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FIRST AMENDMENT—CONSTITUTIONAL RIGHT OF ACCESS TO CRIMINAL TRIALS

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

In *Richmond Newspapers, Inc. v. Virginia*,[1] the Supreme Court resolved the question left undecided in *Gannett Co. v. DePasquale*,[2] whether the Constitution guarantees a right of the public and the press to attend criminal trials.[3] In *Gannett*, the Court found that the sixth amendment protection of a right to a public trial[4] was personal to the accused and did not grant the public a right to attend trials.[5] However, the ambiguous language in the Court's opinion and the variety of approaches suggested in the concurring opinions left the question whether the public had any constitutional right to attend criminal trials unclear.[6] The uncertainty was put to rest by the *Richmond Newspapers* decision, in which the Court held that the press and the public do have a first amendment right of access to criminal trials.[7] As a result of the decision, however, further uncertainty arises as to the extent of the right of access recognized in *Richmond Newspapers*.[8]

[1] 100 S. Ct. 2814 (1980).

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

[3] Chief Justice Burger phrased the question presented in *Richmond Newspapers* as "whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution." 100 S. Ct. at 2818. The question was not answered in *Gannett* because the plurality opinion in that case had limited its holding to finding that there was no right to attend pretrial hearings under the sixth amendment. 443 U.S. at 391.

[4] U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

[5] 443 U.S. at 391.

[6] An example of the variety of approaches taken by members of the Court in *Gannett*, is Justice Stewart's refusal to address the issue of whether there was a first amendment right of access to pretrial hearings because he found that even if there was such a right, the trial judge had given it sufficient consideration. 443 U.S. at 392. In contrast, Justice Powell, while concurring in Stewart's opinion, found that there was a first amendment right of access to pretrial hearings which was satisfied by the trial judge's approach to the closure order. 443 U.S. at 401–02. Justice Rehnquist, while concurring in Justice Stewart's opinion, found that there was no first amendment right of access to pretrial hearings. 443 U.S. at 404.

[7] 100 S. Ct. at 2829.

[8] The uncertainty results from the differences in the approaches suggested by Chief Justice Burger and Justice Brennan. Burger would limit the right of access to places traditionally open to the public, *id.* at 2828, while Brennan would apply a balancing test in determining whether to allow access in an individual case. *Id.* at 2834.

I

The Supreme Court's opinion in *Gannett Co. v. DePasquale* was noted for the confusion which it caused.[9] The issue in *Gannett*, as stated by Justice Stewart in his majority opinion, was "whether members of the public have an independent constitutional right to insist upon 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."[10] Stewart found that the sixth amendment right to a public trial was personal to the accused and did not grant the public a right to attend *pretrial hearings*.[11] In stating his holding, however, he wrote that the public had no right to attend *criminal trials* under the sixth amendment.[12] This language left obvious questions as to the scope of the holding. Chief Justice Burger, while joining in the Stewart opinion, wrote a separate concurring opinion in which he stressed that the holding was limited to pretrial hearings.[13] However, he was the only Justice limiting the opinion in that way, so the questions as to its scope remained unanswered.

In addition to the confusion resulting from Stewart's treatment of the sixth amendment issue, uncertainty was caused by his failure to analyze the first amendment issue. He specifically refused to

[9] *See, e.g.*, Goodale, *Gannett Means What It Says; But Who Knows What It Says?*, Nat'l L. J., Oct. 15, 1979, at 20; Stephenson, *Fair Trial-Free Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39, 63 (1979) ("intended reach of the majority opinion is unclear" (footnote omitted)); Note, *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 62 (1979) ("fragmentation of the Court and the ambiguities of the opinion leave the scope of the holding extraordinarily uncertain").

[10] 443 U.S. 368, 370 (1979).

[11] *Id.* at 381.

[12] *Id.* at 391. "[W]e hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Id.*

[13] *Id.* at 394–96.

decide whether there was a first amendment right of access to pretrial hearings,[14] yet as one commentator noted, "he implicitly defined the outer limit of that putative right by ruling that, in any event, the trial court had adequately taken first amendment concerns into account by balancing the competing interests at stake."[15] Justice Powell, while concurring in the majority opinion, addressed the first amendment issue in a separate opinion. He found that there was a first amendment right of access to pretrial hearings, but he believed that this right was satisfied by the trial court's consideration of the conflicting values in its decision to close the pretrial hearing.[16] Justice Rehnquist also concurred in the majority opinion, but he wrote separately to indicate that he believed that there was no first amendment right of access to pretrial hearings.[17]

Justice Blackmun dissented from the majority and was joined by Justices Brennan, White, and Marshall. He reserved the first amendment issue[18] because he found that there was a public right of access protected by the sixth amendment.[19]

Against this background of uncertainty about the *Gannett* decision, the Supreme Court addressed the issue of whether the Constitution granted the public a right of access to criminal trials in *Richmond Newspapers, Inc. v. Virginia.* On September 11, 1978, Stevenson was tried for murder for the fourth time.[20] His first trial resulted in a conviction which was overturned by the Virginia Supreme Court because a bloodstained shirt had been improperly admitted into evidence.[21] The second trial ended in a mistrial when a juror asked to be excused and no alternate juror was available.[22] The third trial also ended in a mistrial when it was discovered that a prospective juror had read about the case in a newspaper and had told prospective jurors about it.[23]

Before the fourth trial began, counsel for the defendant Stevenson moved to have the public excluded from the courtroom because he was afraid that a member of the murder victim's family who had been in the courtroom before would inform certain witnesses about the testimony of other witnesses.[24] After determining that the prosecutor had no objections to the motion, the judge indicated that Virginia Code § 19.2-226 gave him the discretion to clear the courtroom,[25] and he ordered it cleared of all persons except witnesses who were testifying.[26] The reporters from the appellant newspaper in the courtroom apparently did not object to the order at the time it was issued, but later in

[14] *Id.* at 392.

[15] Note, *supra* note 9, at 63. At the hearing on the objections to the closure order the trial judge had recognized that the press had a right of access but he found that the defendant's right to a fair trial outweighed that right. 443 U.S. at 393. By finding that the trial court's action made it unnecessary to consider whether a first amendment right of access to a pretrial hearing existed, Stewart was implicitly holding that if there was a first amendment right of access, its scope would be determined by balancing the right against the competing interests in closure.

[16] 443 U.S. at 403. Justice Powell found the right of access to criminal trials in the first amendment "[b]ecause of the importance of the public's having accurate information concerning the operation of its criminal justice system." *Id.* at 397. He argued that a trial court should balance the public right of access to information about its courts against the defendant's right to a fair trial, when considering a closure request. When engaging in that balancing process, the court should consider whether there are alternative means to insure the fairness of the trial. *Id.* at 400. Justice Powell also argued that the press and public should be given a reasonable opportunity to be heard before a closure order is put into effect. *Id.* at 401. Since the trial court held such a hearing and engaged in such a balancing process, Justice Powell found that the first amendment was satisfied. *Id.* at 408.

[17] *Id.* at 404. Because he found that there was no constitutional right of access to attend pretrial hearings, Justice Rehnquist argued that the state courts were free to determine for themselves whether to open or close a hearing. *Id.* at 405.

[18] *Id.* at 447.

[19] *Id.* Justice Blackmun argued that although the sixth amendment guaranteed the accused a right to a public trial, this did not carry with it the right to insist on a private proceeding. *Id.* at 418. He further argued that since the sixth amendment protected the public interest in open trials, a defendant must assert an independent constitutional right to support his claim for private proceedings. Since Justice Blackmun could find no such independent right, he found that trials should be open. *Id.* at 418–27. Justice Blackmun recognized that the defendant's right to a fair trial might require the proceeding to be closed, but he would allow a closure only when the defendant could show that irreparable damage would occur by holding an open proceeding, that no alternatives to closure would protect his right of a fair trial, and that closure would be effective in protecting his right to a fair trial. *Id.* at 441–42.

[20] 100 S. Ct. at 2818.

[21] Stevenson v. Commonwealth, 218 Va. 462, 466, 237 S.E.2d 779, 782 (1977).

[22] 100 S. Ct. at 2818.

[23] *Id.*

[24] *Id.* at 2819.

[25] VA. CODE § 19.2-266 (1975) provides in pertinent part:

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

[26] 100 S. Ct. at 2819.

the same day they sought a hearing on a motion to vacate the closure order.[27] The trial judge granted the hearing but denied the motion to vacate the closure order.[28] On the next day, Stevenson was found not guilty and was released.[29]

Richmond Newspapers petitioned the Virginia Supreme Court for a writ of mandamus and filed an appeal of the trial judge's closure order.[30] The court dismissed the mandamus petition and denied appeal. The newspaper then appealed to the United States Supreme Court.

II

The Supreme Court[31] reversed the decision of the Virginia Supreme Court. Chief Justice Burger wrote the plurality opinion, beginning his analysis with a review of the history of the jury trial from the time of the Norman Conquest through the history of the American Colonies.[32] Based on this review of history, the Chief Justice concluded that trials had always been presumed to be open to the public.[33] He observed that there were several good reasons for allowing the public to be present at trials. Open trials helped assure members of the community of the fairness of the proceedings since they could be present to witness it.[34] Open trials also discouraged witnesses from commiting perjury because they were aware that their neighbors might hear their testimony and be able to contradict it.[35] Furthermore, open trials discouraged the misconduct of participants and helped to prevent biased decisionmaking.[36] Finally, Burger noted that open trials had a therapeutic effect on the community since the members of the community could vent their shared feelings of outrage by watching justice being done.[37] Based on the history of open trials and the policy reasons for the practice, Burger found a presumption that criminal trials were open to the public.[38]

Significantly, in his analysis of the constitutional support for the right to attend criminal trials, Chief Justice Burger indicated that the right was not limited to trials, but extended to all places which had traditionally been open to the public.[39] In attempting to demonstrate constitutional support for this right, Chief Justice Burger first relied on the first amendment protection of freedom of speech and press.[40] Noting that the Court had recognized that the first amendment protected the right to receive information as well as the right of self expression,[41] the Chief Justice reasoned that in the context of criminal trials this right to receive information meant that the government could not exclude the public from criminal trials summarily.[42] He further concluded that the freedom to speak about events such as criminal trials must also provide some protection for attending those events because members of the public would be unable to discuss the events without attending them.[43]

Chief Justice Burger found additional support for the right of access to places traditionally open to the public in the first amendment protection of the right of assembly.[44] Observing that the public

[27] *Id.*

[28] *Id.* at 2820.

[29] *Id.*

[30] *Id.*

[31] Justice Powell did not participate in the decision. *Id.* at 2830.

[32] *Id.* at 2821–23.

[33] *Id.* at 2823. "[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 2824–25. Chief Justice Burger warned that "[W]ithout an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self help.'" *Id.* at 2824.

[38] *Id.* at 2825. "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."

[39] *Id.* at 2828.

[40] U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

[41] Chief Justice Burger relied on First National Bank v. Bellotti, 435 U.S. 765 (1978), and Kleindienst v. Mandel, 408 U.S. 753 (1972), for the proposition that the public had a right to receive information. In *Bellotti*, the Court struck down a statute which prohibited corporations from spending money to publicize their views and influence voters because the statute violated the right of expression. In *Mandel*, the Court refused to order the Attorney General to grant a visa to enter the United States to a Marxist journalist, because the Court found that the right to deny access to aliens was inherent in the sovereignty of a government. The question of whether these two cases support Chief Justice Burger's argument is the subject of the discussion in the text accompanying notes 104–15 *infra*.

[42] 100 S. Ct. at 2827.

[43] *Id.* "The explicit, guaranteed rights to speak and to publish concerning what takes place at a criminal trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Id.*

[44] U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . ."

had a right to assemble in public places such as streets and sidewalks, he asserted that the trial courtroom was a similar public place where people had a right to assemble.[45]

In response to the state's argument that there was no public right of access to criminal trials because the Constitution did not spell out such a right, Chief Justice Burger pointed out that the Court had frequently found that "fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensible to the enjoyment of rights explicitly defined."[46] Burger concluded that the right to attend criminal trials was implicit in the first amendment because without the right certain aspects of freedom of speech would be infringed.[47]

After holding that the public had a first amendment right of access to places traditionally open to the public, Chief Justice Burger found that the closure order of the trial judge violated that right because the record was devoid of any countervailing interest which would outweigh the first amendment interest and because the judge failed to consider any less restrictive alternatives to the closure order.[48] Chief Justice Burger held that because of the first amendment right of access to criminal trials, a courtroom could not be closed "[a]bsent an overriding interest articulated in findings,"[49] but he failed to give an example of what an overriding interest might be.[50]

Justice White concurred in the plurality opinion, but stated that the opinion would have been unnecessary if the Court in *Gannett* had recognized a right of access to criminal trials in the sixth amendment.[51] White's comment is explained by the fact that he had concurred in Justice Blackmun's opinion[52] in *Gannett*, where Blackmun had argued that the public's interest in an open trial gave it a right of access protected by the sixth amendment.[53]

Justice Stevens also concurred in Chief Justice Burger's opinion, but he wrote separately and attempted to extend the holding by claiming that it prohibited arbitrary interference with access to important information.[54] Justice Stevens' restatement of the holding suggested that arbitrary interference with *any* important information is prohibited, whereas the holding only prohibited arbitrary interference with information or places that had been "traditionally open to the public."[55] Since Burger was careful to limit the right of access to places or information where access had historically been given,[56] there is no support in his opinion for Justice Stevens' extension.

Justice Brennan concurred only in the judgement of the Court and wrote a separate opinion in which Justice Marshall joined. Justice Brennan introduced a framework for determining when the public had a right of access to *any* governmental information, not merely a right of access to information or places traditionally open to the public.[57] He argued that the first amendment had the structural role in a republican government of ensuring informed public debate, which is essential to the survival of a republican government.[58] In order for public discussion to be informed, Justice Brennan argued a right of access to governmental information must be recognized.[59] Acknowledging that his analysis could lead to a right of access that was "theoretically endless," Justice Brennan proposed a balancing test for determining its scope.[60] In his words, "[a]n assertion of the prerogative to gather

[45] 100 S. Ct. at 2828. The validity of this argument is discussed in the text accompanying notes 116–19 *infra*.

[46] 100 S. Ct. at 2829. As examples of cases where the Court had recognized certain rights as fundamental even though they were not enumerated in the Constitution, Chief Justice Burger cited Taylor v. Kentucky, 436 U.S. 478 (1978) and Estelle v. Williams, 425 U.S. 501 (1976) (recognizing the right to be presumed innocent); *In re* Winship, 397 U.S. 358 (1970) (right to a requirement of a standard of proof beyond a reasonable doubt); Shapiro v. Thompson, 394 U.S. 618 (1969) and United States v. Guest, 383 U.S. 745 (1966) (right to interstate travel); Stanley v. Georgia, 394 U.S. 557 (1969) and Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); and NAACP v. Alabama, 357 U.S. 449 (1958) (right of association).

[47] 100 S. Ct. at 2829. Chief Justice Burger did not explain in what way the right of free speech would be damaged, but it is likely that he was referring back to his argument that the right to discuss information was without value if there was no access to the information. *See id.* at 2827.

[48] *Id.* at 2829–30.

[49] *Id.* at 2830.

[50] Although Chief Justice Burger gave no examples as to what an overriding interest might be, a discussion about what may have been intended is found in the text accompanying notes 139–46 *infra*.

[51] 100 S. Ct. at 2830.

[52] Gannett Co. v. DePasquale, 443 U.S. at 406.

[53] *Id.* at 433. *See also* note 19 *supra* and accompanying text.

[54] 100 S. Ct. at 2831.

[55] *Id.* at 2828.

[56] *Id.*

[57] *Id.* at 2833.

[58] A discussion of whether two of the cases which Brennan relied upon support his argument that the first amendment has a structural role to play can be found in the text accompanying notes 130–33 *infra*.

[59] 100 S. Ct. at 2833.

[60] *Id.*

information must accordingly be assayed by considering the information sought and the opposing interests invaded."[61] Justice Brennan stated two principles to be used in applying his test. First, the case for access would be stronger if the particular proceeding or information for which access was sought had been open to the public historically.[62] Second, the access sought had to have specific value.[63]

In applying his test to the case before the Court, Justice Brennan found that criminal trials had been open to the public historically.[64] Moreover, he found that keeping trials open satisfied the appearance of justice, placed a check on the abuse of judicial power, and ensured accurate fact-finding.[65] Based on this balancing test, Brennan found that the scales were tipped in favor of keeping trials open.[66] He refused to consider what interest might be sufficiently compelling to reverse the presumption of openness because he found the Virginia statute unconstitutional on its face[67] because it allowed judges to close trials at their discretion without requiring them to consider the first amendment interest.[68]

While concurring in the judgment of the Court, Justice Stewart wrote a separate opinion in which he argued that the first amendment right to attend criminal trials was not absolute. Justice Stewart pointed out that a trial judge may impose reasonable limitations upon the openness of the courtroom.[69] As examples of such limitations, Justice Stewart suggested that a trial judge might be required to exclude people from the courtroom in order to preserve order, or because of a finite seating capacity.[70]

Justice Blackmun also concurred in the judgment of the Court but wrote a separate opinion. Justice Blackmun remained convinced, as he was in *Gannett*,[71] that the sixth amendment was the source of the public's right to attend a criminal trial.[72] While observing that the approach followed by the plurality was troublesome, he refused to state his reasons for believing why that was the case.[73] As an example of the difficulties that resulted from relying on sources other than the sixth amendment for the right of access, Justice Blackmun pointed to the uncertainty as to the standard of closure which the Court adopted.[74] While perferring his sixth amendment analysis articulated in *Gannett*, Justice Blackmun indicated that, as a secondary position, he accepted the argument that the first amendment provided the public with the right of access to criminal trials.[75]

The lone dissent in *Richmond Newspapers* was that of Justice Rehnquist. Relying on the reasons stated in his concurring opinion in *Gannett*,[76] he could find no right of access to criminal trials in the first amendment.[77] Justice Rehnquist argued that the Court was reserving to itself all ultimate decision-making power over how justice should be administered in the the states by an overly expansive reading of the fourteenth amendment, and warned that this trend was unhealthy.[78] Justice Rehnquist concluded that the issue in the case before the Court was not the existence of a right of access, but whether the Court could review a decision of the state's highest court regarding a matter within the sovereign power of the state.[79]

III

The Supreme Court's decision in *Richmond Newspapers* significantly extended first amendment doctrine by recognizing the existence of a first amendment right of access for the first time. While the Court has consistently recognized that the first amendment provided citizens with a right of expression[80] and a right to receive information,[81] it

[61] *Id.* at 2834.

[62] *Id.* Brennan argued historical practice should be given weight because the Constitution carries the gloss of history and because a tradition of accessibility suggested that experience showed that accessibility was beneficial. *Id.*

[63] *Id.* Justice Brennan argued that the crucial question was whether allowing access to a particular governmental process had specific value for that process. *Id.*

[64] *Id.* at 2834–36.

[65] *Id.* at 2837–38.

[66] *Id.* at 2839.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 2840.

[70] *Id.*

[71] Gannett Co. v. DePasquale, 443 U.S. at 433.

[72] 100 S. Ct. at 2824.

[73] *Id.*

[74] *Id.* The uncertainty arose, according to Justice Blackmun, because the plurality opinion required an "overriding interest" for closure while Justice Stewart allowed for "reasonable limitations" and Justice Brennan adopted an entirely separate framework. In addition, Blackmun noted that Justice Powell in *Gannett* had been critical of Justices who concluded that closure was authorized only when "strictly and inescapably necessary" by relying on the sixth amendment. *Id.* (quoting Gannett Co. v. DePasquale, 443 U.S. 339–40).

[75] 100 S. Ct. at 2842.

[76] Gannett Co. v. DePasquale, 443 U.S. at 403–08.

[77] 100 S. Ct. at 2843.

[78] *Id.*

[79] *Id.* at 2844.

[80] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (holding a judge's order prohibiting the

has never ruled in favor of a party asserting a right of access.[82] An examination of previous first amendment decisions demonstrates, however, that in denying the claims of parties asserting a right of access, the Court has never excluded the possibility that the right existed. Consequently, the *Richmond Newspapers* decision can be reconciled with prior case law.

In *Zemel v. Rusk*,[83] an individual challenged the Secretary of State's refusal to issue him a passport to Cuba on the grounds that the Secretary's action deprived him of his first amendment right of access to information about other countries.[84] In affirming the court of appeals decision in favor of the Secretary, the Court rejected the argument that a first amendment right was involved and held that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[85]

The Court in *Zemel* did not address the question of whether any right of access to information existed, but rather, limited the holding to a finding that there was no unrestrained right of access. This holding can be reconciled with the holding in *Richmond Newspapers*, since both Chief Justice Burger and Justice Brennan also found that the right of access was not unrestrained. Under Chief Justice Burger's analysis, the right did not exist unless it had been recognized historically,[86] whereas under Justice Brennan's analysis, the right did not exist unless the benefits of permitting access outweighed any countervailing interest.[87]

Justice Brennan distinguished *Zemel* as a case where the interests in security and confidentiality outweighed the interests in allowing access.[88] This distinction is appropriate since the Court in *Zemel* emphasized that the Secretary's action was justified by national security considerations.[89] Chief Justice Burger did not attempt to distinguish *Zemel*, yet his analysis indicates that a citizen did not traditionally have a right of access to a hostile country such as Cuba. This argument had support in the *Zemel* opinion, since the Court indicated in that case that it would give weight to the fact that the Department of State had traditionally viewed itself as having the authority to deny passports to certain hostile countries.[90] Under the analysis of either Chief Justice Burger or Justice Brennan, *Richmond Newspapers* can be reconciled with the *Zemel* decision.

Two related cases where the claims of parties to a right of access were denied are *Pell v. Procunier*[91] and *Saxbe v. Washington Post Co.*[92] In *Pell*, three journalists argued that a California prison regulation which prohibited face to face interviews of prisoners by members of the press violated their right of access to information guaranteed by the first and fourteenth amendments.[93] In *Saxbe*, the Washington Post Company challenged a similar regulation adopted by the Federal Bureau of Prisons. In denying both claims, the Court found

press from publishing accounts of an accused's confession was invalid because there was not a showing of need sufficient to overcome the presumption against prior restraints imposed by the first amendment guarantee of freedom of expression); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (recognizing that "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions" and holding that because of this freedom of expression an individual could not be held liable for damages in a libel action brought by a public official unless malicious intent was shown).

[81] *See, e.g.*, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976) (recognizing that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising," and holding that a state could not prohibit pharmacists from advertising the price of prescription drugs); Stanley v. Georgia, 394 U.S. at 568 (recognizing that "[i]t is now well established that the Constitution protects the right to receive information and ideas," and holding invalid a Georgia statute which made possession of obscene materials a crime because it violated this right); Lamont v. Postmaster General, 381 U.S. 301 (1965) (holding that a statute which required an individual to notify the post office if he desired to receive communist literature addressed to him violated the first amendment).

[82] 100 S. Ct. at 2830. Justice Stevens recognized this and, emphasizing the extension of first amendment doctrine, wrote, "Today, however, *for the first time*, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 2831 (emphasis added).

[83] 381 U.S. 1 (1965).

[84] *Id.* at 16. The appellant also challenged the action on the grounds that it exceeded the scope of authority granted by the Passport Act of 1962, that it violated his right to liberty under the due process clause, and on the grounds that the Passport Act contained indefinite standards for travel controls. The Court rejected all of these claims. *Id.* at 7–18.

[85] *Id.* at 17.

[86] 100 S. Ct. at 2828.

[87] *Id.* at 2834 (Brennan, J., concurring).

[88] *Id.* at 2833.

[89] 381 U.S. at 14–15.

[90] *Id.* at 8–11.

[91] 417 U.S. 817 (1974).

[92] 417 U.S. 843 (1974).

[93] In *Pell*, several inmates also challenged the regulation, arguing that it violated their first amendment right of expression. The Court rejected their claim because it found that prisoners only maintained those first amendment rights which were not inconsistent with the prisoners' status and the regulation's restriction on those rights was justified by the state's interest in maintaining order in the prison. 417 U.S. at 822–24.

that members of the press had no right of access to information beyond that which was granted to members of the public generally.[94] Because the members of the public were afforded a right of access to the prison for tours and visits with relatives,[95] the Court did not address the question of whether the members of the public had a right of access.

Because the Court did not address the question of whether a right of access existed in *Pell* and *Saxbe*, those cases are of questionable relevance to the *Richmond Newspapers* decision. Yet, in denying the members of the press a right of access to the prisoners for interviews, the Court may have been denying that right to members of the public generally. To the extent the cases can be read in that way, they can be distinguished from the *Richmond Newspapers* decision. In his opinion, Chief Justice Burger distinguished *Pell* and *Saxbe* on the grounds that they involved questions of access to penal institutions which were not places traditionally open to public access.[96] Nothing in the *Pell* and *Saxbe* opinions, however, indicates that those decisions turned on the fact that penal institutions were traditionally closed. Justice Brennan distinguished *Pell* and *Saxbe* on the grounds that the governmental interests in security at the prision outweighed the reasons for allowing access.[97] This distinction is supported since the Court in *Pell* stressed the fact that the regulation limiting interviews was necessary to preserve prison security.[98] Under either analysis, however, the *Richmond Newspapers* decision can be reconciled with the decisions in *Pell* and *Saxbe*.

In a case factually similar to *Pell* and *Saxbe*, *Houchins v. KQED*,[99] the Court faced a radio and television broadcasting company's claim that it had been denied its first amendment right of access by a sheriff who refused to allow reporters to inspect the local jail except on regularly scheduled tours which provided little access to the prisoners. In denying the broadcasting company's claim, the Court followed *Pell* and *Saxbe* and held that the press had no right to any more access than was granted to members of the public generally.[100] *Richmond Newspapers* can be reconciled with this holding using the same analysis which was used for reconciling *Pell* and *Saxbe*, since the holdings are the same.[101]

As the preceding discussion demonstrates, previous first amendment cases where a right of access was claimed did not deny the existence of the right. The Court simply denied the claims raised on other grounds without ever addressing the issue. However, in *Richmond Newspapers*, the Court extended first amendment doctrine by addressing the issue for the first time and finding that the right of access did exist. In arriving at this result, however, Chief Justice Burger and Justice Brennan qualified the right in such a way that the decision can be reconciled with previous cases.

IV

Because the decision in *Richmond Newspapers* was the first instance in which the Court recognized a first amendment right of access, the source of this right and support for it in the Court's previous decisions must be analyzed. This examination must consider both Chief Justice Burger's approach and Justice Brennan's approach, however, since neither commanded a majority of the Court. Justice Brennan's approach withstands academic scrutiny, whereas the Chief Justice's opinion has some noteworthy technical flaws.

Chief Justice Burger relied on three different sources for the right of public access in his plurality opinion.[102] He argued that the right could be implied from the freedom of speech and press clause, the right of assembly clause, and the ninth amendment.[103] Unfortunately, an examination of his

[94] *See* Pell v. Procunier, 417 U.S. at 834; Saxbe v. Washington Post Co., 417 U.S. at 850.

[95] Pell v. Procunier, 417 U.S. at 822–24; Saxbe v. Washington Post Co., 417 U.S. at 849.

[96] 100 S. Ct. at 2827 n.11.

[97] *Id.* at 2833 (Brennan, J., concurring).

[98] 417 U.S. 822–24.

[99] 438 U.S. 1 (1978).

[100] *Id.* at 16.

[101] *See* text accompanying notes 96–98 *supra*. It should be noted that while the holding in *Houchins* can be reconciled with *Richmond Newspapers*, the dicta in the case cannot be reconciled. In his plurality opinion in *Houchins*, Chief Justice Burger stated that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." 438 U.S. at 15. He was joined in that plurality opinion by Justices White and Rehnquist. Since both Chief Justice Burger and Justice White recognized a first amendment right of access in *Richmond Newspapers*, 100 S. Ct. 2829–30, they clearly shifted their positions.

Justice Stewart also shifted his position. In his opinion concurring in the judgment in *Houchins*, he stated that "[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government . . . ." 438 U.S. at 16. However, in his opinion concurring in the judgment in *Richmond Newspapers*, he agreed that the first and fourteenth amendments gave the public a right of access to criminal trials. 100 S. Ct. at 2840.

[102] *See* text accompanying notes 39–46 *supra*.

[103] 100 S. Ct. at 2826–29.

analysis of the three sources reveals that he relied on cases which do not support his conclusions, assumed conclusions in making his arguments, and failed to satisfactorily develop his analysis.

The principal difficulty with Chief Justice Burger's analysis of the freedom of speech and press clause is that the cases he relied on do not support his position. He quoted *First National Bank of Boston v. Bellotti*[104] for the proposition that government could not limit the stock of information available to the public,[105] and cited *Kleindienst v. Mandel*[106] for the proposition that there was a first amendment right to receive information.[107] He based his conclusion that the first amendment freedoms of speech and press granted a right of access to places that had traditionally been open to the public upon these two propositions.[108] Neither case which he cited in building his argument, however, suggested such a far reaching conclusion.

In *Bellotti*, the Court struck down a Massachusetts statute which prohibited certain business corporations from spending money to publicize their views in order to influence voters on election issues.[109] The Court invalidated the statute because it abridged the corporations' freedom of expression, *not* because it abridged the public's right of access to information.[110] Although there was a public right of access to information,[111] that right had always been limited to information transmitted by a willing source.[112] That the public has a right to information from an unwilling source certainly does not follow automatically from the Court's suggestion that the public has a right of access to information from a source that is willing to exercise its right of expression. Since Chief Justice Burger failed to provide any explanation or support for this significant logical leap, his reliance on *Bellotti* makes his argument less than convincing.

Kleindienst v. Mandel provides no more support for Chief Justice Burger's argument than *Bellotti* does. In *Mandel*, several professors argued that they had a first amendment right of access to information from a Marxist journalist, which right was being denied by the Attorney General's refusal to grant the journalist a visa to enter the United States.[113] In upholding the Attorney General's action, the Court found that while there was a first amendment right to receive information,[114] this right did not outweigh the justification for exclusion of aliens because the power to exclude aliens was inherent in the sovereignty of the government.[115] Thus, in *Mandel* the Court refused to grant a right of access to information even though it recognized a right to receive information. Yet Chief Justice Burger relied on the decision to argue that there was a right of access to a criminal trial which flowed from the right to receive information. Since he made no attempt to distinguish *Mandel*, or explain why the right of access flowed from the right to receive information in *Richmond Newspapers*, his conclusion that the freedoms of speech and press granted a right to attend criminal trials is unsupported.

Chief Justice Burger's argument that the right of access to criminal trials is related to the first amendment right of assembly is also questionable. Burger stated that the trial courtroom was a public place like a street or sidewalk, therefore people had a right to assemble there.[116] But in making that statement Chief Justice Burger assumed his conclusion. A person's right to assemble in a public place is necessarily predicated on the assumption that a place is public in that any person has a right to be present there. The issue in *Richmond Newspapers* was whether the trial courtroom was a place where the public had a right to be present. Only by assuming that a courtroom was a public place was Burger able to argue that people had a right to assemble there.

Moreover, the issue in the right to assembly cases was different from the issue in *Richmond Newspapers*. For example, in *Hague v. C.I.O.*,[117] cited by the Chief Justice as recognizing a right of assembly, the issue was whether ordinances which prohibited the distribution of printed literature and meeting in a public place without a permit violated the Constitution. In other words, the issue in *Hague* was *not* whether people had a right to be present in the park, but rather what restrictions could be placed on their activities once they were present there.[118] Consequently, the holding in *Hague* was

[104] 435 U.S. 765 (1978).
[105] 100 S. Ct. at 2827.
[106] 408 U.S. 753 (1972).
[107] 100 S. Ct. at 2827.
[108] *Id.*
[109] 408 U.S. at 795.
[110] *Id.* at 776.
[111] *Id.* at 783.
[112] *See* Note, *The Right To Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 (1978).
[113] 408 U.S. at 762.
[114] *Id.*
[115] *Id.* at 765.
[116] 100 S. Ct. at 2828.
[117] 307 U.S. 496 (1939).
[118] *Id.* at 512.

that the first amendment right of assembly clause guaranteed people a right to hold meetings and discuss public questions in public places.[119] The Chief Justice cannot rely on a holding protecting certain activities in public places to determine whether a place is public. Since the issue in *Richmond Newspapers* was whether the trial courtroom was a place where the public had a right to be present, the right of assembly cases are irrelevant.

Chief Justice Burger's analysis of the ninth amendment, despite its validity, is insufficiently developed. As Burger pointed out, the Court has acknowledged that "certain unarticulated rights are implicit in enumerated guarantees."[120] An example is *Griswold v. Connecticut*,[121] where the Court found a right to privacy in the penumbras of several constitutional guarantees. In his plurality opinion in *Griswold*, Justice Douglas reviewed the cases where peripheral rights had been held to be within specific guarantees, and observed that, "[w]ithout those peripheral rights the specific rights would be less secure."[122] While Chief Justice Burger continually asserted that the freedoms of speech and press would be less secure without the right to attend criminal trials,[123] he never explained why a transcript of a proceeding would be insufficient to protect those rights, even though he acknowledged that people seldom attended trials anymore and that they merely read accounts of the trials in the newspaper.[124] Since he failed to adequately explain why access to trials was necessary to protect specific first amendment rights, his ninth amendment analysis suffers from a gap in its logic.

As the preceding discussion demonstrates, Chief Justice Burger was unable to support his reliance on the first, ninth, and fourteenth amendments as the source of the right of access to public places. In addition to the difficulties with his analysis of the source of the right, however, the test which Burger suggested for recognizing the right is deficient because it fails to give sufficient weight to the values served by allowing public access to information. Burger indicated that he would limit the right of access "to places traditionally open to the public, as criminal trials long have been."[125] The only issue that Burger would consider in deciding whether to grant the public access to a proceeding would be the issue of whether the proceeding had been open historically. This approach is inconsistent with Burger's analysis of the source of the right in *Richmond Newspapers*, for he was careful to point out that allowing public access to criminal trials was advantageous because "it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."[126] Ironically, Burger suggested a test for recognition of the right of access which fails to consider the values served by allowing access, while a significant part of his development of the right dealt with the values served by allowing access to criminal trials.

Thus the substantial analytical difficulties of Chief Justice Burger's opinion are attributable to failure to provide convincing support for his analysis of the source of the first amendment right of access, and the failure of the test he suggested to consider the values afforded by allowing access. A better approach to the origin of the right of access and toward establishing a test for its recognition is developed in Justice Brennan's concurring opinion.

Justice Brennan found that the right of access was implicit in the first amendment. He explained that meaningful, informed discussion was necessary in order for a republican form of government to survive.[127] The first amendment has a structural role to play in ensuring the existence of conditions necessary for that discussion.[128] One of the conditions necessary for informed discussion to take place is access to information. Consequently, under Brennan's analysis, a right of access to information is guaranteed by the first amendent.[129]

Justice Brennan's view of the importance of free discussion to a republican form of government has been recognized by the Court in prior opinions. In *Stromberg v. California*,[130] striking down a California statute which prohibited the display of a red flag in a public place as a sign of opposition to organized government, the Court observed that:

[119] *Id.* at 515–16.

[120] 100 S. Ct. at 2829. As examples of cases where such rights have been recognized, see Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); NAACP v. Alabama, 357 U.S. 449 (1958) (right of association).

[121] 381 U.S. 479 (1965).

[122] *Id.* at 482–83.

[123] *See* 100 S. Ct. at 2827–29.

[124] *Id.* at 2825.

[125] *Id.* at 2828. This approach was suggested by at least one commentator as a way to limit the scope of the right of access. Note, *supra* note 9, at 69.

[126] 100 S. Ct. at 2823.

[127] *Id.* at 2833 (Brennan, J., concurring).

[128] *Id.*

[129] *Id.*

[130] 283 U.S. 359 (1931).

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principal of our Constitutional systems.[131]

Similarly, in *Grosjean v. American Press Co.*,[132] striking down a tax imposed on those in the business of selling advertisements in newspapers and magazines, the Court stated:

> The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation then any other instrument of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by the free press cannot be regarded otherwise than with grave concern.[133]

As *Stromberg* and *Grosjean* demonstrate, the Court has recognized the importance of meaningful discussion to a republican form of government. Consequently, Justice Brennan's argument that the first amendment has a structural role to play in constitutional government is well supported.

Furthermore, in previous decisions the Court has derived a specific right from the structure of government as Justice Brennan pointed out.[134] For example, in *Reynolds v. Sims*[135] the Court inferred a fundamental right to vote from the nature of a "free and democratic society" and the vote's importance as a "preservative of all other rights." In *Griswold v. Connecticut*,[136] the Court inferred a right of privacy from several constitutional guarantees. Deriving a right of access to information from the role of the first amendment in assuring informed communication is an analogous approach which is supported by *Griswold* and *Sims*.

[131] *Id.* at 369.
[132] 297 U.S. 233 (1936).
[133] *Id.* at 250.
[134] 100 S. Ct. at 2833 n.4.
[135] 377 U.S. 533 (1964). In *Reynolds*, the Court upheld a district court order of temporary reapportionment which would be in effect until the legislature drew up its own plan. The grounds for the order of reapportionment was a finding that the proposed reapportionment scheme of the legislature violated the equal protection clause of the fourteenth amendment because the number of citizens in the districts varied, causing some citizens to have greater representation than others in the legislature.
[136] 381 U.S. 479, 485 (1965). In *Griswold*, the Court struck down a Connecticut statute which prohibited the use of contraceptives because it was found to violate the right to privacy. *Id.*

As the preceeding analysis demonstrates, Justice Brennan's development of the source of the right of access was more convincing and better supported than Chief Justice Burger's rationale. The balancing test which Justice Brennan employed in defining the scope of the right of public access weighs the values protected by the right, whereas Burger's test fails to do so. Justice Brennan recognized that his definition of a right of access was theoretically unlimited in its scope.[137] His balancing test addressed that difficulty while remaining sensitive to the values which the first amendment was designed to protect in its structural role. Justice Brennan recognized the importance of considering whether the information or proceedings had been traditionally open to the public, yet unlike the Chief Justice, he also required consideration of the values which would be furthered by allowing access.[138] Informed discussion is necessary for a democracy to survive, hence an inquiry into the extent to which denying access will hinder important informed discussion is necessary. Limiting this inquiry to the question whether access had been permitted historically is inadequate to ensure that the values of informed discussion will be protected because it fails to consider those values.

V

Substantial differences exist between the approach taken by Chief Justice Burger and that taken by Justice Brennan in analyzing the right of access issue. Since neither commanded a majority, the Court must still decide which approach to adopt. In addition, the Court must determine the standard to use in deciding when a right of access can be infringed once the right is recognized. On this latter question, however, the approaches of Chief Justice Burger and Justice Brennan are much the same.

In his plurality opinion, Chief Justice Burger held that a criminal trial must be open to the public "[a]bsent an overriding interest articulated in the findings."[139] Justice Brennan refused to consider what interests might be sufficiently compelling to reverse the presumption of openness because he found the Virginia statute unconstitutional on its face.[140] Brennan's compelling interest test appears similar to Burger's overriding interest test, but the standards are difficult to compare because neither gave an example of what a compelling or overriding interest might be.

[137] 100 S. Ct. at 2834.
[138] *Id.*
[139] *Id.* at 2830.
[140] *Id.* at 2839.

Some guidance as to what Chief Justice Burger and Justice Brennan intended by their tests can be found in *Nebraska Press Association v. Stuart.*[141] In *Nebraska Press Association*, the Court faced a challenge to a district court judge's restraining order which prohibited the broadcast of confessions of an accused in a murder case until after the jury was impaneled.[142] In striking down the order, the Court held that it failed to meet the heavy burden that must be met to justify prior restraint on freedom of expression.[143] In order to overcome that burden, the trial judge would have to demonstrate that, because of its nature and extent, pretrial publicity was likely to prevent the defendant's opportunity for a fair trial, that other measures short of a restraining order would be unlikely to mitigate the effects of unrestrained publicity, and that a restraining order would be an effective mechanism to prevent the harm caused by the publicity.[144]

The test adopted in *Nebraska Press Association* to deal with prior restraints is also applicable to denials of access to information because both actions infringe the freedom of expression. The newsman who wishes to publish information about a trial is deprived of his right of expression as much by being denied his right of access to the information he wishes to disseminate as he is by a court order prohibiting him from publishing the information he already has in his possession.[145] Consequently, the compelling or overriding interest that Justice Brennan and Chief Justice Burger require should be equivalent to the interest that must be shown in order to justify prior restraints on the freedom of the press. Therefore, denials of access to information or proceedings to which a person has a right of access should be permissible only upon a showing that the nature and extent of publicity cause a substantial danger of preventing a fair trial which effect is unlikely to be mitigated by any measures short of denial of access to the information sought, and that denial of access to the information is likely to prevent the danger.[146]

Conclusion

The Supreme Court's decision in *Richmond Newspapers* established that the public does have a constitutional right of access to criminal trials, settling the confusion which resulted from *Gannett v. DePasquale.* The question which remains, however, is how far beyond the courtroom this right of access will extend. The significance of the *Richmond Newspapers* decision remains uncertain, therefore, pending the majority's adoption of the approach of either Chief Justice Burger or Justice Brennan. Analytically sound, Justice Brennan's approach offers the Court the opportunity to extend the right of access to many other arguably public places, in contrast to the Chief Justice's rigid historical approach which narrows the holding.

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[141] 427 U.S. 539 (1976).

[142] *Id.* at 541.

[143] *Id.* at 570.

[144] *Id.* at 562.

[145] The argument that denial of access to information was the equivalent of a prior restraint was made prior to the decision in *Richmond Newspapers*, but it was criticized by at least one commentator because it assumed that the person seeking access to the information had a right to it. Since the right of access had not yet been recognized, the commentator found the argument of questionable merit. *See* Note, *supra* note 112, at 1317–18. Since the Court recognized this right of access to information in *Richmond Newspapers*, the argument has new validity.

[146] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. at 562.