim which had been shown at trial. The court recognized the "general right to inspect and copy public records," *id.* at 361, but found that the public release of the tapes would infringe on the victim's privacy. The court distinguished the ABSCAM cases because of the public interest in the tapes shown there. *Id.* at 363. See also *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981) (refusing access to tapes in "Brilab" sting operation case).

²⁵ *Capital Newspapers Div. of Hearst Corp. v. Clyne*, 82 A.D.2d 963, 440 N.Y.S.2d 779 (1981) (mem.); see text accompanying notes 95-178 *infra*.

²⁶ 558 F.2d 1202 (5th Cir. 1977), *cert. denied sub nom.* *Miami Herald Publishing Co. v. Krentzman*, 435 U.S. 968 (1978).

²⁷ *Id.* at 1207.

²⁸ *Id.* at 1208.

²⁹ *Estes v. Texas*, 381 U.S. 532, 584 (1965) (Warren, C.J., concurring).

³⁰ 558 F.2d at 1208 n.9.

³¹ 435 U.S. 589 (1978).

³² *Id.* at 610 (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish. . . . Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying. . . .

The First Amendment generally grants the press no right to information about a trial superior to that of the general public.³³

Thus, the courts will not hesitate to impose some curbs on the ability of the media to report the criminal trial. Still, these curbs are imposed in relatively rare cases where the public's right to know the circumstances of the trial will not be affected. The courts may be unwilling in some cases to give up videotapes; they are not willing to issue orders restricting press coverage or barring media representatives from the criminal trial. When the claim of restrictions on the substantive news is raised, the press normally prevails.

PRETRIAL PUBLICITY

The allegiance of the courts to the media interest has been demonstrated quite saliently in several areas, but nowhere as significantly as in the pretrial publicity cases. The argument of the defendants in these cases is deceptively simple. The Constitution guarantees the defendant a fair and public trial in which the state's case will be evaluated by a jury of impartial citizens. In cases in which substantial publicity develops after the incident in question but before the trial, members of the jury pool may become so inundated with information that they cannot fairly review the evidence. Such a claim, if proven, would indicate a constitutional violation. "A fair trial in a fair tribunal is a basic requirement of due process."³⁴ "The theory of the law is that a juror who has formed an opinion cannot be impartial."³⁵

Few experienced lawyers and judges doubt that the defense claim is correct, at least in some cases. Justice Brennan stated: "No one can seriously doubt, however, that uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial"³⁶ A committee of federal judges chaired by the Honorable Irving R. Kaufman remarked: "[T]he Com-

³³ 435 U.S. at 609. *But see* United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978). In *Sielaff* spectators were excluded during a rape victim's testimony at trial, but members of the media were allowed to attend. Upholding this ruling, the court of appeals emphasized the trauma to the victim and the lack of any harm to the defendant or the general public.

³⁴ *In re Murchison*, 349 U.S. 133, 136 (1955).

³⁵ *Reynolds v. United States*, 98 U.S. 145, 155 (1878).

³⁶ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

mittee cannot ignore the fact that it has become increasingly apparent that in a widely publicized or sensational case, the right of the accused to trial by an impartial jury can be seriously threatened by the conduct of news media prior to and during trial."³⁷ In his concurring opinion in *Irvin v. Dowd*,³⁸ Justice Frankfurter warned that "such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury."³⁹

During the 1960's, at a time when the Supreme Court was carefully construing constitutional rights of the accused at trial,⁴⁰ the Court was faced with numerous cases in which strong defense claims were made with respect to prejudicial pretrial publicity. Three of these cases, in particular, were to guide lawyers and judges.⁴¹ In *Irvin v. Dowd*⁴² residents of a small town received an incredible amount of inflammatory publicity about the defendant for a six-month period prior to trial, including: defendant's confession to burglaries and murders (made public by an official press release), information as to prior convictions of the defendant, and his offer to plead guilty to avoid the death penalty, an offer which was turned down by the government. The trial judge granted a defense motion for a change of venue, but under state statute the change could only be to an adjacent county which had received basically the same news coverage. Defense counsel was able to show bitter citizen prejudice against the defendant.⁴³ Four-hundred thirty persons were called for jury service

³⁷ Report on the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, *supra* note 17, at 394.

³⁸ 366 U.S. 717, 729-30 (1961) (Frankfurter, J., concurring).

³⁹ *Id.* at 730.

⁴⁰ During this period the Court decided the following cases: *United States v. Wade*, 388 U.S. 218 (1967) (defendant entitled to counsel at postindictment lineup); *Miranda v. Arizona*, 384 U.S. 436 (1966) (fifth amendment requires substantial warnings to accused undergoing custodial interrogation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel applies to states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule applies to states in fourth amendment search and seizure cases).

⁴¹ The list of important pretrial publicity cases could be far longer. See, e.g., *Murphy v. Florida*, 421 U.S. 794 (1975) (conviction affirmed where 20 veniremen indicated belief of defendant's guilt; no showing of community "poisoned" against defendant); *Marshall v. United States*, 360 U.S. 310 (1959) (defendant's conviction reversed because seven sitting jurors exposed to news accounts of defendant's prior convictions and arrests); *Stroble v. California*, 343 U.S. 181 (1952) (conviction affirmed where defendant failed to show that publicity was such as to "necessarily prevent fair trial").

⁴² 366 U.S. 717 (1961).

⁴³ *Id.* at 720, 725-27. Sadly, this type of unfortunate atmosphere continues. In *People v. Botham*, ___ Colo. ___, 629 P.2d 589 (1981), 89 jurors were explicitly questioned about pretrial publicity in a case of widely reported homicides. Eighty-six of the 89 admitted to seeing substantial news coverage of the story before being called as jurors. Fifty-seven admitted that they felt, prior to trial, that the defendant was guilty as charged. Seven of the 14 jurors called to hear the case believed, at one time or another, that the defendant was guilty. *Id.* at 599-600. The Colorado Supreme Court reversed the conviction, finding that the "pattern of prejudice throughout the community could not be overcome by the jurors' assurances of impartiality." *Id.* at 600.

at trial. Two-hundred sixty-eight were excused because they had made up their minds with regard to guilt. Eight of the twelve who served as jurors thought the defendant was guilty, but indicated that they could nevertheless render an impartial verdict. One juror said, "You can't forget what you hear and see."⁴⁴ The defendant's conviction was reversed. The Court stated: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion"⁴⁵

*Rideau v. Louisiana*⁴⁶ involved a similar extreme situation. The defendant there was a confessed bank robber who had killed a bank employee during the course of the robbery. He was given the death sentence after trial. The defendant's confession had been obtained in the jail where he was being held the morning following the robbery and murder.⁴⁷ "A local television station had been allowed, perhaps invited, to videotape the confession and the station then broadcast it to tens of thousands of members of the community from which the jury was drawn."⁴⁸ Without explicitly finding any actual prejudicial impact on the jury itself,⁴⁹ the Court reversed the defendant's conviction. "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."⁵⁰

No doubt the leading pretrial publicity case is *Sheppard v. Maxwell*.⁵¹ The defendant, a well-known Cleveland doctor, was charged with the murder of his wife. During the investigation and the trial, the local newspapers covered the story in detailed and inflammatory fashion. There were daily headlines and editorials indicating the defendant's guilt. Revealing evidence from the state's case was presented, and public officials were accused of "mollycoddling" the defendant.⁵² Despite the fact that the

⁴⁴ 366 U.S. at 727-28.

⁴⁵ *Id.* The defendant had argued in a sweeping fashion that his conviction should be reversed simply because the public had received such a large amount of information about him and about the case. This view the Court rejected:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.

Id. at 722.

⁴⁶ 373 U.S. 723 (1963).

⁴⁷ *Id.* at 724-25.

⁴⁸ *Martin v. Warden, Huntingdon State Correctional Inst.*, 653 F.2d 799, 805 n.5 (3d Cir. 1981) (discussing *Rideau*).

⁴⁹ Stephenson, *supra* note 2, at 49. For an interesting debate on the need for such a finding, compare the majority and dissenting opinions in *United States v. Poludniak*, 657 F.2d 948 (8th Cir. 1981).

⁵⁰ 373 U.S. at 726.

⁵¹ 384 U.S. 333 (1966).

⁵² *Id.* at 338-42. The Court described the rather incredible pretrial and trial situation:

Supreme Court did not hear the case until twelve years later,⁵³ it ordered a new trial for the defendant.⁵⁴ The Court found that "this deluge of

During the inquest . . . a headline in large type stated: "Kerr [Captain of the Cleveland Police] Urges Sheppard's Arrest." In the story, Detective McArthur "disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section," a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extramarital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that Sheppard had any illicit relationships besides the one with Susan Hayes.

On July 28, an editorial entitled "Why Don't Police Quiz Top Suspect" demanded that Sheppard be taken to police headquarters. It described him in the following language:

"Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases. . . ."

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling—Bring Him In."

. . . .
Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors.

. . . .
On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom.

Id. at 340-44.

⁵³ After the Ohio Supreme Court affirmed Sheppard's conviction, *State v. Sheppard*, 165 Ohio St. 293, 135 N.E.2d 340 (1956), the United States Supreme Court denied certiorari, 352 U.S. 910 (1956). Eight years later the United States district court found, on a writ of habeas corpus, that Sheppard had been denied due process. *Sheppard v. Maxwell*, 231 F. Supp. 37 (S.D. Ohio 1964). The court of appeals reversed, 346 F.2d 707 (6th Cir. 1965), allowing the United States Supreme Court to grant certiorari and affirm the granting of the writ by the district court.

⁵⁴ As the Third Circuit properly pointed out, the Supreme Court in *Sheppard* did not "say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone" [R]ather the Court ordered that a writ of habeas corpus issue because the trial judge permitted bedlam to reign at the trial, failed to prevent serious disruptive influences in the court, and allowed the intrusion of the media on the deliberative processes occurring in the courtroom." *Martin v. Warden, Huntingdon State Correctional Inst.*, 653 F.2d 799, 805 n.5 (3d Cir. 1981) (citation omitted) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 354 (1966)).

publicity reached at least some of the jury"⁵⁵ and that "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom"⁵⁶ The Court⁵⁷ chastised the trial judge for failing to protect the defendant's rights. It suggested several protective measures: first, limiting the number of reporters in the courtroom and regulating their conduct;⁵⁸ second, "insulating" the witnesses from public interviews;⁵⁹ and third, making "some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides."⁶⁰ The Court added:

[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue the case* until the threat abates, or *transfer it* to another county not so permeated with publicity. In addition, *sequestration of the jury* was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.⁶¹

It is not enough for the defendant to show pretrial publicity. As later noted, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."⁶² The ultimate question is narrow, as stated in the Richard Speck case: "The basic consideration, however, is not the amount of publicity in a particular case, but whether the defendant in that case received a fair and impartial trial"⁶³ The courts'

⁵⁵ 384 U.S. at 357. For a more recent version of this sort of pretrial publicity problem, see *Commonwealth v. Daugherty*, 493 Pa. 273, 426 A.2d 104, 106 (1981).

⁵⁶ 384 U.S. at 355.

⁵⁷ Only Justice Black dissented, without opinion. *Id.* at 363.

⁵⁸ *Id.* at 358.

⁵⁹ *Id.* at 359.

⁶⁰ *Id.*

⁶¹ *Id.* at 363 (emphasis in original). The handling of the trial of Dr. George Nichopoulos, Elvis Presley's doctor, who was charged with overprescribing drugs for Presley and others, is instructive. In that case, the Memphis trial judge, cognizant of the immense publicity, issued detailed and careful orders regulating the use of cameras and sound equipment in the lobbies of the courtroom. *N.Y. Times*, Oct. 1, 1981, § A, at 16, col. 6.

⁶² *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). In some cases there will be no prejudice even with great pretrial publicity due to the passage of time between the underlying incident and the court proceedings. In *State v. Beavers*, 394 So. 2d 1218 (La. 1981), the crime was alleged to have been committed in January 1972. The testimony showed that most coverage of the incident had died down in Baton Rouge following the original trial in April 1973. Certainly, in 1980 (at the time of the retrial) evidence would fail "to establish clearly the existence of such prejudice in the collective mind of the community as to make a fair trial impossible." *Id.* at 1225.

⁶³ *People v. Speck*, 41 Ill. 2d 177, 183, 242 N.E.2d 208, 212 (1968).

adherence to this principle, as well as the general deference given to the rights of the media in criminal cases, is demonstrated in the case which arose after a trial judge attempted to eliminate all difficulties with prejudicial pretrial publicity.

*NEBRASKA PRESS ASSOCIATION v. STUART*⁶⁴

The state trial judge in *Nebraska Press Association v. Stuart* took the Supreme Court's suggestions to heart and "acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial."⁶⁵ The defendant was accused of murdering six members of a family in a Nebraska town of about 850 people. The crime attracted widespread news coverage, locally and nationwide. Three days after the crime, both the prosecuting attorney and the defense counsel asked the trial court to enter an order relating to "'matters that may or may not be publicly reported or disclosed to the public'" due to the "'mass coverage by news media' and the 'reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial.'"⁶⁶ After hearing argument, the judge entered an order which prohibited all persons in attendance from "'releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced.'"⁶⁷ The Nebraska Supreme Court altered the order somewhat,⁶⁸ but defended the restrictions which were being imposed because of the defendant's vital interest in a trial by an impartial jury.⁶⁹ The modified order prohibited reporting of three items: first, confessions or admissions made by the defendant to law enforcement officers; second, confessions or admissions made to other persons (except members of the press); and third, other facts "strongly implicative of the accused."⁷⁰ The order expired when the jury was impaneled.⁷¹

⁶⁴ 427 U.S. 539 (1976). For good discussions of the case, see NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 765-67 (1978); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977); Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431 (1977).

⁶⁵ 427 U.S. at 555.

⁶⁶ *Id.* at 542.

⁶⁷ *Id.* The lower court, though not the state supreme court, also required members of the press to observe the Nebraska bar-press guidelines, which were voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes in criminal trials. *Id.* at 542, 545, n.1. Members of the media expressed great skepticism as to the likely result of this case when it reached the United States Supreme Court. See note 99 *infra*.

⁶⁸ *State v. Simants*, 194 Neb. 783, 801, 236 N.W.2d 794, 805 (1975).

⁶⁹ *Id.* at 799-801, 236 N.W.2d at 804-05.

⁷⁰ *Id.* at 801, 236 N.W.2d at 805.

⁷¹ 427 U.S. at 546. Though the order expired, the Court concluded that the case was not moot because the defendant could be retried and because similar orders could be entered in the State of Nebraska. *Id.* at 546-47.

Chief Justice Burger, writing for the Court, began by noting that the conflict between the right to a free press and the right to a fair trial was "almost as old as the Republic."⁷² After looking to the many pretrial publicity cases,⁷³ he concluded that the cases showed that pretrial publicity, even adverse publicity, would not necessarily lead to an unfair trial. Instead, it was the judge's responsibility to make sure that the jury impaneled could fairly and impartially resolve the issues in the case.⁷⁴

Balanced against this right to a fair trial was the constitutional restriction against limitations on freedom of the press. The Court was especially troubled by "orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech."⁷⁵ After exploring earlier first amendment decisions,⁷⁶ the Court concluded that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."⁷⁷ Although the Court refused to hold that prior restraints on news agencies in criminal trials were per se unconstitutional,⁷⁸ it was careful to evaluate the facts in the record to determine whether such facts supported "the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence."⁷⁹ Looking to three important factors, the Court decided that the prior restraint in this case was unjustified.

The first question was whether the trial judge was correct in determining that there would be intense pretrial publicity about the case. All members of the Court had little trouble concluding that the trial judge was right.⁸⁰ The news media were overwhelming the small Nebraska town, subjecting the case to intense scrutiny and publicity. The next question was whether measures other than a prior restraint would have reduced the pretrial publicity. Placing the burden heavily on the state, the Court found that there was no finding that alternatives would have failed to protect the defendant's rights. The alternatives were change of venue,

⁷² *Id.* at 547.

⁷³ In particular, the Chief Justice considered the *Irvin*, *Rideau*, and *Sheppard* cases. *Id.* at 551-55. For discussion of these cases, see text accompanying notes 42-61 *supra*.

⁷⁴ 427 U.S. at 554-55.

⁷⁵ *Id.* at 556.

⁷⁶ The Court relied heavily on *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) ("[I]t has been generally, if not universally, considered that it is the chief purpose of the [first amendment] to prevent previous restraints upon publication."), and on *New York Times Co. v. United States*, 403 U.S. 713 (1971). 427 U.S. at 556-62.

⁷⁷ *Id.* at 559.

⁷⁸ *Id.* at 570. *But see id.* at 572-617 (Brennan, J., concurring in the judgment) (discussed in text accompanying notes 75-79 *infra*). Media representatives argued strongly that a per se rule should be adopted because of the large number of prior restraints and gag orders which had been issued in response to adverse pretrial publicity claims. See 65 ILL. B.J. 469, 471 (1977).

⁷⁹ 427 U.S. at 562.

⁸⁰ *Id.* at 562-63.

postponement of the trial, substantial questioning of respective jurors, and instructions to the jurors on their sworn duties.⁸¹ Additionally, the Justices wondered how effective the restraining order in this case would have been in preventing prejudicial publicity. Noting that the trial court could not have jurisdiction over news agencies not physically present in court, and further noting that areas not specified in the order might well prove to be prejudicial, the Court found it unlikely that the judge's order would have protected the defendant's rights.⁸²

The Chief Justice stopped short of holding that a prior restraint order could never be issued in connection with adverse pretrial publicity,⁸³ but made clear that it would be the rare case in which such an order would be constitutionally valid.⁸⁴ In the instant case, the Court held:

[W]ith respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other

⁸¹ *Id.* at 563-65 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966)). Justice Erickson of the Colorado Supreme Court explores these alternatives in Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485 (1977).

⁸² 427 U.S. at 566-67. In addition, the Court expressed some question as to the impact of media coverage as opposed to the normal rumor mill present in a small community. In a community of 850 people, "rumors would travel swiftly by word of mouth [and] could . . . be more damaging than reasonably accurate news accounts. But . . . a whole community cannot be restrained. . . ." *Id.* at 567. One commentator argues that pretrial publicity will rarely affect the jury:

The short of my conclusions is that newspaper publicity, or any other assertions of the facts of a case made outside of court, have virtually no impact upon the jury trying the case. It is not that all jurors are without prejudice. . . . In deciding the case before them, however, the jurors almost invariably assumed as a matter important to their status that they knew more about the facts of the case than any newspaper reporter and that their superior understanding was due to their close observation of the trial itself. Moreover, I have reason to believe that jurors, like most other Americans, mistrust the accuracy of specific statements reported in the press and have a poor memory for these things. They seem to be much more influenced by other jurors' arguments, during deliberations, and generally the debates and social pressures of deliberation determine the verdict.

Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1977). For excellent discussions of the empirical evidence in this area, see Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977); J. Buddenbaum, D. Weaver, R. Holsinger & C. Brown, *Pretrial Publicity and Juries: A Review of Research* (Indiana University School of Journalism, March 1981).

⁸³ The Chief Justice stated:

However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

427 U.S. at 569-70.

sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met. . . .⁸⁵

The Chief Justice's opinion strongly reaffirmed the important first amendment interest in the reporting of criminal trials in a timely and unrestricted fashion. Still, other members of the Court had an even stronger view of the first amendment guarantee, though they recognized the important rights of the defendant to a fair trial. Justice White stated that there was "grave doubt" in his mind "whether orders with respect to the press such as were entered in this case would ever be justifiable."⁸⁶ Justice Powell wrote:

In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fairness of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.⁸⁷

The strongest position in favor of the media was taken by Justice Brennan, with whom Justices Stewart and Marshall joined. He began by conceding that the right to a fair trial was "the most fundamental of all freedoms"⁸⁸ and "essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression,"⁸⁹ and that "uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial."⁹⁰ Nevertheless, he concluded that courts cannot impose any prior restraints "on the reporting of or commentary upon information revealed in open court proceedings, disclosed in public documents, or divulged by other sources with respect to the criminal justice system"⁹¹ As the Chief Justice had written, Brennan found that there were numerous alternatives to prior restraint. Justice Brennan did not find that there was any in-

⁸⁴ *Id.* at 570. See also Note, *Prior Restraint on Media Publication to Protect Criminal Trial Must Meet Strict Requirements*, 25 U. KAN. L. REV. 258 (1977).

⁸⁵ 427 U.S. at 570.

⁸⁶ *Id.* at 570-71 (White, J., concurring).

⁸⁷ *Id.* at 571-72 (Powell, J., concurring).

⁸⁸ *Id.* at 586 (Brennan, J., concurring) (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965)).

⁸⁹ *Id.* at 586 (Brennan, J., concurring).

⁹⁰ *Id.* at 587.

⁹¹ *Id.* at 612.

herent conflict between the free press and fair trial rights,⁹² but he made clear that the potential for harm resulting from prior restraints was great and the interests of the first amendment were paramount in resolving whatever conflict might exist:

Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.⁹³

Some may argue that the majority of the Court in *Nebraska Press* did not go far enough in rejecting the notion of prior restraints in the pretrial publicity cases even though all members of the Court heavily emphasized the first amendment interest in news media coverage of criminal trials. In the period immediately after the case numerous groups of lawyers, judges, and journalists were formed to study the matter and all "deferred" to the first amendment interests by suggesting methods for the elimination of potentially unfair pretrial publicity other than the prior restraint.⁹⁴ With respect to the competing interest of the fair trial, the

⁹² But I would reject the notion that a choice is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other. . . . For although there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, judges possess adequate tools short of injunctions against reporting for relieving that tension.

Id. at 611-12.

⁹³ *Id.* at 587. Justice Stevens chose not to answer the question of whether a per se rule against prior restraints was required under the Constitution. He indicated, however, that he subscribed to most of what Justice Brennan said and "if ever required to face the issues squarely, [I] may well accept his ultimate conclusion." *Id.* at 617 (Stevens, J., concurring).

⁹⁴ See Stephenson, *supra* note 2, at 51-52. Typical of the study groups' approaches is Standard 8-3.5 of 2 ABA STANDARD FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS (2d ed. 1980), which provides as follows:

(a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.

(b) Both the degree of exposure and the prospective juror's testimony as to state of mind are relevant to the determination of acceptability. A prospective juror testifying to an inability to overcome preconceptions shall be subject to challenge for cause no matter how slight the exposure. If the prospec-

first amendment interest put forth by media representations has fared well in the pretrial publicity cases, at least when confronted with prior restraints. In very different areas the approaches taken by trial judges have not been as extreme as in *Nebraska Press*. In these areas interests other than the fair trial claim are powerfully asserted. Again, however, the first amendment interest as manifested in free press access to criminal trials normally fares quite well.

THE BALANCE OF COMPETING INTERESTS

A. *Closing the Proceedings*

After *Nebraska Press* it became apparent that a prior order restricting coverage of the pretrial and trial proceedings would be difficult, if not impossible, to obtain.⁹⁵ On the other hand, the Court in *Nebraska Press* had made clear that in many cases prejudicial pretrial publicity will seriously and adversely affect the opportunity of the defendant to receive a fair trial. The question then became: How should the courts proceed with respect to protecting the defendant's interest without unduly restricting the news media coverage of the public event? The obvious answer for many judges was to close portions of the proceedings. If closure were successful, information available only during those proceedings would not become generally available to the public. The argument in favor of closure became particularly compelling when the news reports by the media related to evidence which would be inadmissible at trial. Such inadmissible evidence could include "the past criminal record of the defendant [and]

tive juror remembers information that will be developed in the course of the trial, or that may be inadmissible but does not create a substantial risk of impairing judgment, that person's acceptability shall turn on the credibility of testimony as to impartiality. If the formation of an opinion is admitted, the prospective juror shall be subject to challenge for cause unless the examination shows unequivocally the capacity to be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind.

(c) Whenever there is a substantial likelihood that, due to pretrial publicity, the regularly allotted number of peremptory challenges is inadequate, the court shall permit additional challenges to the extent necessary for the impaneling of an impartial jury.

(d) Whenever it is determined that potentially prejudicial news coverage of a criminal matter has been intense and has been concentrated in a given locality in a state (or federal district), the court shall have authority in jurisdictions where permissible to draw jurors from other localities in that state (or district).

⁹⁵ Recall that in *Nebraska Press* it was not at all certain whether a majority said that a prior restraint would ever be valid. See notes 86-93 & accompanying text *supra*.

illegally seized evidence or confessions that . . . are constitutionally inadmissible."⁹⁶ This type of argument led to revised American Bar Association standards allowing for the exclusion of the public from pretrial as well as trial hearings which would normally be held outside the presence of the jury.⁹⁷

If the closure cases had been limited to cases in which it was vital for the fairness of the trial to close the hearings,⁹⁸ and if it was clear that no alternative would solve the problem,⁹⁹ the major constitutional debate might not have occurred. The cases were not so limited. As Carl Stern, NBC news correspondent and also an attorney, put it,

The courts were not placed outside the sort of public supervision that lies at the very heart of self-government. . . . Yet, lawyers . . . are trained to think in terms of secrecy. [The lawyer's] first instinct is

⁹⁶ Kaplan, *Free Press/Fair Trial Rights in Conflict: Freedom of the Press and the Rights of the Individual*, 29 OKLA. L. REV. 361, 361-62 (1976).

⁹⁷ 2 ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS, *supra* note 94, at Standard 8-3.6(d). This standard provides:

If the jury is not sequestered, the defendant shall be permitted to move that the public, including representatives of the news media, be excluded from any portion of the trial that takes place outside the presence of the jury if:

(i) the dissemination of information from the hearing would pose a clear and present danger to the fairness of the trial, and

(ii) the prejudicial effect of such information on the jurors cannot be avoided by any reasonable alternative means. With the consent of the defendant, the court may take such action on its own motion or at the suggestion of the prosecution. Whenever such action is taken, a complete record of the proceedings from which the public has been excluded shall be kept and shall be made available to the public following the completion of the trial or earlier if consistent with trial fairness. Nothing in this recommendation is intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize the right to a fair trial by an impartial jury.

⁹⁸ In the terms of the ABA Standards, "a clear and present danger to the fairness of the trial." *Id.*

⁹⁹ The obvious alternatives would be an intensive voir dire or a change of venue. For views of the effectiveness of these techniques, compare the statements made by news correspondent Carl Stern with those by law professor John Kaplan:

But right now there are very few barriers to a judge closing his courtroom or moving a substantial portion of a proceeding into chambers. . . . The judges say it happens only in controversial cases, and of course, that is true. But it probably is the controversial ones (where the judges are most likely to impose restraints) that are precisely the ones the public has the greatest need and right to know about. . . .

. . . The Task Force in which I participated found there was no reason to close pretrial proceedings or to issue gag orders except in those rare cases where the life of an informant or witness might be endangered. While the voir dire may not be a perfect device, the evidence is persuasive that a jury can be found in virtually every case that has not been influenced by pretrial publicity. Most pretrial publicity occurs months before the actual date of trial and has subsided or been dissipated in a swirl of conflicting accounts. . . . I remember that in the Mitchell-Haldeman-Erichman trial, approximately three prospective jurors out of each 75-member panel swore they'd never even heard

to ask to see the judge privately, to have some *closed-door* hearings. . . . But what it all adds up to is that many lawyers still don't appreciate that when a case gets down to a *public* courthouse, it is no longer a private matter.¹⁰⁰

The question was put at issue in cases where it did not seem that closure was essential to the fairness of the trial, or where reasonable alternatives had not been attempted. In those cases the news media became concerned that they were being closed out of the proceedings for no good reason. In such cases,¹⁰¹ the media contended that they had a first amendment right to attend the proceedings; this position led to the Court's decision in *Gannett Co. v. DePasquale*.¹⁰²

The defendant in *Gannett* questioned whether the public has a "constitutional right to . . . access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial."¹⁰³ The police in a suburb of Rochester, New York, investigated the disappearance of a man who seemed to have met a violent death. Two Rochester

of Watergate . . . ! . . . Pretrial publicity may make it more expensive to select a jury, more time-consuming perhaps; those are the tradeoffs we make in a free society to keep the workings of our courts open.

Stern, *Free Press/Fair Trial The Role of the News Media in Developing and Advancing Constitutional Processes*, 29 OKLA. L. REV. 349, 358 (1976).

[A] change of venue, in some cases, will work. . . . But in some cases it won't . . . I know of no persuasive evidence that voir dire will solve the problems of reporting criminal records or illegally seized evidence. . . . There were three people, I believe, who, in the Watergate voir dire said they had never heard of Watergate. That is all very well, but it seems to me that just as we want an unprejudiced jury, we want a jury that has no imbeciles. . . .

So, this really is a problem, and it is not a problem where we can say, "Well, there is a first amendment," because we happen to have a fifth amendment with a due process clause, and we also have a sixth amendment which talks about impartial juries. There is a flat conflict, and there is just simply no way to get around it.

Kaplan, *supra* note 96, at 362.

¹⁰⁰ Stern, *supra* note 99, at 356. In a concurring opinion in *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 446, 399 N.E.2d 518, 527, 423 N.Y.S.2d 630, 640 (1979), Chief Judge Cooke responded to a request for closure:

[M]erely because a pending prosecution has aroused public interest does not lead inexorably to the conclusion that the fair trial rights of the defendant would be irrevocably prejudiced, or even jeopardized, by reports of what has transpired in pretrial proceedings. Such a conclusion would result in an unfortunate paradox: the greater the interest in a particular prosecution, the more apt the defendant to claim the possibility of prejudice and, concomitantly, the more likely that the proceeding will be isolated from public scrutiny.

¹⁰¹ See, e.g., Stern, *supra* note 99, at 357; see generally Comment, *Richmond Case Widens Access, Spawns Doubts*, 66 A.B.A.J. 946, 947 (1980).

¹⁰² 443 U.S. 368 (1979). For a good discussion of the case, see BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980).

¹⁰³ 443 U.S. at 370-71. While the Court first pointed out that the district attorney simply "did not oppose the motion," *id.* at 375, the opinion later went on to state that in the case "the defendants, the prosecutor, and the judge all agreed that closure of the pretrial suppression hearing was necessary to protect the defendants' right to a fair trial." *Id.* at 382 n.11.

newspapers gave considerable coverage to the disappearance and the later tracking down of the suspects in Michigan. Articles provided background information on the victim's life and the manner in which it was thought the victim had been killed. Coverage included the arraignment of the defendants on murder charges, the indictment, and the defendants' pleas of not guilty. The defendants moved to suppress statements on the ground that they had been given involuntarily; they also attempted to suppress evidence seized as fruits of the confessions. A hearing was scheduled by the trial judge on the motions.¹⁰⁴ At the hearing defense attorneys argued that the adverse publicity in the newspaper stories had affected the ability of the defendants to receive a fair trial. They requested that the public and press be excluded from the hearings on the motions to suppress. The district attorney did not oppose this request, and it was granted by the trial judge.¹⁰⁵ The trial judge stated, however, that in his view the press had a constitutional right of access to the hearing, but that this right "had to be balanced against the constitutional right of the defendants to a fair trial."¹⁰⁶ Finding that an open hearing would pose a "reasonable probability of prejudice to these defendants,"¹⁰⁷ the judge ruled that "the interest of the press and the public was outweighed in this case by the defendants' right to a fair trial."¹⁰⁸

Writing for the Court,¹⁰⁹ Justice Stewart initially stressed the important role of the trial judge in determining that the defendants' due process rights were protected: "[A] trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."¹¹⁰ He described why the trial judge's obligation was particularly important in cases involving pretrial motions to suppress:

Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of

¹⁰⁴ *Id.* at 371-75. At least seven stories appeared in each of the two newspapers before the pretrial motions were made. *Id.*

¹⁰⁵ *Id.* at 375.

¹⁰⁶ *Id.* at 376.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Justice Stewart began his discussion by finding, as in *Nebraska Press*, that the dispute was not moot, as it was one which was "'capable of repetition, yet evading review.'" *Id.* at 377 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

¹¹⁰ *Id.* at 378 (citation omitted).

the trial. After the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means. When such information is publicized during a pretrial proceeding, however, it may never be altogether kept from potential jurors. Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun.¹¹¹

The opinion recognized "a strong societal interest in public trials,"¹¹² but remarked that such an interest "is a far cry . . . from the creation of a constitutional right on the part of the public."¹¹³ Concluding that the sixth amendment guarantee of a public trial was for the benefit of the defendant,¹¹⁴ the Court rejected the media's claim that "members of the general public have a constitutional right to attend a criminal trial," stating that "the history of the public-trial guarantee . . . ultimately demonstrates no more than the existence of a common-law rule of open civil and criminal proceedings."¹¹⁵

The opinion in *Gannett* raised more questions than it answered. While the basic question was whether the press had a constitutional right to attend the pretrial hearing, there was considerable discussion in the case as to the right of the public to attend *trials* as opposed to pretrial hearings.¹¹⁶ While the media petitioners also argued that members of the press and the public had a right of access to pretrial hearings by reason of the first and fourteenth amendments, the Court reserved this question. Assuming *arguendo* that the media did have such a right, as the trial judge had held, the trial judge himself had found "under the circumstances of this case, that this right was outweighed by the defendants' right to a fair trial."¹¹⁷ These difficult questions were left to be

¹¹¹ *Id.* at 378-79 (citation and footnote omitted).

¹¹² *Id.* at 383. The opinion continued: "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system." *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 380. The Court also stated:

All of this does not mean, of course, that failure to close a pretrial hearing, or take other protective measures to minimize the impact of prejudicial publicity, will warrant the extreme remedy of reversal of a conviction. But it is precisely because reversal is such an extreme remedy, and is employed in only the rarest cases, that our criminal justice system permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial.

Id. at 379 n.6.

¹¹⁵ *Id.* at 384.

¹¹⁶ Several times the opinion referred to the alleged sixth amendment right "to a public trial," and the right to "attend criminal trials." See *id.* at 382-84, 387.

¹¹⁷ *Id.* at 393.

partially answered by other opinions in the case, and by *Richmond Newspapers, Inc. v. Virginia*.¹¹⁸

The Chief Justice, concurring in *Gannett*, argued that the holding in the case was limited to pretrial proceedings rather than trials and that different considerations were involved in the two.¹¹⁹ Justice Powell, also concurring, agreed with the Chief Justice; however, he would have held explicitly that the reporters had an interest "protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing."¹²⁰ While finding such a first amendment right, he concluded that there might be situations in which the "unrestrained exercise of First Amendment rights poses a serious danger to the fairness of a defendant's trial."¹²¹ Consequently, the defendant's sixth amendment trial interest would have to be weighed against the first amendment right of the media to report the court proceedings. Distinguishing *Nebraska Press*,¹²² he concluded that with a proper test, the judge could order closure in spite of the strong public interest in the case.¹²³

Like Justice Powell, Justice Rehnquist reached the first amendment issue raised by the media. However, he rejected the "proposition . . . that the First Amendment is some sort of constitutional 'sunshine law' that requires notice, an opportunity to be heard, and substantial reasons before a government proceeding may be closed to the public and press."¹²⁴

The four dissenters,¹²⁵ in an opinion written by Justice Blackmun, rejected the view that "if the defense and the prosecution merely agree to have the public excluded from a suppression hearing, and the trial judge does not resist—as trial judges may be prone not to do, since nonresistance

¹¹⁸ 448 U.S. 555 (1980).

¹¹⁹ See 443 U.S. at 394-97 (Burger, C.J., concurring).

¹²⁰ *Id.* at 397 (Powell, J., concurring) (footnote omitted).

¹²¹ *Id.* at 399.

¹²² *Id.* ("[T]he gag order at issue in *Nebraska Press* . . . involved a classic prior restraint In the present case . . . we are confronted with a trial court's order that in effect denies access only to one . . . source.")

¹²³ *Id.* at 401. (Powell, J., concurring). Justice Powell stated the following test:

[I]t is the defendant's responsibility as the moving party to make some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings. Similarly, if the State joins in the closure request, it should be given the opportunity to show that public access would interfere with its interests in fair proceedings or preserving the confidentiality of sensitive information. On the other hand, members of the press and public who object to closure have the responsibility of showing to the court's satisfaction that alternative procedures are available that would eliminate the dangers shown by the defendant and the State.

Id.

¹²⁴ *Id.* at 405 (Rehnquist, J., concurring). He relied on the Court's rulings, in a series of cases, indicating that there was no special right of access in the press to investigate prisons or to speak with prisoners. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

¹²⁵ Justices Brennan, White, and Marshall joined the dissent. 443 U.S. at 406.

is easier than resistance—closure shall take place”¹²⁶ They concluded that the sixth amendment to the Constitution “prohibits the States from excluding the public from a proceeding within the ambit of the Sixth Amendment’s guarantee without affording full and fair consideration to the public’s interests in maintaining an open proceeding.”¹²⁷ The dissenters stressed the significance of many pretrial proceedings and the need for the media to report them:

[T]he suppression hearing resembles and relates to the full trial in almost every particular. . . . Each side has incentive to prevail, with the result that the role of publicity as a testimonial safeguard, as a mechanism to encourage the parties, the witnesses, and the court to a strict conscientiousness in the performance of their duties, and in providing a means whereby unknown witnesses may become known, are just as important for the suppression hearing as they are for the full trial.

Moreover, the pretrial suppression hearing often is critical, and it may be decisive, in the prosecution of a criminal case. If the defendant prevails, he will have dealt the prosecution’s case a serious, perhaps fatal, blow; the proceeding often then will be dismissed or negotiated on terms favorable to the defense. If the prosecution successfully resists the motion to suppress, the defendant may have little hope of success at trial (especially where a confession is in issue), with the result that the likelihood of a guilty plea is substantially increased.¹²⁸

Justice Blackmun recognized, however, that occasions could arise in which the needs of the media would conflict with the needs of the defendant. He stated that the public might be excluded from “portions of the proceeding at which the prejudicial information would be disclosed,”¹²⁹ but that a record of the *in camera* proceedings should be available to the public “as soon as the threat to the defendant’s fair-trial right has passed.”¹³⁰ The dissenters gave a short answer to the question raised by

¹²⁶ *Id.* at 406 (Blackmun, J., concurring & dissenting in part). The opinion also stated:

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

Id. at 433 n.13 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, Standard 8-3.2 at 15 (Approved Draft 1978)).

¹²⁷ 443 U.S. at 433 (Blackmun, J., concurring & dissenting in part). The dissenters emphasized that they did not reach the first amendment issue in the case. *Id.* at 447.

¹²⁸ *Id.* at 434.

¹²⁹ *Id.* at 445.

¹³⁰ *Id.*

Justice Stewart at the start of the majority opinion: There is an independent constitutional right to insist upon access unless there is a substantial probability that an open hearing would result in harm to the defendant's right to a fair trial. The dissenters, however, could find no such substantial probability in this case: "The coverage in petitioner's newspapers . . . was circumspect. . . . All coverage ceased on August 6 and did not resume until after the suppression hearing three months later. The stories that appeared were largely factual in nature. . . . And petitioner's newspapers had only a small circulation in [the county]."¹³¹

The conclusions to be drawn from *Gannett* are varied, to say the least. One could argue effectively that the media was the big loser in the Supreme Court. All nine Justices assumed without question that the media had no absolute right to demand that pretrial proceedings be kept open. Utilizing the balancing test of weighing the fair trial interest against the open access interest, five members of the Court¹³² found that the petitioner in this case could not expect an open proceeding. This conclusion is particularly unfortunate for two reasons: first, as indicated in the dissenting opinion, the conduct of the media representatives was hardly egregious.¹³³ It is not clear that alternatives would have failed or that closure was necessary in light of the relatively calm and responsible reporting concerning the case. Second, the majority refused to confront the fact that in the vast majority of criminal proceedings there is no trial, making the reporting of important pretrial proceedings crucial. The Chief Justice remarked that "[s]omething in the neighborhood of 85 percent of all criminal charges are resolved by guilty pleas,"¹³⁴ a figure which has been consistently supported by research in the area.¹³⁵ Even in those cases which are not resolved by guilty pleas, pretrial proceedings are often dispositive. As Justice Powell observed in his concurring opinion, because suppression hearings may determine the outcome of the case, "the public's interest in this proceeding often is comparable to its interest in the trial itself."¹³⁶

Most distressing to some journalists was the reluctance of the Justices

¹³¹ *Id.* at 446-48.

¹³² The Chief Justice and Justices Stewart, Powell, Rehnquist, and Stevens. *See id.* at 378-91, 394, 397-98, 403.

¹³³ *See* note 131 & accompanying text *supra*.

¹³⁴ 443 U.S. at 397 (Burger, C.J., concurring).

¹³⁵ In the county in which the trial took place, every felony prosecution for the year 1976 was terminated without a trial on the merits. *Id.* at 435 (Blackmun, J., concurring & dissenting in part). The statistics cited by Justice Blackmun are particularly striking: In the year 1976 in the Supreme Court for the City of New York, almost 90% of all criminal cases were terminated by dismissal or by a plea of guilty. In the trial courts outside New York City the percentage was even higher. *Id.* at 435 n.14. *See generally* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, PLEA BARGAINING IN THE UNITED STATES, app. A (1978).

¹³⁶ 443 U.S. at 397 n.1 (Powell, J., concurring).

to consider seriously the first amendment claim for access to pretrial proceedings. Only Justices Powell and Rehnquist discussed the issue at length, and only Justice Powell thought that there was some merit to the first amendment assertion.

The result in *Gannett*, then, is hardly cause for media celebration. There is, however, another side to the analysis. There is some indication that if a proper constitutional claim had been made, five Justices might have agreed with the media access contention in this particular case. Justice Powell pointed out that "although I disagree with my four dissenting Brethren concerning the origin and the scope of the constitutional limitations on the closing of pretrial proceedings, I agree with their conclusion that there are limitations and that they require the careful attention of trial courts before closure can be ordered."¹³⁷

In spite of the serious claims of harm made in *Gannett*, in the vast majority of cases the pretrial publicity issue is not troublesome.¹³⁸ Even in those unusual cases where the question is at issue, it appears that judges are likely to be cautious before imposing closure orders. The American Bar Association position is that closure should only be ordered upon findings that "[1] the dissemination of information from the hearing would pose a clear and present danger to the fairness of the trial, and [2] the prejudicial effect of such information on the jurors cannot be avoided by any reasonable alternative means."¹³⁹ Even the lesser standard suggested in the proposed Federal Rules of Criminal Procedure would allow closure only if "[1] there is a reasonable likelihood that dissemination of information from the proceeding would interfere with defendant's right to a fair trial by an impartial jury; and [2] the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means."¹⁴⁰

¹³⁷ *Id.* at 398 n.2 (Powell, J., concurring). *But see* Justice Rehnquist's opinion: I do not so lightly as my Brother Powell impute to the four dissenters in this case a willingness to ignore the doctrine of *stare decisis* and to join with him in some later decision to form what might fairly be called an 'odd quintuplet,' agreeing that the authority of trial courts to close judicial proceedings to the public is subject to limitations stemming from two different sources in the Constitution.

Id. at 405-06 n.2 (Rehnquist, J., concurring).

¹³⁸ *But see* Franklin, *Untested Assumptions and Unanswered Questions*, 29 STAN. L. REV. 387, 391 (1977).

¹³⁹ 2 ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, *supra* note 94, at Standard 8-3.6(d).

¹⁴⁰ *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 91 F.R.D. 289, 365-67 (1982) (proposed rule 43.1). *See also* *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519 (1980). The more stringent ABA Standard is the same substantive test as used in *Nebraska Press*. The test was considered and rejected by the Federal Rules Advisory Committee because "there is a crucial difference between imposing prior restraints against the press on the one hand and the denial of access to news sources on the other," and because a 'clear and present danger' test would be impractical in this setting and un-

The situation immediately after the Court's decision in *Gannett* was unsettled and unsettling.¹⁴¹ The Court had allowed a closure order in that pretrial proceeding, thus giving support to the defense position that closures were generally proper.¹⁴² *Gannett*, though, had involved a very specific fact situation, a closure order in a narrow pretrial proceeding. What about closure orders in other proceedings¹⁴³ or in the trial itself?¹⁴⁴ The Supreme Court, just one year to the day after *Gannett* was decided, shed light on this last question in *Richmond Newspapers, Inc. v. Virginia*.¹⁴⁵

The criminal defendant in *Richmond Newspapers* was tried for murder four times over a two-year period.¹⁴⁶ At the fourth trial, counsel for the defendant moved that the trial be closed to the public due to a fear that testimony would be recounted to witnesses during the course of the proceedings. The district attorney made no objection to the motion. Pursuant to statute,¹⁴⁷ the judge ordered the trial closed after accepting the defense counsel's argument and finding that "'having people in the Courtroom is distracting to the jury.'" ¹⁴⁸ Chief Justice Burger, along with Justices White and Stevens, began the plurality opinion by noting that the issue in the instant case had never been decided by the Court, thereby distinguishing *Gannett*.¹⁴⁹ When the question was framed by the Chief Justice, its answer was clearly suggested:

necessary where the only consequence is *deferral* of public knowledge of the matters occurring during closure." *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 91 F.R.D. 289, 372 (1982) (quoting 2 ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, at Standard 8-3.2 note (2d ed. 1980)).

¹⁴¹ Within a year after the decision, over 150 proceedings were ordered closed, including 34 trials. Comment, *The Public's Right to Access Versus the Right to a Fair Trial: A Balancing Compromise*, 33 BAYLOR L. REV. 191, 193 n.22 (1981).

¹⁴² See generally *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 448-49, 399 N.E.2d 518, 528-29, 423 N.Y.S.2d 630, 641-42 (1979) (Fuchsberg, J., concurring).

¹⁴³ For consideration of other hearings, see *In re Antitrust Grand Jury Investigation*, 508 F. Supp. 397 (E.D. Va. 1980) (immunity hearings), and *Rapid City Journal Co. v. Circuit Court*, 283 N.W.2d 563 (S.D. 1979) (voir dire hearings). With respect to post-trial proceedings, see *United States v. Winner*, 641 F.2d 825 (10th Cir. 1981). The Proposed Federal Rules contend that "there is no justification for extending the rule to [post-trial] proceedings." *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, *supra* note 140, at 369.

¹⁴⁴ "[T]he Court [in *Gannett*] spoke no less than twelve times of a general public right of access to criminal trials." Boyd & Lehrman, *When, If Ever, Should Trials be Held Behind Closed Doors?*, 5 NOVA L.J. 1, 1 (1980).

¹⁴⁵ 448 U.S. 555 (1980).

¹⁴⁶ In the first trial evidence was improperly obtained; the second and third trials ended in mistrials. *Id.* at 559.

¹⁴⁷ In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

VA. CODE § 19.2-266 (Supp. 1981).

¹⁴⁸ 448 U.S. at 561 (plurality opinion).

¹⁴⁹ *Id.* at 563-64. "In [*Gannett*], the Court was not required to decide whether a right of access to trials, as distinguished from hearings on pretrial motions, was constitutionally guaranteed." *Id.* at 564 (emphasis in original).

But here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.¹⁵⁰

After tracing the origins of the criminal trial, the Chief Justice noted that "[w]hat is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe."¹⁵¹ The opinion emphasized that open access to criminal trials serves the public interest because "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion,"¹⁵² and because awareness that society is responding to crime reduces the probability that the public will take the law into its own hands.¹⁵³ The difficulty here, as in *Gannett*, was that neither the Constitution nor the Bill of Rights contains any provision which expressly guarantees the public or the media the right to attend criminal trials. Nevertheless, in construing the first amendment, the Chief Justice wrote that it could be read as "protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. . . . The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."¹⁵⁴ For the three Justices, "without the freedom to attend [criminal] trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"¹⁵⁵

The Justices pointed out that the first amendment interest was not absolute,¹⁵⁶ and that the trial must remain open to the public and the press "[a]bsent an overriding interest articulated in findings"¹⁵⁷ Here,

¹⁵⁰ *Id.*; see Sack, *Principle and Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 411 (1977).

¹⁵¹ 448 U.S. at 564 (plurality opinion).

¹⁵² *Id.* at 571.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 575-77. The plurality noted other rights implicit in the Constitution, such as "the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial. . . ." *Id.* at 579-80.

¹⁵⁵ *Id.* at 580. See also *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari) ("One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.").

¹⁵⁶ Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic . . . , so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

448 U.S. at 581 n.18 (plurality opinion) (citation omitted).

¹⁵⁷ *Id.* at 581.

"the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial."¹⁵⁸

Justice Stevens concurred, primarily to explain the importance of the case:¹⁵⁹

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. . . . Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.¹⁶⁰

In a lengthy concurring opinion, Justices Brennan and Marshall explored the rationale for the Court's ruling requiring open access. They particularly stressed the unique role of the media to carry forth such policies: "[T]he institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals."¹⁶¹ Justice Stewart wrote separately to emphasize that while a first amendment right existed in the press and the public with respect to access to criminal trials, such a right had to be weighed against the interests of the criminal defendant. In this case, he found that the trial judge had "given no recognition" to the rights of the press and the public to be present at trial.¹⁶² In other cases, he would grant considerable discretion to the trial judge. Denying that the right of access was absolute, Justice Stewart said that "a trial judge [may] impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public."¹⁶³ Justice Blackmun, concurring in the result, would have relied primarily on the sixth amendment right to a public trial.¹⁶⁴

Only Justice Rehnquist dissented. Analyzing the language and origins of the first, sixth, fourteenth, and ninth amendments, he was unable to find any provision of the Constitution which prohibited the closure of a

¹⁵⁸ *Id.* at 580-81.

¹⁵⁹ Justice Stevens also explained his view, as originally set forth in *Houchins v. KQED, Inc.*, 438 U.S. 1, 19-40 (1978) (Stevens, J., dissenting), as to why access to information should be given considerable leeway in a nontrial setting. 448 U.S. at 583-84 (Stevens, J., concurring).

¹⁶⁰ 448 U.S. at 582-83 (Stevens, J., concurring).

¹⁶¹ *Id.* at 586 n.2 (Brennan, J., concurring). Justice White also concurred to reiterate his view in *Gannett* that the sixth amendment should be construed to forbid the general closing of criminal proceedings. *Id.* at 581-82 (White, J., concurring).

¹⁶² *Id.* at 599-601 (Stewart, J., concurring).

¹⁶³ *Id.* at 600 (Stewart, J., concurring).

¹⁶⁴ *Id.* at 603 (Blackmun, J., concurring).

trial.¹⁶⁵ He also attacked the Court's general willingness to concentrate in itself so much power over the control of the criminal justice system. Justice Rehnquist objected to the Court's assuming "ultimate decision-making power over how justice shall be administered, not merely in the federal system but in each of the 50 States."¹⁶⁶ Nine persons should not exercise such authority over 220 million people.¹⁶⁷

What is one to make of *Richmond Newspapers* with its seven separate opinions, none commanding more than three members of the Court? While questions concerning the legal bounds of the holding may be legitimately raised, the case is a major victory for the media. Eight members of the Court have explicitly recognized a first amendment right of access for the public and the press in connection with the criminal trial.¹⁶⁸ The broad language in the various opinions shows a judiciary most sympathetic to media claims.¹⁶⁹ All members of the Court who supported the first amendment argument concluded that the first amendment right of the press and public was not absolute, but had to be balanced on a case-by-case basis against the defendant's interest in a trial free from bias. Nevertheless, in order to satisfy the Supreme Court, a judge who orders closure of a trial will have to demonstrate, at a minimum, the existence of a genuine potential for prejudice, the effectiveness of a closure order in eliminating that threat, and the unavailability of alternatives in doing so.¹⁷⁰

While the media were big winners in the Supreme Court in connection with the open access to the trial itself, it is less clear what impact, if any, *Richmond Newspapers* will have beyond the trial. Most of the Justices

¹⁶⁵ *Id.* at 605-06 (Rehnquist, J., dissenting). See also *Gannett Co. v. DePasquale*, 443 U.S. at 403-06 (Rehnquist, J., concurring).

¹⁶⁶ 448 U.S. at 606 (Rehnquist, J., dissenting).

¹⁶⁷ *Id.*

¹⁶⁸ Justice Powell did not participate in *Richmond Newspapers*. *Id.* at 581. However, his opinion in *Gannett* leaves little doubt as to his position concerning the first amendment argument. See note 120 & accompanying text *supra*.

¹⁶⁹ The various discussions call to mind the argument made by journalist Carl Stern in response to a claim that a controversial trial should not be kept open.

I remember another case recently in suburban Washington where a judge closed a courtroom in which three men were being tried for sex offenses against two girls on the grounds that the men were modestly high government employees whose work for the government would be embarrassed and their performance for the taxpayers made more difficult if there was extensive publicity about the case. Well, that's too bad. I can't think of a better deterrent to that type of conduct . . .

Stern, *supra* note 99, at 357. For an opinion echoing the sentiments expressed in the *Richmond Newspapers* opinions, see *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 445, 399 N.E.2d 518, 526, 423 N.Y.S.2d 630, 639 (1979) (Cooke, C.J., concurring).

¹⁷⁰ Comment *supra* note 141, at 202; Comment, *First Amendment—Constitutional Right of Access to Criminal Trials*, 71 J. CRIM. L. & CRIMINOLOGY 547, 557 (1980). See generally Hale, *Attitudes of Media Attorneys Concerning Criminal Proceedings*, 3 COM. & L. 3 (1981).

The Supreme Court reaffirmed its decision in *Richmond Newspapers* by striking down the state statute in *Globe Newspapers Co. v. Superior Court*, 102 S. Ct. 2613 (1982). Massachusetts law is unique in the country; by statute judges are *required* to close the

in their separate opinions stated that this case was to be distinguished from *Gannett* because *Richmond Newspapers* involved a trial while *Gannett* did not.¹⁷¹ Nevertheless, the broad language throughout the opinions has made some commentators wonder whether *Richmond Newspapers* was decided by the Court in order to "reconsider *Gannett*,"¹⁷² whether the Court took the case "in order to clarify the earlier decision,"¹⁷³ or whether it was intended to have "any impact at all on the *Gannett* decision."¹⁷⁴ However, there has already been considerable impact in the nontrial setting. Some courts have gone beyond *Richmond Newspapers* in holding first amendment considerations applicable to aspects of proceedings which could

courtroom to the press and the public when a sex crime victim under the age of 18 is testifying. In other states, judges may exercise their discretion in such cases. In the trial at issue, neither the prosecution nor the government requested closure. The Massachusetts Supreme Judicial Court upheld this portion of the statute, as well as a provision giving the judge discretion to close the entire trial:

The plaintiff says that a balancing of State interests against First Amendment rights is permissible only if undertaken on a case-by-case basis. We do not agree. We perceive no such holding in *Richmond Newspapers*. . . . [B]y their very nature, these substantial State interests would be defeated if a case-by-case determination were used. Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. . . . To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience.

____Mass. at ____, 423 N.E.2d at 779-80. The media argument on appeal was that "no portion of the trial should be closed without a hearing at which the judge must ascertain that the reasons for the closing are 'tangible and substantial' and that the young victim's interest cannot otherwise be adequately protected." Greenhouse, *Law Closing Testimony in Sex Case Faces Test*, N.Y. Times, Nov. 17, 1981, § A, at 11, col. 1.

While there is considerable force behind the statutory policy, and while a closure order will be proper in many such cases, the Court in a 6-3 decision (the Chief Justice and Justices Rehnquist and Stevens dissenting) found that the statute conflicted irreconcilably with the holding in *Richmond Newspapers*. 102 S. Ct. at 2622-23, 2627. The Court in *Richmond Newspapers* stressed the first amendment interests in keeping important criminal trials open. It required "an overriding interest articulated in findings" before closure would be proper. A blanket closure rule in *all* cases in which minor victims testify conflicts with this principle. *Id.* at 2620-22. As stated by Justice Brennan for the *Globe Newspapers* majority, "[The state's interest] could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure." *Id.* at 2621.

¹⁷¹ See, e.g., 448 U.S. at 563-64 (plurality opinion). Justice Stevens found that "[t]he absence of any articulated reason for the closure order" distinguished *Richmond Newspapers* from *Gannett*. *Id.* at 584 n.2 (Stevens, J., concurring).

¹⁷² Boyd & Lehrman, *supra* note 144, at 2.

¹⁷³ Comment, *supra* note 141, at 194.

¹⁷⁴ *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 156 n.42 (1980). The commentator stated:

It is much less certain whether *Richmond Newspapers* extends a first amendment right of access to the pretrial context. In *Gannett*, the Court rejected the analogical argument that the sixth amendment policies justifying open trials should justify access to pretrial proceedings; the impact of *Richmond Newspapers*' first amendment ruling upon pretrial closures thus remains undetermined.

Id.

be termed nontrial.¹⁷⁵ The tone of the opinions in *Richmond Newspapers* has influenced trial judges who apply a much closer scrutiny to closure requests than ever before.¹⁷⁶

The *Richmond Newspapers* case, for all its uncertainty, for all the questions concerning its potential impact, can properly be labeled as the Supreme Court's "most ringing endorsement of the press and public's right of access to government under the First Amendment."¹⁷⁷ Indeed, as counsel for the newspapers stated, "[t]he fact is the Court has taken as large a leap in the First Amendment area as it has in the last quarter century."¹⁷⁸ This leap was significant and entirely justified, for the closure

¹⁷⁵ Consider, for example, the attempt by one district judge to close portions of voir dire examination of jurors and to examine veniremen individually in chambers. The court of appeals frowned upon this type of closed activity in *In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676, 678 (8th Cir. 1980). The court explained:

Our sole reason for granting the writ in this case is based on the failure of the district judge to announce his reasons for the decision to close the voir dire proceedings and for his failure to balance the right of the public to attend the trial against the right of the defendant to a fair trial in accordance with the principles announced in [*Richmond Newspapers*].

Id. See also a decision to label a juvenile delinquency proceeding a "criminal trial" under *Richmond Newspapers*, holding that the press had a first amendment right to attend such sessions absent unusual circumstances. *In re certain Juvenile Delinquency Proceedings*, [1981] 29 CRIM. L. REP. (BNA) 2248.

¹⁷⁶ In *Palm Beach Newspapers, Inc. v. Florida*, 378 So. 2d 862, 864-65 (Dist. Ct. App. 1980), *rev'd*, 395 So. 2d 544, 548 (Fla. 1981), the court found that two witnesses' fear of retaliation for testifying was insufficient cause to exclude the press without specific supporting information. *But see* *Globe Newspaper Co. v. Superior Court*, ___ Mass. ___, 423 N.E.2d 773 (1981) (statute requiring closure during testimony of minor complainants in sexual assault cases constitutional). As indicated previously, *see* note 170 *supra*, the United States Supreme Court reversed in *Globe Newspaper*.

¹⁷⁷ Comment, *supra* note 101. This is especially clear when *Richmond Newspapers* is contrasted with the prison access cases, *see* note 124 *supra*.

¹⁷⁸ Comment, *supra* note 177, at 947. Harvard Law Professor Lawrence Tribe argued the case. *Id.* Professor Tribe's enthusiasm ought not to be unrestrained, however. Under the Supreme Court's ruling, trials still may be closed in special cases, *see* *Sacramento Bee v. United States Dist. Court*, 656 F.2d 477 (9th Cir. 1981); and, of course, the case does not overrule *Gannett*, thus allowing closures quite readily in pretrial matters, *see* *Federated Publications, Inc. v. Swedberg*, 96 Wash. 2d 13, 633 P.2d 74 (1981) (reporters could be excluded from suppression hearings in "Hillside Strangler" case if they refused to sign agreement to abide by state's bar/bench/press guidelines). As indicated in note 175 & accompanying text *supra*, however, it cannot be doubted that *Richmond Newspapers* has had considerable impact, even on the pretrial situation ostensibly covered by *Gannett*. This point was well made in *Miami Herald Publishing Co. v. Chappell*, 403 So. 2d 1342, 1344 (Dist. Ct. App. 1981), where the court refused to close a pretrial competency hearing. On appeal the judges adopted a three-part test to review closure orders:

[T]he public may be denied access . . . only if the movant proves that: (1) closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) no less restrictive alternative measure is available, and (3) closure will in fact achieve the court's purpose The first prong of the test protects a defendant's right to a fair trial; the second prong employs traditional First Amendment techniques, and the third prong employs practical considerations. Because the test protects competing societal interests in providing fair trials while permitting free access to courts, we adopt its criteria.

Id. at 1345 (citations omitted).

order poses a great threat to the free dissemination of information about unquestionably newsworthy events. In that sense, it parallels the prior restraint conflict in *Nebraska Press*. In both cases the press would not be allowed to report newsworthy events, in the former case, by a court order of prohibition, and in the latter case, by a court order cutting off the source of information. The only real question to be raised as a matter of policy in *Richmond Newspapers* is why the Court did not take the opportunity to overrule or at least seriously cut back the shortsighted holding in *Gannett*.

B. The Privacy and Rehabilitation Interests

To this point this article has examined cases in which the reporting of criminal trials has arguably conflicted with only one interest, that of the defendant under the sixth amendment to receive a fair trial before an unbiased jury. Apart from the trial and pretrial publicity conflicts, other interests may surface when there is media coverage of a criminal trial. Of great concern in this area are questions involving the privacy and rehabilitation of offenders.¹⁷⁹ One of the most famous cases in the area, *Melvin v. Reid*,¹⁸⁰ illustrates these interests. The plaintiff was a former prostitute who had been tried for murder. The murder trial was widely reported, but she was acquitted. After the trial, she married and became, according to the court, "entirely rehabilitated."¹⁸¹ Seven years after the trial, the movie "The Red Kimono" was made; in the film the plaintiff's former life was set out in some detail. Included in the film were the facts of the murder charge and trial as well as the plaintiff's name.¹⁸² The California court recognized the press and public interest generally in access to such information:

[T]he use of the incidents from the life of appellant in the moving picture is in itself not actionable. These incidents appeared in the records of her trial for murder, which is a public record, open to the perusal of all. The very fact that they were contained in a public record is sufficient to negative the idea that their publication was a violation of a right of privacy. When the incidents of a life are so public as to be spread upon a public record, they come within the knowledge and into the possession of the public and cease to be private.¹⁸³

The public interest, however, did not include the need to know the plaintiff's name because it was not newsworthy. In addition, the use of the

¹⁷⁹ The problem of televising criminal proceedings raises all three issues: privacy concerns, questions of rehabilitation, and issues surrounding the unbiased jury. See notes 243-96 & accompanying text *infra*.

¹⁸⁰ 112 Cal. App. 285, 297 P. 91 (1931).

¹⁸¹ *Id.* at 286, 297 P. at 91.

¹⁸² *Id.* at 287, 297 P. at 91.

¹⁸³ *Id.* at 290, 297 P. at 93.

name tended to jeopardize society's efforts to rehabilitate convicted criminals:¹⁸⁴

One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology, it is our object to lift up and sustain the unfortunate rather than tear him down. Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime. Even the thief on the cross was permitted to repent during the hours of his final agony.¹⁸⁵

The court allowed a civil action by the plaintiff against the producers.¹⁸⁶

The "Red Kimono" case was relied on in *Briscoe v. Reader's Digest Association*,¹⁸⁷ a thoughtful opinion written by the California Supreme Court forty years later. The plaintiff had been convicted in 1956 of truck hijacking. Immediately thereafter he became rehabilitated. The defendant published an article discussing truck hijacking. The article referred to the plaintiff and the conviction, but not to the fact that the hijacking had occurred eleven years earlier. The court found that as a "result of the defendant's publication, plaintiff's 11-year-old daughter, as well as his friends, for the first time learned of this incident. They thereafter scorned and abandoned him."¹⁸⁸

The facts in *Briscoe* put the question at issue. In a situation in which the basic story was newsworthy,¹⁸⁹ how would the interest in the dissemination of information balance against the objective of rehabilitating felons and the interest in the felon's privacy after he had been rehabilitated? The court acknowledged the important interest in reporting crimes and judicial proceedings and even in identifying persons currently charged with crimes.¹⁹⁰ The reports of *past* crimes and the identification of *past* defendants were different matters.

[I]dentification of the *actor* in reports of long past crimes usually serves little independent public purpose. Once legal proceedings have terminated, and a suspect or offender has been released, identification

¹⁸⁴ See *id.* at 290-91, 297 P. at 93.

¹⁸⁵ *Id.* at 292, 297 P. at 93.

¹⁸⁶ Though at the time it was not clear that there was a cause of action denominated privacy, the court was willing to allow the claim to go forward no matter what the label given to it. *Id.* at 292, 297 P. at 93-94.

¹⁸⁷ 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

¹⁸⁸ *Id.* at 533, 483 P.2d at 36, 93 Cal. Rptr. at 868.

¹⁸⁹ There was little question raised by the court that this was a legitimate newsworthy story involving substantial public issues. The plaintiff himself conceded that the basic subject of the article "may have been 'newsworthy.'" *Id.*

¹⁹⁰ There can be no doubt that reports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with

of the individual will not usually aid the administration of justice. Identification will no longer serve to bring forth witnesses or obtain succor for victims. Unless the individual has reattracted the public eye to himself in some independent fashion, the only public "interest" that would usually be served is that of curiosity.¹⁹¹

The court went on to state that "the state has a compelling interest in the efficacy of penal systems in rehabilitating criminals A jury might well find that a continuing threat that the rehabilitated offender's old identity will be resurrected by the media is counter-productive to the goals of this correctional process."¹⁹²

A wide-ranging balancing test was adopted in *Briscoe* to determine whether the plaintiff's privacy action would lie. He would have to show that the publication was not newsworthy and that it revealed facts so offensive as to shock the community's notions of decency.¹⁹³ The case was remanded to the trial court to decide

(1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed.¹⁹⁴

Melvin and *Briscoe*, taken together, represent an important line of cases because they demonstrate an awareness by the judiciary of the balance involved in the privacy and rehabilitation cases. On the one hand, many

the exigencies of modern life. Reports of these events may also promote the values served by the constitutional guarantee of a public trial. Although a case is not to be "tried in the papers," reports regarding a crime or criminal proceedings may encourage unknown witnesses to come forward with useful testimony and friends or relatives to come to the aid of the victim.

It is also generally in the social interest to identify adults currently charged with the commission of a crime. While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime. Naming the suspect may also persuade eye witnesses and character witnesses to testify. For these reasons, while the suspect or offender obviously does not consent to public exposure, his right to privacy must give way to the overriding social interest.

Id. at 536, 483 P.2d at 39, 93 Cal. Rptr. at 871 (footnote omitted).

¹⁹¹ *Id.* at 537, 483 P.2d at 40, 93 Cal. Rptr. at 872 (emphasis in original).

¹⁹² *Id.* at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

¹⁹³ *Id.* at 541, 483 P.2d at 42-43, 93 Cal. Rptr. at 874-75.

¹⁹⁴ *Id.* at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876. Commentators generally applauded *Briscoe*. See Comment, *First Amendment Limitations on Public Disclosure Actions*, 45 U. CHI. L. REV. 180, 199 (1977); Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1392, 1399 (1976). But see *Forsher v. Bugliosi*, 26 Cal. 3d 792, 608 P.2d 716, 163 Cal. Rptr. 628 (1980), where the California Supreme Court noted that the courts in California have refrained from extending the *Briscoe* rule to other cases: "Our decision in *Briscoe* was an exception to the more general rule that 'once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.'" *Id.* at 811, 608 P.2d at 726, 163 Cal. Rptr. at 638 (quoting Prosser, *Privacy*, 48 CAL. L. REV. 383, 418 (1960)).

of these cases, particularly cases dealing with reporting of recent events, involve especially newsworthy activities and should be given considerable deference under the first amendment.¹⁹⁵ On the other hand, questions must be raised as to whether such deference should be given when the event is not current or identification of an individual adds little to the newsworthiness of the story but could adversely affect important privacy and rehabilitation interests.¹⁹⁶ The California courts seem to have struck the correct balance in dealing with these important concerns. These cases contrast with several cases recently decided by the Supreme Court in which the Court spent little time analyzing the rehabilitation and privacy interests and instead focused almost exclusively on first amendment objectives.

In *Cox Broadcasting Corp. v. Cohn*,¹⁹⁷ the privacy interest was paramount. The plaintiff's teenaged daughter was the victim of a rape who died during the incident. Six teenagers were indicted for both the murder and the rape. There was substantial media coverage of the incident and the trial, but the identity of the victim was not disclosed prior to trial. At the time the trial court accepted the guilty pleas, the defendant broadcasting company named the victim in a news report describing the court proceedings. Claiming an invasion of privacy, the father of the victim sued the defendants for money damages.¹⁹⁸ During the course of the civil proceedings, all parties conceded that the defendants had learned the name of the victim from an examination of the indictments which were available for inspection by the public in the courtroom.¹⁹⁹ The state trial court found that the defendant's broadcasting was in violation of a state statute which made it a misdemeanor to publish or broadcast the name or identity of a rape victim.²⁰⁰

The Georgia Supreme Court rejected the defendant's claim that the first amendment, as a matter of constitutional law, required judgment for the defendant. The court agreed that the criminal proceedings were matters of public concern. The court disagreed with the broader media argument, concluding instead that there was "no public interest or general concern about the identity of the victim of such a crime as will make

¹⁹⁵ 4 Cal. 3d at 537, 483 P.2d at 39, 93 Cal. Rptr. at 871.

¹⁹⁶ It is quite difficult to articulate the strong first amendment interest involved in publishing the plaintiff's name in *Briscoe*, rather than merely describing the events.

¹⁹⁷ 420 U.S. 469 (1975).

¹⁹⁸ *Id.* at 471-75. Considerable question was raised as to whether, apart from constitutional claims, there existed a right of privacy in the plaintiff for disclosure of the name of the deceased daughter. The trial judge held that the Georgia statute gave a civil remedy to the plaintiff. The Georgia Supreme Court held that the trial court's ruling was in error but found that the common law tort of public disclosure allowed for an invasion of privacy claim. *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 61-62, 200 S.E.2d 127, 129-30 (1973), *rev'd*, 420 U.S. 469 (1975).

¹⁹⁹ 420 U.S. 469, 472-73 (1975).

²⁰⁰ *Id.* at 471 n.1 (citing GA. CODE ANN. § 26-9901 (1972)).

the right to disclose the identity of the victim rise to the level of First Amendment protection."²⁰¹

Looking to the injury involved in the case, public disclosure of private facts, the United States Supreme Court chose to construe the issue narrowly: "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."²⁰² The Court relied heavily on the media defendant's role in reporting the criminal trial proceedings. The Court reasoned that individuals have limited opportunities to see the government at work and that the media's reporting of governmental proceedings is a service without which many citizens and their representatives "would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials"²⁰³ Justice White, writing for the majority, rejected plaintiff's claim "that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim."²⁰⁴ He explained: "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."²⁰⁵ In reversing the Georgia courts, the Court placed considerable emphasis on the fact that the information in this case had been placed in the public domain as official court records.²⁰⁶ The Court gave virtually no consideration to the privacy interests claimed by the family of the rape and murder victim: "Once true information is disclosed in public court documents open to public inspection

²⁰¹ *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 68, 200 S.E.2d 127, 134 (1973), *rev'd*, 420 U.S. 469 (1975). The court relied heavily on the *Briscoe* case. Interestingly enough, in *Briscoe* the California Supreme Court said that the disclosure of the names of suspects in connection with recent crimes would generally be protected by the first amendment. 4 Cal. 3d at 537, 483 P.2d at 39, 93 Cal. Rptr. at 871. However, the court pointed out that the media would not necessarily have an "unmitigated right" to publish the identity of offenders or victims, relying on numerous statutes which prohibited the disclosure of the name of the rape victims in news reports, including the Georgia statute at issue in the *Cox Broadcasting* case. *Id.* at 537 n.10, 483 P.2d at 39 n.10, 93 Cal. Rptr. at 871 n.10.

²⁰² 420 U.S. at 491.

²⁰³ *Id.* at 492.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 495. The Court was almost unanimous in its holding. Chief Justice Burger concurred in the judgment and Justices Powell and Douglas wrote concurring opinions focusing more generally on the first amendment issues with respect to public figures and public affairs. Only Justice Rehnquist dissented; his dissent was limited to the question of whether the decision which was the subject of the appeal was a final judgment or decree under 28 U.S.C. § 1257 (Supp. IV 1974). *Id.* at 501.

tion, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast."²⁰⁷

The Supreme Court chose not to deal with the issues raised in *Briscoe* as well as in the Georgia courts' disposition in *Cox Broadcasting*. Although in many instances society needs to rely upon the judgment of those who decide what to publish or broadcast, it is not clear that the rape victim's disclosure case is such an instance. As the court in *Briscoe* pointed out, there is necessarily a delicate balance between the interests of free dissemination of information on the one side and preservation of privacy and rehabilitation interests on the other. Even more to the point is the conclusion reached by the Georgia Supreme Court in *Cox Broadcasting*: There is "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection."²⁰⁸ No doubt the *incident* is newsworthy and the *trial* is newsworthy, but what is the public interest in the *identity* of the victim or the victim's family? Unfortunately, the Court did little to respond to this question.²⁰⁹ The Justices simply concluded that publication of truthful information contained in official court records open to public inspection cannot be the subject of criminal sanction under the first and fourteenth amendments.²¹⁰

²⁰⁷ *Id.* at 496.

²⁰⁸ 231 Ga. 60, 68, 200 S.E.2d 127, 134 (1973), *rev'd*, 420 U.S. 469 (1975).

²⁰⁹ A number of the cases following *Cox Broadcasting* also chose to ignore the question. In *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okla. 1980), the court, acknowledging the holding in *Melvin v. Reid*, rejected it: "There is no liability for giving publicity to facts about the plaintiff's life which [sic] are matters of public record." *Id.* at 742 (quoting RESTATEMENT (SECOND) OF TORTS § 652 D, Comment b (1977)). See also *Moloney v. Tribune Publishing Co.*, 26 Wash. App. 357, 363, 613 P.2d 1179, 1183 (1980) ("If the report of an official public action or proceeding is accurate or a fair abridgement, an action cannot constitutionally be maintained, either for defamation or for invasion of the right to privacy."). As broadly stated in *WXYZ, Inc. v. Hand*, 658 F.2d 420, 427 (6th Cir. 1981): "[The statute] represents a legislative determination that in every case involving certain sex offenses, there exists a sufficiently serious and imminent threat to the privacy interests of the persons involved to justify a suppression order. Deference to such legislative judgments is impossible when First Amendment rights are at stake."

²¹⁰ The holding was strongly criticized:

Buttressing the result dictated by its first two grounds of decision, the Court argued that, as recognized by the common law public records defense to a privacy action, there is no substantial privacy interest in information already on the public record. Although the Court was less than explicit, the argument seems to be that because no legitimate privacy interests are infringed by giving publicity to public information, it is unconstitutional to impose sanctions on the press for printing such information regardless of its importance.

This argument rests on a false premise. Although it is true that a public disclosure action lies only if the facts disclosed are not widely known, it is disingenuous to suggest that all facts on the public record are public facts, in the sense that they are known to a substantial number of people. Giving publicity to little-known facts in the public record may appreciably affect individual privacy.

Comment, *First Amendment Limitations on Public Disclosure Actions*, *supra* note 194, at 189-90 (footnotes omitted).

By emphasizing the public nature of the trial and the public access to the court records in *Cox Broadcasting*, the Court left important questions open. The question was soon raised as to the result in cases in which there were state policies not allowing access by either the public or the press to various kinds of official records. Soon, too, the Court was confronted with cases involving proceedings which had traditionally been closed to the public, such as juvenile delinquency matters. Moreover, journalists asked what the impact of *Cox Broadcasting* would be when facts were found due to the independent investigation of the journalists rather than the availability of public records. The Court quickly answered these questions in a way which did little to displease the media defendants.

In *Oklahoma Publishing Co. v. District Court*,²¹¹ the Supreme Court, in a short per curiam opinion, relied heavily upon the decisions in *Cox Publishing* and *Nebraska Press*. The state trial judge had enjoined members of the news media from "'publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child' in connection with a juvenile proceeding involving that child then pending"²¹² The reporters for the defendant's newspapers had been in the courtroom during an open hearing on a detention petition in connection with a murder case. The newspaper obtained the eleven-year-old delinquent's name and picture. Thereafter, the trial judge entered the order, and the media petitioners moved to quash.²¹³ The Court held that under the first amendment the state judge could not "prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public."²¹⁴

The Oklahoma case was an easy one. While the state statute provided for closed juvenile hearings, members of the press were present at the hearing with the full knowledge of the judge, the prosecutor, and the juvenile's lawyer. The media representatives had thus obtained the information lawfully and with the state's implicit approval.²¹⁵ Consequently, the Court quickly found that *Cox Broadcasting* required the result, without having to focus on the purposes which could be served by closed proceedings. Just one year later, however, the Court had before it a case in which the proceedings *could* be closed under state statute and *were* closed during the reporting of the incident.

The Virginia State Constitution²¹⁶ and statutes²¹⁷ prohibited the

²¹¹ 430 U.S. 308 (1977) (per curiam).

²¹² *Id.* at 308 (quoting pretrial order entered by Dist. Court, Okla. County).

²¹³ *Id.* at 309.

²¹⁴ *Id.* at 310.

²¹⁵ *Id.* at 311.

²¹⁶ VA. CONST. art. VI, § 10, *quoted in* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 830 n.1 (1978).

²¹⁷ VA. CODE § 2.1-37.13 (1973), *quoted in* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 830 n.1 (1978); *see* Judicial Inquiry & Rev. Comm'n R. 10, *quoted in* 435 U.S. at 830 n.1.

dissemination of information respecting the investigations of the confidential judicial review commission. The media defendant in *Landmark Communications, Inc. v. Virginia*²¹⁸ was found guilty of violating these provisions by publishing an article which accurately reported on a pending inquiry by the commission, and which identified the state judge whose conduct was the subject of the investigation.²¹⁹ The Supreme Court acknowledged that a large number of states had statutes requiring confidentiality with respect to judicial inquiry commissions.²²⁰ It listed three functions served by the requirement of confidentiality in commission proceedings: first, protection against harm to a judge's reputation which might unfairly result from frivolous complaints; second, maintenance of confidence in the judicial system in preventing early disclosure of an otherwise unfounded charge; and third, protection of complainants and witnesses from possible recrimination.²²¹ The Court decided that the first amendment interest involved outweighed these functions after determining "that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment . . ."²²² Chief Justice Burger stressed that the state courts had not demonstrated in the case at hand that the facts were such as to justify criminal sanction:

It is true that some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Inquiry and Review Commission may be posed by premature disclosure, but the test requires that the danger be "clear and present" and in our view the risk here falls far short of that requirement.²²³

The interest in confidentiality may be significant and the dissemination of information during the pendency of the proceedings may jeopardize that interest, yet the Court concluded without question that the first amendment interest must prevail.

Once again, the Court's decision in a case involving a balance of the first amendment against other interests is not difficult to understand. The state had *not* made an effective case for demonstrating the need for criminal prosecution.²²⁴ Still, the result is troublesome. While in *Cox Broad-*

²¹⁸ 435 U.S. 829 (1978).

²¹⁹ *Id.* at 831-32.

²²⁰ *Id.* at 834.

²²¹ *Id.* at 833.

²²² *Id.* at 838.

²²³ *Id.* at 845. The Court relied on the fact that in more than 40 states having similar commissions, criminal sanctions were not used to enforce the confidentiality against non-participants. *Id.* at 841.

²²⁴ The Court did discuss alternatives which could be used, such as contempt proceedings against the breach of the confidentiality requirement by commission members or staff, the ability to require witnesses and members to take an oath of secrecy, and so forth. *Id.* at 841 n.12. It is not clear to this writer why such alternatives are so obviously superior to the approach taken by Virginia. In each of these alternative cases, the ultimate sanction (for violating the oath, for being held in contempt) would be a criminal or quasi-criminal penalty. But see Justice Stewart's concurring opinion, where he argued that confidentiality

casting the Court had before it a specific case involving fairly compelling facts, it refused to look to the facts in support of a privacy claim and focused exclusively on the first amendment issue. In *Landmark Communications* no specific facts were presented by the defendant, yet broad policies were enunciated in support of the result. Still, the Court had little trouble rejecting the privacy claim.

Some of the questions which remained open after *Cox Broadcasting* and *Landmark Communications* were considered in *Smith v. Daily Mail Publishing Co.*²²⁵ The proceedings were directed to be closed by the state statute and were actually closed.²²⁶ A strong argument was made as to a countervailing interest which would be served by the confidentiality of the proceedings.

The West Virginia Code provided: "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court"; and "[a] person who violates . . . a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor. . . ."²²⁷ In 1978 a junior high school student was shot and killed at school by a fourteen-year-old classmate. The classmate was identified by numerous eyewitnesses and was arrested by police soon after the incident. The media defendant learned of the shooting by monitoring the police band radio. Reporters and photographers were dispatched to the school. They obtained the name of the assailant by asking various witnesses. The following day the newspaper published a story about the shooting including the juvenile's name and picture.²²⁸

"The predominant philosophy of the juvenile justice system in the twentieth century has been one of positivism and rehabilitation. Protecting confidentiality in the juvenile process has been a central but controversial tenet of this philosophy."²²⁹ In *Daily Mail* the state effectively argued the need for confidentiality by linking it to this goal of rehabilitating

was a high government interest. He decided, however, that the state could not punish the newspaper:

If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming.

Id. at 849 (Stewart, J., concurring) (footnote omitted).

²²⁵ 443 U.S. 97 (1979).

²²⁶ *Id.* at 98-100.

²²⁷ W. VA CODE §§ 49-7-3 to -7-20 (1976).

²²⁸ 443 U.S. at 99-100.

²²⁹ Comment, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation*, 65 IOWA L. REV. 1471, 1471 (1980) (footnotes omitted).

²³⁰ Brief of Petitioners at 9-17, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

juvenile delinquents,²³⁰ "the primary goal of the juvenile justice system."²³¹ Justice Rehnquist, in his concurring opinion, stressed that "publicity may have a harmful impact on the rehabilitation of a juvenile offender."²³² In support of his proposition, Justice Rehnquist referred to an empirical psychological study on the effects of publicity on a juvenile.²³³ For Justice Rehnquist, a prohibition against publication of the names of youthful offenders was a small price to pay to promote the state policy. "[A] State's interest in preserving the anonymity of its juvenile offenders—an interest that I consider to be, in the words of the Court, of the 'highest order'—far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' names entails."²³⁴

The remainder of the Court²³⁵ disagreed with Justice Rehnquist. For the majority, the focal point was "simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper."²³⁶ The Court noted that the only interest advanced to justify the statute was the protection of the anonymity of the juvenile offender. "It is asserted that confidentiality will further his

²³¹ Comment, *supra* note 229, at 1483. As noted in *S.A.S. v. Dis. Court*, ___ Colo. ___, 623 P.2d 58, 60 (1981) (citation omitted):

In order to protect the young from the stigma frequently associated with criminal proceedings, a petition in delinquency is classified as civil in character. The state's role in such a proceeding is not that of a prosecutor in a criminal case, but rather the role of *parens patriae* to protect the welfare of the child.

²³² 443 U.S. at 108 n.1 (Rehnquist, J., concurring).

²³³ Recently, two clinical psychologists conducted an investigation into the effects of publicity on a juvenile. They concluded that publicity "placed additional stress on [the juvenile] during a difficult period of adjustment in the community, and it interfered with his adjustment at various points when he was otherwise proceeding adequately." Publication of the youth's name and picture also led to confrontations between the juvenile and his peers while he was in detention. While this study obviously is not controlling, it does indicate that the concerns that prompted enactment of state laws prohibiting publication of the names of juvenile offenders are not without empirical support.

Id. (quoting Howard, Grisso & Neems, *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 210 (1977)). The subject of this study was the eleven-year-old boy accused of the shooting in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977). *Id.*

²³⁴ 443 U.S. at 107. Justice Rehnquist concurred because the statute did not accomplish its stated purpose. Only newspapers were prohibited from printing the names of the youths, with the statute excluding electronic media and other forms of publication. *Id.* at 110. The majority of the Court agreed. *Id.* at 104-05. It disagreed, however, with his conclusion that "a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional," *id.* at 110 (Rehnquist, J., concurring); see *id.* at 102-03 (majority opinion).

²³⁵ Justice Powell did not participate in the decision. 443 U.S. at 106.

²³⁶ *Id.* at 105-06. The Court relied heavily on *Davis v. Alaska*, 415 U.S. 308 (1974), where the state had not permitted a criminal defendant to impeach a prosecution witness on the basis of his juvenile record. The Court had struck down the state's ruling, finding that the state's policy had to be subordinated to the defendant's sixth amendment right of confrontation. But see Justice Rehnquist's response to this point:

In *Davis*, where the defendant's liberty was at stake, the Court stated that '[s]erious damage to the strength of the State's case would have been a real

rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense."²³⁷ The majority opinion of the Chief Justice did not substantively analyze this claim, but merely stated that "[t]he magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents."²³⁸ Because forty-five other states had similar confidentiality statutes without criminal penalties, the State of West Virginia had not demonstrated that its action was "necessary to further the state interests asserted."²³⁹

The *Daily Mail* case represents a resounding triumph for the media. The state presented a very strong case: This was a proceeding which had traditionally been found to be confidential, empirical evidence was offered in support of the need for confidentiality, and the media's information was received outside of the closed official proceedings. Indeed, the Court chose not to dispute Justice Rehnquist's point that "[p]ublication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public."²⁴⁰ Even granting such an interference, the Court found that the first amendment interest in the dissemination of information concerning the proceedings prevailed.²⁴¹ One can seriously challenge this conclusion. No doubt the reporting of the basic incident and the proceedings was newsworthy and deserved protection under the first amendment. It is not clear, however, what the interest of the public is in finding out the name of the delinquent. Nor is it clear what the adverse impact of a contrary Court ruling would be on the media and the public. Was not Justice Rehnquist's point well taken? Is this not a trivial interference with the media's function of keeping the public well informed about newsworthy events? The Court

possibility had petitioner been allowed to pursue this line of inquiry [related to the juvenile offender's record]. The State also could have protected the youth from exposure by not using him to make out its case. By contrast, in this case the State took every step that was in its power to protect the juvenile's name, and the minimal interference with the freedom of the press caused by the ban on publication of the youth's name can hardly be compared with the possible deprivation of liberty involved in *Davis*. Because in each case we must carefully balance the interest of the State in pursuing its policy against the magnitude of the encroachment on the liberty of speech and of the press that the policy represents, it will not do simply to say, as the Court does, that the 'important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment.'

443 U.S. at 109 n.2 (Rehnquist, J., concurring) (citations omitted).

²³⁷ *Id.* at 104.

²³⁸ *Id.*

²³⁹ *Id.* at 102, 105.

²⁴⁰ *Id.* at 107-08 (Rehnquist, J., concurring).

²⁴¹ See note 238 & accompanying text *supra*.

refused to address these questions, deferring as before to the first amendment contentions, which lacked considerable strength in this particular case.²⁴² As in *Cox Broadcasting* and *Landmark Communications*, one must question the Court's lack of consideration of interests other than the first amendment.

C. Televising Trials

The televising of trials is an area quite apart from the previous discussions. The media are not closed out of proceedings. They are not forbidden to disseminate information and are not restricted as to the content of the information they publish. There is no punishment, civil or criminal, for the act of publishing. The question here is whether the electronic media shall have access to the criminal trial so that the trial process may be photographed or televised.

Throughout recent history, lawyers have been both skeptical about the media need for photographic coverage of criminal trials (whether still cameras or television) and apprehensive about the potential for disruption. Nowhere was this fear realized more clearly than in the spectacular trial of Bruno Hauptmann for the Lindbergh kidnapping.²⁴³ The American

²⁴² The majority could have decided the case on the equal protection ground that only newspapers were covered under the statute. See note 234 & accompanying text *supra*. Instead, this point became somewhat of an afterthought. See 443 U.S. at 104-05.

²⁴³ *State v. Hauptmann*, 115 N.J.L. 412, 180 A. 809 (1935), *cert. denied*, 296 U.S. 649 (1935). The scene was well described in Seidman, *supra* note 7, at 13-14 (footnotes omitted):

Guilty or innocent, Bruno Richard Hauptmann certainly did not receive a trial calculated to determine the truth in a reliable fashion. The jury's verdict served only to formalize a verdict reached months earlier by the press. From the moment the Lindbergh child was seized, press coverage was intense and unrelenting. Although the hysteria abated somewhat during the long search for the kidnapper, it began anew upon Hauptmann's arrest. Reams of copy were published examining every scrap of evidence tending to implicate Hauptmann. By the time of the trial, most major papers had established small bureaus in Flemington and had conducted massive advertising campaigns boasting of their coverage.

Flemington, a peaceful town of 2500 with a one-man police force, was simply not prepared to deal with the 64,000 sightseers and 16,000 automobiles that descended on it. Predictably, complete bedlam reigned outside the courthouse. The situation was only slightly less chaotic in the courtroom itself. The media and the spectators constantly disrupted court proceedings. Elaborate telegraph equipment was installed inside the courthouse, and although the trial judge prohibited the taking of pictures inside the courtroom itself, his order was openly flouted. Indeed, sound and motion picture equipment was plainly visible in the balcony of the courtroom throughout the trial.

Despite sequestration during the trial, the jury obviously was exposed to massive pretrial publicity. Moreover, each day as the jurors walked up the courthouse steps, they passed through a gauntlet of reporters, newsboys, and ordinary citizens making bets on the case, shouting "Burn Hauptmann," and selling souvenir reproductions of the kidnap ladder. The jurors ate in a public

Bar Association formally adopted a rule in direct response to the adverse impact of massive media coverage in that world famous case:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.²⁴⁴

In 1952 a special committee of the ABA produced a report which caused the House of Delegates to amend this canon to proscribe televising court proceedings as well.²⁴⁵ A majority of states adopted the substance of this rule.²⁴⁶ The Federal Rules of Criminal Procedure also prohibits camera coverage of trials: "The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."²⁴⁷

A recent poll of practicing lawyers reflected once again the overwhelming sentiment against allowing proceedings to be televised:

dining room, separated only by a cloth screen from reporters discussing the case over lunch. Even during deliberations, the jury could hear the mob that had gathered outside the courthouse screaming "Kill Hauptmann! Kill Hauptmann!"

²⁴⁴ ABA CANONS OF JUDICIAL ETHICS No. 35, reprinted in 62 ABA REP. 1123, 1134-35 (1937).

²⁴⁵ 77 ABA REP. 110, 257 (1952). The Canon was recodified as 3A(7) of the Code of Judicial Conduct which provides:

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

ABA CODE OF JUDICIAL CONDUCT No. 3A(7) (1980).

²⁴⁶ Pequignot, *From Estes to Chandler: Shifting the Constitutional Burden of Courtroom Cameras to the States*, 9 FLA. ST. U.L. REV. 315, 319 (1981); *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (Fla. 1979).

²⁴⁷ FED. R. CRIM. P. 53.

Lawyers' attitudes toward statements regarding televised
courtroom proceedings, United States, 1979

[NOTE: this table presents the findings of a survey done by Kane, Parsons and Associates for the American Bar Association Journal. Telephone interviews were conducted with a random sample of 601 lawyers who are members of the American Bar Association.]²⁴⁸

[percentages]

	Agree strongly	Agree with reser- vations	Dis- agree with reser- vations	Disagree strongly	Not sure
Television cameras in the courtroom would tend to distract witnesses	55	20	15	8	2
TV cameras in the courtroom should be discouraged as they will be used to show the more sensational aspects of a trial only	47	23	20	8	2
The use of televised proceedings should not be allowed as they will encourage lawyers and judges to grandstand for the TV audience	39	25	20	14	2
Televised courtroom proceedings would enhance the public concept of our system of justice	16	21	26	34	3
Televised courtroom proceedings should be encouraged because citizens are entitled to see our courts in operation	15	18	26	40	1
Barring television from courtrooms discriminates against that news source	9	11	19	59	2

Indeed, as recently as September 1980, the Judicial Conference of the United States adopted a rule prohibiting the taking of photographs and the use of radio or television broadcasting in the courtroom:

The taking of photographs and operation of tape recorders in the

²⁴⁸ *Lawyers Aren't Convinced that TV Belongs in Courtrooms*, 65 A.B.A.J. 1306, 1308 (1979).

courtroom or its environs during the progress of or in connection with judicial proceedings . . . is prohibited. A judge may, however, permit (1) the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record, and (2) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.²⁴⁹

Several arguments have been made respecting the adverse impact of cameras in the courtroom. The major points were succinctly set out by columnist James Reston:

They would be a distracting influence and make it more difficult to get the truth out of witnesses, whose powers of observation, recollection and communication are already limited in the emotional stresses of a courtroom.

They would encourage jurors to think about themselves on camera rather than concentrating on the evidence, and tempt lawyers to play to the cameras rather than to the jury.

While they would extend the process of justice to a much wider audience, they would in many if not most cases give that audience a distorted picture of the proceedings.²⁵⁰

A case illustrating the potential for disruption by cameras in the courtroom is that of Billie Sol Estes, a well-known financier and friend of Presidents who was convicted of swindling numerous farmers.²⁵¹ The Texas Judicial Canons allowed the trial judge, in his discretion, to direct the televising and photographing of court proceedings.²⁵² The difficulty in *Estes* was that the proceedings looked very much like a circus.²⁵³ "Massive pretrial publicity total[ed] 11 volumes of press clippings"²⁵⁴

[At pretrial proceedings when the case was first called for trial,] all available seats in the courtroom were taken and some 30 persons stood in the aisles. . . . [A]t least 12 cameramen were engaged in the courtroom throughout the hearing Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. [All parties] conceded that the activities . . . led to considerable disruption of the hearings.²⁵⁵

²⁴⁹ Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, *supra* note 140, at 535-36.

²⁵⁰ Reston, *Television And The Courts*, N.Y. Times, Jan. 28, 1981, § A, at 23, col. 5. See also Tongue and Lintott, *The Case Against Television in the Courtroom*, 16 WILLAMETTE L. REV. 777 (1980). (Justice Tongue sits on the Oregon Supreme Court.)

²⁵¹ *Estes v. Texas*, 381 U.S. 532 (1965). *Estes* continues to have difficulties with the criminal justice system. See *Horton v. United States*, 646 F.2d 181 (5th Cir. 1981) (affirming conviction for defrauding United States).

²⁵² *Estes v. Texas*, 381 U.S. 532, 535 (1965).

²⁵³ See *id.* at 536. See also *Murphy v. Florida*, 421 U.S. 794, 799 (1975). The issue also arose in the Sam Sheppard case, though the disposition there primarily rested on the adverse pretrial publicity. See text accompanying notes 51-61 *supra*.

²⁵⁴ 381 U.S. 532, 535 (1965).

²⁵⁵ *Id.* at 535-36.

Though this extreme situation was altered somewhat at trial,²⁵⁶ a good deal of television coverage occurred, and this coverage was broadcast the same day it was taken.²⁵⁷ According to the Court, on one occasion the video tapes were rebroadcast in place of the "late movie".²⁵⁸

When the case came before the Supreme Court, the defendant claimed that his due process rights had been violated by the televising and broadcasting of the pretrial proceedings and the trial. Six separate opinions were written. Justice Clark's opinion for the Court established what appeared to be a *per se* rule that the televising of proceedings, over the objection of the defendant, denied due process rights. In response to the state's contention that no prejudice had been shown by the petitioner as resulting from the televising, Justice Clark stated: "Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced."²⁵⁹ Chief Justice Warren, joined by Justices Douglas and Goldberg, made the point even more directly, stating

[t]hat the televising of criminal trials is inherently a denial of due process. . . . The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.²⁶⁰

This view of a *per se* rule commanded the four votes indicated above.²⁶¹

Four Justices dissented,²⁶² finding that there was no *per se* constitutional rule against the introduction of television into a courtroom. They also found that there had been no showing that under the circumstances of the particular trial the petitioner was denied his constitutional rights.²⁶³ The real issue, therefore, centered on the position of the ninth Justice,

²⁵⁶ Ultimately, the televising of the trial itself was restrained compared to the pretrial proceedings.

A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

[L]ive telecasting was prohibited during a great portion of the actual trial. *Id.* at 537.

²⁵⁷ *See id.*

²⁵⁸ *Id.* at 538.

²⁵⁹ *Id.* at 544.

²⁶⁰ *Id.* at 552 (Warren, C. J., concurring).

²⁶¹ While Justice Harlan concurred, he did not subscribe to the Court's *per se* analysis. *Id.* at 588-90 (Harlan, J., concurring).

²⁶² *Id.* at 601.

²⁶³ *Id.* at 602 (Stewart, J., dissenting, joined by Black, Brennan and White, JJ.). Even the dissenters recognized that "the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of the courtroom." *Id.* at 601.

Justice Harlan. He concurred in the Court's judgment, but in his separate opinion he left some doubt as to how much of Justice Clark's opinion he supported. In Justice Harlan's view, although television in the courtroom could have negative effects, prohibiting it could preclude states' "procedural experimentation."²⁶⁴ Justice Harlan concluded:

[T]here is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.²⁶⁵

The confusion as to the *Estes* holding was fueled, to a large extent, by the egregious facts presented there. One federal court characterized Justice Harlan's opinion as favoring the per se rule "in a 'notorious' case which is 'heavily publicized' and 'highly sensational.' Thus, *Estes* can be construed as standing for the proposition that television coverage of a 'notorious' criminal case absent the defendant's validly obtained consent is a per se violation of due process."²⁶⁶ Other judges viewed *Estes* as being limited to the situation in which the presence of cameras in the courtroom actually was shown to have prevented a fair trial,²⁶⁷ while still others took a very broad view of *Estes*.²⁶⁸

With this shaky constitutional precedent in mind, the states proceeded cautiously. Many states, following the lead of the American Bar Association, refused to allow any electronic coverage. Others limited such coverage to particular kinds of proceedings, such as appellate arguments.

²⁶⁴ *Id.* at 587 (Harlan, J., concurring).

²⁶⁵ *Id.* at 587, 591 (emphasis added). Justice Harlan added:

In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a 'hidden audience' of unknown but large dimensions. There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense attorney, and even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'?

Id. at 591.

²⁶⁶ *Zaehring v. Brewer*, 635 F.2d 734, 738 (8th Cir. 1980). Enormous problems would be created, however, if trial judges actually had to determine which cases were sufficiently "notorious."

²⁶⁷ *State v. Newsome*, 177 N.J. Super. 221, 226-28, 426 A.2d 68, 71-72 (1980).

²⁶⁸ See *Bradley v. Texas*, 470 F.2d 785, 787 (5th Cir. 1972) ("Television coverage of a trial is considered inherently prejudicial . . ."). But see Merola, *Who'd Beat on a Suspect While the Camera's Running?*, TV GUIDE, July 25, 1981, at 17 (Mr. Merola is the district attorney of Bronx County in New York City).

A few began to allow television coverage of criminal trials.²⁶⁹ In *Chandler v. Florida*,²⁷⁰ which ultimately came before the Supreme Court, the state had chosen to go farther than any other by allowing television coverage of criminal trials, even over the specific objection of the defendant.

The state of Florida embarked on an ambitious pilot program in 1975 for televising one civil and one criminal trial under specific guidelines requiring the consent of all parties.²⁷¹ After this program ended in 1978, the state supreme court reviewed briefs, reports, and studies, including its own survey of interested parties, and concluded that "on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage."²⁷² The Florida Supreme Court then promulgated a permanent canon allowing for such coverage.²⁷³

The implementing guidelines required by the Florida canon specified in detail the type of equipment to be used and the manner of its use.²⁷⁴ As noted by Chief Justice Burger, the restrictions are designed to eliminate any adverse impact which might otherwise be present:

[N]o more than one television camera and only one camera technician are allowed. Existing recording systems used by court reporters are used by broadcasters for audio pickup. Where more than one broadcast news organization seeks to cover a trial, the media must pool coverage. No artificial lighting is allowed. The equipment is positioned in a fixed location, and it may not be moved during trial. Videotaping equipment must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed. The judge has discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial. The Florida

²⁶⁹ See *Chandler v. Florida*, 449 U.S. 560, 565 n.6 (1981); see also *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 786-91 app. 2 (Fla. 1979) (reprinting National Center for State Courts, *Television in the Courtroom: Recent Developments*, Feb. 7, 1979); see also Carter, *Television in the Courtrooms*, 5 STATE CT. J. 6 (1981).

²⁷⁰ 449 U.S. 560 (1981).

²⁷¹ Petition of Post-Newsweek Stations, Fla., Inc., 327 So. 2d 1, 2 (Fla. 1976).

²⁷² Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979). This opinion contains an excellent discussion of the various arguments to be made as to the desirability of televising criminal trials. See *id.* at 779-81.

²⁷³ FLA. CANON 3A(7). This canon provides:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

²⁷⁴ 370 So. 2d at 783-85 app. 1, A.

Supreme Court has the right to revise these rules as experience dictates, or indeed to bar all broadcast coverage of photography in courtrooms.²⁷⁵

The defendants in *Chandler* had been charged with the relatively routine offenses of conspiracy to commit burglary, grand larceny, and possession of burglary tools. While the case was hardly notorious along the lines of *Estes*, it was not ordinary either. At the time of their arrest, the defendants were Miami Beach police officers. A television camera was in place for one afternoon during which the state presented the trial testimony of its chief witness. No coverage occurred in connection with the defendants' case. The defendants argued that the Florida rule was unconstitutional on its face and as applied, but the arguments were rejected at the state court level.²⁷⁶ The defendants in argument before the United States Supreme Court read the *Estes* case as announcing a per se constitutional rule that televising of any portion of a criminal trial without the defendant's consent is a denial of due process.²⁷⁷

Chief Justice Burger, focusing on Justice Harlan's swing vote in *Estes*,²⁷⁸ concluded:

[*E*]stes is not to be read as announcing a constitutional rule barring still photographic, radio and television coverage in all cases and under all circumstances. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.²⁷⁹

While at least two members of the Court, Justices Stewart and White, thought that *Estes* did announce a per se rule and should be overruled,²⁸⁰ no member of the Court²⁸¹ was willing in 1981 to accept such a per se rule. As stated by the Chief Justice: "The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's

²⁷⁵ 449 U.S. at 566.

²⁷⁶ *Id.* at 567-68. See *Chandler v. State*, 366 So. 2d 64, 69 (Dist. Ct. App. 1979) (per curiam), cert. denied, 376 So. 2d 1157 (Fla. 1979) (per curiam), *aff'd*, 449 U.S. 560 (1981).

²⁷⁷ *Id.* at 570.

²⁷⁸ See notes 264-68 & accompanying text *supra*.

²⁷⁹ 449 U.S. at 573-74. The Chief Justice emphasized the limitations imposed by Justice Harlan in his opinion: "At the present juncture, I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned." *Id.* at 573 (quoting 381 U.S. at 595-96 (Harlan, J., concurring)) (emphasis added by Chief Justice Burger).

²⁸⁰ 449 U.S. at 583 (Stewart, J., concurring) ("Although concurring in the judgment, I cannot join the opinion of the Court because I do not think the convictions in this case can be affirmed without overruling *Estes v. Texas*."); *id.* at 587 (White, J., concurring) ("I think *Estes* is fairly read as establishing a per se constitutional rule against televising any criminal trial if the defendant objects. So understood, *Estes* must be overruled to affirm the judgment below.").

²⁸¹ Justice Stevens did not participate in the case. *Id.* at 583.

coverage of his case . . . compromised the ability of the particular jury that heard the case to adjudicate fairly."²⁸²

The Court acknowledged that since *Estes* had been decided, many states had allowed experimentation and many of the negative factors found in *Estes*—cumbersome equipment, cables, poor lighting, and the number of camera technicians—were no longer of great concern.²⁸³ The Court thus decided that "no one has been able to present empirical data sufficient to establish the mere presence of the broadcast media inherently has an adverse effect . . ."²⁸⁴ Because the defendants were not able to offer any evidence of particular prejudice,²⁸⁵ the Court held that, unlike the situation in *Estes*, there was no showing that the trial was in any way affected by television coverage.²⁸⁶

The difficulty with the approach of the Court is that few defendants will ever be able to show prejudice resulting from the television cameras, apart from the spectacular case such as *Estes*.²⁸⁷ More importantly, it is not clear to this writer why such a showing should have to be made by the defendant. This is not a case where severe first amendment restrictions are being imposed on the media. The sources of information are not being limited or cut off. No punishment of any sort is being meted out for the content of the reporting. Can anyone doubt that—at least in some cases—the televising of proceedings will have some serious impact on the trial participants,²⁸⁸ an impact which will not be tangible and will not likely lead to appealable issues?

If the central thesis is that televising of criminal proceedings will educate the public far better than other forms of coverage, does not this assertion prove too much? If it is educational in the context in which a defendant stands to be deprived of his or her liberty, is it not also educational for the public to understand how the United States Supreme Court operates? The Court does not, however, allow electronic media coverage

²⁸² *Id.* at 575.

²⁸³ *Id.* at 576-77.

²⁸⁴ *Id.* at 578-79. The Chief Justice recognized that the "data thus far assembled" were "limited" and "non-scientific." *Id.* at 576 n.11.

²⁸⁵ *Id.* at 568. The only evidence was to the contrary because at voir dire the jurors were asked if the presence of the camera would in any way compromise their ability to consider the case. *Id.* at 567.

²⁸⁶ *Id.* at 582. See Platte, *TV in the Courtroom: Right of Access?*, 3 COM. & L. 11 (1981).

²⁸⁷ Of course, even after *Chandler*, restrictions on television may be legitimately imposed so as to control prejudicial publicity and protect the defendant's right to a fair trial. The obvious example is the notorious Atlanta child murder trial which, the trial judge ruled, could not be televised. The court there held that under the Georgia rules consent of all parties was a prerequisite, but in any case, televising of the proceedings would not be in the public interest in view of the potential harm "to those children and families who were adversely affected by the ordeal" in the city of Atlanta. *State v. Williams*, [1981] 29 CRIM. L. REP. (BNA) 2516.

²⁸⁸ As Justice White noted in *Chandler*, "the majority does not underestimate or minimize the risks of televising criminal trials over a defendant's objections. I agree that those risks are real and should not be permitted to develop into the reality of an unfair trial." 449

of appellate arguments before it.²⁸⁹ The Court in *Chandler* did not respond to these issues, but again stressed the importance of media coverage of criminal trials. Despite the importance of such coverage, the Court's focus on it seems to miss the mark.

In fairness to the Court, it did make clear that there was no *constitutional right* of media access with respect to electronic coverage of trials. Instead, relying on the Florida rules, it wrote that trial judges would have to be vigilant to make sure no prejudice was suffered by defendants in these televised cases.²⁹⁰

In many respects, *Chandler* is a seminal case. Reversing the traditional legal view of electronic coverage of trials, the Court refused to adopt a per se rule against such coverage.²⁹¹ It is true that the Court also did not establish any constitutional right of access regarding electronic coverage, but made explicit that the key was a showing of specific prejudice to the defendant. This showing will be a difficult one to make absent a circuslike atmosphere.²⁹² The ruling in *Chandler* is, thus, a very

U.S. at 588-89 (White, J., concurring). See also the comments of Justice Stewart in 14 *THIRD BRANCH* 3 (1982):

I think a good argument can be made against televising the proceedings in a trial court, the argument being that the televising of such proceedings would distort the administration of justice, would distort the actions of the witnesses and the members of the jury and even the judge, conscious as they would be that they were not just in a courtroom but in everybody's living room.

For an interesting exchange on this point by two practicing lawyers, see Allied Educational Foundation, *Television in the Courtroom—Limited Benefits, Vital Risks?*, 3 *COM. & L.* 30 (1981) (educational conference).

²⁸⁹ Even at the swearing-in ceremony of Justice Sandra Day O'Connor, only reporters and artists were allowed to record the event in accordance with the Supreme Court's policy banning television, tape-recording, and picture-taking of proceedings. *Washington Post*, Sept. 25, 1981, § A, at 3, col. 1 (reprinted in the *Bloomington Herald-Telephone*, Sept. 26, 1981, § 1, at 3, col. 1). At this time an intense controversy exists in the California Supreme Court. Despite strenuous objections from two Justices, the California court has now agreed to allow cameras to film oral arguments for the first time in the Court's history. Chief Justice Byrd noted that the court wished to treat litigants fairly while "mak[ing] court proceedings more open and understandable to the public." Hager, *Cameras Allowed to Enter Supreme Court*, *Los Angeles Times*, Sept. 4, 1981, § 1, at 3, col. 5. The dissenting Justices, however, stated that "it is regrettable that a majority of the members of this court have yielded to the persistence of an entertainment media." . . . 'As a result, this temple of justice is being transformed into a theater, and lawyers and justices are to be the actors.'" *Id.* at 3-21, col. 5.

²⁹⁰ 449 U.S. at 574.

"The Florida guidelines place on trial judges positive obligations to be on guard to protect the fundamental right of the accused to a fair trial. . . . [I]t is significant that Florida requires that objections of the accused to coverage be heard and considered on the record by the trial court." *Id.* at 577.

²⁹¹ Tornquist & Grifall, *Television in the Courtroom: Devil or Saint?* 17 *WILLAMETTE L. REV.* 345 (1981); Zimmerman, *Overcoming Future Shock: Estes Revisited, or A Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 *DUKE L.J.* 641.

²⁹² See Zimmerman, *supra* note 291. One reporter reviewed the evidence and received these quotes from judges and lawyers: "I've yet to see how they detract from the administration of justice"; "it's worked better than we anticipated"; "after two or three minutes, everybody in the courtroom forgets the cameras and the mikes are there." Lind-

broad victory for the media.²⁹³ Without any showing by the media of a great need to broadcast the proceedings or a showing that such proceedings would not be inherently prejudicial, the Court recognized the importance of open access absent a compelling showing of prejudice by the defendant.²⁹⁴ The impact of *Chandler* has already been widespread. Numerous states have adopted rules paralleling the Florida experiment,²⁹⁵ and as the technology improves one expects further experimentation.²⁹⁶

CONCLUSION

There has always been and will continue to be a great public interest in criminal trials. These events are newsworthy and central to the democratic process and need to be fully and freely reported by the various news media. Within the last decade the Supreme Court has strongly accepted this view, moving away from an occupation with the sixth amendment and fourteenth amendment rights of the accused on trial and toward the legitimate interest of the media to open access to criminal trials. Instead of merely deferring to a claim of potential prejudice to the trial rights of the defendant, the Court has become greatly concerned with the impact of restrictions on the dissemination of information under the first amendment.

The position of the Court makes a good deal of sense in the first two areas discussed in this article. Prior restraint orders should be virtually impossible to obtain,²⁹⁷ as these orders completely cut off the media from the news events. Similarly, closure orders should only be granted in the rarest of circumstances. In this sense *Richmond Newspapers* is right, but *Gannett* is wrong. If the press cannot be routinely shut out from trials,

sey, *After 5 Years, Judges and Lawyers See Courts Adjusting to the Camera's Eye*, N.Y. Times, Feb. 7, 1981, at 6, col. 1.

²⁹³ Cf. Pequignot, *supra* note 246.

²⁹⁴ It is surprising and disappointing that the Court was not willing to evaluate the various interests involved; instead it deferred to the media's claims. One would have hoped for a test somewhat parallel to that used in *Mathews v. Eldridge*, 424 U.S. 319 (1976), a case in which the Court discussed the procedural safeguards required under the due process clause. There the Court looked to three factors (private interest, risk of erroneous deprivation, the government's interest) in reaching its determination of the due process mandate. *Id.* at 335. In *Chandler* the Court did not engage in such a weighing process.

²⁹⁵ Tornquist & Grifall, *supra* note 291; Erickson, COLORADO LAWYER, Sept. 1981, at 2199, 2200, indicates that 31 states now permit television and camera coverage of trial or appellate proceedings. For a good discussion of the manner in which this evolution has occurred, see Carter, *supra* note 269. The proposed Illinois rules are typical of the new trend. Section 61(c)(24) of the Supreme Court Rules as passed by the Illinois State Bar Association would allow the taking of photographs and broadcasting or televising of court proceedings "subject to conditions imposed by authority of the presiding judge."

²⁹⁶ For a good discussion of the great improvements in the technology in this area, see Loewen, *Cameras in the Courtroom: A Reconsideration*, 17 WASHBURN L.J. 504 (1978).

²⁹⁷ They may now be impossible to obtain under any circumstances, in light of the various concurring opinions in *Nebraska Press*. See notes 86-93 & accompanying text *supra*.

it is difficult to understand why no strong showing need be made by the trial judge in the vital pretrial setting.

The other actions taken in this field by the Supreme Court are far less defensible. When the press is not being kept away from the proceedings, when they are free to report the important facts of the subject incident, as well as the pretrial hearings and the trial, the Court should be reluctant to disregard other state interests. The privacy of rape victims and the goal of the state in keeping juvenile and judicial inquiry matters confidential are significant. On the other hand, it is a subtle argument, indeed, to contend that first amendment interests are seriously affected by forbidding the reporting of the names of victims of crimes, juvenile delinquents, or judges not yet determined to have acted improperly. Of even greater concern is the Court's ruling in the televised trial case where the states were given much discretion, though questions regarding the limited educational value of such broadcasting and the adverse impact on the trial process were expressed.²⁹⁸

In spite of the fears stated by many journalists,²⁹⁹ the media have fared quite well before the Supreme Court when the question involved the reporting of criminal trials. In many of these cases, the first amendment was quite properly given great weight. In others, however, the unwillingness of the Justices to evaluate other, conflicting interests is troubling.

²⁹⁸ As noted by the Chief Justice in *Chandler*, the Conference of State Chief Justices, by a vote of 44 to 1, recently approved a resolution allowing the highest court of each state to promulgate rules regulating radio, television, and other photographic coverage of court proceedings. 449 U.S. at 564 n.4.

²⁹⁹ For the views of Carl Stern and Bob Woodward, see notes 20, 99 & 169 *supra*; see also note 100 & accompanying text *supra*.