IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., et al., *Appellants,*

v.

COMMONWEALTH OF VIRGINIA, *Appellee.*

(And Two Companion Cases)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF OF APPELLANTS

DAVID ROSENBERG
Langdell Hall 264
Cambridge, Mass. 02138
Of Counsel

LAURENCE H. TRIBE
Griswold Hall 307
Cambridge, Mass. 02138

ANDREW J. BRENT
ALEXANDER WELLFORD
LESLIE W. MULLINS
CHRISTIAN, BARTON,
EPPS, BRENT & CHAPPELL
1200 Mutual Building
Richmond, Va. 23219
Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: PAGE

PAGE

PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., et al.,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

(And Two Companion Cases)

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

BRIEF OF APPELLANTS

Opinions Below

The judgments of the Virginia Supreme Court refusing appellants' petition for appeal (A. 24a) and dismissing appellants' petitions for writs of mandamus (A. 25a) and prohibition (A. 27a), are unreported.

Jurisdiction

This is a consolidated appeal from three final judgments of the Virginia Supreme Court denying appellants, Richmond Newspapers, Inc., and two of its reporters, Timothy

B. Wheeler and Kevin McCarthy, relief from an order of the Hanover County Circuit Court, the Hon. Richard H.C. Taylor, Circuit Judge, presiding, barring the public and press from the two-day murder trial of John Paul Stevenson, held on September 11 and 12, 1978. The Circuit Court entered its closure order on the morning of September 11, 1978, at defense counsel's request, unopposed by the Commonwealth's Attorney (A. 4a), on the authority of Va. Code § 19.2-266. *See* Part I-A *infra*.

Later that day, having permitted them to intervene in the case to challenge its closure order, the Circuit Court rejected all of appellants' constitutional objections and refused to reopen the trial (A. 7a, 21a). Under the Circuit Court's closure order, the second and final day of the murder trial proceeded in secrecy to its conclusion.

On September 27, 1978, appellants filed a notice of appeal to the Virginia Supreme Court, their motion to intervene *nunc pro tunc* in the murder trial having been granted that day by the Circuit Court. On November 8, 1978, appellants filed in the Virginia Supreme Court petitions for appeal from the Circuit Court's closure order and for writs of mandamus and prohibition ensuring access to the murder trial and to future criminal trials. On July 9, 1979, citing only this Court's week-old decision in *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979), the Virginia Supreme Court refused the petition for appeal, and dismissed the petitions for writs of mandamus and prohibition.

A notice of appeal to this Court from each of those judgments was timely filed with the Clerks of the Virginia Supreme Court and the Hanover County Circuit Court (J.S. 31a-43a), on August 13, 1979, and appellants filed

their Jurisdictional Statement in this Court on August 14, 1979. On October 9, 1979, this Court postponed consideration of jurisdiction to the hearing on the merits. The jurisdiction of this Court rests both on 28 U.S.C. § 1257(2), *see* Part I-A *infra,* and on 28 U.S.C. § 1257(3). *See* Part I-B *infra.*

Questions Presented

1. Was the constitutional validity of the Virginia Closure Statute, Va. Code §19.2-266, sufficiently drawn in question to support this Court's exercise of appellate jurisdiction under 28 U.S.C. §1257(2)?

2. Do the First, Sixth, and Fourteenth Amendments to the Constitution of the United States, singly or in combination, give members of the public a judicially enforceable right of access to criminal trials that can be asserted independently of the participants in the litigation?

3. Does the Virginia Closure Statute, Va. Code §19.2-266, as construed and applied by the court below to authorize the total exclusion of the press and the public from an entire criminal trial, violate the separate and combined constitutional guarantees that criminal trials will be held in open court, accessible to the public?

4. Have the Constitution's guarantees that criminal trials will be open to the public been violated where, as in this case, all members of the press and the public were summarily expelled for the duration of a criminal trial without any factual showing or judicial finding that orderly public observation would endanger the fair trial of the

accused or any similarly transcendent concern, that conducting the trial in secret would effectively meet the concerns that led to closure, or that available procedures less drastic than secret trial—such as sequestering the jury—would not have sufficed?

Statute Involved

The text of Va. Code § 19.2-266, in pertinent part, is as follows:

> "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."

Statement of the Case

When on September 11, 1978, as the murder trial of John Paul Stevenson began, the Hanover County Circuit Court granted defense counsel's request for an order clearing the courtroom of all members of the public and press, and directing that the entire trial be conducted in secret, centuries of faithful adherence under Anglo-American law to the principle of open criminal trials came to an abrupt end.

Nothing in the case portended this breathtaking result. This was not the trial of an individual marked either by great fame or by extraordinary infamy. Nor was it in any other way distinguishable from the uncounted thousands of cases previously tried in open English and American

courts. The place of trial itself was not peculiar; indeed, the courtroom of the Hanover County Circuit Court, in which Stevenson's trial was conducted, is a prototype of the American trial forum.* That the trial of an ordinary case was so casually sacrificed to secrecy dramatically underscores the truth that secret trials are a virulent "menace to liberty." *In re Oliver,* 333 U.S. 257, 269 (1948).

The facts in this case sharply contradict a basic assumption expressed by this Court in *Gannett Co., Inc.* v. *DePasquale,* 99 S.Ct. 2898 (1979): that the right of public access to criminal trials will be steadfastly championed by the prosecutor and trial judge if not by the accused himself. Defense counsel waived Stevenson's right to a public trial not to prevent some unusual and otherwise unavoidable form of prejudice, but merely "because I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what" (A. 5a). Defense counsel's closure motion drew no objection from the Commonwealth's Attorney, who was content to "leave it to the discretion of the Court" (A. 6a), in response to which the trial court agreed that "the [closure] statute gives me that power specifically" (*Id.*). Then, without further consideration of the issues, without any factual inquiry whatever, and without any finding of necessity, efficacy, or lack of alternatives, the trial court summarily ordered that, since "the defendant has made the motion," "I'll rule that the Courtroom be kept clear of all parties except the wit-

* A diagram and a photograph of the courtroom involved in this case appear in this brief as Exhibits A and B, respectively. That these exhibits, which were not before the court below, accurately portray the trial courtroom has been stipulated by the parties. A copy of that stipulation has been filed with this Court.

nesses when they testify" (*Id.*). The murder trial then proceeded in secrecy to its amazing conclusion.

Among those immediately ousted from the courtroom when the closure motion was granted were appellants Wheeler and McCarthy, reporters for appellant Richmond Newspapers, Inc., parent of two local newspapers. As soon as counsel could be consulted, appellants sought a hearing on a motion to vacate the trial court's order and to reopen the trial. The trial court scheduled a hearing on the motion to follow the close of the day's proceedings—even though the trial, scheduled months earlier to last just two days (A. 36a), would by then be half over.

When the reporters appeared for the afternoon hearing with counsel, the trial court ordered them to leave the courtroom—even though theirs were the rights at issue in the hearing—stating that "we have to treat this . . . as a part of the original trial that we're in" (A. 8a). The trial court acknowledged to appellants' counsel that excluding the reporters "is going to . . . increase your position in your motion, but I . . . ruled that the Courtroom had to be cleared and I'm going to have to ask the reporters to leave at this time, too" (*Id.*). No justification for their exclusion from the hearing was offered, and none suggests itself—other than the trial court's arbitrary determination to conduct every aspect of the trial outside the public's view.

Counsel for appellants immediately challenged the constitutionality of the court's asserted power to issue the closure order. Characterizing that order as a "novel form of censorship" that violated the First, Sixth and Fourteenth Amendments to the Constitution, counsel vigorously and unambiguously objected to the trial court's failure to make any "evidential finding" that a fair trial would be

jeopardized by the presence of orderly members of the public (A. 10a, 12a). Counsel further argued that, even if such jeopardy might be shown, the trial could would be constitutionally required to conclude, before ordering closure, that "sequestration of the jury or changes of venue" (*id.*), or other "alternatives which might protect the defendant's rights" (A. 13a), were unavailable or could not safeguard the rights of the accused. Contrasting the New York Court of Appeals' decision in *Gannett Co., Inc.* v. *DePasquale*, 43 N.Y.2d 370, 372 N.E.2d 544 (1977), counsel for appellants also emphasized that the exclusion of the press from a *pre*trial hearing was not at issue (A. 9a, 11a).

Counsel for defendant responded by alluding cryptically to "difficulty . . . with information . . . between the jurors" (A. 14a), and letting "information . . . leak out" through the press back to the jury in this "small community" (A. 15a). Counsel indicated that a different rule might apply "in a big city where you've got three hundred thousand people" (*Id.*). Defendant's counsel asserted that "[t]here's no way" a court can shield jurors from news about a trial (*id.*), and insisted that the accused's right to a fair and impartial trial "supersedes all other rights" (*Id.*).

Having heard these arguments, the trial court offered its own impression that, given the court's "layout," "having people in the Courtroom is distracting to the jury" (A. 16a). The court added that "maybe that's not a very good reason" to close a trial (*Id.*). The court also noted that three previous attempts to try the defendant had failed (*id.*),[1] and expressed the view that, this time, every

[1] In July 1976, defendant John Paul Stevenson was convicted in the Hanover County Circuit Court of the second-degree murder of a local hotel manager. In October 1977, the Virginia Supreme Court reversed his conviction and remanded the case for a new trial, holding that certain evidence introduced against him at trial was inadmissible. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237

step should be taken to assure that "the . . . rights of the defendant are [not] infringed in any way . . ." (A. 17a). The court then stated that it was "inclined to go along with the defendant's motion" (*Id.*).

The trial continued in secret the next day. What transpired may only be inferred from a one-page order signed by the trial judge on September 12, 1978 (A. 22a). That order indicates that the defendant moved unsuccessfully for a mistrial—although there is no hint of the grounds for the motion, and no clue as to why the court neither granted nor otherwise disposed of it.[2] The order also states that, at the close of the Commonwealth's case, defense counsel moved to strike the Commonwealth's evidence "on grounds stated to the record" (*Id.*). Again, the substance of these grounds remains secret. The order does report that the motion was sustained—but the reason, once again, is not supplied. Thus, in the midst of the defendant's fourth trial, in 1978, for a murder allegedly committed in 1976, the trial court, having stricken the case against him, declared the accused "not guilty of murder, as charged in the indictment, and he was allowed to

---

S.E. 2d 779 (1977). In May 1978, Stevenson's retrial before appellee Taylor ended in a mistrial when a juror asked to be excused after the trial had begun and no alternate juror was available. *Richmond News Leader*, May 31, 1978, at 59, col. 1 (A. 34a). In June 1978, Stevenson's second retrial, again before appellee Taylor, also ended in mistrial. *Richmond News Leader*, June 7, 1978, at B-6, col. 1 (A. 35a). Neither appellee Taylor, nor defense counsel, nor the prosecution would say why the mistrial had been declared *(Id.)*. According to one account, "the mistrial declaration involved a prospective juror who had read about Stevenson's trial in a newspaper and had proceeded to tell other prospective jurors about the case before the trial began yesterday" *(Id.)*.

[2] It is clear that much may sometimes turn, for purposes of double jeopardy, on why a mistrial is declared or denied. *See, e.g., Arizona* v. *Washington*, 434 U.S. 497 (1978); *Illinois* v. *Somerville*, 410 U.S. 458 (1973); *United States* v. *Jorn*, 400 U.S. 470 (1971).

depart" (*Id.*). The next morning's newspapers could report only that the defendant had been set free.[3]

Summary of Argument

I.

For centuries, it has been an axiom of every just society that the people may enter freely into its halls of justice. The right to attend and observe criminal trials was taken for granted by our Constitution's Framers as well. No single provision of the Constitution expressly and unambiguously confers that right, but each of several provisions plainly implies it, and its existence is demonstrably entailed by those provisions' interrelated meaning and structure.

A guarantee that criminal trials will be open to orderly public attendance and observation is, first of all, implicit in the First Amendment. That the freedoms of speech and press include the freedom to observe and learn, and not only the freedom to talk and publish, is beyond doubt. Self-government presupposes knowledge; and knowledge of the administration of justice lies at the core of any society dedicated to the rule of law.

Although the First Amendment does not unseal government records or unlock private files, its central meaning requires that people remain free to seek understanding and information in those forums that have traditionally been open *to* the public, at least when their function depends vitally upon access *by* the public. This nation's

[3] To say much more in such circumstances, on the basis of interviews with jurors, witnesses, or the parties, could well expose the press to crippling liability. *See Wolston* v. *Reader's Digest Ass'n, Inc.*, 99 S. Ct. 2701, 2707-08 (1979) (one does not become a public figure, for purposes of comment regarding a jury verdict, by becoming involved in a criminal trial).

courthouses are the clearest illustration: open from the beginning, and unable, if sealed from view, to fulfill their mission of displaying as well as doing justice.

The case for a First Amendment right of access to *criminal* trials is uniquely strong, for such trials are public by constitutional command. Even if the Sixth Amendment were thought to confer only on the accused the right to demand a public trial, the very fact that the accused has that right automatically removes criminal trials from the realm of proceedings the state is free unilaterally to treat as wholly internal and confidential, and from the realm of places that the state is empowered unilaterally to cordon off. In this special context, it matters not that the freedoms of speech and press are being invoked against the wishes of the trial's participants: since it is settled that the accused has no right to demand a secret trial, government's action making it secret is simply a form of censorship.

Entirely apart from the First Amendment, the Sixth confers standing on members of the public to invoke the public trial guarantee. No one doubts that the constitutional norm of open trials does more than protect defendants from oppression. It also protects the public from prosecutorial and judicial malfeasance and ineptitude. Because the public's interest in enforcing the Sixth Amendment's public trial clause is independent of, and often conflicts with, the perceived self-interest of the participants in a trial, vindicating that public interest requires recognizing standing for members of the public who have been denied access. Doing so not only serves the purposes of the Sixth Amendment; it also fully meets this Court's constitutional and prudential tests for determining who may assert a claim under the Constitution.

Nor is the norm of open trials one that could better be vindicated politically than judicially. Like the right to vote or the right to speak, the right to watch silently the operation of our courts must be held securely beyond the reach of pluralist interest-group compromise.

Although dicta in the majority opinion in *Gannett* point in a different direction, nothing this Court has ever held—not even in *Gannett*—either requires or implies that the public trial clause is unavailable to persons ejected from a criminal trial at the behest of its participants. *Gannett*, as the majority noted and the Chief Justice stressed, involved only *pre*trial suppression hearings. To find no public right of access to such proceedings under the Sixth Amendment says nothing about access to trials as such, since both in history and in purpose suppression hearings and criminal trials are poles apart. The aim of the first is to keep *inadmissible* information *from* the jury; of the second, to present *admissible* information *to* the jury—and to the community that the jury represents. It is only in the context of the pretrial suppression hearing that openness and fairness are in tension. At trial, where a battery of devices may be deployed to keep any improper evidence from the jury, the two norms converge—even though the personal interests of the accused, the accuser, or the judge may at times be advanced by concealment.

Thus the Sixth Amendment, like the First, guarantees that criminal trials will be open to public attendance and observation. But even if the inference from these two texts seemed problematic, a judicially enforceable norm of open trials would follow from the role such trials play in the Anglo-American regime of ordered liberty and in our Nation's history and traditions. Like the right to vote, which the Constitution does not expressly mention, the

right to attend criminal trials is fundamental because it preserves all other rights. And, like the right to demand proof of guilt beyond reasonable doubt, the right to observe criminal trials is constitutionally protected because it is indispensable to public confidence in the legal system. Plainly, the time-honored right to observe criminal prosecutions in progress was among the rights "retained by the people" when the Constitution was adopted.

II.

Given its indispensable role in preserving an open society, the right to attend criminal trials can be limited only to the degree that it unavoidably clashes with some equally transcendent value. Since the tension between the constitutional norms of open and fair trials ceases the moment a trial begins, closing a criminal trial to the public can almost never be justified. To accommodate the extraordinary case in which some justification may exist, without inviting a plethora of mistaken or ill-motivated closures, it is crucial to adopt a set of stringent procedural and substantive safeguards—a set of safeguards that would contrast starkly with Virginia's Closure Statute, which delegates to trial courts practically unbridled authority summarily to expel all observers from an entire criminal trial on the indefensible premise that the very presence of observers may stand in the way of fairness.

Having been construed to permit secret trials even when secrecy is not demonstrably required to avoid unfair prosecution or any other grave evil—even when less drastic alternatives could do as well, and even when the efficacy of secrecy itself is dubious—the Virginia statute that was invoked to expel appellants from the trial of John Paul Stevenson is plainly unconstitutional.

III.

Independent of the statute's constitutional infirmities, it is clear that appellants' expulsion from the Stevenson trial was both procedurally and substantively incompatible with the First, Sixth, and Fourteenth Amendments. No adversary hearing on closure was held until the secret trial was half over, and nothing disclosed at that hearing could remotely have justified closing the entire trial. Even if taken seriously, defense counsel's vague worries about such risks as that of jurors reading newspapers overnight could at most have justified sequestration. But when counsel for appellants suggested that option, the parties to the trial simply changed the subject. Ultimately, the only reason the trial court gave for banishing all observers for the duration of the proceedings was that the public's presence might distract the jury—an astonishing rationale strikingly incompatible with the centuries-old norm of public trials, and with an unbroken tradition of open trials in this very courthouse since its construction in 1735.

That so unexceptional a case as John Paul Stevenson's could have provided the occasion for so extraordinary and so blatantly unconstitutional an exercise of censorial power illustrates the enormous danger of closure authority and demonstrates the necessity for erecting a barrier of safeguards so sturdy that litigants seeking to close an entire criminal trial will never surmount it without irresistible justification. Our very survival as an open society requires no less.[4]

---

[4] Appellants seek review on appeal, 28 U.S.C. § 1257(2), because the closure order entered below represented not a lawless aberration but a quite literal application of Va. Code § 19.2-266, which invites the state's trial courts, "in [their] discretion, [to] exclude from . . . trial" any and all observers, however orderly, on the theory that their "presence would impair the conduct of a fair trial." The trial court based its closure order exclusively on that

I.

This Case Is Properly Before This Court Both on Appeal and on Certiorari.

A. This Case Is Properly Before This Court on Appeal.

The state would have this Court, on jurisdictional grounds, avoid reaching the merits of this appeal. The state contends that appellants did not explicitly enough voice their constitutional objections to Va. Code § 19.2-266, both on its face and as applied, to afford the Virginia Supreme Court "an opportunity" to construe the statute "in a way that saves [its] constitutionality," Motion to Dismiss ("Motion") at 7, and thus that appellants may not ask this Court to review the judgments below under 28 U.S.C. § 1257(2). The state's contention is without merit.[5]

---

statute, and the state relied solely on the statute to convince the Virginia Supreme Court to show that the order was authorized by state law. Inasmuch as appellants have from the outset argued that the assertion of such closure authority violates the First, Sixth, and Fourteenth Amendments, only a willful blindness could have prevented the court below from recognizing that there was "drawn in question the validity" of the closure statute, both facially and as the sole source of appellants' expulsion from criminal trials in the state. In these circumstances, the Virginia Supreme Court's rejection of appellants' constitutional claims was beyond doubt a decision "in favor of [the] validity" of Va. Code § 19.2-266.

In any event this case is of course properly before the Court at least on certiorari, 28 U.S.C. § 1257(3), *see* 28 U.S.C. § 2103, since the state's highest court, in refusing appellants' requests for original writs of mandamus and prohibition, and in refusing appellants' petition for appeal—all on the sole authority of *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979)—rejected on the merits the First, Sixth, and Fourteenth Amendment objections that appellants have from the beginning pressed against the state's asserted authority to expel appellants, and all other members of the public, from criminal trials in Virginia.

[5] Intriguingly, on the one hand the Attorney General insists that the court below did not construe Va. Code § 19.2-266 as authorizing

The transcript of proceedings in the trial court unmistakably shows that, with the state's unquestioning assent, the trial court entered its closure order on the sole authority of § 19.2-266—over the constitutional objections vigorously pressed by appellants there and reiterated here.[6] It cannot be denied that the trial court's action, treating all members of the press and public as "persons whose presence would impair the conduct of a fair trial," Va. Code § 19.2-266, fell within the literal terms of that statute. Nor has the state ever suggested any particular narrowing construction of § 19.2-266 that would have rendered lawless the trial closing in this case or would align the

---

the closure of Stevenson's trial, Motion to Dismiss ("Motion") at 10; on the other hand the Attorney General reveals an intention to react to what the court below did by proposing "amendments" to Va. Code § 19.2-266 "to provide additional statutory guidance for state judges" on the subject of closure orders. Motion at 2 n.1.

[6] *See, e.g.,* Petition for Appeal at 6. To assert that the trial court "made general reference to his statutory authority to exclude persons from the courtroom when he initially entered the closure order," Motion at 8 n.5, is to understate the case considerably. Upon entering his closure order in response to defense counsel's request "that everybody be excluded from the Courtroom" (A. 5a), the trial judge opined that "the *statute* gives me that power *specifically*" (A. 6a) (emphasis added), and cited no other source of authority for closing the trial.

When the trial judge several hours later declined to vacate the closure order despite appellants' constitutional objections, he again invoked no other source of authority for closing the trial—although he did note that the exercise of such authority seemed appropriate if the trial judge "feel[s] that the . . . rights of the defendant are infringed in any way then . . . he makes the motion . . . and . . . it doesn't completely override the rights of everyone else" (A. 17a). In context, the trial court was obviously ruling that the authority conferred by Va. Code § 19.2-266—to order complete closure on unopposed defense motion—was a proper and constitutional means of avoiding even arguable infringements of the defendant's "fair trial" rights, so long as the exercise of that authority does not "completely override" various unspecified rights of unidentified third parties.

statute with constitutional standards.[7] Indeed, before the Virginia Supreme Court, the state itself cited § 19.2-266 as sole and dispositive authority for the trial court's closure order[8]—and it was in this context that appellants unambiguously asserted their constitutional objections before the Virginia Supreme Court.[9]

In rejecting those objections, the court below obviously and necessarily decided the constitutionality of Va. Code § 19.2-266, both on its face and as applied.[10] "That is suf-

[7] It is therefore immaterial that "the Virginia Supreme Court did not define the terms of and [expressly] interpret the statute," Motion at 11, since no narrowing construction consistent with the Attorney General's position that the closure order in this case was "justified," see Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition ("Opposition to Writs") at 17, could possibly have stripped from this statute the constitutionally objectionable power of wholesale trial closure on which this appeal rests.

[8] Again seeking to minimize "the degree of involvement of the statute," Motion at 10, the Attorney General notes only that the statute "was cited . . . in [the] brief in opposition to the appeal, for the proposition that state law allowed a judge in his discretion to exclude persons from the courtroom whose presence would impair the conduct of a fair trial." *Id.* at 8 n.5. In fact, the statute was the *only* source of authority cited in that brief, and it was cited as support not only for selectively or temporarily excluding particular persons *but as authority for expelling all observers.* Brief in Opposition to Petition for Appeal ("Opposition to Appeal") at 5, 7.

Similarly, the Attorney General suggests that the statute was cited only parenthetically in the Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition. Motion at 8 n.5. In fact, however, the statute was the *only* authority in state law for the closure order cited in that Opposition, and the statute was there cited for the central proposition that mandamus would not lie inasmuch as the trial judge was to act, according to the statute, "in his discretion." Opposition to Writs at 3. *See id.* at 17.

[9] *See* Petition for Appeal and Memorandum in Support of Petitions for Writs of Mandamus and Prohibition ("Petition for Appeal") at 6.

[10] The Attorney General has cited two inapposite Virginia cases for the proposition that "Virginia procedure requires that constitu-

ficient under [this Court's] practice." *Jenkins* v. *Georgia,* 418 U.S. 153, 157 (1974). *See Braniff Airways, Inc.* v. *Nebraska State Board,* 347 U.S. 590, 599 (1954); *Cissna* v. *Tennessee,* 246 U.S. 289, 293-294 (1918). The jurisdictional requirement of 28 U.S.C. § 1257(2) calls "not for some abracadabra," *Flournoy* v. *Wiener,* 321 U.S. 253, 264-265 (1944) (Frankfurter, J., dissenting), but demands instead a commonsense assessment of the questions presented to the court below in express terms and by necessary implication. And the decision of the court below warrants precisely

---

tional challenges to state statutes be made in the trial court," Motion at 8, citing *King* v. *Commonwealth,* 219 Va. 171, 247 S.E. 2d 368 (1978) (per curiam); *Rice* v. *Commonwealth,* 212 Va. 778, 188 S.E. 2d 196 (1972). Unlike the accused in *King,* who evidently claimed no violation of his constitutional rights at trial, 219 Va. at 173, 247 S.E. 2d at 370, and unlike the Commonwealth in *Rice,* which raised its constitutional claim for the first time on appeal, 212 Va. at 779, 188 S.E. 2d at 197, appellants here vigorously asserted their constitutional objections to the closure order entered by the trial court pursuant to § 19.2-266 *during the trial.* Moreover, notwithstanding *King* and *Rice,* the Virginia Supreme Court by its own Rule 5:21 provides that even an objection not timely asserted below—or asserted without specified grounds—will nonetheless be entertained on appeal "to enable this Court to attain the ends of justice." *Cf. Archer* v. *Mayes,* 213 Va. 633, 641, 194 S.E. 2d 707, 712-13 (1973) (contention advanced for first time on appeal will be considered, "because it raises a question of considerable appeal"). *See also Reid* v. *Baumgardner,* 217 Va. 769, 773, 232 S.E. 2d 778, 780 (1977) (purpose of requirement that ground of objection be specified is to give trial court opportunity to rule intelligently, and failure to specify ground of objection will be overlooked on appeal if trial judge could hardly have failed to comprehend reason why it was interposed). In addition, the Virginia Supreme Court does not insist unwaveringly that the grounds of an objection be stated with specificity at trial "where the character of the objection is perfectly patent." *Solomon* v. *Atlantic Coast Railroad Co.,* 187 Va. 240, 243, 46 S.E. 2d 369, 370 (1948); *Smith* v. *Commonwealth,* 165 Va. 776, 781, 182 S.E. 124, 127 (1935). In any event, a state court's power deliberately to blind itself to a federal constitutional claim necessarily presented by a pending case would itself be open to serious challenge. *Cf. Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 233-234 (1969); *Henry* v. *Mississippi,* 379 U.S. 443, 446-448 (1965).

the same form of analysis. New York *ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63 (1928). *Cf. Eureka Lake & Yuba Canal Co.* v. *Superior Court,* 116 U.S. 410, 415-416 (1886); *Furman* v. *Nichol,* 75 U.S. (8 Wall.) 44, 55-56 (1868).

The Virginia Supreme Court could scarcely mistake the object and substance of appellants' constitutional attack. Since Stevenson's trial had ended, an order simply purporting to admit appellants to that trial—or to others exactly like it—would obviously be of no use, as the court below was forcefully reminded by the state itself.[11] Appellants therefore sought relief below from the "recurrent phenomenon" [12] of orders closing entire criminal trials—orders entered on the remarkable premise that all observers could be "persons whose presence would impair the conduct of a fair trial." Va. Code § 19.2-266. By asking the court below for a determination that such closure orders are necessarily repugnant to the First, Sixth, and Fourteenth Amendments, appellants have manifestly "drawn in question the validity of a statute" as required by 28 U.S.C. § 1257(2): Va. Code § 19.2-266, which expressly authorizes precisely such orders, and which was the sole authority invoked for the closure order entered in this case. Since the state squarely rested its opposition to the relief sought below by appellants on the express authority of Va. Code § 19.2-266,[13] the Virginia Supreme Court's rulings against appellants necessarily represented a "decision in favor of [the] validity" of that statute. *See* 28 U.S.C. § 1257(2). As Chief Justice Marshall said in an analogous context:

---

[11] Opposition to Writs at 3-4.

[12] Petition for Appeal at 48.

[13] *See* n.8 *supra.*

> The defendants in error deny the jurisdiction of this Court, because, they say, the record does not show that the constitutionality of the act of the legislature, under which the plaintiff claimed to support his action, was drawn into question.
>
> Undoubtedly the plea might have stated in terms that the act . . . was repugnant to the Constitution of the United States; and it might have been safer, it might have avoided any question respecting jurisdiction, so to frame it. But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state Court. That question must have been discussed and decided.
>
> The plaintiffs sustain their right . . . by the act of assembly. Their declaration is founded upon that act. The injury of which they complain is to a right given by it. They do not claim for themselves any right independent of it. They rely entirely upon the act of assembly.

Willson v. *Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829).[14] It is § 19.2-266, construed by the court

[14] Nor would any purpose be served by adopting the state's jurisdictional argument. Undeniably, the rule requiring clear presentation of constitutional attacks on state statutes serves salutary purposes, weeding out cases of purely lawless action, cases where statutes may readily be interpreted consistent with constitutional requirements, and cases where effective remedies are available short of invalidating a statute on its face or as applied. But none of these purposes is involved or furthered here. *Contrast, e.g., Raley* v. *Ohio*, 360 U.S. 423, 434-435 (1959), dismissing the appeal but granting certiorari and reversing as violative of due process several convictions for refusing to testify before a state commission whose chairman had assured witnesses that the privilege against self-incrimination could be invoked as a basis for refusing to testify. Although the state supreme court in *Raley* had relied on an immunity statute to hold that no privilege of self-incrimination was

below to authorize secret trials virtually on a whim, that poses a continuing threat to the rights of appellants and the public they represent. Only if this Court holds that open criminal trials cannot be sacrificed—a holding that would, in effect, invalidate § 19.2-266 as applied here—will the threat of impermissible trial closings be removed and "the constitutional right of the press and public to access," *Gannett,* 99 S.Ct. at 2916 (Powell, J., concurring), be restored.[15]

---

available on these facts, the validity of that statute had not been challenged in the state courts, and simply reversing the conviction on due process grounds was entirely consistent with leaving the immunity statute intact both on its face and as applied.

[15] In any event, an appeal would be proper even without the statute—since the combined effect of the trial court's order and the Virginia Supreme Court's judgments denying relief was not simply the resolution of a dispute between the parties in this litigation, or even simply the creation of a precedent for future disputes, but the establishment and enforcement of a statewide *rule of court* having the force of law in Virginia, *see* nn.16-19, *infra,* under which a defense motion unopposed by the prosecution easily suffices to shroud a full trial in secrecy. Accordingly, appellants' complaint is not simply that their constitutional rights have been violated, but that the *regime of judicial administration* put in place by the Virginia courts, pursuant to an undeniably broad reading of Va. Code § 19.2-266, has caused, and continues to threaten, serious infringement of appellants' constitutional rights of access to criminal trials. A federal constitutional challenge to such a statewide rule of court, unambiguously made but decisively rejected below, properly reaches this Court on appeal under 28 U.S.C. § 1257(2). *See, e.g., Lathrop* v. *Donohue,* 367 U.S. 820, 824-825 (1961) (rule established by state supreme court may be statute within meaning of § 1257(2) even absent delegation of authority by legislature to establish the rule); *Mayer* v. *City of Chicago,* 404 U.S. 189, 191-193 & n.2 (1971) (rule established by court under broad legislative delegation of authority to amend statutory provisions governing criminal appeals held to be statute under § 1257(2)); *In re Griffiths,* 413 U.S. 717, 718 (1973) (rules promulgated by judges and administered by state bar are statutes within the meaning of § 1257 (2)).

B. This Case Is Also Properly Before This Court on Certiorari.

There can be no doubt that the judgments of the court below are properly reviewable in this Court not only on appeal under 28 U.S.C. § 1257(2), but also on certiorari under 28 U.S.C. § 1257(3). *See* 28 U.S.C. § 2103. In "[f]inding no reversible error" (A. 24a), and thus refusing appellants' petition for appeal on the authority of *Gannett* (*id.*), the court below rendered a final judgment on the merits having the binding force of statewide precedent.[16]

---

[16] The Virginia Supreme Court has emphasized that the effect of a refusal of a petition for appeal "is to affirm the decree of the . . . circuit court." *Harris* v. *Battle*, (Jan. 27, 1954) (unreported opinion), reprinted in Jurisdictional Statement at 14, *Harris* v. *Battle*, 348 U.S. 803 (1954) (per curiam) (noting probable jurisdiction to review decision by Virginia Supreme Court refusing petition for appeal). *See Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (granting certiorari to review decision of Virginia Supreme Court refusing petition for appeal). *See also* n.16, *infra*. In Virginia, "[the] denial of an appeal acts as a judgment on the merits." A. Vanderbilt, *Minimum Standards of Judicial Administration* 399 (1949). "[A] decision to deny a petition is in reality a decision on the merits in that it represents an affirmance of the decision below." Report of the Appellate Justice Project of the National Center for State Courts 1972-1973, *The Appellate Process and Staff Research Attorneys in the Supreme Court of Virginia* 56 (1974), cited with approval in *Saunders* v. *Reynolds*, 214 Va. 697, 700-702, 204 S.E. 2d 421, 424 (1974) ("We state unequivocally that a decision to grant or refuse a petition for writ of error is based upon one equally-applied criterion—the merits of the case.").

Decisions by the Virginia Supreme Court refusing petitions for appeal or dismissing writs of error accordingly carry the binding force of statewide precedent. *E.g., Cheatham* v. *Taylor*, 148 Va. 26, 138 S.E. 545 (1927) (appeal) (noting that court explains its decisions refusing petitions for appeal or dismissing writs of error in "exceptional cases" involving "main question" of "supposed novelty"); *Jones* v. *Kirby*, 146 Va. 109, 135 S.E. 676 (1926) (appeal); *Allen* v. *Commonwealth*, 114 Va. 826, 77 S.E. 66 (1913) (error); *McCue* v. *Commonwealth*, 103 Va. 870, 1001, 49 S.E. 623, 629 (1905) (error) (construing statute to apply to criminal as well as to civil proceedings). *See Mid-State Equipment Co., Inc.* v. *Bell*, 217 Va. 133, 141, 225 S.E. 2d 877, 884 (1976) (following

That ruling necessarily rejected appellants' constitutional objections to orders excluding the public and the press from entire criminal trials.[17] Moreover, in dismissing appellants' petitions for writs of mandamus and prohibition, again on the authority of *Gannett* (A. 26a, 28a), the court below also exercised its original jurisdiction to rule on the merits against appellants' constitutional objections to

---

Cheatham); *McCotter* v. *Carle*, 149 Va. 548, 590, 140 S.E. 670, 672 (1927) *(Jones)*; *Henry* v. *Commonwealth*, 195 Va. 281, 294, 77 S.E. 2d 863, 870 (1953) *(Allen)*; *Tate* v. *Commonwealth*, 155 Va. 1016, 1024, 154 S.E. 508, 511 (1930) *(McCue)* (construction of statute).

Federal courts also rely on decisions of the Virginia Supreme Court refusing petitions for appeal or dismissing writs of error, *e.g.*, *Case* v. *Morisette*, 475 F. 2d 1300, 1308 & n.46, 1311 n.60 (D.C. Cir. 1973) *(Cheatham)*; *DeMaurez* v. *Swope*, 104 F. 2d 758, 759 (9th Cir. 1939) *(McCue)*, as do other state courts. *E.g.*, *Bouley* v. *City of Nashua*, 106 N.H. 74, 79, 205 A. 2d 34, 37 (1974) *(Cheatham)*; *State* v. *Lilja*, 155 Minn. 251, 255, 193 N.W. 178, 180 (1923) *(Allen)*; *People* v. *Logan*, 137 Cal. App. 2d 331, 333, 290 P. 2d 11, 12 (Ct. App. 1955) *(McCue)*.

Thus the Virginia Supreme Court's refusal of appellants' petition for appeal is reviewable in this Court as a final judgment of "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. *See Foster* v. *County School Board*, No. 79-13, 48 U.S.L.W. 3216 (U.S. Oct. 10, 1979), *dismissing for want of a substantial federal question an appeal from* No. 790029 (Va. Sup. Ct. Apr. 6, 1979), *refusing without opinion a petition for appeal from* Law No. 9299 (Cir. Ct. Oct. 10, 1978); *Matthews* v. *Huwe*, 269 U.S. 262, 265 (1925); *Martin* v. *City of Struthers*, 319 U.S. 141, 142 n.2 (1943); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 231-232 (1969); *id.* at 243-244 (Harlan, J., dissenting); *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Hetrick* v. *Village of Lindsey*, 265 U.S. 384, 386 (1924).

[17] The explicit reliance on *Gannett* by the court below (A. 24a) further demonstrates, in the circumstances of this case, that the federal constitutional claims pressed by appellants were disposed of on their merits. *See Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975) (fact that state courts found it necessary to attempt to distinguish a decision of this Court enunciating federal constitutional principles reveals federal basis of state courts' decisions).

Judge Taylor's closure order.[18] All three judgments are final and reviewable in this Court on appeal or on certiorari.[19]

II.

The United States Constitution Guarantees the Right to Attend and Observe Criminal Trials.

Introduction.

With the sole exception of those who rule unabashedly by brute force, no government has ever claimed legitimacy while embracing a power to conduct criminal trials in secret. Indeed, the principle of public criminal trials has received wide adherence as much because open trials best

---

[18] The Virginia Supreme Court has original jurisdiction in cases of mandamus and prohibition. Va. Const. Art. VI, § 1; Va. Code § 17-96; Va. S. Ct. Rule 5:5. *Cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 175-176 (1803).

[19] As to the judgments of the court below dismissing appellants' petitions for writs of mandamus and prohibition, the Virginia Supreme Court was not only the "highest court . . . in which a decision could be had," 28 U.S.C. § 1257; it was the *only* court. *See, e.g., Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) (reviewing denial of writ of prohibition); *Michigan Central Railroad Co.* v. *Mix*, 278 U.S. 492, 494 (1929) (same); *Hartman* v. *Greenhow*, 102 U.S. 672, 676 (1881) (reviewing Virginia Supreme Court's denial of writ of mandamus).

The government has not suggested in this Court or in opposing the appeal below any nonfederal ground on which any of the three judgments of the Virginia Supreme Court could be upheld without reaching the federal questions presented here. Indeed, no such ground could be suggested, for none was relied upon by the Virginia Supreme Court, and it is settled that the theoretical possibility that some independent and adequate nonfederal ground might have been available, *see* Motion at 7, cannot relieve "this Court of the necessity of considering the federal question[s]" decided below. *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 630-631 (1973); *see California* v. *Byers*, 402 U.S. 424 (1971); *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967) (per curiam); *Evans* v. *Newton*, 382 U.S. 296, 302 (1966). *Cf. Gannett*, 99 S.Ct. at 2903-2904.

evince a government's democratic character, as because secret trials inevitably evoke public terror.

Powerfully indicative of the central place of open trials in Anglo-American history is the fact that "[t]he practice of conducting . . . trial[s] in public was established as a feature of English justice long before the defendant was afforded even the most rudimentary rights." *Gannett,* 99 S.Ct. at 2927 (Blackmun, J., concurring in part and dissenting in part). The centuries-old tradition of open criminal trials in England and the United States bespeaks the realization that a legal system's very legitimacy requires openness regardless of what a criminal trial's participants may wish. It is for this reason that public criminal trials were initially viewed as "a characteristic of the system of justice, rather than . . . a right of the accused." *Id.* at 2928.

In canvassing state laws on this subject some three decades ago, this Court noted that, "almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public." *In re Oliver,* 333 U.S. 257, 267-68 (1948) (footnotes omitted). Most prophetically, the very statute involved in this appeal was singled out for quotation as the exceptional case. *Id.* at 267 n.17. Similar provisions exist elsewhere,[20] but only recently have any courts thought to exercise such grants of latent authority to cordon off entire criminal trials.[21] In fairness, these departures from the prescribed

[20] *E.g.,* Iowa Code Ann. § 605.16 (West 1975 & Supp. 1979-1980) ("All judicial proceedings must be public, unless otherwise specially provided by statute *or* agreed upon by the parties.") (emphasis added); Ariz. Rev. Stat. Ann., R. Crim. P. 9.3(b) (closure on application of defendant authorized in all proceedings if court finds "clear and present danger" to fair trial).

[21] Before one month had passed from the date of the Court's decision in *Gannett,* serious breaches in the public's right of access

historical and constitutional route appear to represent neither caprice nor calculation, but simply a mistaken reading of this Court's decision in *Gannett*. For that case decided only "[t]he question . . . whether members of the public have an independent constitutional right [under the Sixth and Fourteenth Amendments] to insist upon access to a *pre*trial 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." 99 S.Ct. at 2901 (emphasis added). The Court's negative answer to that question was premised upon the "special risks of unfairness" if "potential jurors [learned] of inculpatory information wholly inadmissible at the actual trial." *Id.* at 2905.

---

to criminal trials had begun to appear. Research by a number of interested groups indicated that, as of the time this appeal was docketed, at least the following had occurred: One rape trial was entirely closed. *State* v. *Hicks*, No. 5003 (Md. Cir. Ct.). A murder trial was closed to the press—although not to the public. *State* v. *Woomer*, No. 79-GS-26-203 (S.C. Cir. Ct.) (jury selection proceeding) (pretrial suppression hearing). Another rape trial proceeded behind the screen of a gag order. *State* v. *Giles*, No. CC79-090-091 (Ala. Cir. Ct.) (on motion of judge) (alleged possible prejudice to co-conspirator in separate trial). Closure motions were pending in two federal district courts, *United States* v. *Powers*, No. 79-26 (S.D. Iowa) (opposed by prosecution); *United States* v. *Benson*, 79-30054 (M.D. Tex.) (bribery trial of former public official), and in two cases trial closure motions had been refused. *People* v. *Bartowsheski*, No. 79CR-516 (Colo. Dist. Ct.) (opposed by prosecution) (jury instructed not to read or listen to news accounts of trial); *People* v. *Angus*, No. 104-69-78 (N.Y., Albany County Ct.) (alleged possible prejudice to witness in future trial). This burgeoning series of cases strongly suggests that the unbounded authority conferred by Va. Code § 19.2-266 is by no means unique. As the *Gannett* Court itself noted, at least some other states have statutes that could be similarly construed. 99 S. Ct. at 2910 n.19. *See* n.20 *supra*. And the questions posed would not be materially different were closure ordered pursuant to purely judge-made rules.

But no such "special risks" are involved in the criminal trial proper, since "inadmissible prejudicial information about a defendant can [then] be kept from a jury by a variety of means." *Id.* (footnote omitted). And while the public interest in a *pre*trial proceeding may be partly served by subsequent release of the transcript if one is made and typed, and by the rehearing that may be triggered if corruption is revealed, these potential palliatives are ineffective at the trial stage, since the double jeopardy rule bars retrial and since the credibility of testimony, on which the question of guilt or innocence routinely turns, can never be adequately assessed from a cold transcript.

Thus, unlike pretrial suppression hearings—which pose difficult problems of accommodating the public's historically unquestioned right of access with the accused's right to prevent jurors from becoming aware of inadmissible evidence—criminal trials themselves involve no need, and present no occasion, for any broad inroad upon the rights of orderly observers to take their seats in the courtroom for the purpose of seeing justice done. Given the total absence of any legitimate (let alone compelling) interest in excluding all members of the public from an entire criminal trial, the claim of statutory or judge-made authority to exercise such extraordinary power cannot be countenanced by this Court.

Thus, whether invoked pursuant to a statutory provision like Virginia's or otherwise, the power—or simply the imagined duty—to conduct entire criminal trials in secret plainly does not follow from *Gannett* and should be repudiated by this Court as a singularly unwarranted "menace to liberty," *In re Oliver, supra,* 333 U.S. at 269, and to fair process. Only in this way can the deep-rooted and hallowed tradition of open trials be promptly restored. Nor should it prove difficult to identify a constitutional basis for what

has so long been taken for granted. For so fundamental is the open trial principle that its expression in and enforcement under the Constitution is not limited to a single provision, but rather is implicit in several separate provisions, and in their interrelated meaning and structure.

A. The First Amendment Secures Such a Right.

In *Gannett* this Court was willing to assume, but did not decide, that the First Amendment "may guarantee" public access to criminal trials. 99 S.Ct. at 2912 (majority opinion).[22] Appellants now urge this Court to recognize a First Amendment right of members of the public to attend criminal trials—a right essential to intelligent self-government, a right reflecting the public character of criminal trials, a right indispensable to public participation in a vital social drama—a right government may not limit without compelling justification, and never by closing an entire criminal trial.[23]

1. Conducting criminal trials in secret deprives citizens of information singularly vital to self-government.

In affirming the Hanover County Circuit Court's closure of an entire criminal trial, the Virginia Supreme Court

[22] Of the four Justices who joined in Justice Stewart's majority opinion, Justice Powell was prepared to recognize "[a] right of access to judicial proceedings" under the First Amendment, 99 S.Ct. at 2915 (concurring opinion), while Justice Rehnquist recognized no such right. *Id.* at 2918-19 (concurring opinion). Justice Blackmun and the three others who joined him declined to reach "the issue of First Amendment access," *id.* at 2940 (Blackmun, J., joined by Brennan, White, and Marshall, JJ., concurring in part and dissenting in part), but pointedly observed that "this Court's prior decisions emphasizing the protection afforded reporting of judicial proceedings under the First Amendment . . . point up the grave concern that information relating to the administration of criminal justice be widely available." *Id.* at 2922 n.2.

[23] *See* Parts III and IV *infra.*

sanctioned the suppression of information vital to self-government. Such information has always received this Court's most zealous protection, for it "lies near the core of the First Amendment." *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 838 (1978). *See First National Bank* v. *Bellotti,* 435 U.S. 765, 776-78 (1978); *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964); *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 269-70 (1964); *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945); *Grosjean* v. *American Press Co.,* 297 U.S. 233, 247, 250 (1936); *Whitney* v. *California,* 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring); A. Meiklejohn, *Free Speech And Its Relation To Self-Government* (1948).

No realm of knowledge is more crucial to intelligent self-government than knowledge about how government power is being exercised—particularly in courts of justice. *See Landmark Communications, Inc.* v. *Virginia, supra,* 435 U.S. at 838-39; *Wood* v. *Georgia,* 370 U.S. 375, 391 (1962). The people and their legislators cannot possibly "vote intelligently," *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492 (1975), for prosecutors and elected judges,[24] or "register opinions," *id.,* on issues of judicial administration and court reform—or on the very substance of the criminal law—if trials may be held behind closed doors. Thus, "[o]ne of the demands of a democratic society is that the public should know what goes on in courts . . . to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland* v. *Balti-*

[24] Virginia's Attorney General is elected by state-wide popular ballot, Va. Const. Art. VI, § 15; Va. Code Ann. § 24.1-80 (1973), and each county's voters elect a Commonwealth's Attorney. Va. Const. Art. VII, § 4; Va. Code Ann. § 24.1-86 (1973 & Supp. 1979). The judges of the state's circuit courts are elected by a majority of the elected members of the Virginia General Assembly. Va. Const. Art. VI, § 7; Va. Code Ann. §§ 17-120 to 17-122.1 (1975 & Supp. 1979).

more Radio Show, Inc., 338 U.S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of certiorari to 193 Md. 300, 67 A.2d 497 (1949)). As long as we prize "'the intelligent discharge of . . . political responsibilities,'" *Gannett*, 99 S.Ct. at 2914-15 (Powell, J., concurring), quoting *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting), it can never be claimed in a democratic society that the public may be denied "the right to know what is being done in their courts." *State* v. *Hensley*, 75 Ohio St. 255, 257, 79 N.E. 462, 463-64 (1906). *See Gannett*, 99 S.Ct. at 2922-23 & n.2, 2930-31 (Blackmun, J., concurring in part and dissenting in part). Accordingly, "[t]he suggestion that there are limits upon the public's right to know what goes on in the courts causes . . . deep concern." *Estes* v. *Texas*, 381 U.S. 532, 614-15 (1965) (Stewart, J., joined by Black, Brennan, and White, JJ., dissenting).[25]

Such concern is all too well founded. For, as James Madison wrote nearly two centuries ago:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

9 *Writings of James Madison* 103 (G. Hunt ed. 1910).

---

[25] In *Estes*, this Court found that the accused had been denied due process by the electronic media's broadcasts of his trial, but emphasized that "the public has the right to be informed as to what goes on in its courts," 381 U.S. at 541, that the various news media "are entitled to the same rights [of access] as the general public," *id.* at 540, and that the press may thus attend criminal trials "if they wish to be" present, *id.* at 541—whether or not at the pleasure of the participants in the litigation. *See also id.* at 584-85 (Warren, C.J., joined by Douglas and Goldberg, JJ., concurring).

2. *Denying access to the unique source of this vital information constitutes forbidden censorship.*

Whatever the limits on the public's right to *demand* knowledge, *see, e.g., Zemel* v. *Rusk,* 381 U.S. 1, 17 (1965) (there is no "unrestrained right to gather information" that entitles one to insist on a passport to Cuba or, *e.g.,* to demand entry to the White House), this Court has unanimously affirmed that the First Amendment confers at least *"some* protection for seeking out the news," *Branzburg* v. *Hayes,* 408 U.S. 665, 681 (1972) (emphasis added), protection without which "freedom of the press could be eviscerated." *Id.* Thus the Court has stressed that "reporters remain free," although they have no special privilege, "to seek news from any source by means within the law." *Id.* at 681-82. For "imposing upon [the public and press] the burden of justifying [their] presence is contrary to where . . . the presumption must lie in the area of First Amendment freedoms . . . and . . . contains an invitation to censorship which [this Court should not] accept." *Estes* v. *Texas, supra,* 381 U.S. at 615 (Stewart, J., joined by Black, Brennan, and White, JJ., dissenting).

Censorship of news commonly brings to mind an image of public officials tearing stories out of newspaper galleys —"tell[ing] the press what it may and may not publish." *Gannett,* 99 S.Ct. at 2915 (Powell, J., concurring). But, as Justice Rehnquist has observed, "censorship . . . as often as not is exercised not merely by forbidding the printing of information in the possession of a correspondent, but in *depriving him of access to places where he might obtain such information.*" Rehnquist, "The First Amendment: Freedom, Philosophy, And The Law," 12 Gonz. L. Rev. 1, 17 (1976) (emphasis added). Whether a particular deprivation of access is constitutionally permissible obviously depends on the character of the place or source

from which the information is sought. That observers may be excluded from "grand jury proceedings, [this Court's] conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations," *Branzburg* v. *Hayes, supra,* 408 U.S. at 684, plainly does not imply that observers may similarly be excluded from traditionally and distinctively *public* places or proceedings.

This Court has never hesitated to examine the history and function of settings and institutions in order to identify certain forums[26] and certain functions[27] as inherently "public" for various purposes as a matter of constitutional law—regardless of the government's attempt to treat them as something else. By the criteria this Court has employed in the course of such examination, courtrooms are undeniably public forums and criminal trials undeniably public events for purposes of orderly attendance and observation.

a. Criminal Trials Are Public By Tradition.

That government maintains physical control over courtrooms—as over city streets, public parks, capitol grounds, and public libraries—does not deprive them of their public character. For "[i]t is the practice of Western societies, and has been part of the common-law tradition for centu-

[26] *E.g., Evans* v. *Newton,* 382 U.S. 296 (1966) (municipal park); *Marsh* v. *Alabama,* 326 U.S. 501 (1946) (streets of a town). Contrast, *e.g., Greer* v. *Spock,* 424 U.S. 828 (1976) (military base); *Pell* v. *Procunier,* 417 U.S. 817 (1974) (jail cells); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974) (same); *Adderley* v. *Florida,* 385 U.S. 39 (1966) (jailhouse grounds).

[27] *E.g., Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 353 (1974) (eminent domain) (dictum); *Marsh* v. *Alabama,* 326 U.S. 501 (1946) (running a town); *Terry* v. *Adams,* 345 U.S. 461 (1953) (election). Contrast, *e.g., Jackson, supra* (providing electrical service).

ries, that trials generally be public." *Gannett,* 99 S.Ct. at 2913 (Burger, C.J., concurring). In such a setting, "First Amendment values [must] inalterably prevail," *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 302 (1974), in view of the undeniable "'history of the place.'" *Id.,* quoting *M'Ara* v. *Magistrates of Edinburgh,* [1913] Sess. Cas. 1059, 1073-74 (per Lord Dunedin, J.). And the precise sense in which criminal trials have always been "public" fits perfectly the right that appellants claim: Appellants seek First Amendment protection not for "demonstrations in or near . . . courtrooms . . . at the time of trial," *Cox* v. *Louisiana,* 379 U.S. 559, 565 (1965), but for quiet and peaceful observation of criminal trials—"'that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.'" *Gannett,* 99 S.Ct. at 2931 n.10 (Blackmun, J., concurring in part and dissenting in part), quoting *Cowley* v. *Pulsifer,* 137 Mass. 392, 394 (1884) (per Holmes, J.). *Cf. Marsh* v. *Alabama,* 326 U.S. 501, 505, 508 (1946) (right to receive leaflets in company-owned town). *See generally Grayned* v. *City of Rockford,* 408 U.S. 104, 116 (1972); Kalven, "The Concept Of The Public Forum: Cox v. Louisiana," 1965 Sup. Ct. Rev. 1.

b. Criminal Trials Are Public By Function.

That criminal trials *must* be open to public observation if they are to fulfill their historic mission follows not only from their irreplaceable role as sources of information about how the entire system of criminal justice is functioning, but also from the special character of criminal trials as unique communicative events, enabling "[t]he victim of the crime, the family of the victim, others who have suffered similarly, or others accused of like crimes, [to] . . . observ[e] the course of a prosecution." *Gannett,* 99 S.Ct.

at 2930 (Blackmun, J., concurring in part and dissenting in part). *Cf.* F. Kafka, *The Trial* 49-55 (W.&E. Muir trans. 1968) ("In The Empty Courtroom").

More fundamentally, every criminal trial is a vital social drama—a grave occasion on which the entire community, acting through carefully-chosen representatives, determines the fate of those accused of breaking its laws. So long as it is open, the proceeding has about it a quality of solemn ritual, which serves not only to impress upon the jury the seriousness of its mission, but also to assure the larger community that the criminal sanction is justly imposed. But when a criminal trial is conducted in secrecy, the public cannot feel assured that justice has been done in any particular case, for the public has not been allowed to satisfy itself that each actor has properly discharged his role in the "theatre of justice." 1 J. Bentham, *The Rationale Of Judicial Evidence* 597 *et passim* (J. Mill ed. 1827).[28]

No sense of catharsis is possible " 'where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's conclusion sealed from view.' "

---

[28] As Bentham wrote in his treatise:

> [B]y publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means: a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice. Without effort on their own parts, without effort and without merit on the part of their respective governments, they learn the chief part of what little they are permitted to learn (for the obligation of physical impossibility is still more irresistible than that of legal prohibition), of the state of the laws on which their fate depends.

Id. at 525.

Gannett, 99 S.Ct. at 2931 (Blackmun, J., concurring in part and dissenting in part), quoting *United States* v. *Cianfrani,* 573 F.2d 835, 851 (8th Cir. 1978). Secret trials can be neither an experience in justice for the community nor a symbol of public morality. *See* T. Arnold, "The Criminal Trial As A Symbol Of Public Morality," in *Criminal Justice In Our Time* 141-43 (A. Howard ed. 1965); C. Fried, *An Anatomy Of Values* 125-32 (1970); H. Hart, "The Aims Of The Criminal Law," 23 Law & Contemp. Prob. 401 (1958); Note, "Trial Secrecy And The First Amendment Right Of Public Access To Judicial Proceedings," 91 Harv. L. Rev. 1899, 1906-09 (1978). Secret criminal trials instead portend a regime of "mystery, miracle, and authority," F. Dostoevsky, *The Brothers Karamazov* 301 (D. Magarshack trans. 1958)—a regime wholly inhospitable to First Amendment values and traditions.[29]

Given the unbroken public tradition and unmistakably open character of criminal trials, it is entirely unsurprising that this Court so confidently proclaimed in *Craig* v. *Harney,* 311 U.S. 367, 374 (1947), that "[a] trial is a public event. What transpires in the court room is public property. . . ." [30]

---

[29] Viewed in this light, the functions of the pretrial suppression hearing and those of the trial-in-chief stand at opposite poles. The suppression hearing is an internal judicial mechanism for screening out those evidentiary items that should never be shared with the community or with the jury as its formal representatives. *Gannett,* 99 S.Ct. at 2905. The trial, by contrast, is an external drama whose first task is "the determination of truth," *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406, 416 (1966)—not as the historian or the clinician might determine that truth, but through the public forms of justice. *See generally* D. Lerner, *Evidence and Inference* (1959).

[30] *See also Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 609 (1978); *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 840 (1978); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 492-95 (1975).

c. Criminal Trials Are Public As A Matter of Constitutional Text And Structure.

That the Constitution provides no warrant for treating criminal trials as purely personal affairs is plain enough: Nothing in the Constitution entitles the accused to compel a *private* trial. *Gannett*, 99 S.Ct. at 2907 n.11. Indeed, "[b]y express command of the Sixth Amendment the proceeding *must* be a 'public trial.' " *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 36 (1978) (Stevens, J., joined by Brennan and Powell, JJ., dissenting) (emphasis added). This command at least implies that government cannot claim unfettered discretion to treat criminal trials as wholly internal and confidential, or to view the information such trials yield as "information generated and controlled by government." *Houchins* v. *KQED, Inc., supra,* at 16 (Stewart, J., concurring in judgment). *See id.* at 36-37 (Stevens, J., joined by Brennan and Powell, JJ., dissenting).

For even if the Sixth Amendment were deemed to confer rights only on the accused,[31] that fact would alone suffice to remove criminal trials from the realm of official proceedings within government's unilateral control. *Cf. Branzburg* v. *Hayes,* 408 U.S. 665, 684 (1972); *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974); *United States* v. *Nixon,* 418 U.S. 683, 705 (1974); *Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 834-37, 841 (1978). "[T]he Sixth Amendment presumes . . . open trials as a norm." *Gannett,* 99 S.Ct. at 2908.

Unlike the "unshared power" over foreign policy data conferred by the Constitution on the Executive, *New York Times Co.* v. *United States,* 403 U.S. 713, 729 (1971) (Stewart, J., joined by White, J., concurring), the power over access to a criminal trial *is* shared—at least with the ac-

[31] *But see* Part II-B *infra.*

cused—simply by virtue of the Sixth Amendment. It follows that, unlike the "unshared duty [of the Executive] to determine . . . the degree of internal security necessary to exercise that [unshared] power successfully," *id.*, the duty to determine the degree of confidentiality due in a criminal trial does not belong, unshared, to those who prosecute and judge the accused. Even without the First Amendment, therefore, unilateral government control over access to criminal trials remains constitutionally unavailable: The accused may always insist on a public trial under the Sixth Amendment.

The First Amendment thus operates in this case not as "some sort of constitutional 'sunshine law,'" *Gannett,* 99 S.Ct. at 2918 (Rehnquist, J., concurring); it does not open to public gaze information and proceedings otherwise securely within the Government's unilateral control. The First Amendment instead opens a constitutional window into a proceeding *already identified by the Sixth Amendment as beyond such control*—assuring that, even with the connivance of the accused,[32] the state may not bar members of the public and press from a criminal trial without compelling justification. Even if the Sixth Amendment's public trial guarantee runs only to the accused, therefore, the First Amendment provides a "way to ensure that the public interest is protected." 99 S.Ct. at 2935 (Blackmun, J., concurring in part and dissenting in part).

The proceedings of criminal trials are the quintessential subjects of First Amendment protection against governmental interference with public access: public by tradition, public by function, and public as a matter of constitutional text and structure. It is difficult to imagine many settings

[32] *See* n.34 *infra.*

in which so powerful a confluence of proofs may be adduced to support a protected right of access.

d. The Possible Absence Of A "Willing Speaker" Cannot Justify Denying Access.

Members of the public have a First Amendment right to attend criminal trials even though the accused—and, indeed, *all* of the trial's participants—might wish to prevent the public from seeing and hearing the proceedings. It is, of course, settled that the First Amendment protects not only the right to *communicate* information, but also the right to *receive* it. *See, e.g., First National Bank* v. *Bellotti,* 435 U.S. 765, 781-83, 791-92 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756-57 (1976); *Kleindienst* v. *Mandel,* 408 U.S. 753, 762 (1972); *Red Lion Broadcasting Co.* v. *FCC,* 385 U.S. 367, 390 (1969); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Marsh* v. *Alabama,* 326 U.S. 501, 505, 508 (1946); *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943). This right to receive information is protected even when the speaker is not entitled to the Constitution's protection at all, *see Lamont* v. *Postmaster General, supra,* and even when the speaker's right to invoke the First Amendment is at best unsettled. *See First National Bank* v. *Bellotti, supra; Procunier* v. *Martinez,* 416 U.S. 396, 408-09 (1974); *Stanley* v. *Georgia,* 394 U.S. 557, 563-64 (1969). So, too, the fact that the original source of information now in the hands of another might have been unwilling to communicate it is constitutionally irrelevant, *see, e.g., Smith* v. *Daily Mail Publishing Co.,* 99 S.Ct. 2667 (1979); *Oklahoma Publishing Co.* v. *District Court,* 430 U.S. 308 (1976); *Nebraska Press Association* v. *Stuart,* 427 U.S. 539 (1976); *New York Times Co.* v. *United States,* 403 U.S.

713 (1971), just as it is constitutionally irrelevant that the original source might be entirely willing. *See, e.g., Houchins* v. *KQED, Inc.,* 428 U.S. 1 (1978); *Pell* v. *Procunier,* 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974). Indeed, when the "source" of information is not a person or organization at all, but in fact a *place* or a *proceeding,* the dichotomy between "willing" and "unwilling sources or speakers itself becomes an irrelevant talisman.[33]

Consider, for example, a state policy of purchasing books for a public library and then rigidly controlling access to the library's reading rooms, delegating to a public official unbridled discretion to decide which members of the public and press might use such library facilities to read which government-purchased books. It seems plain that excluded persons would have a powerful First Amendment claim—a claim obviously independent of the rights of the authors of

---

[33] To illustrate the arbitrary character of any such dichotomy in the instant setting, one need only recall that John Paul Stevenson's 1976 murder conviction was reversed because his wife's out-of-court identification of a bloodstained shirt as belonging to Stevenson was held to be inadmissible hearsay. *Stevenson* v. *Commonwealth,* 218 Va. 462, 465-66, 237 S.E.2d 779, 781-82 (1977). *See* n.1 *supra.* If the prosecution had introduced *admissible* evidence of the shirt's ownership at Stevenson's most recent retrial, and if Stevenson's wife had been willing to testify on his behalf that the shirt belonged to someone else, *see* Va. Code § 19.2-271.2, then the closure order upheld by the court below would quite literally have prevented the public, including the victim's surviving relatives, from seeing this very "willing speaker" and hearing what she had to say. Stevenson's initial conviction was reversed precisely because a mere report of what his wife had previously said *out of court* was an insufficient substitute for *his* seeing and hearing her say it *in court,* face-to-face, under oath, and subject to cross-examination. *See* n. 37 (2d ¶) *infra.* Surely rights of access for interested members of the public and the press cannot be made to turn on such adventitious circumstances. The conclusion must be that the search for willing and unwilling speakers is, in this context, a largely useless diversion.

the books in question,[34] and a claim in no sense defeated by the unwillingness of the state, as the intermediate "speaker," to provide full public access. *See Minarcini* v. *Strongville City School District,* 541 F.2d 577, 584 (6th Cir. 1976) (ordering district court to direct replacement by school board of banned library books); *Cary* v. *Board of Education,* 427 F.Supp. 945, 953 (D.Colo. 1977) ("school board may not impose its value judgments on literature [teachers and students choose] to consider"); *Right to Read Defense Committee* v. *School Committee,* 454 F.Supp. 703 (D.Mass. 1978) (enjoining school board's ban of controversial anthology).

e. The State's Conduct In Trying The Accused Is Itself Inconsistent With A "No Willing Speaker" Theory.

By choosing to bring a public indictment against the accused, to subject him to trial before a cross-section of the community, and to seek a public condemnation of him by that body—in these ways and in others[35] the state waives any possible claim to treat the contents of the trial as "information generated or controlled by government," *Houchins* v. *KQED, Inc., supra,* 438 U.S. at 16 (Stewart, J., concurring in judgment)—information still held entirely secret within the bosom of the state.

---

[34] One might imagine certain authors acquiescing in, or even requesting, such censorial power, without in the least altering this conclusion.

[35] Needless to say, the state's own representation in this case that "the tape recording of Stevenson's trial has been available and remains available at the Circuit Court of Hanover County," Motion to Dismiss at 12 n.*, only further belies any attempt to characterize as internal to government the events that transpired at John Paul Stevenson's murder trial on September 11 and 12, 1978. Indeed, that very representation itself demonstrates the state's willingness to reveal—if in its own good time, to the extent it finds suitable, and with a texture it finds convenient—what went on in defendant Stevenson's trial.

It follows that, in sharp contrast to the submission of evidence to a judge for preliminary screening as to admissibility, the presentation to a jury of the evidence in this trial can only be considered a public airing of the state's case against the accused. For this reason, and for all of the reasons set forth above, the state's exclusion of the public and press from that proceeding can only be interpreted as an official decision to censor public consciousness of an undeniably public event, in unjustifiable derogation of "the public's right to know what goes on when men's lives and liberty are at stake. . . ." *Houchins* v. *KQED, Inc., supra,* 438 U.S. at 37 n.32 (Stevens, J., joined by Brennan and Powell, JJ., dissenting), quoting *Lewis* v. *Peyton,* 352 F.2d 791, 792 (4th Cir. 1975).

Because the state has no legitimate claim of control in the first instance over the information yielded by its trial of an accused, a trial court cannot be allowed to censor an entire criminal trial at the joint request of the accused and the prosecution. Denying access in this special context amounts to an abridgment of First Amendment freedoms, establishing a regime under which "freedom may rest upon the precarious base of judicial sensitiveness and caprice. And a chain reaction may be set up, resulting in countless restrictions and limitations on liberty." *Pennekamp* v. *Florida,* 328 U.S. 331, 370 (1946) (Murphy, J., concurring).

3. *Only a right to attend and observe criminal trials can assure the access which the First Amendment protects.*

Whether or not some of the functions served by the First Amendment right of access, *see* Part II-A(1), (2) *supra,* can be replaced by supplying a recording or transcript of pretrial suppression hearings to interested parties as soon as the risks that were deemed to justify closure have dis-

sipated, *see Gannett,* 99 S.Ct. at 2912 (majority opinion) (suggesting affirmative answer); *id.* at 2917 & n.4 (Powell, J., concurring); *cf. id.* at 2937 n.17 (Blackmun, J., concurring in part and dissenting in part) (suggesting negative answer), it seems clear that few if any of those functions can be discharged by such a device in a setting where an entire criminal trial has been closed to the public and the press.

Insofar as the First Amendment right of access to the trial itself embodies a right of the community to share in the "theatre of justice," there can be no doubt that a mere technological substitute cannot suffice.[36] Moreover, a recording or a transcript can scarcely serve the function of informing the public at a time when the news is still fresh. *See Nebraska Press Association* v. *Stuart, supra,* 427 U.S. at 561; *id.* at 609 (Brennan, J., joined by Stewart and Marshall, JJ., concurring); *Bridges* v. *California,* 314 U.S. 252, 268 (1941). This is especially true when the rationale of a closure order is not the maintenance of secrecy simply until a jury can be impanelled, *cf. Gannett,* 99 S.Ct. at 2905, but the prevention of any possible prejudice in a potential retrial (A. 14a-15a); Motion to Dismiss at 13 n.9. For following such a rationale would require the unthinkable policy of closing *all* criminal proceedings, and impounding *all* tape recordings and transcripts—until *every* direct and collateral route of review and retrial had been thoroughly and finally exhausted.

Even if the First Amendment proscription of delay could be altogether ignored, we dare not depend upon the

[36] *See* W. Benjamin, *Illuminations* 243 n.3 (H. Arendt ed. 1969) ("The poorest provincial staging of *Faust* is superior to a *Faust* film in that, ideally, it competes with the first performance at Weimar"); S. Sontag, *On Photography* 153-80 (1977) (discussing refractive effect of technological representation).

preparation of post-trial transcripts to bring the full truth to light. Not many people can afford the expense, especially after a long trial. In addition, the only available recording of what transpired at trial might prove to be garbled or inaudible.[37] And, even if the recording were both complete and unflawed, such matters as demeanor and credibility—plainly critical at the trial-in-chief—would be forever lost if only a cold transcript were available.[38]

---

[37] The existence and availability of "the tape recording of the Stevenson's trial," or part of it, was revealed for the first time in respondents' Motion to Dismiss before this Court. Motion at 12 n.8. Appellants' efforts to obtain access to or transcripts of the "tape recording" met substantial obstacles both in time and in cost. A special schedule had to be arranged weeks in advance with the court reporter, who, apparently by court order, had to be present to operate the dictabelt machine and who charged for these services twice her *per diem* rate of $60.00. According to the reporter, a complete trial transcript would cost $2,162, and it is not clear how long it would take to prepare—or when preparation would even begin. The recordings themselves contain many substantial segments that are inaudible, garbled by overlapping conversation, or incomprehensible because a speaker cannot be identified or because an exhibit (of which there were many), is unexplained, and segments otherwise casualties of technical distortion and mechanical breakdown. Lost completely, of course, is the crucial demeanor evidence and, for the most part, voice inflections and other telltale signs of untruthfulness. *See* n.38 *infra*.

In answer to the concern of the victim's family and of the public over why a murder case—where the defendant has been convicted once, and there is apparently enough evidence to fuel three more prosecutions—should suddenly be taken from the jury to be ended abruptly with a judicial acquittal, the tapes disclose only a barely audible statement by the trial judge, who appears to have said something like this: "The prosecution's case is filled with holes."

[38] *See, e.g., NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (per curiam); *Mincey* v. *Arizona*, 437 U.S. 385, 410 (1978) (Rehnquist, J., concurring in part and dissenting in part); *Davis* v. *Alaska*, 415 U.S. 308, 321 (1974) (White, J., joined by Rehnquist, J., dissenting). Not only would a recording or transcript be unable to disclose various forms of nonverbal evidence, *see* 3 *Wigmore on Evidence* §§ 789-798a (J. Chadbourn, ed. 1970); neither instrument could convey witness demeanor of the very sort that has made trial courts reluctant to award summary judgment on the basis of affi-

Thus critical information about the administration of criminal justice—information originating uniquely in criminal trials—will reach the public only if this Court recognizes not the compromised right to learn *someday,* through an indirect technological source, what went on at trial, but *a right to be there:* "the right to observe the administration of justice," *E.W. Scripps Co.* v. *Fulton,* 100 Ohio App. 157, 162, 125 N.E. 896, 906 (1955)—or, for those persons who do not attend, the right to learn promptly from those members of "the press [who are present] what happens there." *Maryland* v. *Baltimore Radio Show, Inc.,* 338 U.S. 912, 920 (1950) (opinion of Frankfurter, J., respecting denial of certiorari to 193 Md. 300, 67 A.2d 497 (1949)). *See Saxbe* v. *Washington Post Co.,* 417 U.S. 843, 850 (1974) (Powell, J., dissenting); *Gannett,* 99 S.Ct. at 2914-15 (Powell, J., concurring).

---

davits when credibility is at stake, *see* 6 Moore's *Federal Practice* ¶ 56.11 at 56-200 (2d ed. 1976), and made appellate courts reluctant to review a fact-finder's assessments of credibility. *See, e.g., United States* v. *Yellow Cab Co.,* 338 U.S. 338 (1949); *Orvis* v. *Higgins,* 180 F.2d 537 (2d Cir. 1950).

For similar reasons, this Court has refused to treat the fact of a would-be listener's access to a lecturer's writings, or even access to electronic recordings of the lecturer's voice, as an answer to the would-be listener's First Amendment objections to government interference with his access to the lecturer's "physical presence." *Kleindienst* v. *Mandel,* 408 U.S. 753, 765 (1972). And, again stressing the inherent inadequacy of paper or mechanical substitutes for directly-observed live testimony, this Court has treated the jury's opportunity to view a witness "face to face," *Mattox* v. *United States,* 156 U.S. 237, 242-43 (1895), as central to the Sixth Amendment right of confrontation—holding, for example, that a conviction based partly upon a transcript of an accuser's prior testimony violates the confrontation clause even if the accused had a chance to cross-examine the accuser at the time the transcribed testimony was given. *Barber* v. *Page,* 390 U.S. 719, 725-26 (1968) (confrontation clause requires at least a good faith attempt by state to assure accuser's presence at trial).

B. The Sixth Amendment Secures Such a Right.

Every Member of this Court agreed in *Gannett* that, apart from the defendant's right to demand the safeguard of publicity, there is "an *independent* public interest in the enforcement of [the] Sixth Amendment" guarantee of a public trial. 99 S.Ct. at 2907 (emphasis added). *See id.* at 2913 (Burger, C.J., concurring); *id.* at 2914 (Powell, J., concurring); *id.* at 2930-33 (Blackmun, J., concurring in part and dissenting in part). In addition to the defendant's right to a public trial, therefore, the Sixth Amendment "presumes open trials as a *norm*," *id.* at 2908 (majority opinion) (emphasis added), a norm serving not only vital educative and participatory functions, *see* Part II-A *supra*, but also the distinctive functions of deterring perjury, inducing unknown witnesses to come forward, and guarding against prosecutorial and judicial ineptitude or misconduct.

The protections which publicity thus provides, as this Court recognized when it referred to the "independent" public interest in enforcing the public trial clause, do not always serve the interests of the defendant, the prosecutor, or the trial judge—each of whom might stand to gain far more from concealment than he would lose. *See* 99 S.Ct. at 2930 (Blackmun, J., concurring in part and dissenting in part). To rely *exclusively* upon the trial's self-interested participants to vindicate the Sixth Amendment's manifold aims ignores teachings about human nature far older than the Sixth Amendment. *Cf. Dr. Bonham's Case*, 8 Co. 114a, 118a (1610) (a "person cannot be judge in his own cause"). *See* J. Bentham, *The Rationale of Judicial Evidence* 576-77 (J. Mill ed. 1827).[39]

[39] There is nothing in the cursory exchanges among defense counsel, the prosecutor, and the trial judge on the subject of

1. Excluded Members of the Public Have Standing to Invoke the Public Trial Guarantee.

Even assuming that a particular case might give rise to some conceivable constitutional justification for closing an entire trial, it is clear that any *unwarranted* instance of closure would violate the "independent public interest" protected by the Sixth Amendment's open trial norm. As such, the question of whether an ousted member of the public should be entitled to invoke the Sixth Amendment as a basis for reviewing the closure order's validity is essentially one of standing. And, tested under both constitutional and prudential criteria, those expelled from the courtroom plainly do have standing to seek judicial protection of their independent Sixth Amendment interests. Unquestionably, the "case or controversy" requirement is met, since those ousted from a criminal trial plainly have the requisite "personal stake in the outcome," *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), having suffered a "distinct and palpable" injury traceable directly to the constitutionally challenged closure order. *See Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977).[40]

Beyond that, the standing of persons expelled from court would more than satisfy "prudential concerns." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978). Indeed, to *reject* the standing of ousted in-

---

closure in this case, *see, e.g.* (A. 19a), to make one doubt this ancient learning. Given the clear absence of any need to close the trial to assure fairness to the defendant, *see* Parts III & IV *infra*, one is led to wonder who in this case was trying to hide what. Nor does the alternative supposition—essentially motiveless closure, representing perhaps the path of least resistance and the course least likely to trigger appellate review—augur well for the survival of Sixth Amendment values.

[40] *See* nn. 41, 43 *infra*.

dividuals to invoke the Sixth Amendment would imprudently limit this Court's ability to oversee state and federal judicial adherence to the Constitution's norm of open trials. *Cf. Baker* v. *Carr,* 369 U.S. 186 (1962); *Flast* v. *Cohen,* 392 U.S. 83 (1968). Appellants, like any other members of the public who have been personally ousted from a trial, are not asserting some "generalized grievance shared by a large number of citizens in a substantially equal measure," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra* at 80; instead, they have suffered a direct, individual, and particularly focused harm. For newspapers, which have a civic obligation to report trial proceedings; for the victims or their families and friends; and for other members of the public with a specialized interest in the case, the injury of forced exclusion is especially poignant.[41] Moreover, there can be no question that when those ousted are granted standing, "the most effective advocate[s] of the [Sixth Amendment] rights at issue [are] present to champion them." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra* at 80. *See Central South Carolina Chapter* v. *Martin,* 556 F.2d 706, 708 (4th Cir. 1977).[42]

---

[41] This seems particularly clear once it is recognized that violation of the Sixth Amendment's open trial "norm," *Gannett,* 99 S.Ct. at 2908, in a case where closure has been granted at the accused's request for impermissible or insufficient reasons, would violate a governmental duty running directly to those who are improperly ousted. Cf. *United States* v. *Richardson,* 418 U.S. 166, 202-03 (1974) (Stewart, J., joined by Marshall, J., dissenting) (one who claims breach of asserted governmental duty to supply information has standing, as "traditional Hohfeldian plaintiff . . . to litigate the issue of his entitlement").

[42] Where, as here, the ousted member of the public can "champion[ ] his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested," there is no need to apply a "nexus" requirement. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra* at 80-81. Indeed, since a major purpose of such a requirement is to avoid adjudication of rights that others may not wish

2. The Norm of Open Trials Cannot Be Remitted to Political Processes.

Nor is this a case where the constitutional violation can or should be left to the political process for correction. The validity of the closure power and its exercise in any particular criminal trial is not one committed by any sensible reading of the Constitution "to the surveillance of Congress [or state legislatures], and ultimately to the political process." *United States* v. *Richardson*, 418 U.S. 166, 179 (1974). Public access to criminal trials surely is not a norm to be defined by majority vote or interest-group compromise. On the contrary—whether viewed as a source of fundamentally personal rights, *cf. Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-37 (1964); or as a structural safeguard of the separation of powers, *cf. Buckley* v. *Valeo*, 424 U.S. 1, 109-44 (1976) (per curiam); or as a combination of the two, *cf. United States* v. *Brown*, 381 U.S. 437, 442-44 (1965)—the right of access implicit in the open trial norm is irretrievably lost if it is not "place[d] . . . beyond the reach of majorities and officials." *West*

---

to assert, that requirement's application is particularly inapposite here. For it is precisely when all participants find secrecy to their mutual advantage that the greatest suspicion of corruption, incompetence, or overbearing arises; it is then that there exists the greatest need for independent review to vindicate the open trial norm of the Sixth Amendment.

In any event, a "nexus" requirement—even if applicable—would be easily satisfied in this case. For as members of the public ousted by closure orders from attending a criminal trial, appellants' status and injury are linked by direct "logical nexus" to the constitutional infringement alleged." *Flast* v. *Cohen*, *supra*, at 102; *United States* v. *Richardson*, *supra*, at 175.

It should also be noted that appellants assert no third party rights; nor would the relief sought interfere with any. Neither the defendant, prosecutor, nor trial court has any constitutional right or even "independent interest" in secrecy as such. *Gannett*, 99 S.Ct. at 2907 n.11. Since their only right or interest of a *constitutional* nature is to maintain the trial's fairness, and since the right of an ousted member of the public to attend and observe the trial is consistent with a fair trial, the two rights are reciprocal rather than in conflict.

Virginia State Board of Education v. *Barnette,* 319 U.S. 624, 638 (1943).

But even if one could assume political majorities to be reliably hospitable to the norm of open trials, departures from that norm would tend to be self-insulating. For if trials are closed by agreement of the parties in criminal cases, the same "walls of silence," *Sheppard* v. *Maxwell,* 384 U.S. 333, 349 (1966), behind which "justice cannot survive," *id.; see also United States* v. *Cianfrani,* 573 F.2d 835, 854 (3d Cir. 1978), will prevent the public from ever learning—especially when unreviewable acquittals result—whether various closures were corrupt or otherwise inconsistent with the Sixth Amendment's norms. Unable to learn of abuses, the public will have too little incentive to seek political correctives—and no notion of how such correctives might be designed. And the difficulty goes still deeper. For unless the Sixth Amendment's open trial norms are vigorously enforced, the public can have no assurance that any of the Constitution's *other* guarantees for fair trial and due process of law are being complied with. Like the right to vote, therefore, the right of members of the public to attend criminal trials should be "regarded as a fundamental political right, because preservative of all rights," *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886)—in part because the exercise of this right maintains pressure on government to adhere to legality, but also because, like electoral malapportionment, breaches in the principle of open trials are all but impossible to cure from within.

It is therefore not only entirely appropriate to derive and enforce a constitutional cause of action for members of the public to resist ouster from criminal trials, *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971); it is imperative. Unless an independent right of

action is recognized for expelled members of the public, there will be no means even for this Court to enforce the Sixth Amendment norm of open trials. For when the participants find their joint or several interests served by secrecy—which, in the trial context, is never *required* by fairness—there will be no one to seek independent review unless ousted members of the public may be heard. *See Gannett,* 99 S.Ct. at 2935 (Blackmun, J., concurring in part and dissenting in part).

3. *Gannett* Is Consistent With Judicial Enforcement of Public Access to Criminal Trials.

Gannett neither requires nor implies a contrary rule. The Court's holding explicitly focused on "pretrial proceedings," not on the trial proper. The New York Court of Appeals decision under review was described by this Court as encompassing *only* the question of "exclusion of the press and the public from the pretrial proceeding," 99 S.Ct. at 2904. Moreover, the Court at least twice emphasized that this question of closing certain pretrial proceedings was the only question it had considered and decided. Thus, for example: "[T]he issue here is whether the Constitution *requires* that a pretrial proceeding such as this one be opened to the public. . . ." *Id.* at 2908; *see id.* at 2901, 2913. And the Chief Justice in his concurring opinion pointedly reserved judgment on the issue of trial closures, suggesting that the focus in *Gannett* on *pre*trial proceedings " 'makes . . . *all the difference.*' "[43]

[43] 99 S.Ct. at 2913, approvingly quoting *Daubney* v. *Cooper,* 5 Manning & Ryland, 314, 316-18 (K.B. 1829). In permitting a spectator ejected from a courtroom to recover for assault and battery, the *Daubney* court wrote:

> [I]t is one of the essential qualities of a Court of Justice that its proceedings should be public, and . . . all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose,—provided they do not interrupt the proceedings, and provided there is no specific reason why

While dicta in *Gannett* may be given a broader reading,[44] the fundamental functional and historical distinctions between a pretrial suppression hearing and a criminal trial proper decisively remove any basis for extending the Court's Sixth Amendment analysis to trials themselves.[45] In most pretrial closure proceedings, enforcement of an independent right of access would pose inherent problems. For the most part, pretrial proceedings are employed to screen out inadmissible or illegally obtained information whose pretrial dissemination in small communities, like that involved in *Gannett,* may at least plausibly be thought ineradicably to taint potential jurors. Harmonizing the competing rights at stake at this pretrial stage, unless judges are permitted "to be overcautious" in the direction of fair trial, *id.* at 2905 n.6, would require that a complex and highly particularistic balance

---

they should be removed,—have a right to be present for the purpose of hearing what is going on.

Id. at 3, 10 Barn. & C. 237, 240, 109 Eng. Rep. 438, 440.

[44] *See, e.g.,* 99 S.Ct. at 2911. Such dicta surely need not be elevated into holdings. *See, e.g., McGrath* v. *Kristensen,* 340 U.S. 162, 177 (1950) (Jackson, J., concurring) ("Precedent . . . is not lacking for ways by which a [court] may recede from a prior opinion that has . . . perhaps misled others"); *Henslee* v. *Union Planters Bank,* 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[45] Indeed, although some lower courts have held the Sixth Amendment's public trial guarantee applicable to various pretrial proceedings if the *defendant* invokes the guarantee, *see, e.g., United States* v. *Cianfrani,* 573 F.2d 835 (3d Cir. 1978), this Court has never decided the question. If, as has been suggested, *see Gannett,* 99 S.Ct. at 2935 (Blackmun, J., concurring in part and dissenting in part), this Court would hold "that not even the accused has a right to a public pretrial suppression hearing," then *Gannett* only decided that, in a proceeding to which the Sixth Amendment's public trial clause is wholly inapplicable, *nobody* can invoke the clause to demand access—hardly a remarkable conclusion, and one that says nothing at all about the existence or nonexistence of a Sixth Amendment right enforceable by members of the public to gain access to criminal *trials.* Indeed, the Court quite plainly recognized that its Sixth Amendment holding would not "necessarily" preclude the existence of such a right. *Id.* at 2909.

be struck between confidentiality and openness. Meaningful review of that balance at the behest of interested members of the public would in most cases prove extremely difficult if not impossible without destroying the very confidentiality that closure was designed to maintain.

By contrast, once the trial has commenced, "inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means." 99 S.Ct. at 2905 (footnote omitted). Thus, not only is the legitimacy and constitutionality of any order closing the entire trial suspect to the point of presumptive invalidity, *see* Parts III & IV *infra*; it is also clear that independent review of *trial* closures, initiated by ousted members of the public, *can* be effective—without sacrificing values as fundamental as the public interest in open trials. The trial court's capacity to insulate the jury from outside information once the trial is underway makes it plain that even the fullest public airing of the supposed reasons for a closure order at the behest of an excluded member of the public need not compromise in the least the right of the accused to an untainted jury.

The Sixth Amendment should therefore be held to guarantee open criminal trials as "a fundamental and essential feature of our system of criminal justice," *id.* at 2923 (Blackmun, J., concurring in part and dissenting in part), binding on the states through the Fourteenth Amendment, *In re Oliver,* 333 U.S. 257 (1948), and enforceable at the behest of excluded members of the public, even when all of the trial's participants opt for secrecy.

C. The Right Is Implicit in the Interdependence of the First and Sixth Amendments.

At a minimum, it is plain that a right of attendance for members of the public is vital both to the public accountability of the participants in the criminal process and to

the public's ability to understand and criticize, and thus to make intelligent choices about, the administration of justice. These twin aims of institutional accountability and public awareness are crucial, in turn, to realizing the distinct core purposes of the Sixth and First Amendments. Thus it would be anomalous in the extreme— and ultimately subversive of our constitutional plan—if, whenever the participants in criminal trials might find it preferable to operate in the dark, excluded members of the public could not assert the one right on which the purposes of both these amendments so heavily depend.

Whatever the true limits of the First Amendment's protection of public awareness, directly affected members of the public could not be deemed to be unprotected against a government policy of conducting criminal trials in secret on the accused's request without admitting a flaw in the Constitution difficult to imagine the Framers of the Sixth Amendment accepting—let alone intending. So, too, whatever other gaps the Sixth Amendment's protection of vigorous prosecution and impartial adjudication might contain, directly affected members of the public could not be deemed to be without any safeguard against a government policy of suppressing information about criminal justice without conceding an omission not readily to be ascribed to the Framers of the First Amendment, and difficult to suppose they could have countenanced.

The very fact of such close interdependence between the aims of the two constitutional provisions as they converge in the context of criminal proceedings renders doubly suspect a constitutional interpretation that would leave so deep a rent in the fabric of the Nation's fundamental law, and strongly counsels a construction that would avoid any such scar. Accordingly, the Court should find in the very "conjunction of liberties" at stake here,

Thomas v. *Collins*, 323 U.S. 516, 531 (1945), and in "the close nexus between the freedoms" involved, *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958), a basis for according special constitutional protection to the right of members of the public to attend criminal trials free of unwarranted governmental interference—regardless of the wishes of the accused or of the trial's other participants. *Cf. Boyd* v. *United States*, 116 U.S. 616, 630 (1886) (interdependence of Fourth and Fifth Amendments); *Stanford* v. *Texas*, 379 U.S. 476, 484-85 (1965) (interdependence of First and Fourth Amendments); *Griswold* v. *Connecticut*, 381 U.S. 479, 482-85 (1965) (interdependence of First, Third, Fourth, and Fifth Amendments); *United States* v. *United States District Court*, 407 U.S. 297, 313-14 (1972) ("convergence of First and Fourth Amendment values").

D. Even if Not Otherwise Enumerated, the Right Is Implicit in Ordered Liberty and Is Among the Rights or Privileges "Retained by the People."

Even if this Court should conclude that the right of members of the public to be present as observers at criminal trials finds insufficiently specific "enumeration in the Constitution," that fact alone could "not be construed to deny or disparage" the existence of such a right, as one "retained by the people." U.S. Const., Amend. IX.

On the contrary, a Ninth and Fourteenth Amendment right, privilege, or immunity of access to criminal trials would follow directly, even without more specific textual enumeration, from the central role of such a right in the "Anglo-American regime of ordered liberty," *Duncan* v. *Louisiana*, 391 U.S. 145, 149-50 n.14 (1968)—a role at least informed, even if not unambiguously guaranteed, by the First and Sixth Amendments, and one undeniably revealed

in "this Nation's history and tradition." *Moore* v. *City of East Cleveland,* 431 U.S. 494, 503 (1977) (footnote omitted). *Cf. Duncan* v. *Louisiana, supra,* 391 U.S. at 148-149 & n.14; *Johnson* v. *Louisiana,* 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring).[46] Just as the expressive "use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens," *Hague* v. *C.I.O.,* 307 U.S. 496, 515 (1939) (opinion of Roberts, J., joined by Black, J.), so, too, the observational use of the Nation's halls of justice has, from time immemorial, been among those same privileges, immunities, rights, and liberties. *See, e.g.,* 3 W. Blackstone, *Commentaries* * 373 (6th ed. 1681); 2 E. Coke, Institutes of the Laws of England * 103 (1765-1769).

Indeed, the right of public access to criminal trials seems an indispensable precondition of the system of government established by the Constitution. No less than the unenumerated right to vote in state elections, *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 665 (1966), the right of access to criminal trials must be "regarded as a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886) (voting). No less than the unenumerated right to proof beyond a rea-

[46] To hold that *due* process of law must be *open* process of law would entail no elevation of a substantive zone of personal autonomy into a newly-recognized right against the majority, *cf. Moore* v. *City of East Cleveland, supra,* 431 U.S. at 537 (Stewart, J., joined by Rehnquist, J., dissenting); *id.* at 549 (White, J., dissenting); it would require little beyond the quintessentially procedural recognition that accessibility to the public is a characteristic "inhering in the institutional process by which justice is administered." *Estes* v. *Texas,* 381 U.S. 532, 588 (1965) (Harlan, J., concurring). For a public trial implies nothing about the permissible *content* of a state's criminal laws or sanctions; it "implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process." *Id.* at 589.

sonable doubt, *In re Winship,* 397 U.S. 358 (1970), the right of access to criminal trials has won "virtually unanimous adherence" throughout our history, reflecting "a profound judgment about the way in which law should be enforced and justice administered." *Id. at* 361-62, quoting *Duncan* v. *Louisiana, supra,* 391 U.S. at 155. Indeed, much like the reasonable doubt requirement, our system of open trials has proven itself "indispensable to . . . the respect and confidence of the community in applications of the criminal law." *In re Winship, supra,* 397 U.S. at 364.[47]

As with the right of interstate travel, *United States* v. *Guest,* 383 U.S. 745, 757-59 (1966), there is thus no need "to ascribe the source of this right . . . to a particular constitutional provision." *Shapiro* v. *Thompson,* 394 U.S. 618, 630 (1969) (footnote omitted). For "the full scope of the liberty guaranteed by the Due Process Clause"—and, one might add, the full scope of privileges or immunities likewise secured by the Fourteenth Amendment—"cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." *Poe* v. *Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). "The tacit postulates" of the constitutional plan "are as much engrained in the fabric of the document as its

[47] Where the state forbids any extrajudicial resolution of a particular dispute, this Court has held that only the litigant's unimpeded access to court can make the state's "monopoly over techniques for binding conflict resolution . . . acceptable under our scheme of things." *Boddie* v. *Connecticut,* 401 U.S. 371, 375 (1971) (indigent divorce plaintiff entitled by due process to waiver of court costs). So too, the state's monopoly, through the criminal law, over the legitimate use of force, *see Ogden* v. *Saunders,* 25 U.S. (12 Wheat.) 213, 346-47 (1827) (Marshall, C.J., joined by Duvall and Story, JJ., dissenting), is acceptable only because all have access to criminal trial courts. For the victims of violent crimes, for example, the legitimacy of insisting that official prosecution replace private vengeance is ultimately linked to the victim's ability to enter the courthouse to see justice done.

express provisions." *Nevada* v. *Hall,* 99 S.Ct. 1182, 1195 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting).

Thus, the right of the individual to attend and observe any criminal trial, subject only to narrowly focused restraints to assure fairness, order, and other overriding values, is "of constitutional dimension because [its] derogation would undermine the logic of the constitutional scheme," *id.* at 1197—a logic that inescapably entails publicity and openness in the state's ultimate confrontations with its citizens, when life and liberty are at risk. Whatever may be deemed its precise textual source, the right to attend criminal trials is confirmed by our "shared experience and common understanding," *id.* at 1194, an experience and understanding critically shaped but neither wholly defined nor fully expressed by the First and Sixth Amendments.

Our "common understanding," *id.,* warns that we dare not rely solely on appellate review to expose abuses of judicial or prosecutorial power—whether those abuses occur with the complicity of an accused who purposely seeks the cover of secrecy, or with the reluctance of an accused subtly pressured to waive without protest the protection of publicity. Moreover, some secret trials, like the one in the instant case, will end in nonappealable acquittals. Even where appeals are possible, much judicial and prosecutorial misconduct will either be insulated from correction by such doctrines as harmless error, or remain hidden because visible only through the pattern revealed by a series of individual cases.

Nor can we depend wholly on the preparation of post-trial transcripts to bring the truth to light. As already noted, few can afford this expense—even after a relatively short trial. Moreover, the delay alone will often make the record stale, and matters like credibility are forever lost

when only a cold transcript is available. Indeed, secret trials automatically defeat the right of neighbors, friends and relatives—not only the accused's but the victim's—to judge for themselves who was lying and who was telling the truth.

More fundamentally, our "shared experience," *id.*, teaches that the very spectre of secret trials is a source of public terror. The state's bland assurance that anyone accused of crime is free to demand a public proceeding offers scant comfort to those who wonder how genuine that freedom truly is or how costly its exercise might be made, and hardly reassures those who fear less that they will be unable to obtain an open trial than that the criminal law itself—what it proscribes, how it is enforced—is destined to remain a mystery until the day they discover that they too have been accused.

Experience also teaches that secret trials encourage corruption and abuse of power, spawning both the reality and the appearance of manipulation. Neither confidence in the administration of justice, nor a system of justice worthy of confidence, would long survive a scheme in which the trial's participants were empowered, by mutual agreement, to conceal each other's crimes.[48]

By avoiding secret trials, we have not only minimized these evils; we have also become known to the world as an informed and free people. Indeed, our political and legal history has been significantly shaped by the criminal trials our people have watched, reported, and relived. Imagine an America in which secret trials had been held in the prosecutions of Aaron Burr, John Peter Zenger, or John Thomas Scopes; of James Earl Ray, Sirhan Sirhan,

[48] *Cf. United States* v. *Nixon,* 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure . . . ").

or Arthur Bremmer; of the Chicago Eight, the Watergate Seven, or the Wilmington Ten.

Nor need one focus on such historic trials to recognize the crucial importance of public access to criminal trials even in wholly non-political contexts. This very case makes the point with force: A man is tried in a small town for the murder of a local hotel manager; the case drags through three open trials; then a fourth trial is held—behind closed doors. Suddenly, the jury is excused and the defendant set free. Can there be any doubt that not only those close to the victim, but all members of the community, are bound to feel cheated of something they had always supposed was theirs—the simple right to *see* justice done?

Given the well founded "traditional Anglo-American distrust for secret trials," *In re Oliver,* 333 U.S. 257, 268 (1948), we can assure neither the accountability of government, nor any reasonable confidence that the guilty are indeed being punished and the innocent set free, if entire criminal trials may be closed. Membership in the political community, given our form of government, thus entails a specially protected "liberty" interest in access to criminal trials by members of the public—an interest whose abridgment requires "particularly careful scrutiny," *Poe* v. *Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), an interest that certainly cannot be sacrificed at the altar of secrecy, either on whim or in gross.

It follows that our right to attend criminal trials—to watch as silent observers the necessarily public drama of criminal justice—is secured not only by the texts of the First and Sixth Amendments, and not only as an interstitial inference from those two provisions taken together, but also as a cornerstone of the Constitution's fundamental structure.

Without that right, none of the other guarantees of liberty or of the rule of law could be assured. Both because the right has been honored by centuries of Anglo-American practice, and because its denial would leave a treacherous and ultimately unendurable void in our constitutional scheme, that right must be counted among those "retained by the people." [49]

---

[49] It should be added that, based on a multiplicity of constitutional sources, a presumptive right of members of the public to attend criminal trials has *already* been recognized by a majority of this Court. Four members of the Court, relying on the Sixth and Fourteenth Amendments, would "require an accused who seeks closure to establish that it is strictly and inescapably necessary in order to protect the fair trial guarantee." *Gannett*, 99 S.Ct. at 2936 (Blackmun, J., joined by Brennan, White and Marshall, concurring in part and dissenting in part). Another Member of the Court, relying on the First and Fourteenth Amendments, would find a "right of access to courtroom proceedings . . . limited [only] . . . by the constitutional right of defendants to a fair trial . . . . and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." *Id.* at 2915 (Powell, J., concurring). Despite the characterization of this grouping of Justices as "an 'odd quintuplet,'" *id.* at 2919 n.2 (Rehnquist, J., concurring), there is nothing unique about constitutional principles resting on divergent theoretical analyses. *See, e.g., Apodaca* v. *Oregon*, 406 U.S. 404 (1972); *Johnson* v. *Louisiana*, 406 U.S. 356 (1972); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Indeed, this Court only recently declared its "institutional duty" in the face of such theoretical disagreements "to follow until changed the law as it now is, not as some Members of the Court might wish it to be." *Hudgens* v. *NLRB*, 424 U.S. 507, 518 (1976). Under the constitutional *standard* espoused by a majority of this Court in *Gannett*—whatever the varying *theories* underlying that standard—it is clear that the Constitution imposes upon the state a heavy burden of justification where, as here, the press and the public have been excluded from a criminal trial and stand threatened with repeated exclusion.

III.

As Construed and Applied by the Court Below to Authorize Summary Expulsion of the Public for the Duration of a Criminal Trial, the Virginia Closure Statute Violates the Constitution's Guarantees That Criminal Trials Will Be Open to Public Attendance and Observation.

Because the right of access to criminal trials is among "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society," *Kovacs* v. *Cooper,* 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring), that right "come[s] to this Court with a momentum for respect lacking when appeal is made to [less basic and enduring] liberties." *Id.* As such, the right of access to criminal trials must be protected from any risk of unconstitutional infringement by a shield of procedural safeguards and substantive standards founded on the principle that this fundamental right is susceptible of limitation only when, and only to the degree that, it unavoidably clashes with some other equally transcendent value.

Even with regard to the closure of pretrial suppression proceedings, whose "whole purpose . . . is to . . . insure that [unreliable or illegally obtained] evidence does not become known to the jury," *Gannett,* 99 S.Ct. at 2905, this Court made clear that secrecy was tolerable precisely because the values of openness could be "outweighed by the defendant's right to a fair trial." *Id.* at 2912; *id.* at 2915-16 (Powell, J., concurring); *id.* at 2936 (Blackmun, J., concurring in part and dissenting in part). But, as the Court made equally clear, there is no unavoidable clash between the constitutional norms of open and fair trials once the trial itself has begun, given the "variety of means"

short of secrecy that are always available "[a]fter the commencement of the trial" to prevent unfairness. *Id.* at 2905 (majority opinion).[50] Indeed, publicity *promotes* the aims of a fair trial—even if not always the perceived self-interest of its participants—just as publicity may *defeat* the aims of a pretrial suppression hearing.

A. Orders Closing Entire Criminal Trials Must Overcome An All-But-Conclusive Presumption Of Constitutional Invalidity.

Given the purposes and effects of orders closing judicial proceedings, the costly case-by-case task of judging future closure orders that might be issued in the name of fairness, *cf. id.* at 2916-17 (Powell, J., concurring); *id.* at 2936-39 (Blackmun, J., concurring in part and dissenting in part), would almost certainly only confirm what history has already shown beyond doubt: that closing an entire criminal trial is *never* legitimate, because it is never necessary. That lesson, in turn, implies an all-but-conclusive presumption: that an order excluding the public from an entire criminal trial is unconstitutional.

If ever a trial court thinks it appropriate to test this presumption in a particular case, such a test must conform strictly to standards and procedures permitting of no mistaken or ill-motivated lurch to secrecy. The "over-caut[ion]" that may lead courts to impose closure orders which are not strictly necessary may be acceptable at the *pre*trial stage, *id.* at 2905 n.6, given the "special risks" of

[50] These include continuance, severance, change of venue, *voir dire*, peremptory challenges, sequestration, admonition of jurors or of witnesses, exclusion of witnesses from the courtroom except during their own testimony, expulsion of unruly spectators, and others. *See, e.g.*, ABA Project on Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press Standard 8-3.2 (App. Draft 1978). *See also Nebraska Press Ass'n* v. *Stuart, supra*, 427 U.S. at 562-65; *Sheppard* v. *Maxwell, supra*, 384 U.S. at 354 n.9, 358-62.

irremediable prejudice from dissemination of unreliable or illegally obtained evidence to potential jurors in a small community. *Id.* at 2905; *id.* at 2915-16 (Powell, J., concurring). But at the *trial* stage, where a battery of remedies short of closure can be deployed to avoid such risks, excessive caution spells constitutional overkill when it leads to an order ousting the public from an entire trial.

This Court's First and Sixth Amendment decisions establishing the standards and procedures that are required to protect rights no more fundamental than the right at issue here provide a blueprint for the structure of safeguards that should be put in place to prevent any constitutionally unjustifiable encroachment upon the domain ruled by the right to an open and public trial.

First, no closure order, however limited in duration, should ever be considered except to meet the state's duty to assure the defendant a fair trial, or another equally compelling objective. *Id.* at 2936 (Blackmun, J., concurring in part and dissenting in part); *cf. Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1968); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963); *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960); *Thomas* v. *Collins,* 323 U.S. 516, 520 (1945); *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942).

Second, no closure order should be considered absent convincing evidence on the record that the degree of secrecy imposed by the order is required to prevent a clear and present danger of irreparable damage to a concern as fundamental and compelling as fair trial. *See Gannett,* 99 S. Ct. at 2937 (Blackmun, J., concurring in part and dissenting in part). If an order is requested that would bar observers for the entire duration of the trial, this requirement of course implies that orders of more limited duration must be preferred absent a powerful showing that only the more extreme option would suffice. *See id.* at 2939.

Third, no closure order should be considered absent convincing evidence and explanations on the record demonstrating that no means less drastic than excluding the public—such as jury sequestration or a change of venue—could adequately protect fairness or serve whatever other compelling objective the closure order would have been designed to advance. *Id.* at 2937. *See also Sherbert* v. *Verner, supra,* 374 U.S. at 407; *Shelton* v. *Tucker,* 364 U.S. 479, 487-90 (1960); *Talley* v. *California,* 362 U.S. 60, 64 (1960); *Schneider* v. *State,* 308 U.S. 147, 161, 164 (1939).

Fourth, no closure order should be considered without convincing evidence and explanations on the record demonstrating a very high probability that the order will in fact prove effective in protecting against the perceived harm. *Cf. Gannett,* 99 S.Ct. at 2937 (Blackmun, J., concurring in part and dissenting in part); *Nebraska Press Ass'n* v. *Stuart, supra,* 427 U.S. at 565-67; *New York Times Co.* v. *United States, supra,* 403 U.S. at 733 (White, J., joined by Stewart, J., concurring).

Fifth, no closure order should be considered unless affected members of the public are given a fair and timely opportunity to be heard in response and to obtain expedited judicial review if they protest to no avail. *Cf. Blount* v. *Rizzi,* 400 U.S. 410, 421 (1971). If it is known in advance that a closure order will be entertained at a given time and place, or if it reasonably could have been known, then the public should be given some correspondingly prior notice. *Cf. Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Board of Regents* v. *Roth,* 408 U.S. 564, 575 n.14 (1972); *Baldwin* v. *Hale,* 68 U.S. (1 Wall.) 223 (1864). In any event, anyone removed from the court under a closure order should be notified *at that time* of the right to an immediate, informal hearing. And if a closure motion is made in such a way that interested members of the public would have no reason to be aware of the matter,

then at least a short delay should be provided during which reasonable public notice may be given. To permit a closure order to take effect, and a trial to proceed in secret, while excluded individuals or potentially interested members of the public remain unaware either that the trial is in progress or that they have a right to contest its closure, is to sanction, for reasons of sheer convenience, the irreversible loss of the rights and values that open trials serve. *See* Part II *supra.*

Sixth, once a closure order has been issued, interested members of the public must be promptly informed of the grounds on which it was issued, including the reasons for rejecting less extreme measures. Legitimately confidential information obviously need not be disclosed in open court—although a record of *in camera* proceedings must be available under appropriately secure conditions to assure meaningful appellate review of any closure order that may issue.

Seventh, throughout any period during which a criminal trial has been closed to the public, the court should "ensure that an accurate record is made of [the] proceedings . . . and that the public is permitted proper access to the record as soon as the threat to the defendant's fair trial right has passed." *Gannett,* 99 S.Ct. at 2939 (Blackmun, J., concurring in part and dissenting in part). Although no after-the-fact recording or transcript can substitute for the opportunity to observe a trial in progress, *see* Part II-A(3) *supra,* no record at all is obviously worse. Failure to assure that the fullest and most accurate possible record is in fact preserved, and to make such a record available at public expense[51] at the earliest possible mo-

[51] Just as it would almost certainly be unconstitutional to charge a fee for the "privilege" of exercising the basic right of attending and observing a trial, *cf. Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966); *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943),

ment, constitutes a completely gratuitous sacrifice of a basic constitutional right.

Eighth, and finally, closure orders cannot be tolerated when issued pursuant to open-ended delegations of discretionary power, exercised with the equally discretionary acquiescence of the prosecution upon the motion of the accused. *See Cox* v. *Louisiana, supra,* 379 U.S. at 557-58; *Saia* v. *New York,* 334 U.S. 558, 560-62 (1948); *Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940); *Lovell* v. *Griffin,* 303 U.S. 444, 450-53 (1938). *Cf. Furman* v. *Georgia,* 408 U.S. 238 (1972). As with uncontrollable discretion generally, that conferred by a standardless closure scheme represents both an abdication of the public power to make explicit choices of policy, *see McGautha* v. *California,* 402 U.S. 183, 248-87 (1971) (Brennan, J., dissenting), and an invitation to abridge the rights of would-be trial observers for plainly impermissible and permanently invisible reasons.[52]

B. The Virginia Closure Statute Utterly Fails To Overcome That Presumption.

Without doubt, the Virginia Closure Statute invoked by the trial court and defended before and sustained by the Virginia Supreme Court in this case,[53] flagrantly violates

---

at least where the cost would be prohibitive for the individual who seeks access, *cf. Lubin* v. *Panish,* 415 U.S. 709 (1974); *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), so too it would appear to be impermissible to limit post-closure access to those who could afford to buy a transcript. *Cf. Griffin* v. *Illinois,* 351 U.S. 12 (1956).

[52] That the scheme of Va. Code § 19.2-266 also reposes in the accused a power to *prevent* a secret trial cannot save it from this constitutional infirmity; from the perspective of members of the public who wish to attend the trial, this is simply a delegation, to a self-interested private party, of unbridled control over a fundamental constitutional right. *Cf. New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.,* 99 S.Ct. 403, 420 (1978) (Stevens, J., dissenting).

[53] *See* Part I-A *supra.*

even the most minimal conception of the standards and procedures required for the protection of the open trial right. Indeed, of the eight requirements described above, not one is met by Va. Code §19.2-266, as written or as construed and applied in this case.

By its terms, Va. Code §19.2-266 invites trial judges to act as the trial court in Stevenson's case did: exercising completely unrestricted discretion, in virtually summary fashion, to close whole trials for the trifling convenience of proceeding in secret. The only "hearing" that was provided any member of the public took place after a full day of secret proceedings—half way through the trial. No notice was given anyone, before or after closure, of what was about to happen or of what had occurred. The only recording made was one that can barely be understood, and can be transcribed only at a court reporter's convenience and at private expense.[54] The court conducted no inquiry into the supposed need for the order or into such an order's efficacy, and gave no consideration whatever to less drastic alternatives. To the contrary, in proceeding as it did, the court was complying fully with the unreigned spirit of blanket authority conferred by Va. Code §19.2-266.[55]

One criterion of the statute stands out: persons may be expelled from the courtroom if their "presence would impair the conduct of a fair trial." But as the statute's meaning is revealed through its application in this case, that language goes far beyond authorizing the exclusion of witnesses while others testify, *see Johnson* v. *Commonwealth,* 217 Va. 682, 232 S.E.2d 741 (1977); *Yorke* v. *Com-*

[54] *See* n.37 *supra.*

[55] *See* n.7 *supra.* Indeed, the state itself insisted below that the closure of Stevenson's trial pursuant to Va. Code § 19.2-266 was not only fully authorized by that provision; it was entirely "justified." Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition at 17.

monwealth, 212 Va. 776, 188 S.E.2d 77 (1972); or authorizing the removal of a disruptive individual or an unruly mob; or authorizing the removal of individuals as to whom, or in circumstances as to which, a particular danger of prejudicing the defendant's trial has been shown likely.

In fact, the language authorizes the removal of all spectators—friends, relatives, journalists, strangers—however few and orderly, *on the simple theory that the presence of people other than the trial's participants might somehow spoil matters.* Although counsel for defendant made several nebulous and unsupported suggestions as to how this might occur,[56] all the trial court offered by way of explanation in invoking the statute was that "the defendant has made the motion" (A. 6a). And all the trial court offered of an explanatory character in refusing to vacate the closure order later the same day was that, given the "lay-out of the Courtroom," it might be that "having people in the Courtroom is distracting to the jury" (A. 16a).

The Virginia Closure Statute has thus been construed to authorize closing an entire criminal tral in the name of "fairness" on the sole grounds that the defendant would like the trial closed, and that the bare fact of being observed—since no concrete distraction was suggested—might prevent jurors from rendering a fair verdict, or prevent witnesses from giving proper testimony.

Needless to say, both grounds are flatly inconsistent with the very existence of any right at all in members of the public to observe a trial: Virginia's premise—that public trials are unfair trials—directly contravenes the premises of the Constitution.

No law so interpreted and enforced as the Virginia Closure Statute has been in this case could possibly be

[56] *See* Part IV *infra.*

reconciled with the existence of a right to observe criminal trials. And even if the statute had not been given so extreme a reach, its failure to meet any of the substantive or procedural requirements derived above from this Court's First and Sixth Amendment cases would suffice to render the statute clearly unconstitutional.

IV.

Regardless of the Statute or Rule Invoked to Expel the Public From the Criminal Trial in This Case, That Expulsion Was Both Procedurally and Substantively Unconstitutional and Illustrates the Need for This Court to Articulate Clear Limits on the Use of Closure Orders.

If we begin with the all-but-conclusive presumption that an order excluding the public from an entire criminal trial is unconstitutional, *see* Part III-A *supra,* then the order in this case was surely void. For there was nothing even remotely unusual about the case, its background, or the context of the trial—nothing to suggest that the ordinary harmony between an open trial and a fair trial could not obtain.

The record contains only two hints of anything even faintly different about this case. First, the trial court referred to the courtroom's "layout" and suggested that having people there might be "distracting to the jury." (A. 16a). In fact, there was nothing about this courtroom (*see* Exhibits A and B *infra*) that could possibly warrant departure from the open trial norm. Although of modest size, the courtroom is of classic design; built in 1735, it has doubtless served as a model for literally hundreds of other courts throughout the Nation. In any event, why this courtroom's "layout" should suddenly have seemed a

problem—after it had been used to conduct public criminal trials for nearly two-and-a-half centuries—was not explained. The trial court was surely right in its conclusion: "[M]aybe that's not a very good reason" (*Id.*).

Second, there were references to the fact that this was Stevenson's third retrial (A. 14a-16a), and a suggestion that secrecy might somehow decrease the risk of having to endure a fourth—or at least would spare Stevenson's attorney the bother of "keep coming back up to the Court" to defend his client. (A. 15a). If anything, of course, this factor cuts against closure rather than for it. Given the prior trials and the publicity they generated (A. 34a, 35a), it is difficult to see what could possibly have been accomplished by stemming the flow of information from the third replay. Indeed, the very notion that shutting out the public might make it easier to bring the saga of John Paul Stevenson to a more rapid end is suggestive of precisely what open trials are designed to avoid: clandestine arrangements that the trial's participants would fear to make in the light of day.

With these two hints of the unusual removed as possible justifications for closure, we are left with virtually nothing to support the action of the courts below. For not even the most generous interpretation of the concerns alluded to by defense counsel—that jurors might read the papers (A. 15a), or that witnesses might talk to court-watchers (A. 5a)—could possibly have amounted to justification for conducting a murder trial behind closed doors.

Moreover, in response to the concerns defense counsel mentioned, counsel for appellants suggested the possibility of sequestering the jury, *see* Va. Code §19.2-264, and excluding or admonishing witnesses (A. 9a-13a). Defense counsel simply asserted "[t]here's no way" to prevent jurors from reading the papers or watching television (A. 15a), and

said not a word about the device of sequestration. In ruling that the press and the public should be expelled, the trial court likewise said nothing about the availablity or efficacy of any of the less drastic means that had been suggested. As one would expect, the usual devices, *see* n.50 *supra,* were in fact more than ample to remove any risk that openness seemed to pose for fair trial—yet the trial court ordered closure, without explaining its use of a bludgeon when not even a scalpel was necessary.

Nor was the bludgeon even likely to accomplish its intended purpose. For banishing the press and the public was a patently ineffectual answer to the vague concerns defense counsel voiced. That jurors might learn through press reports what others thought about the proceedings remained as great, or as small, a danger after the closure as before, since jurors were not prevented from discussing the case with others outside the courthouse. Any danger of prejudicing a possible future jury could hardly have been stilled by closure, since details about the trial could have been spread, by the jurors then impanelled, to prospective jurors in any future trial. In any event, the trial court did not even advert to the question of efficacy. As with the issues of need and alternatives, it seemed sufficient that closure was something defense counsel wanted, and something Va. Code §19.2-266 allowed.

The constitutional defects in the procedure by which this extraordinary order was entered in this all-too-ordinary case have already been set forth. *See* Part III *supra.* One can only conclude that, even if the presumption against trial closure were far weaker than it in fact is, what the trial court did in this case—and what the Virginia Supreme Court approved on the authority of *Gannett*—was a blatant violation of the rights secured by the Constitution to appellants and to the many others in Hanover

County who had an interest in seeing—and a *right* to see—how the guilt or innocence of John Paul Stevenson would finally be resolved.

Yet there is not the slightest reason to suppose that the trial judge who expelled the public from his courtroom in order to decide Stevenson's fate in secret, or the judges of Virginia's highest court who upheld the closure authority thus exercised, are less sensitive to the premises of an open society than countless others in similar situations would be. The simple explanation is that it is easier, may seem kinder, and no doubt has appeared safer, to err without pause on the side of the accused. But once the legitimacy of conducting entire trials in secret—something few would previously have found thinkable—is accepted, the number of closure requests by defendants in criminal cases will certainly mount, and neither prosecutors nor trial judges will have as much reason to resist as to go along. Given the self-accelerating character of departures from the norm of open trials, *see* Part II-B(2) *supra*, the norm of openness could well be replaced, in time, with a norm of secrecy. And one of "the indispensable conditions of an open as against a closed society," *Kovacs* v. *Cooper, supra,* at 95 (Frankfurter, J.), would be in grave peril.

CONCLUSION

The case from which this appeal arises began in the courthouse where Patrick Henry's name first appeared upon the pages of American history. To a courthouse crowded with an overwhelming multitude, he raised his voice in defense of liberty. How different was the trial of John Paul Stevenson, held in the same courthouse—emptied of all observers—more than 200 years later. If upheld on appeal, the judgments of the Virginia Supreme

Court sustaining that secret proceeding would entomb our courts in crypts of silence and put liberty itself at risk throughout the land. For this and for all the foregoing reasons, the judgments of the Virginia Supreme Court should be reversed.

Respectfully submitted,

LAURENCE H. TRIBE
Griswold Hall 307
Cambridge, Massachusetts 02138
(617) 495-4621

ANDREW J. BRENT
ALEXANDER WELLFORD
LESLIE W. MULLINS
CHRISTIAN, BARTON, EPPS,
BRENT & CHAPPELL
1200 Mutual Building
Richmond, Virginia 23219
(804) 644-7851

*Counsel for Appellants**

DAVID ROSENBERG
Langdell Hall 264
Cambridge, Massachusetts 02138
(617) 495-4558

Of Counsel

November 30, 1979

---

* Counsel for appellants acknowledge the assistance of David H. Remes, J.D. 1979, in the preparation of this brief.