IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-243

RICHMOND NEWSPAPERS, INC., TIMOTHY B. WHEELER, and KEVIN McCARTHY, *Appellants,*

v.

COMMONWEALTH OF VIRGINIA and RICHARD H.C. TAYLOR, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF OF THE WASHINGTON POST, AMERICAN BROADCASTING COMPANIES, INC., CBS INC., NATIONAL BROADCASTING COMPANY, INC., THE NEW YORK DAILY NEWS, THE WALL STREET JOURNAL, ET AL.

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SACRAMENTO BEE, THE (BALTIMORE) SUN, THE (BALTIMORE) EVENING SUN, THE (JACKSONVILLE) FLORIDA TIMES UNION, JACKSONVILLE JOURNAL, WICHITA EAGLE, WICHITA BEACON, THE SALT LAKE TRIBUNE, THE (ALLENTOWN, PA.) MORNING CALL, (ALLENTOWN, PA.) EVENING CHRONICLE, THE ALBANY TIMES-UNION, THE (ALBANY, N.Y.) KNICKERBOCKER NEWS, THE WISCONSIN STATE JOURNAL, THE (MADISON, WISC.) CAPITOL TIMES, THE (RIVERSIDE, CALIF.) PRESS, THE (RIVERSIDE, CALIF.) ENTERPRISE, ST. JOSEPH (MO.) GAZETTE, ST. JOSEPH (MO.) NEWS-PRESS, THE DECATUR (ILL.) HERALD, DECATUR (ILL.) DAILY REVIEW, JACKSON (TENN.) SUN, THE ANNISTON (ALA.) STAR, ANCHORAGE (ALASKA) DAILY NEWS, THE (FREDERICKSBURG, VA.) FREE LANCE-STAR, WAUKESHA (WISC.) FREEMAN, THE (BEND, ORE.) BULLETIN, CHIPPEWA HERALD-TELEGRAM (CHIPPEWA FALLS, WISC.), THE GREENWOOD (MISS.) COMMONWEALTH, OMAHA SUN, THE (HAVRE DE GRACE, MD.) RECORD, GRINNELL (IOWA) HERALD-REGISTER, HOMER (ALASKA) NEWS, *AMICI CURIAE,* IN SUPPORT OF REVERSAL

Fifty-six newspapers and three television networks submit this brief as *amici curiae* in support of appellants' claim that three final judgments of the Supreme Court of Virginia, entered on July 9, 1979, should be reversed. All parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk.

OPINIONS BELOW

The opinions of the Supreme Court of Virginia refusing appellants' petition for appeal, dismissing appellants' petition for a writ of mandamus and dismissing appellants' petition for a writ of prohibition, dated July 9, 1979, are set forth in the Appendix to the Jurisdictional

Statement (hereinafter "J.S. App.") at 1a, 2a and 3a, and are unreported.

JURISDICTION

This is a consolidated appeal from three final judgments of the Supreme Court of Virginia, issued on July 9, 1979, denying appellants, Richmond Newspapers, Inc. and two of its reporters, relief from an order of the Circuit Court of Hanover County banning the public and the press from a two-day criminal trial held on September 11 and 12, 1978.

A Jurisdictional Statement was timely filed with this Court on August 14, 1979, invoking this Court's jurisdiction under 28 U.S.C. § 1257(2).

On October 9, 1979 this Court issued an order postponing consideration of the question of jurisdiction until a hearing on the merits.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

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[1] For the reasons stated in the Reply Brief of Appellants to Appellees' Motion to Dismiss, *amici* submit that this Court has jurisdiction over the final judgments in this case pursuant to 28 U.S.C. § 1257(2). In any event, in light of the importance of the questions presented, the Court should at a minimum treat the appeal papers as a petition for certiorari, see 28 U.S.C. § 2103, and grant that petition pursuant to 28 U.S.C. § 1257(3). See, *e.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 434-35 (1959).

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

The text of Virginia Code § 19.2-266 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.
>
> "A court shall not permit the taking of photographs in the courtroom during the progress of judicial proceedings or the broadcasting of judicial proceedings by radio or television."

QUESTIONS PRESENTED

1. Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as construed to authorize the total exclusion of the press and the public from an entire criminal trial.

2. Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as construed to give trial judges unfettered discretion to close an entire criminal trial to the press and the public.

3. Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render Virginia's Closure Statute void as enforced to expel the press and the public from an entire criminal trial, where

   (a) there is no showing or finding that public observation of the proceedings would substantially

impair the fair trial of the accused, or endanger any other compelling or even significant interest; and

(b) there is no showing or finding that procedures less drastic than secret trial—such as sequestering the jury—are unavailable or are inadequate to protect the interests said to be involved; and

(c) there is no showing or finding that banishing the press and the public from the trial would effectively protect those interests; and

(d) there is no showing or finding that those interests are of sufficient magnitude and are endangered to such a degree as to outweigh the constitutional rights of the press and the public.

INTEREST OF THE AMICI

Amici are fifty-six newspapers of general circulation and three broadcasting networks. They frequently report to the public on the affairs of government, including matters involving the judiciary. *Amici* represent a broad spectrum of the American newspaper publishing and broadcasting industry. They are located in cities and towns in states as diverse as New York, Nebraska, Texas, California and Virginia, among others. They are diverse in size—their newspapers have circulations ranging from over one million daily to under 2,000 weekly, and the three broadcasting companies have in excess of 30 million viewers for their nightly news programs.

The Washington Post is a newspaper published in Washington, D.C. with a daily circulation of 559,371.

American Broadcasting Companies, Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

National Broadcasting Company, Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

The New York Daily News is a newspaper published in New York, New York with a daily circulation of 1,824,836.

The Wall Street Journal is a newspaper published in New York, New York with a daily circulation of 1,750,000.

The Los Angeles Times is a newspaper published in Los Angeles, California with a daily circulation of 1,108,490.

The Chicago Sun-Times is a newspaper published in Chicago, Illinois with a daily circulation of 683,573.

The Detroit News is a newspaper published in Detroit, Michigan with a daily circulation of 631,836.

The San Francisco Chronicle is a newspaper published in San Francisco, California with a daily circulation of 504,644.

Newsday is a newspaper published on Long Island, New York with a daily circulation of 497,759.

The Boston Globe is a newspaper published in Boston, Massachusetts with a daily circulation of 480,752.

The Philadelphia Inquirer is a newspaper published in Philadelphia, Pennsylvania with a daily circulation of 419,497.

The Kansas City Times is a newspaper published in Kansas City, Missouri with a daily circulation of 315,589. *The Kansas City Star* is a newspaper published in Kansas City, Missouri with a daily circulation of 286,032.

The Houston Post is a newspaper published in Houston, Texas with a daily circulation of 299,546.

Buffalo Evening News is a newspaper published in Buffalo, New York with a daily circulation of 266,260.

The Minneapolis Star is a newspaper published in Minneapolis, Minnesota with a daily circulation of 226,899. *Minneapolis Tribune* is a newspaper published in Minneapolis, Minnesota with a daily circulation of 226,828.

The Des Moines Register is a newspaper published in Des Moines, Iowa with a daily circulation of 217,584. *Des Moines Tribune* is a newspaper published in Des Moines, Iowa with a daily circulation of 87,697.

The Atlanta Journal is a newspaper published in Atlanta, Georgia with a daily circulation of 217,450. *The Atlanta Constitution* is a newspaper published in Atlanta, Georgia with a daily circulation of 216,002.

The Courier-Journal is a newspaper published in Louisville, Kentucky with a daily circulation of 199,713. *The Louisville Times* is a newspaper published in Louisville, Kentucky with a daily circulation of 157,638.

The San Diego Union is a newspaper published in San Diego, California with a daily circulation of 198,334. *The Evening Tribune* is a newspaper published in San Diego, California with a daily circulation of 130,148.

The Sacramento Bee is a newspaper published in Sacramento, California with a daily circulation of 186,454.

The Sun is a newspaper published in Baltimore, Maryland with a daily circulation of 174,784. *The Evening Sun* is a newspaper published in Baltimore, Maryland with a daily circulation of 172,145.

The Florida Times Union is a newspaper published in Jacksonville, Florida with a daily circulation of 154,943. *Jacksonville Journal* is a newspaper published in Jacksonville, Florida with a daily circulation of 49,584.

Wichita Eagle is a newspaper published in Wichita, Kansas with a daily circulation of 121,849. *Wichita Beacon* is a newspaper published in Wichita, Kansas with a daily circulation of 41,540.

The Salt Lake Tribune is a newspaper published in Salt Lake City, Utah with a daily circulation of 106,459.

The Morning Call is a newspaper published in Allentown, Pennsylvania with a daily circulation of 102,556. *Evening Chronicle* is a newspaper published in Allentown, Pennsylvania with a daily circulation of 22,466.

The Albany Times-Union is a newspaper published in Albany, New York with a daily circulation of 85,174. *The Knickerbocker News* is a newspaper published in Albany, New York with a daily circulation of 57,093.

The Wisconsin State Journal is a newspaper published in Madison, Wisconsin with a daily circulation of 73,413. *The Capitol Times* is a newspaper published in Madison, Wisconsin with a daily circulation of 34,581.

The Press is a newspaper published in Riverside, California with a daily circulation of 35,826. *The Enterprise* is a newspaper published in Riverside, California with a daily circulation of 62,471.

St. Joseph Gazette is a newspaper published in St. Joseph, Missouri with a daily circulation of 44,640. *St. Joseph News-Press* is a newspaper published in St. Joseph, Missouri with a daily circulation of 51,271.

The Decatur Herald is a newspaper published in Decatur, Illinois with a daily circulation of 37,396. *Decatur Daily Review* is a newspaper published in Decatur, Illinois with a daily circulation of 27,685.

Jackson Sun is a newspaper published in Jackson, Tennessee with a daily circulation of 32,226.

The Anniston Star is a newspaper published in Anniston, Alabama with a daily circulation of 31,075.

Anchorage Daily News is a newspaper published in Anchorage, Alaska with a daily circulation of 29,713.

The Free Lance-Star is a newspaper published in Fredericksburg, Virginia with a daily circulation of 27,118.

Waukesha Freeman is a newspaper published in Waukesha, Wisconsin with a daily circulation of 25,080.

The Bulletin is a newspaper published in Bend, Oregon with a daily circulation of 18,812.

Chippewa Herald-Telegram is a newspaper published in Chippewa Falls, Wisconsin with a daily circulation of 9,220.

The Greenwood Commonwealth is a newspaper published in Greenwood, Mississippi with a daily circulation of 8,854.

The *Omaha Sun* newspapers are published in Omaha, Nebraska with a weekly circulation of 100,700.

The *Record* is a newspaper published in Havre de Grace, Maryland with a weekly circulation of 6,031.

Grinnell Herald-Register is a newspaper published in Grinnell, Iowa with a weekly circulation of 4,126.

Homer News is a newspaper published in Homer, Alaska with a weekly circulation of 1,800.

STATEMENT OF THE CASE

John Paul Stevenson's trial for second degree murder began on September 11, 1978 in the Hanover County (Virginia) Circuit Court.[2] At the start of the trial, defense counsel moved to exclude the public and the press from the courtroom for the duration of the trial, "because I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what." J.S. App. at 7a. The Commonwealth's Attorney did not object to the motion and stressed that the matter was "in the discretion of the Court." *Id.* The Court, noting that "the [closure] statute gives me the power specifically," *id.*, ordered "that the courtroom be kept clear of all parties except the witnesses when they testify." J.S. App. at 8a. The Court's ruling was made

[2] This was his fourth trial. His first trial ended in conviction on the charge, but the verdict was later reversed and the case remanded because prejudicial evidence had been improperly introduced at the trial. The next two trials ended in mistrials.

without conducting any factual inquiry or making any finding of necessity. All members of the public, including appellants, reporters Wheeler and McCarthy, were ordered from the courtroom. The remainder of the trial was conducted in secret.

Counsel for appellants sought a hearing on a motion to vacate the Court's order and to reopen the trial. When this hearing was held at the end of the day's proceedings, appellants were again ordered from the courtroom. No reason for the exclusion of the reporters was given.

Counsel for appellants argued that the closure order was violative of the reporters' First, Sixth and Fourteenth Amendment rights, and contended that there had been no showing that a fair trial would be jeopardized by the presence of members of the press and public. Appellants' counsel pointed out that other remedies, such as sequestration of the jury or change of venue, had not been exhausted or shown to be insufficient to ensure the rights of the defendant.

Defense counsel referred to "difficulty . . . with information . . . between the jurors," J.S. App. at 15a, and to his fear that news of the trial might reach the jury through the press in this "small community." *Ibid.* He insisted that the defendant's right to a fair and impartial trial "supersede[d] all other rights." *Ibid.*

After hearing argument on the motion, the Court noted that the configuration of the courtroom itself made the presence of spectators distracting to the jury. The Court conceded, however, that "maybe that's not a very good reason" to close a trial. J.S. App. at 16a. The Court also observed that in view of the three previous unsuccessful attempts to try the defendant, every effort should be taken at the trial then in progress to assure that "the . . . rights of the defendant are [not] infringed in any way. . . ." *Ibid.* Defendant's motion was then granted

and the courtroom remained closed for the duration of the trial.

Appellants petitioned the Supreme Court of Virginia for writs of mandamus, J.S. App. at 25a, and prohibition, J.S. App. at 28a, and filed an appeal from the closure order, J.S. App. at 24a. Relief was denied in each case, based on this Court's recent decision in *Gannett Co., Inc.* v. *DePasquale*, 99 S.Ct. 2898 (1979).

The public record leaves the actual events of the trial open to conjecture. An order was entered by the trial judge on September 12, 1978. It shows that defendant's motion for a mistrial had been "taken under advisement" —although no grounds for the motion were stated and no reasons given why the court did not dispose of it. The order also revealed that, "on grounds stated to the record," the Court had sustained the defendant's motion to strike the Commonwealth's evidence at the close of the Commonwealth's case. And it found the defendant not guilty of murder, as charged in the indictment. J.S. App. at 44a. Thus, on the morning after the dismissal of the charge, newspapers could only report that a man who had been tried four times for an alleged murder in 1976 had been set free.

SUMMARY OF ARGUMENT

I.

The Sixth Amendment guarantee of a "public trial" embodies a long-standing Anglo-American tradition of conducting criminal trials in public view. As an historical matter, that tradition was based as much on the societal interests served by public trials as it was on the interests of the accused. And although the public trial is set forth in the Sixth Amendment together with other rights of the "accused," the Framers did not thereby

intend to deny the public's interest in public criminal trials as a matter of constitutional concern.

The public's interest in open criminal trials can only be protected by recognition of an implicit constitutional right to attend criminal trials. Protection of the public's interest cannot be entrusted to the individual defendant. For he has little, if any, interest in some of the broad societal functions of public trials—such as informing the public, promoting the appearance of justice, and satisfying the victim that justice has been done. And in a particular case, he may have an interest in defeating some important societal functions of public trials—such as guarding against bias on the part of the judge, deterring perjury, and encouraging unknown witnesses to come forward. There is, in short, "an *independent* public interest in the enforcement of [the] Sixth Amendment guarantee" of a public trial. *Gannett Co.* v. *DePasquale*, 99 S. Ct. 2898, 2907 (1979) (emphasis supplied).

Protection of this independent public interest in open proceedings cannot be left to the other participants in the proceedings, the prosecutor and the judge. The public trial guarantee exists in large measure to guard against their misconduct, and the independent public interest in open proceedings cannot be entrusted entirely to the parties whose misconduct may escape detection in closed proceedings. Moreover, as a practical matter, the prosecutor and the judge may be hesitant to stand in the way of a defendant's desire for a closed proceeding—either out of fear of reversal or a genuine desire to appear fair and cooperative to the defendant.

Finally, because members of the public have a direct, personal interest in *participating* in criminal trials as spectators, they are appropriate parties to object to their exclusion.

II.

In their most fundamental application, the First Amendment guarantees of free speech and free press protect "the paramount public interest in a free flow of information to the people" concerning the affairs of government, including the administration of justice. *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964). Thus, "the public has the right to be informed as to what occurs in its courts." *Estes* v. *Texas*, 381 U.S. 532, 541 (1965).

Every Member of this Court in *Estes* recognized, at least implicitly, that the First Amendment protects the right of the public and the press to attend criminal trials. That recognition is buttressed by the Court's express acknowledgment in *Branzburg* v. *Hayes*, 408 U.S. 665, 681, 707 (1972), that the acquisition, or gathering, of information is entitled to some measure of constitutional protection. And it is completely unaffected by the Court's subsequent "right-of-access" decisions. *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978). Unlike prisons and government institutions and proceedings generally, a criminal trial is a "public event." *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). As a matter of common law tradition and constitutional principle, every criminal trial is presumptively open, and that presumptive openness fundamentally alters the nature of the First Amendment issue in this case.

III.

Under any scheme that recognizes the public's constitutional right to attend criminal trials, there can be no basis for excluding the public from any portion of a criminal trial in order to protect the defendant's right to a fair trial. The defendant's rights can always be protected through alternative measures, such as sequestration, and the exercise of the court's inherent power to control the conduct of courtroom spectators and trial participants.

ARGUMENT

I. THE SIXTH AMENDMENT PROTECTS THE RIGHT OF THE PUBLIC TO ATTEND CRIMINAL TRIALS.

A. Introduction: The Right To A Public Trial.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." This provision rests on a deep-seated "Anglo-American distrust for secret trials," *In re Oliver*, 333 U.S. 257, 268 (1948), based on the belief that "justice cannot survive behind walls of silence." *Sheppard* v. *Maxwell*, 384 U.S. 333, 349 (1966).[3]

The tradition in this country of conducting criminal trials in public view is an unbroken one. When this Court decided *In re Oliver*, *supra*, in 1948, it was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." 333 U.S. at 266.[4] That observation remained true during the thirty years from the Court's decision in *In re Oliver* until the entry of the closure order in this case.[5] This tradition

[3] The public trial guarantee is recognized as fundamental to our system of criminal justice, and is therefore fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment. *In re Oliver*, 333 U.S. 257 (1948). See *Duncan* v. *Louisiana*, 391 U.S. 145, 148-50 (1968); *Argersinger* v. *Hamlin*, 407 U.S. 25, 28 (1972).

[4] "Nor," the Court continued, "have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute." 333 U.S. at 266.

[5] Prior to this case, there had been a few, isolated instances in which members of the public were excluded from limited portions of a trial. These cases are discussed in the Court's opinion in *Gannett Co.* v. *DePasquale*, 99 S. Ct. 2898, 2910 n.19 (1979), and in the concurring and dissenting opinion of Mr. Justice Blackmun, *id.* at 2931 n.11.

of openness, embodied firmly in an express constitutional provision, has become ingrained in the very notion of a criminal trial: "A trial is a *public event.* What transpires in the court room is public property." *Craig* v. *Harney,* 331 U.S. 367, 374 (1947) (emphasis supplied).

In *Gannett Co.* v. *DePasquale,* 99 S.Ct. 2898 (1979), this Court held that the Sixth Amendment's public trial guarantee does not protect the right of the public to attend a *pretrial* hearing on a motion to suppress evidence.[6] The Sixth Amendment question presented in this case is whether the members of the public have any constitutionally protected right to attend criminal *trials.*

B. The Sixth Amendment Protects Important Public Interests.

One point on which there was agreement among all Members of the Court in *Gannett* was that there is, in addition to the defendant's interest, "a strong societal interest in public trials." 99 S.Ct. at 2907. See also *id.* at 2913 (Burger, C.J., concurring), 2914 (Powell, J., concurring), 2930-31 (Blackmun, J., concurring in part and dissenting in part). Public trials, in fact, serve a number of societal interests:

—They serve as a "restraint on possible abuse of judicial power." *In re Oliver,* 333 U.S. at 270.

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[6] In a concurring opinion, the Chief Justice was careful to preserve the question that is posed in this case—whether the public enjoys a right under the Sixth Amendment to attend the trial itself. 99 S.Ct. at 2913. Prior to *Gannett,* this Court had never considered whether the public trial guarantee has any application to pretrial proceedings. Since *Gannett* did not present the question whether the defendant has any right to public pretrial proceedings, that question may still be regarded as an open one. While other Sixth Amendment rights, such as the right to counsel, are clearly applicable "[i]n all criminal *prosecutions,*" the guarantee of openness, like that of speediness, is expressed in terms of the right to a "speedy and public *trial.*" (Emphasis supplied.) But see *United States* v. *Cianfrani,* 573 F.2d 835, 848-51 (3d Cir. 1978); *United States* v. *Clark,* 475 F.2d 240, 246-47 (2d Cir. 1973).

—They guard against misconduct by the police and prosecutors. *Sheppard* v. *Maxwell*, 384 U.S. at 350.

—They protect the integrity of the trial process by deterring perjury. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2930 (Blackmun, J., concurring in part and dissenting in part).

—They promote the search for the truth by inducing unknown witnesses to come forward with relevant testimony. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2907.

—They "cause all trial participants to perform their duties more conscientiously." *Ibid.*

—They perform an informative, educative function by enabling the public to observe the operation of the criminal justice system and the conduct of public officials, many of whom are elected. *Gannett Co.* v. *DePasquale*, 99 U.S. at 2907; *id.* at 2930 (Blackmun, J., concurring in part and dissenting in part); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975); *Lewis* v. *Peyton*, 352 F.2d 791, 792 (4th Cir. 1965).

—They enable the victim of crime, his family and friends to satisfy themselves that justice has been done. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2930 (Blackmun, J., concurring in part and dissenting in part).

—They promote the appearance of justice. *Id.* at 2931; *Levine* v. *United States*, 362 U.S. 610, 616 (1960).

The recognition that public trials serve important societal interests is not of recent vintage; it was central to the tradition of public trials that ultimately gave rise to the Sixth Amendment's public trial guarantee. Indeed, as Mr. Justice Blackmun persuasively demonstrated in his opinion in *Gannett*, the early English tradition of conducting criminal trials in public was established "long before the defendant was afforded even the most rudimentary rights," 99 S.Ct. at 2927, for reasons "quite

unrelated to the rights of the accused." *Id.* at 2925-26. "And there is strong evidence that the public trial . . . widely was perceived as serving important social interests, relating to the integrity of the trial process . . . ." *Id.* at 2928.

When the English common law tradition of public trials was transplanted to the colonies, it was initially viewed as "a characteristic of the system of justice, rather than . . . a right of the accused." [7] *Id.* Of course, by the time the Sixth Amendment was adopted, the public trial had come to be recognized as an important right of the accused. It was therefore appropriate, as well as convenient, for the Framers to include the public trial guarantee in the Sixth Amendment's list of the accused's rights. But it is unlikely, in view of the common law history of public trials and the history of the Sixth Amendment itself,[8] that the inclusion of the public trial as one of the rights of the accused was intended by the Framers as an exclusive statement of the guarantee's foundation.[9]

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[7] Thus, the first public trial provision to appear in the colonies spoke not in terms of the right of the accused, but in terms of the right of the public to attend trials:

> "That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner."

Concessions and Agreements of West New Jersey (1677), Ch. XXIII, quoted in 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971).

[8] That history is set forth in Mr. Justice Blackmun's opinion in *Gannett*, 99 S.Ct. at 2929-30, and will not be recounted in this brief.

[9] Indeed, the initial proposal for a public trial amendment to the Constitution did not cast the right as one belonging to the accused, but urged simply that Congress propose an amendment providing that the "trial should be speedy, public, and by an impartial jury. . . ." Amendments Proposed by New York (1788),

[Footnote continued on page 18]

Certainly in the absence of any debate on the question, it is unlikely that the Framers intended to deny the public's interest in open proceedings as a matter of constitutional concern. It is probable that the Framers, aware that publicity generally serves the interest of both the accused and the public, did not anticipate the day when the accused would seek to be tried behind closed doors, and therefore did not appreciate the need to consider whether the public's interest in publicity required separate, express recognition in the Constitution. Under these circumstances, the absence of express recognition of a public right to attend criminal trials is surely not dispositive.[10] It is appropriate to consider whether the public's interest in public trials is implicitly protected by the Sixth Amendment, by considering whether the public's interest is subsumed completely in the interest of the individual defendant and, if not, whether the public's interest is adequately protected without recognition of an enforceable public right to attend criminal trials.[11]

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quoted in 1 Elliott's Debate, 328 (2d ed. 1836). As Mr. Justice Blackmun noted, there is no indication that the Framers' incorporation of the New York proposal in the Amendment as adopted was intended as a rejection of the public's right to attend criminal trials. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2929-30 (Blackmun, J., concurring in part and dissenting in part).

[10] If an express textual basis for the public's rights under the Sixth Amendment is necessary, it can be found in the term "trial" itself, a term that has its own meaning. *Bridges* v. *California*, 314 U.S. 252, 271 (1941); *Estes* v. *Texas*, 381 U.S. at 559 (Warren, C.J., concurring). "The trial is always public." 3 J. Story, Commentaries on the Constitution of the United States 662 (1833). As Mr. Justice Harlan noted in *Estes*, the right to a public trial "inhere[s] in the institutional process by which justice is administered." 381 U.S. at 588. *Amici* submit, however, that an express textual basis for the public's right to a "public trial" is unnecessary. The Framers expressly provided in the Ninth Amendment that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[11] Certainly the suggestion that the Sixth Amendment implicitly protects the rights of the public is not without precedent. In

[Footnote continued on page 19]

C. The Public's Interest In Public Trials Requires Recognition Of A Sixth Amendment Right To Attend Criminal Trials.

1. *The Public's Interest Is Independent Of The Defendant's Interest.*

Although the defendant as a general matter has a vital interest in many of the benefits of public trials, the

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Singer v. *United States*, 380 U.S. 24, 35 (1965), the Court stated that "although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States* v. *Kobli*, 172 F.2d 919, 924 (3d Cir. 1949) (by implication)." The "implication" referred to in *Kobli* was that the defendant's right to waive a public trial is limited by the public's *constitutional* right to attend the trial:

> ". . . 'it is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on . . . have a right to be present . . . .'
>
> ". . . the right thus accorded to members of the public to be present at a criminal trial as mere spectators . . . has been imbedded in our Constitution as an important safeguard not only to the accused but to the public generally." 172 F.2d at 924.

In *Estes* v. *Texas*, 381 U.S. 532, 559 (1965), three of the five Justices forming the majority assumed that the public trial guarantee, although primarily for the benefit of the defendant, also conferred rights on the public. The electronic media, not the defendant, asserted Sixth Amendment claims in that case, and those three Justices did not reject those claims by holding that the public has no rights under the Sixth Amendment, but rather by addressing themselves to the minimum scope of the public trial guarantee:

> "This prohibition [on televising criminal trials] does not conflict with the constitutional guarantee of a public trial, because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, . . . when the public is free to use those facilities . . . ." 381 U.S. at 584 (Warren, C.J., concurring).

See also *id.* at 595 (Harlan, J., concurring) ("Attendance by interested spectators . . . will fully satisfy the safeguards of 'public trial.' ")

public's interest in those benefits does not vanish simply because a particular defendant does not see the virtues of publicity. The public's interest persists regardless of the personal desires of the individual defendant.

The public's interest, in fact, may be quite different from the interest of the individual defendant. The individual defendant has little, if any, interest in some of the broad societal functions of a public trial—such as informing the public, enabling the victim and his family to satisfy themselves that justice has been done, and promoting the appearance of justice. Indeed, a particular defendant may have an interest in defeating some of the broad societal functions that public trials are designed to serve—such as guarding against bias on the part of the judge, deterring perjury, and encouraging unknown witnesses to come forward. A corrupt, biased or incompetent judge may favor the defendant as well as the prosecution. Perjury is certainly as great a temptation to the defendant's witnesses as it is to the prosecution's. And the unknown witness is as likely to favor the government as the accused. In short, "a secret trial can result in favor to as well as unjust prosecution of a defendant." *Lewis* v. *Peyton*, 352 F.2d 791, 792 (4th Cir. 1965). For these reasons, the public's interest in public trials does not necessarily coincide with that of the defendant, and protection of the public's interest cannot be entrusted to the defendant.[12]

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[12] See also *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884), in which Justice Holmes analogized the privilege for reports of judicial proceedings to the "access of the public to the courts," and stated the privilege's rationale as follows:

> " 'Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.' " (Quoting *The King* v. *Wright*, 8 T.R. 293, 298 (K.B. 1799).

In short, as the Court recognized in *Gannett*, there is "an *independent* public interest in the enforcement of [the] Sixth Amendment guarantee" of a public trial. 99 S.Ct. at 2907 (emphasis supplied). The crucial question is whether that independent public interest is adequately protected by the other participants in the litigation, or whether recognition of an enforceable public right is essential to safeguard that interest.

2. *The Public's Interest Is Not Adequately Protected By The Other Participants In The Litigation.*

In *Gannett*, the Court concluded that there was no basis for inferring a Sixth Amendment right on the part of the public to attend pretrial proceedings, because of its view that "[i]n an adversary system of criminal justice, the public interest . . . is protected by the participants in the litigation." 99 S.Ct. at 2907. Like the public interest in speedy trials and trial by jury, the Court concluded, the independent public interest in public proceedings is adequately protected by the prosecutor and the court.

Amici submit that, whatever assumptions might generally be made about the ability of the prosecutor and the court to protect the public interest, they are peculiarly unsuited to protect the independent public interest in public trials. For three reasons, it is both necessary and appropriate for the Court to recognize a constitutional right, enforceable by the public, to attend criminal trials.

First, the suggestion that the public's independent interest in public trials can be adequately protected by the prosecutor and the court is fundamentally at odds with the basic rationale of the public trial guarantee. The guarantee exists in large measure to guard against misconduct by the judge and by the prosecutor. It is un-

thinkable that the law would entrust to the judge and the prosecutor alone the public interest in guarding against their own misconduct. Simple logic dictates that the public interest in enforcement of a constitutional guarantee not be entrusted entirely to the very parties against whose potential misconduct the guarantee is designed to protect.[13] The prosecutor or judge whose misconduct may be hidden from public view in closed proceedings simply cannot be presumed on his own initiative [14] to consider in good faith the public's interest in having the proceedings open.[15]

Second, assuming that the prosecutor and the judge are acting in good faith, as a practical matter they may

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[13] The difficulties inherent in accepting the prosecutor and the court as adequate guardians of the public's independent interest in public trials are easily illustrated. Mr. Justice Blackmun's example of connivance between a defendant, a prosecutor and a judge of the same political party to close a trial, followed by an acquittal or other favorable ruling by the court, *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2935, is but one example that comes to mind. A defendant who waives his right to a public trial—in an effort, perhaps, to avoid the embarrassment of publicity—may also become an unsuspecting victim of judicial or prosecutorial misconduct, and the prosecutor or judge who is inclined to abuse his power in the course of the trial will hardly be inclined to oppose the defendant's request that the trial be closed.

[14] Both the prosecutor and the judge are more likely to give fair consideration to the public's interest if interested members of the public are given an opportunity to be heard, and the judge is required to make specific findings before ordering closure. See p. 42 *infra*.

[15] As Jeremy Bentham noted, in urging that criminal trials not be closed even at the request of the defendant:

> "The reason is . . . there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the other persons concerned (the judge included) be made a sacrifice." J. Bentham, The Rationale of Judicial Evidence 576-77 (1827).

be less than vigilant in fulfilling their "duty to protect the societal interest in an open trial." *Gannett*, 99 S.Ct. at 2908 n.12. Absent recognition of an enforceable constitutional right on the public's part, which will ensure that the public's interests are vigorously presented by persons who will be directly affected by a closure order, the dynamics of a closure motion are such that the prosecutor and the judge may be hesitant to stand in the way of the defendant's desire for a closed proceeding. Both may be concerned about the possibility of a reversal if the defendant's request is denied. In addition, a genuine spirit of cooperation on the part of the prosecutor, or a desire to appear cooperative to the judge, may deter him from interposing any objection to a request that will not impede the presentation of his case. And the judge's concern that the defendant be treated fairly and believe himself to have been treated fairly may lead the judge to accede to a request that is unopposed by the prosecutor, without any real consideration of the public's interest.[16]

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[16] If these concerns appear unrealistic, one need only consider the course of the proceedings in this case. When defendant's counsel made his oral request to clear the courtroom, the court asked the prosecutor whether he had any objection. This brief exchange then occurred:

"THE COURT: . . . Do you have any objection to clearing the Courtroom, Mr. Bynum [the prosecutor]?

MR. BYNUM: Uh, no sir, I'll leave it to the discretion of the Court. Are you talking about every—are you talking about everyone; the press included? Is that—does your motion extend to them?

MR. NORWOOD: Yes, sir, that would be my motion.

THE COURT: All right, sir.

MR. BYNUM: It's in the discretion of the Court. You know, I—I understand, you know. It's strictly on defense motion.

THE COURT: Yes, sir, well, the statute gives me that power specifically—

MR. BYNUM: Yes, sir.

[Footnote continued on page 24]

By contrast, the public's interest in the enforcement of the right to a jury trial and its interest in the enforcement of the right to a speedy trial are not apt to be so easily disregarded by the prosecutor and the court. The timid prosecutor or judge need not fear a reversal or mistrial if the defendant's request to waive his jury trial right is denied, and to that extent he will be less inclined simply to acquiesce in the defendant's request. In addition, the prosecutor and the judge may well have compelling reasons to prefer a jury trial—the prosecutor because he fears the judge may be overly sympathetic to the defendant, and the judge because he believes that the responsibility for decision in a particular case should be borne by a jury. Similarly, the prosecutor and the judge need not be overly concerned about a reversal based on the denial of a defendant's request for a postponement of his trial—if adequate reasons exist they will be evident at the time, whereas the basis for a closure motion is the fear of events that cannot be anticipated. Moreover, the prosecutor often has a strong interest in proceeding to trial without delay, and the judge has an interest in advancing his docket. It is only when the defendant seeks to waive his right to a public trial, then, that the fear of reversal and the absence of any strong countervailing prosecutorial or judicial interest combine to produce a situation in which the public's interest is apt to be overlooked.

Third, the public's interest in public trials is fundamentally different in nature from its interest in other Sixth Amendment guarantees, in a way that underscores

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THE COURT: —and the defendant has made the motion and I'll rule that the Courtroom be kept clear of all parties except the witnesses when they testify." J.S. App. at 7a-8a.

Neither the prosecutor nor the court gave the slightest consideration to the public's interest in open proceedings.

the appropriateness of recognizing an enforceable public right to insist upon public trials. The public's interest in jury trials and speedy trials, for example, is indirect and general in nature. Its interest in public trials, on the other hand, is a direct, *participatory* interest. Members of the public have an interest in participating in criminal trials as observers, and their interest in participating makes them appropriate parties to object to their exclusion. It is surely true, as the Court noted in *Gannett*, that a member of the public cannot raise an objection to the defendant's waiver of a jury trial or the defendant's request for a continuance. But it is clearly appropriate, *amici* submit, to recognize the right of a member of the public to object to a request that he be excluded from the courtroom.[17]

As the foregoing discussion demonstrates, the public's interest in enforcement of the Sixth Amendment public trial guarantee is qualitatively different from its interest in the enforcement of other Sixth Amendment guarantees. Protection of the public's independent interest in public trials can only be assured by recognition of an enforceable Sixth Amendment right on the part of the public to attend criminal trials.

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[17] This point is supported by traditional standing principles. A member of the public seeking to attend a criminal trial, as opposed to one demanding that a defendant be tried by jury or denied a continuance, has "a personal stake in the outcome of the controversy." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). His is not simply "the generalized interest of all citizens in constitutional governance," which the Court has characterized as too "abstract" to support standing. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 217 (1974). See also *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *United States* v. *Richardson*, 418 U.S. 166, 173, 175 (1974). His interest in observing the proceedings firsthand is a direct, personal one; and consequently his exclusion from the courtroom causes him to suffer a "particular, concrete injury" that is sufficient to confer standing. *United States* v. *Richardson, supra*, at 180, quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 740-41 n.16 (1972). See *United States* v. *SCRAP*, 412 U.S. 669, 687-90 (1973).

II. THE FIRST AMENDMENT PROTECTS THE RIGHT OF THE PUBLIC TO ATTEND CRIMINAL TRIALS.

In *Gannett*, this Court expressly reserved the question whether the public enjoys a right under the First and Fourteenth Amendments [18] to attend pretrial hearings, and it had no occasion to consider whether there is such a right to attend criminal trials. *Amici* submit that the right to attend criminal trials flows ineluctably from the most fundamental principles underlying the First Amendment, that this Court has implicitly recognized a First Amendment right to attend criminal trials, and that continued recognition of that right is fully warranted in view of the relevant precedents.

A. The First Amendment Protects The Right Of The Public To Be Informed About The Conduct Of Government, Including The Administration Of Justice.

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). The First Amendment thus promotes the most basic goal of a democratic system—an informed citizenry. It ensures that the people—the ultimate repository of power and sovereignty—will have the ability effectively and intelligently to govern themselves.

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[18] The First Amendment is fully applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment. *E.g.*, *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 749 n.1 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

> "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).[19]

Of course, "[t]he protection of the public requires not merely discussion, but information." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964). In its most fundamental application, then, the First Amendment guarantee of freedom of speech protects "the paramount public interest in the free flow of information to the people" concerning the affairs of government. *Garrison* v. *Louisiana*, 379 U.S. at 77.[20] Similarly, "[t]he predominant purpose of [the free press guarantee] was to preserve an untrammeled press as a vital source of public information." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

Equipped with information about the affairs of government, the people will have the ability to assure that it is responsive to their will, and to engage in the public debate necessary to arrive at the wisest governmental

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[19] "Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power." A. Meiklejohn, *The First Amendment is an Absolute*, 1961 S.Ct. Rev. 245, 257.

See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); T. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877 (1963); Z. Chafee, Free Speech in the United States (1931).

[20] See also *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85, 92, 95, 98 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976); *Pell* v. *Procunier*, 417 U.S. 817, 832 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 725-26 (1972) (Stewart, J., dissenting); *Lamont* v. *Postmaster General*, 381 U.S. 301, 306 (1965); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

policies.[21] Without information about the conduct of government, the people are powerless to control it. As James Madison wrote:

> "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).

The First Amendment's protection of the "free flow of information" to the public necessarily encompasses the receipt of information and ideas, as well as their publication. As this Court stated in *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), "It is now well established that the Constitution protects the right to receive information and ideas." Thus, for example, in *Martin* v. *Struthers*, 319 U.S. 141 (1943), the Court struck down an ordinance prohibiting door-to-door distribution of literature, not simply because it violated the First Amendment "right to distribute literature," but also because it infringed "the right to receive it." *Id.* at 143. In *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), the Court invalidated a provision of the Postal Service Act authorizing the Postmaster General to detain "communist political propaganda" mailed from abroad, based on "the addressee's First Amendment rights" to receive it.[22] And in

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[21] See generally *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-70 (1964); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940); *Stromberg* v. *California*, 283 U.S. 359, 369 (1931).

[22] Mr. Justice Brennan, while joining the Court's opinion in *Lamont*, also wrote separately to underscore the essential character of the right to receive information.

> "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308.

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936), the Court invalidated a license tax on the advertising revenues of the printed press, because it "limit[ed] the circulation of information to which the public is entitled in virtue of the constitutional guarantees." *Id.* at 250.[23]

The First Amendment guarantees of free speech and free press thus protect the right of the people to receive information—to be informed—about the affairs of government. This protection undoubtedly extends to information pertaining to the administration of justice in general, and the conduct of criminal trials in particular. As the Court noted in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975):

> "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." [24]

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[23] There are numerous other decisions and expressions by the Court to the same effect. See, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Pell* v. *Procunier*, 417 U.S. at 832; *Procunier* v. *Martinez*, 416 U.S. 396, 408-09 (1974); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-65 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *Marsh* v. *Alabama*, 326 U.S. 501, 505 (1946); *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945). To be sure, the right to receive information at issue in these cases was limited in that the Court's reasoning "presuppose[d] a willing speaker." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. at 756. But the cases nevertheless recognize that the First Amendment serves a vital informing function, and that the interest in receiving information is entitled to enforcement in its own right.

[24] See also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978); *Sheppard* v. *Maxwell*, 420 U.S. 333, 349-50 (1966); *Craig* v. *Harney*, 331 U.S. 367, 374 (1947); *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Opinion of Frankfurter, J., respecting denial of certiorari).

The public, in short, "has the right to be informed as to what occurs in its courts." *Estes* v. *Texas*, 381 U.S. 532, 541 (1965).

B. The Right To Attend Criminal Trials Is An Indispensable Element Of The Right To Be Informed About The Administration Of Justice.

If the right of the public "to be informed as to what occurs in its courts" is to have meaning, it must embrace a right to attend criminal trials. As discussed below, in *Estes* v. *Texas*, *supra*, this Court recognized, at least implicitly, that the press and the public enjoy a First Amendment right to attend criminal trials. That recognition is buttressed by the Court's express acknowledgment in *Branzburg* v. *Hayes*, 408 U.S. 665, 681, 707 (1972), that the acquisition, or gathering, of information is entitled to some measure of constitutional protection. And it is completely unaffected by the Court's subsequent "right-of-access" decisions. *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978).

In *Estes*, the Court held that the defendant "in a heavily publicized and highly sensational" [25] criminal trial had been deprived of his right to a fair trial by the televising and broadcasting of the proceedings, in light of then-available technology and prevailing public attitudes. In the course of its opinion, the Court considered the related contentions that the First Amendment protected the right of the press to televise criminal trials and the right of the public to be informed by means of tele-

[25] Mr. Justice Harlan, whose vote was decisive, joined the Court's opinion only to the extent that it was limited to such cases. 381 U.S. at 590-91.

vised proceedings. See *id.* at 539-42.[26] The Court rejected those contentions, at least in light of the prevailing technology and public attitudes, but left no doubt as to its view that the First Amendment protects the right of the press, as well as the public, to *attend* criminal trials. The Court reasoned as follows:

> "It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media." *Id.* at 541-42.[27]

The Court referred to these rights to attend and report as the "reportorial privileges of the press," *id.* at 542,[28] and the entire thrust of the Court's opinion was that the First Amendment right to attend and report on criminal trials must be accommodated fully to the extent that it does not infringe the defendant's right to a fair trial.[29]

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[26] See also Brief of the National Association of Broadcasters et al. as *Amici Curiae, Estes* v. *Texas*, at 5-12; Brief for Respondent, at 22-24; Brief for the Petitioner, at 34-37.

[27] The Court also stated:

"Nor can the courts be said to discriminate [against the television and radio reporter] where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public." 381 U.S. at 540.

[28] "These reportorial privileges of the press were stated years ago:

'The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials . . .' 2 Cooley's Constitutional Limitations 931-932 (Carrington ed. 1927)." 381 U.S. at 542.

[29] "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption

[Footnote continued on page 32]

Chief Justice Warren, joined by Mr. Justice Douglas and Mr. Justice Goldberg, repeated the point in a separate concurring opinion:

> "So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of the press." *Id.* at 585.

And in a dissenting opinion, Mr. Justice Stewart, joined by Mr. Justice Black, Mr. Justice Brennan, and Mr. Justice White, questioned the Court's suggestion that the *televising* of the trial was not protected by the First Amendment:

> "While no First Amendment claim is made in this case,[30] there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. . . . Where there is no disruption of the 'essential requirement of the fair and orderly administration of

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among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process." 381 U.S. at 539.

[30] The case was before the Court on the defendant's appeal from his conviction, not from any ruling on a claimed right to televise or broadcast the proceedings.

> justice,' '[f]reedom of discussion should be given the widest range.'" *Id.* at 614-15 (citations deleted).

Every Member of the Court in *Estes* thus recognized, at least implicitly, that the public and the press enjoy a First Amendment right to attend criminal trials.[31]

The right to attend criminal trials, *amici* submit, arises unmistakably from the informing function of the First Amendment. For that function is not satisfied by enforcement of the rights to publish and receive information discussed in Part II A, *supra*. As this Court has expressly recognized, the initial acquisition, or gathering, of information by the press and the public is also entitled to some measure of protection.

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[31] It may be suggested that, contrary to the implication in *Estes*, the informing function of the First Amendment is satisfied so long as a transcript of the proceedings is made available to the public. That suggestion is without merit for two reasons. First, the consequent delay in transmission of information, which can destroy its timeliness and immediacy, is itself a serious threat to First Amendment values. See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 560-61 (1976); *id* at 609 (Brennan, J., joined by Stewart and Marshall, JJ., concurring); *Bridges* v. *California*, 314 U.S. 252, 268-69, 277-78 (1941); *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962); *Pennekamp* v. *Florida*, 328 U.S. 331, 346 (1946). "Indeed, it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." A. Bickel, The Morality of Consent 61 (1975).

Second, a transcript of the proceedings is no substitute for the ability to observe a trial firsthand. The transcript may contain errors, and, more importantly, it does not record everything that takes place in the courtroom. Crucial elements of the trial—motions, pauses, tone of voice, facial expressions—will be lost forever if the public's knowledge is limited to the content of the transcript. The public's ability to judge the fairness of the proceedings, the credibility of witnesses, and the performance of the participants, including the jury, will be irreparably harmed.

In short, the immediacy, and the very quality, of information available to the public concerning criminal trials will suffer drastically if the public's knowledge of the proceedings is to be restricted to the content of a naked transcript.

Thus, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the Court expressly noted that "news gathering is not without its First Amendment protections," *id.* at 707, and explained that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Mr. Justice Stewart expressed the same point:

> "No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist." *Id.* at 728 (Stewart, J., dissenting).

Mr. Justice Stevens has explained the rationale behind the First Amendment's protection of information-gathering in terms that make clear its importance to self-government and its applicability to the public, as well as the press:

> "It is not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 32 (1978) (Stevens, J., dissenting).

See also *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 862-64 (1974) (Powell, J., dissenting).

The right of the public and the press to gather information is, concededly, not without limits. In *Zemel* v. *Rusk*, 381 U.S. 1 (1965), the Court rejected a First Amendment challenge to the Secretary of State's refusal to validate United States passports for travel to Cuba, citing "the weightiest considerations of national security," as evidenced by the Cuban missile crisis that preceded the filing of the complaint by less than two months. Char-

acterizing the Secretary's refusal as "an inhibition of action," the Court noted that "there are few [such] restrictions . . . which could not be clothed by ingenious argument in the garb of decreased data flow." *Id.* at 16-17.

> "For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the *unrestrained* right to gather information." *Id.* at 17 (emphasis supplied).

Nothing in the Court's decision in *Zemel* casts any doubt on the right of the public to attend criminal trials, implicitly recognized in *Estes.* As the Court expressly recognized in *Kleindienst* v. *Mandel*, 408 U.S. 753, 764-65 (1972), *Zemel* cannot be read as suggesting that an inhibition survives First Amendment scrutiny so long as it can be characterized as an inhibition on action. See also *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Saxbe* v. *Washington Post Co.*, 417 U.S. at 858-59 (Powell, J., dissenting). *Zemel* merely held that action in pursuit of information is subject to the traditional authority of the Secretary of State to restrict foreign travel in the national interest.[32] It also made clear that such action is subject to other limitations, such as the prohibition of "unauthorized entry into the White House." Attendance at criminal trials, however, is fundamentally

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[32] *Zemel* is thus closely analagous to *Kleindienst* v. *Mandel* itself, in which the Court acknowledged that the First Amendment right to "receive information and ideas" was implicated in the government's exclusion of an alien scheduled to speak in this country, but held that right to be subject to the "plenary congressional power to make policies and rules for exclusion of aliens." 408 U.S. at 769.

different from travel to Cuba or admission to the White House. No passport is needed, and no custom or law prohibits "unauthorized entry." By contrast, entry is, as the Court recognized in *Estes*, presumptively permitted.

If anything, the Court's rejection of an "unrestrained right to gather information" in *Zemel* adds force to its implicit recognition in *Estes* of a right to attend criminal trials. *Estes* and *Zemel* were under consideration by the Court at the same time, and *Estes* was decided one month after *Zemel*. Thus, the Court was clearly sensitive to the limits on the right to gather information when it decided *Estes*, and for that reason its clear intimation of a right to attend criminal trials assumes even greater significance than it ordinarily would have.

Subsequent decisions have recognized other limitations on the right to gather information, but the right to attend criminal trials is unaffected by those decisions as well. In *Branzburg*, the Court noted that "the First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally." 408 U.S. at 684. And the Court later applied that principle to uphold prison regulations denying the press access to prisons superior to that afforded the public generally. In *Pell* v. *Procunier*, 417 U.S. 817 (1974), the Court rejected a challenge by the press to a prison regulation limiting media interviews with inmates. It noted at the outset that the regulation was "not part of an attempt by the State to conceal the conditions in its prisons," and that it accorded the press and the general public "full opportunities to observe prison conditions." *Id.* at 830. The Court then concluded that the refusal to extend to the press any special interviewing privilege not accorded the public generally posed no constitutional difficulty, because "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 834.

The Court applied this same reasoning in a second case decided on the same day as *Pell*, rejecting a media challenge to federal regulations limiting interviews with prison inmates. *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974). And in *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978), the Court once again reaffirmed the principle that the news media do not have a special constitutional right of access to prisons, "over and above that of other persons." *Id.* at 3 (Opinion of the Chief Justice). See also *id.* at 16 (Stewart, J., concurring in the judgment).

Nothing in the Court's prison-access decisions, however, casts any doubt on the right of the public and the press to attend criminal trials. Those decisions merely rejected a special right of access by the press to government institutions that, notwithstanding the community's interest in their operation, have been traditionally set apart from and closed to the community at large. Even if they were to be read broadly, as rejecting a general claim of public access to government institutions or government-held information, the prison cases do not undermine the clear implication of *Estes*—that the public and the press have a right to sit as observers at criminal trials. For a criminal trial is vitally different from a prison, and from government institutions and proceedings generally, and those differences fundamentally alter the nature of the First Amendment claim in this case.

A criminal trial is no ordinary government proceeding. Indeed, the term "government proceeding" seems peculiarly ill-suited to a criminal trial. As noted earlier in this brief:

> "A trial is a *public event.* What transpires in the court room is public property." *Craig* v. *Harney*, 331 U.S. at 374 (emphasis supplied).

This characterization of a criminal trial as a "public event" is amply supported by an unbroken tradition, in

this country and in England, of conducting criminal trials in full view of the public. See pp. 14-17, *supra*.[33] It is supported, too, by an express provision of the Constitution, the Sixth Amendment's guarantee of a "public trial." Even if that provision does not, by itself, establish a right enforceable by the public to attend criminal trials, "[t]here is no question that [it] . . . presumes open trials as a norm." *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2908.[34] Both as a matter of common law tradition and constitutional principle, then, every criminal trial is presumptively open. And that presumptive openness not only serves to guarantee the integrity of criminal trials that is the overriding concern of the Sixth Amendment; it also promotes the First Amendment's central purpose of ensuring an informed public.

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[33] This tradition of public trials has encompassed a tradition of First Amendment protection for reports of events in the courtroom.

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.'"

Sheppard v. *Maxwell*, 384 U.S. 333, 350 (1966) (citations deleted). See *id.* at 362-363 ("Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom.")

[34] Mr. Justice Stevens relied upon the Sixth Amendment's public trial guarantee to support his conclusion in *Houchins* that the public has an interest in how a convicted person is treated, sufficient to warrant recognition of a First Amendment right of access to prisons. 438 U.S. at 36-37 (Stevens, J., dissenting). *A fortiori*, the public trial guarantee would require recognition of a First Amendment right to attend criminal trials.

The presumptive openness of criminal trials distinguishes this case from *Pell*, *Saxbe* and *Houchins*, regardless of how broadly those cases are construed. For the claim in this case is not that the First Amendment grants the public or the press any general right of access to government institutions or to information generated or controlled by the government. The claim is simply that the First Amendment limits the government's power to exclude the public from a proceeding that has always been considered a "public event," and whose very integrity has been viewed as dependent upon its openness.

The attempt here is not to use the First Amendment as a Freedom of Information Act or "sunshine law," or "to require openness from the bureaucracy." Stewart, "Or of the Press," 26 Hastings L.J. 631, 636 (1975). It may well be that political forces and "factors other than the Constitution must determine what government-held data are to be made available to the public." *Houchins* v. *KQED, Inc.*, 438 U.S. at 16 (Stewart, J., concurring in the judgment). But it would be a denial of an unbroken tradition in this country, embodied in an express constitutional provision, to treat an objection to being excluded from a criminal trial—a "public event" —as tantamount to a demand for "government-held data." Unlike "government-held data," which by definition are unavailable to the public absent a decision by the government to release them, a criminal trial is presumptively open to the public.[35]

For these reasons, continued recognition of the public's right to observe criminal trials need not lead to the compelled disclosure of government-held data or to the compelled opening of government institutions and proceed-

[35] Indeed, since the defendant has no right to compel a closed trial, *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2907 n.11, it is only through the affirmative action of the court that the public can be deprived of information to which it would otherwise be entitled.

ings generally. Nor, in view of the clear and limited rationale articulated in this brief, need it engender any difficulties over the development of standards governing compelled disclosure of, or access to, information. See *Houchins* v. *KQED, Inc.*, 438 U.S. at 14. In short, recognition of the continued vitality of the principles implicit in *Estes* is not at all inconsistent with this Court's "right of access" decisions, regardless of how broadly they are construed.

In sum, the right of the public to attend criminal trials is clearly deserving of First Amendment protection, for the ability of the public to observe criminal trials firsthand has always been recognized as essential to the accomplishment of the First Amendment's most basic objective, an informed public.

III. PROTECTION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL DOES NOT REQUIRE EXCLUSION OF THE PUBLIC FROM A CRIMINAL TRIAL.

This case presents the question whether, and under what circumstances, the defendant's interest in a fair trial justifies the exclusion of the public from a criminal trial.[36] Specifically, it poses the question whether, and

[36] Thus, the Court need not consider when, if ever, any portion of a trial may be closed to protect national security information, but see H.R. 4736, 96th Cong., 1st Sess. (1979) (assuming trial must be public and proposing establishment of certain trial and pretrial procedures for the use of classified information in connection with federal cases), to preserve the confidentiality of the government's "skyjacker profile," see *United States* v. *Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972), to protect trade secrets, to protect an undercover agent's or informant's identity, but see *People* v. *Jones*, 47 N.Y. 2d 409, 418 N.Y.S. 2d 359 (N.Y.Ct.App.), *cert. denied*, No. 79-450 (Nov. 5, 1979), or to preserve the confidentiality of communications seized under 18 U.S.C. § 2510 *et seq.*, see *United States* v. *Cianfrani*, 573 F.2d 835 (3d Cir. 1978). It is *amici's* position, however, that there are substantial constitutional objections to entry of even limited closure

[Footnote continued on page 41]

under what circumstances, the defendant's fair-trial right can justify the exclusion of the public [37] from an *entire* criminal trial. It is *amici's* position that, given the alternatives available to a court to ensure that a defendant receives a fair trial, and given the inherent power of a court to control the conduct of courtroom spectators and trial participants, there is no conceivable situation in which the defendant's fair-trial right can justify the exclusion of the public from an entire criminal trial or, indeed, from any portion thereof.[38]

In light of the views expressed by the Members of the Court in *Gannett*, it is clear that an order excluding the public from a criminal trial, or any portion thereof, could not be entered unless there were a determination, at a minimum, (a) that in the absence of closure the defendant's right to a fair trial is likely to be prejudiced, (b) that there are no alternatives to closure that would adequately protect the defendant's right to a fair trial, and (c) that the entry of a closure order would be effective in guarding against the perceived harm to the defendant's rights. See *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2937-38 (Blackmun, J., concurring in part and dissenting in part); *id.* at 2916 (Powell, J., concurring). In addi-

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orders of short duration based on those considerations, at least at the actual trial where the information is being disclosed to a jury, and that those considerations, which relate to specific testimony, certainly could not justify entry of a closure order encompassing an entire trial.

[37] Certainly a court may limit the number of spectators at a trial to those who reasonably can be accommodated in the courtroom.

[38] The Jurisdictional Statement has framed the questions presented in this case in terms of the constitutionality of the Virginia Closure Statute. *Amici* agree with the appellants that the question of that statute's constitutionality is properly before this Court. See note 1, *supra*. Regardless of whether the question of the statute's constitutionality is before the Court, however, the ultimate issue in this case is whether, and under what circumstances, a closure order can be entered to protect the defendant's right to a fair trial. *Amici* will address the case in those terms.

tion, the public could not be deprived of its right to attend a criminal trial without being accorded minimal procedural safeguards: no closure order could be validly entered unless the public had been given an opportunity to be heard on the question of its exclusion [39] and the trial court had made findings revealing the legal and factual bases for that exclusion.[40]

Judged by these standards, the closure order entered in this case was, without question, procedurally and substantively defective. The substantive defects, *amici* submit, do not stem from any peculiar circumstances of this case, but are inherent in the order itself. The order related not to any pretrial proceedings, which may be the source of prejudicial information that could potentially be relayed to prospective jurors, but to the trial itself. Indeed, the order extended to the entire trial [41]—

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[39] *Amici* submit that the right to be heard cannot be limited to those members of the public "actually present" at the time a closure order is made, for that rule would permit total circumvention of the public's rights. First, the closure motion itself might be made in writing under seal, or in an in-chambers conference. Second, even if the motion is made in open court, it may be made at a pretrial proceeding or at another time when members of the public interested in attending the trial are not present. Finally, members of the public present when the motion is made may not be aware of their right to object to a closure request. This does not mean that entry of a closure order must await the delay attendant upon public notice. It means simply that members of the public must be permitted to file written motions and supporting memoranda opposing a previously-entered closure order.

[40] In addition, any closure order could be no broader than absolutely necessary to prevent the perceived harm, and a transcript of the proceedings would be required to be made and released as soon as the threat to the defendant's right to a fair trial had passed. *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2916 (Powell, J., concurring); *id.* at 2939 (Blackmun, J., concurring in part and dissenting in part).

[41] While this aspect of the court's order dramatically illustrates its unconstitutional impact, *amici* do not view it as the dispositive aspect. For the reasons discussed in Part B of this section, *infra*,

[Footnote continued on page 43]

including jury selection, opening and closing argument, and the taking of testimony.[42] And the order was not directed to specific individuals whose presence was deemed to pose a threat to the defendant's right to a fair trial, but extended indiscriminately to all members of the public. For the reasons stated in Part B, *infra*, no such order could ever be justified by reference to the defendant's right to a fair trial.

A. The Trial Court Failed Adequately To Consider The Public's Right To Attend Criminal Trials.

The trial court in this case failed to observe the minimum procedural safeguards and make the necessary findings that reflect full and fair consideration of the public's right to attend criminal trials. The court's order that "the Courtroom be kept clear of all parties except the witnesses when they testify" came in response to a brief, unopposed request by defense counsel prior to jury selection, based exclusively on the vague, undifferentiated fear of "information being shuffled back and forth when we have a recess as to . . . who testified to what." J.S. App. at 7a-8a. In entering the order, the court observed simply that "the statute [Virginia Code § 19.2-266] gives me that power," and that "the defendant has made the motion." *Ibid.*

The trial court gave the public no opportunity to voice objections to an exclusion order, and it provided no indication of the legal or factual basis for its order. The court made no effort to accommodate the right of the

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amici cannot conceive of any situation in which closure of any portion of a trial could be justified by any imagined threat to the defendant's fair-trial right.

[42] Because the court sustained a motion to strike the Commonwealth's evidence and declared the defendant not guilty as charged at the close of the Commonwealth's case, it is not clear whether the closure order would have encompassed instructions to the jury, return of the verdict, and sentencing as well.

public to attend the trial, and it required no showing that an open proceeding was even "likely" to prejudice the defendant's right to a fair trial, much less that such an exclusionary order was "strictly and inescapably necessary." Compare *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2916 (Powell, J., concurring) with *id.* at 2936 (Blackmun, J., concurring in part and dissenting in part). Moreover, the court gave no explicit consideration to alternative means of avoiding any perceived danger to a fair trial. Indeed, the court appeared to enter the exclusionary order for no reason other than that "the defendant has made the motion," and the prosecution did not object. Such an order is invalid under any scheme that recognizes the public's constitutional right to attend a criminal trial.

Nor was the court's order legitimized by the subsequent proceedings. After appellants, who had been excluded from the trial, consulted with counsel, they returned with counsel in order to file a motion to open the trial to the press and the public. During the hearing on the motion, which was held after an entire day's proceedings had been held in secret,[43] counsel for appellants emphasized many of the serious constitutional infirmities in the previously-entered exclusionary order, and argued specifically that, before excluding the public, the court must "entertain alternatives which might protect the defendant's rights"—such as "sequestration of the jury or change of venue." J.S. App. at 13a-14a. Confronted with these arguments, the Court simply reaffirmed its prior order, noting in passing that it was the third effort to give the defendant a trial since his initial conviction was reversed, and that because of the "layout of the

[43] The court ordered appellants to leave the courtroom during the hearing on the motion, and considered entry of an order precluding counsel from discussing the hearing with appellants. See J.S. App. at 9a-10a, 13a-19a.

Courtroom," spectators would be "distracting to the jury." J.S. App. at 16a.

The court made absolutely no finding that there was any likelihood of irreparable injury to the defendant's right to a fair trial, or that the entry of a closure order would be effective in guarding against the perceived dangers. Nor did it give any consideration to the alternatives to a closure order. In short, the court failed altogether to give the necessary consideration to the public's right to attend criminal trials, and for that reason alone the order is fatally defective.

The defect in this order, however, is not simply that the court failed to make the express findings that consideration of the public's rights required. As the discussion below indicates, the order in this case would be invalid even if the court had purported to make the appropriate findings. The court's order—indeed, any order excluding the public from a criminal trial—simply cannot be justified by any considerations related to the defendant's right to a fair trial.

B. The Public's Right To Attend Criminal Trials Can Always Be Accommodated With The Defendant's Right To A Fair Trial.

During the proceedings in the trial court, three distinct concerns—arguably related to the defendant's fair-trial right—were discussed as possible bases for entering a closure order. Reference was made, either by the court or by counsel, to (1) the rule against witnesses, (2) juror taint through exposure to inadmissible information or erroneous press accounts of public trial proceedings, and (3) distraction of jurors by those attending the trial. None of those concerns could possibly justify the order entered in this case, or any other order closing all or part of a criminal trial to the public.

1. *The Rule Against Witnesses.*

Defense counsel apparently based his original motion to exclude the public from the courtroom on the fear that courtroom observers might relay the substance of one witness' testimony to another witness yet to testify, thereby circumventing the rule of excluding all witnesses from the courtroom during the testimony of other witnesses. Such an undifferentiated fear certainly cannot form the basis for excluding the public from a criminal trial.

First, it is unlikely that circumvention of the rule against witnesses poses a serious threat to the defendant's right to a fair trial. To be sure, exclusion of witnesses once a trial begins is designed to prevent falsification and to uncover fabrication that has already occurred. See, *e.g.*, 3 Weinstein's Evidence at 615-4 (1977). But although statutes often provide for exclusion as a matter of right,[44] many jurisdictions clearly commit the matter to the sound discretion of the trial court. *Id.* at 615-6. And while the practice of excluding witnesses is "at least as old as the Bible," *id.* at 615-4, *amici* are not aware of any case holding that a violation of a rule against witnesses, without more, constitutes a denial of due process.[45]

Second, there are less restrictive alternatives to total exclusion of the public that will adequately guard against circumvention of the rule against witnesses. Witnesses

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[44] See, *e.g.*, Federal Rules of Evidence, Rule 615.

[45] In *Holder* v. *United States*, 150 U.S. 91 (1893), this Court held that it was not error to deny a defendant's request to disqualify a witness who had violated a rule against witnesses. Explaining that the testimony of such a witness "is open to comment to the jury by reason of his conduct," the Court concluded that the witness "is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." *Id.* at 92.

can be instructed not to discuss the case with anyone other than counsel under pain of contempt, see *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 553-54 (1976); *id.* at 601 n.27 (Brennan, J., concurring). And they can be cross-examined about their conversations about prior testimony. In addition, if a showing is made that a particular observer at trial is likely to relay information to witnesses, that observer could be directed not to discuss the testimony with witnesses, or even be excluded from the courtroom.[46]

In *Estes* v. *Texas*, *supra*, this Court recognized that routine newspaper coverage of a trial could frustrate invocation of the rule against witnesses, but implicitly held that that effect cannot justify exclusion of the public or the press from the courtroom. 381 U.S. at 547-48; see *id.* at 590 (Harlan, J., concurring). That conclusion is surely correct. For if the vague fear of frustration of the rule against witnesses were sufficient to justify closure of a trial, then the rule's invocation would justify closure of any criminal case, and the public's right to attend criminal trials would be rendered a nullity.

2. *Juror Taint.*

There can be no doubt that a juror's exposure to inadmissible evidence may, under certain circumstances, threaten a defendant's right to a fair trial.[47] But that concern, which was cited in *Gannett* as a potential basis for closing a pretrial hearing, can hardly justify an order closing the trial itself. The public surely has a right, at

[46] Defense counsel in this case referred vaguely to "this woman that was with the family of the deceased when we were here before." J.S. App. at 7a. He made no showing, however, that she had acted as a "go-between" among prosecution witnesses in the defendant's prior trials, or that she was likely to do so at this trial.

[47] Defense counsel in this case alluded vaguely to the "difficulty . . . with information . . . between the jurors" and to the possibility that information might "leak out." J.S. App. at 15a.

a minimum, to attend and hear what jurors will concededly be hearing.[48]

Nor can an order excluding the public from the trial, or any portion thereof, be justified by the fear that prejudicial testimony given outside the presence of the jury, or information acquired beyond the confines of the courtroom, might be transmitted to the jury. If the trial has begun, there are effective alternatives to a closure order —instructions that the jurors not discuss or read about the case and, if necessary, sequestration. See *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2905 n.5. Appropriate deference to the constitutional right to attend criminal trials requires that those alternatives be adopted. Indeed, to the extent that prejudicial information stems from previously held proceedings, or extra-judicial sources, the alternatives of special instructions and sequestration are the *only* effective safeguards against juror taint.

3. *Juror Distraction.*

The only reason affirmatively stated by the court for closing the trial in this case was that because of the "layout of the Courtroom," spectators would be "distracting to the jury." J.S. App. at 16a.[49] The court's

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[48] One could always speculate that a criminal trial will result in a reversal because the judge erroneously admitted highly prejudicial inadmissible evidence. But even in that situation, it must be presumed that a judge has adequate means available to ensure that any retrial is conducted with all due deference to the defendant's rights. See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562-565 (1976); *Sheppard* v. *Maxwell*, 384 U.S. 333, 358-362 (1966). And any finding by a trial judge that evidence is admissible, but that his ruling on admissibility is so likely to be reversed that the public should be excluded from the trial, is inherently suspect.

[49] In light of the court's further observation that "the rule of the Court may be different" when it moved to a new building, "where people can sit in the audience so the jury can't see them," J.S. App. at 16a, it appears that the court closed an entire criminal trial for no reason other than the possibility of juror distraction.

further observation that "maybe that's not a very good reason" to exclude the public was, *amici* submit, closer to the mark.

The Hanover County courtroom is designed like thousands of courtrooms throughout the land,[50] in which hundreds of thousands of public trials have been conducted. A trial there is simply a "trial in a traditional courtroom under traditional conditions." *Estes* v. *Texas*, 381 U.S. at 595 (Harlan, J., concurring). The very notion that a defendant might not receive a fair trial because jurors will be "distracted" by silent spectators maintaining decorum in the courtroom is directly contrary to one of the fundamental premises underlying the public trial guarantee—that openness will cause all trial participants, including the jurors, to perform their duties more conscientiously. See, *e.g.*, *Gannett Co.* v. *DePasquale*, 99 S.Ct. at 2907. A trial judge, after all, has more than adequate power to prohibit actual disruptions, expel unruly spectators, instruct jurors about their solemn obligations to listen to the testimony and, if necessary, castigate a juror whose attention strays. The suggestion that an exclusion order may also be necessary or permissible to ensure an attentive jury is patently frivolous.[51]

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[50] Like most courtrooms, it has a bar separating the area for spectators from the area where the trial participants are situated. As this Court has noted, the bar of the court is designed, among other things, "to protect the witness and the jury from any distractions, intrusions or influences." *Sheppard* v. *Maxwell*, 384 U.S. at 355.

[51] It might also be suggested that witness embarrassment about particular testimony might impede the search for the truth and thereby deprive the defendant of his right to a fair trial. *Cf. Geise* v. *United States*, 262 F.2d 151 (9th Cir. 1958). It is unnecessary for the Court to consider in this case whether the witness' interest would ever permit exclusion of the public. See note 36, *supra*. It is clear, however, that concern about the impact of a witness' embarrassment upon the quality of his testimony cannot justify the wholesale exclusion of the public. For it is inconceivable, *amici*

[Footnote continued on page 50]

The above considerations lead to the conclusion that, when proper deference is given to the right of the public to attend criminal trials, there can be no justification for abridging that right in the name of the defendant's right to a fair trial. The rights of the public and of the defendant are harmonious, and neither need be rendered subservient. Some of the arguments for closing a criminal trial simply do not seriously implicate the defendant's right to a fair trial, or, indeed, are contrary to the fundamental rationale of the public trial guarantee. Other concerns can be adequately dealt with by the courts through measures that do not infringe on the rights of the public. Indeed, in light of the court's power to sequester a jury and control the conduct of all spectators in the courtroom and all participants in the trial, *amici* submit that exclusion of the public from a criminal trial is never a constitutionally sanctioned method for safeguarding a defendant's right to a fair trial.

CONCLUSION

On the ground floor of Independence Hall in Philadelphia, there are two chambers. In the eastern chamber, the meeting place of the provincial Assembly, the Founding Fathers formulated and signed the Declaration of Independence and the Constitution of the United States. In the western chamber, the seat of various state and local courts, this Court held brief sessions during 1791 and 1796.

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submit, that a witness—required in any event to give testimony in the presence of the court, counsel, the defendant, the court reporter, other court officials and, in most cases, a cross-section of the public selected as jurors—would be so inhibited by the presence of some additional spectators, however few, as to deprive the defendant of his fair-trial right. Certainly, concern about the impact of the public's attendance on the quality of testimony can never justify exclusion of the public from an entire criminal trial.

These two famous chambers, though generally similar in shape and design, are separated not only by a magnificent hallway, but by the fundamentally different conceptions of their functions. Because the Assembly's sessions were sometimes held in secret, the eastern chamber was provided with a door. But the western chamber, where the courts sat and justice was administered, had no doors —that chamber was entered through open archways.

The open archways to justice in Independence Hall stood as silent witness to the faith of our forebears that the halls of justice must be open to all, and that tyranny, incompetence, malfeasance, and corruption can only flourish in secrecy. The open archways to justice stood as a public repudiation of the practices of the Court of Star Chamber and embodied our profound belief that no government, no legislature, no court, and no individual can deprive the public of the right to attend and observe the criminal trials of this Nation. They reflected the recognition not only that justice must be done, but also that the public has the right to observe first-hand that justice is being done, and that both the innocent accused and the heinous criminal are dealt with fairly.

The thought of secret trials, the hallmark of totalitarianism, has always been anathema to the fundamental precepts of our constitutional scheme. Inherent in the very concept of a criminal trial has been the notion that interested members of the public have a right to attend. And the proposition that the enjoyment of that right rests solely on the pleasure or whim of the trial participants, whose conduct is subject to scrutiny and control only when the public is present, has never before been seriously advanced. At this time in our Nation's history —when the effectiveness of the criminal justice system is being questioned as never before, when the competence of prosecutors, defense counsel and judges is constantly challenged, and when the fairness and justness of the ad-

versary system itself is under attack—the need for public knowledge and understanding of the criminal justice system is more vital than ever before. Now is not the time to allow that system to become shrouded in secrecy.

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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