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, *Appellee.*

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

v.

RICHARD H.C. TAYLOR, *Appellee.*

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v.

RICHARD H.C. TAYLOR, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA.

Jurisdictional Statement.

Appellants are the Richmond Newspapers, Inc., and two of its reporters, who, along with all other members of the public,

were banished from a two-day murder trial held on September 11 and 12, 1978, in the Circuit Court of Hanover County, Virginia. Closure was ordered without prior notice or evidentiary hearing, without any showing that the presence of observers threatened the defendant's rights or the orderly conduct of the trial, and without any finding that less drastic means of preventing any perceived threat to such interests were unavailable or inadequate. For the first time in its 243-year history, the Hanover County Courthouse was the scene of a secret trial.[1]

The trial judge, appellee Richard H.C. Taylor, acted on the express authority of Va. Code § 19.2-266, which provides, in pertinent part:

> "In the trial of all criminal 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."

[1] It was in this courthouse, built in 1735, that Patrick Henry's name "was to become indelibly written for the first time upon the pages of American history." J. & M. Peters, *Courts of the Richmond Area: A Primer* 22 (1969). Appearing on December 1, 1763, before his father, the presiding justice, Henry aroused a packed courthouse with a philippic against the tyranny of the King and the greed of the clergy. R. Lancaster, *A Sketch of the Early History of Hanover County* 11 (1957). See W. Wirt, *Sketches of the Life and Character of Patrick Henry* 24 (3d ed. 1818) ("The court house was crowded with an overwhelming multitude, and surrounded with an immense and anxious throng, who, not finding room to enter, were endeavouring to listen without, in the deepest attention."). Neither before nor since that colonial public proceeding, so far as appellants have been able to ascertain, had a closed trial ever been held in this courthouse — until the trial in the instant appeal.

Relying on that statute and on the plenary authority it confers on trial courts,[2] the Commonwealth urged the Virginia Supreme Court to reject the petitions for appeal and for writs of mandamus and prohibition filed by appellants.

On July 9, 1979, the Virginia Supreme Court denied appellants' requests for relief from the trial court's order, over appellants' First, Sixth, and Fourteenth Amendment objections. The judgments of the court below were accompanied by brief orders containing no discussion of the merits, but simply citing this Court's recent decision in *Gannett Co., Inc.* v. *DePasquale*, 99 S. Ct. 2898 (1979).

In challenging the judgments below and the validity of the statute whose construction and application those judgments uphold, appellants make no claim that a trial court may never expel an individual to preserve order in the face of specific misconduct that threatens the fairness or decorum of the proceedings. But the Virginia statute invoked here contains no limitation to such instances. Both on its face and as construed and applied, the law confers upon trial courts a sweeping and unbounded authority to ban all observers from a trial for its entire duration — regardless of their orderliness, and regardless of the trial court's capacity to afford the accused a fair trial by other means.

A trial court's authority to order such wholesale exclusion without justification cannot be allowed to stand. Prior decisions of this Court neither require nor suggest any such result and, indeed, compel a contrary conclusion.

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[2] Attorney General's Memorandum in Opposition to Petitions for Writs of Mandamus and Prohibition 3; Commonwealth's Attorney's Brief in Opposition to Petition for Appeal 5.

Opinions Below.

The opinions of the Virginia Supreme Court refusing appellants' petition for appeal (App. A) and dismissing appellants' petitions for writs of mandamus (App. B) and prohibition (App. C), dated July 9, 1979, are unreported.

Jurisdiction.

This is a consolidated appeal from three final judgments of the Virginia Supreme Court denying appellants, Richmond Newspapers, Inc., and two of its reporters, relief from an order of the Circuit Court of Hanover County barring the public and the press from a two-day criminal trial held on September 11 and 12, 1978.[3] On the morning of September 11, 1978, the day the jury trial began, the trial judge expelled the press and the public from the courtroom on the authority of Va. Code § 19.2-266 (hereinafter sometimes the "Closure Statute"), and directed that the entire trial "be kept clear of all parties except the witnesses when they testify." App. D, at 8a.

On the same day, appellants petitioned the court to permit them to intervene in the case to assert defenses to the court's order closing the trial, which petition the court thereupon granted. App. E, at 18a; see App. F; App. G. At the close of the first day of trial, the court entertained appellants' motion to vacate its order closing the trial. App. E, at 10a; see App. H. Despite efforts by appellants' counsel to contrast the

[3]Because the three cases appealed from the court below involve identical issues, appellants are filing this single Jurisdictional Statement to cover all three cases, pursuant to Rule 15(3) of the Rules of the Supreme Court.

New York Court of Appeals' decision in *Gannett Co., Inc.* v. *DePasquale*, 43 N.Y. 2d 370, 372 N.E. 2d 544 (1977), and to distinguish orders closing pretrial hearings from orders closing entire trials, App. E, at 11a, the trial court rejected all of appellants' constitutional objections and refused to vacate its closure order. App. E, at 16a; App. I. Under that order, the second and final day of the trial proceeded in secrecy to its conclusion.

On September 28, 1978, appellants filed a notice of appeal to the Virginia Supreme Court. App. J. On November 8, 1978, appellants filed a petition for appeal[4]; a petition for a writ of mandamus to enjoin the trial judge "to grant them access to [these] criminal proceedings . . . and to all future criminal proceedings which he may order closed in violation of the Constitution," App. K; and a petition for a writ of prohibition to enjoin the trial judge "from denying them access to [these] criminal proceedings . . . and to all future criminal proceedings which he may order closed in violation of the Constitution." App. L. On July 9, 1979, the Virginia Supreme Court, citing only this Court's newly-issued decision in *Gannett*, refused the petition for appeal, App. A, and dismissed the petitions for a writ of mandamus, App. B, and a writ of prohibition. App. C.

A notice of appeal to this Court from each of those judgments was timely filed with the Clerks of the Circuit Court of Hanover County and the Virginia Supreme Court on August 13, 1979. App. M. This appeal is being docketed within 90 days from July 9, 1979, the date of entry of the final judgments of the Virginia Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

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[4]The Petition for Appeal was also the Memorandum in Support of Petitions for Writs of Mandamus and Prohibition. This Petition was appellants' brief in the court below and thus is not included in the Appendix.

Statute Involved.

The text of Va. 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.

Statement of the Case.

The relevant facts were not in dispute below.[5] At the start of John Paul Stevenson's murder trial on September 11, 1978, his attorney 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." App. D, at 7a. The prosecutor interposed no objection, emphasizing that "[i]t's strictly on defense motion," but also stressing that the matter was "in the discretion of the Court." *Id.* Observing that "the [closure] statute gives me that power specifically," *id.*, the trial court ordered "that the Courtroom be kept clear

[5]The Attorney General and the Commonwealth's Attorney accepted the statement of facts set forth in appellants' Memorandum in Support of Petitions for Writs of Mandamus and Prohibition 2-5. Attorney General's Memorandum, *supra* n.2, at 1; Commonwealth's Attorney's Brief, *supra* n.2, at 2.

of all parties except the witnesses when they testify." *Id.* at 8a. The court so ruled without conducting any factual inquiry and without making any finding of necessity, and directed the ouster of all members of the public, including appellants Wheeler and McCarthy, reporters for the Richmond Newspapers, Inc. The trial then proceeded in secrecy.

As soon as counsel could be consulted, appellants sought a hearing on a motion to vacate the court's order and to reopen the trial. The court scheduled the motion to follow the close of the day's proceedings. When the reporters appeared for the hearing with counsel, the court ordered them out of the courtroom, stating that "we have to treat this . . . as a part of the original trial that we're in." App. E, at 9a. The court acknowledged to appellants' counsel that excluding the reporters "is going to . . . increase your position in your motion, but I . . . ruled that the Courtroom had to be cleared and I'm going to have to ask the reporters to leave at this time, too." *Id.* at 9a-10a. No other justification for the exclusion of the reporters from the hearing was offered.

Counsel for appellants argued that the court's closure order "constitute[d] a novel form of censorship," *id.* at 11a, in violation of the First, Sixth, and Fourteenth Amendments, insofar as it was issued upon no showing by defendant's counsel nor upon any "evidential finding" by the court, *id.* at 13a, that a fair trial would be jeopardized by the presence of members of the public. Counsel argued further that, even if such jeopardy were to be shown, the trial court would be constitutionally bound to conclude that "sequestration of the jury or changes of venue," *id.*, or other "alternatives which might protect the defendant's rights," *id.* at 14a, were unavailable or would not suffice to safeguard the rights of the accused. Counsel for appellants also emphasized, contrasting the New York Court of

Appeals' decision in *Gannett*, that the exclusion of the press from a pretrial hearing was not at issue. *Id.* at 11a.

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

Having heard these arguments, the trial court offered its own impression that, given the court's "layout," "having people in the Courtroom is distracting to the jury." *Id.* at 16a. The court added that "maybe that's not a very good reason" to close a trial. *Id.* The court also noted that three previous attempts to try the defendant had failed, *id.*,[6] and expressed the view that, this time, every step should be taken to assure that "the . . . rights of the defendant are [not] infringed in any

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[6]In July 1976, defendant John Paul Stevenson was convicted in the Hanover County Circuit Court of the second-degree murder of a local hotel manager. *Stevenson* v. *Commonwealth*, 218 Va. 462, 237 S.E. 2d 779 (1977). In October 1977, the Virginia Supreme Court reversed his conviction and remanded the case for a new trial, holding that certain evidence introduced against him at trial was inadmissible. *Id.* In May 1978, Stevenson's retrial before appellee Taylor, circuit court judge, ended in a mistrial when a juror asked to be excused after the trial had begun and no alternate juror was available. *Richmond News Leader*, May 31, 1978, at 59, col. 1. In June 1978, Stevenson's second retrial, again before appellee Taylor, also ended in mistrial. *Richmond News Leader*, June 7, 1978, at B-6, col. 1. Neither appellee Taylor, nor defense counsel, nor the prosecution would say why the mistrial had been declared. *Id.* According to one account, "the mistrial declaration involved a prospective juror who had read about Stevenson's trial in a newspaper and had proceeded to tell other prospective jurors about the case before the trial began yesterday." *Id.*

way . . .." *Id.* The court then stated that it was "inclined to go along with the defendant's motion." *Id.*

Thus, the trial continued in secret the next day. What transpired may only be inferred from a one-page order signed by the trial judge on September 12, 1978. App. N. That order indicates that the defendant moved unsuccessfully for a mistrial — although there is no hint of the grounds for the motion, and no clue as to why the court neither granted nor otherwise disposed of it.[7] The order also states that, at the close of the Commonwealth's case, defense counsel moved to strike the Commonwealth's evidence "on grounds stated to the record." App. N. Again, the substance of these grounds remains secret. The order does report that the motion was sustained — but the reason, once again, is not supplied. Thus, in the midst of the defendant's fourth trial in 1978 for a murder allegedly committed in 1976, the court, having stricken the case against him, declared the accused "not guilty of murder, as charged in the indictment, and he was allowed to depart." *Id.* The next morning's newspapers could report only that the defendant had been set free.[8]

The Questions Are Substantial.

This appeal presents the Court with a ripe opportunity to determine whether its decision in *Gannett Co., Inc.* v. *DePas-*

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

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

quale, 99 S. Ct. 2898 (1979), may be invoked to sanction the wholesale exclusion of the public and the press from entire criminal trials — to install a regime of secret prosecutions alien to our history and our traditions.[9]

When this Court decided *In re Oliver*, 333 U.S. 257 (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." *Id.* at 266 (footnote omitted).[10] And when this Court decided *Gannett* just last month, it "cite[d] no case where the public [had] been totally excluded from all of a trial or all of a pretrial suppression hearing." 99 S. Ct. at 2931 n.11 (Blackmun, J., concurring in part and dissenting in part).

Although some cases of exclusion from pretrial hearings were to be expected in the wake of *Gannett's* ruling that such exclusion is permissible, cases of exclusion from entire trials should not have followed. For *Gannett* did not involve, and nothing in *Gannett* upheld, the total closing of a complete

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[9]On September 12, 1978, defendant Stevenson was found not guilty, after the trial judge granted a defense motion to strike the evidence and dismissed the jury. App. N. That circumstance does not moot this appeal, however, just as the guilty pleas of defendants in *Gannett* did not moot that appeal. See 99 S. Ct. at 2904-05 & n.4. Like an order closing a pretrial hearing, an order closing a criminal trial "is too short in its duration to permit full review. . . . The order is 'by nature short-lived.'" *Id.* at 2904, quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976). Cf. *Gannett*, 99 S. Ct. at 2915 ("[I]t would be entirely impractical to require criminal proceedings to cease while appellate courts were afforded an opportunity to review a trial court's decision to close proceedings.") (Powell, J., concurring). Moreover, as in the case of petitioner in *Gannett*, "it is reasonably to be expected that [appellants] . . . will be subjected to similar closure orders entered by [Virginia] courts in compliance with the judgment[s] of that State's [Supreme Court]." *Id.* at 2904. Thus, "the controversy is not moot." *Id.*

[10]The only exceptions discovered by the Court were courts martial. 333 U.S. at 266 n.12. Even in juvenile proceedings, the Court observed, "it has never been the practice wholly to exclude parents, relatives, and friends . . .." *Id.*

criminal trial. On the contrary, as the majority pointedly noted, "[t]he whole purpose of [pretrial suppression] hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury." *Id.* at 2905. By contrast, the "whole purpose" of a *trial* is to set before the jury, as a "representative cross section" of the public, *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975), evidence already screened for its admissibility and reliability. Publicity thus promotes the aims of a trial just as it may defeat the aims of a pretrial hearing. As the Court said in *Gannett*, "inadmissible prejudicial information about a defendant" aired in "pretrial suppression hearings" might prove impossible to keep from potential jurors, while such "information . . . can be kept from a jury by a variety of means" after "commencement of the trial itself . . .." 99 S. Ct. at 2905 (footnote omitted). Thus, the Chief Justice emphasized in his concurring opinion that *Gannett* resolved only the constitutionality of excluding the press and the public from a "*pre* trial hearing." *Id.* at 2913 (Burger, C.J., concurring) (emphasis in original). Cf. *id.* at 2914 n.1 (Powell, J., concurring). At the very least, whether *Gannett* can properly be enlarged to permit secret criminal trials presents a substantial federal question requiring this Court's plenary consideration.

The four Justices who dissented in *Gannett* expressed their doubt that, as of the date of the Court's decision, any cases existed entirely excluding the public and the press from trials. *Id.* at 2931-32 n.11 (Blackmun, J., joined by Brennan, Marshall, White, JJ., concurring in part and dissenting in part). Whether the instant case represents the first exception to the dissent's surmise is unclear. It surely does not represent the last. For the extension of *Gannett* to encompass entire

criminal trials has not been the mistake of the court below alone.[11]

As this case demonstrates, the need for this Court's guidance is already urgent. No matter how many courts follow the precedent set below, another appeal squarely raising this crucial issue may not soon reach this Court. Neither reporters nor other observers can automatically be assumed to have the resources to mount repeated challenges to closure orders on behalf of the excluded public. Thus, some secret trials never contemplated by *Gannett* but decreed on its supposed authority will evade challenge entirely. And, if such challenges were nonetheless to become frequent, the orderly administration of justice would suffer — especially if insistent intervenors were to succeed in "requir[ing] criminal proceedings to cease while appellate courts . . . review[ed] . . . decision[s] to close pro-

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[11] Before one month had passed from the date of the Court's decision in *Gannett*, serious breaches in the public's right of access to criminal trials had begun to appear. One rape trial has been entirely closed. *State* v. *Hicks*, No. 5003 (Md. Cir. Ct.). A murder trial has been closed to the press — although not to the public. *State* v. *Woomer*, No. 79-GS-26-203 (S.C. Cir. Ct.) (jury selection proceeding); cf. *People* v. *Warth*, No. 79-C13 (W. Va. Cir. Ct.) (kidnapping) (pretrial suppression hearing). Another rape trial has proceeded behind the screen of a gag order. *State* v. *Giles*, No. CC79-090-091 (Ala. Cir. Ct.) (on motion of judge) (alleged possible prejudice to co-conspirator in separate trial). Closure motions are pending in two federal district courts, *United States* v. *Powers*, No. 79-26 (S.D. Iowa) (opposed by prosecution); *United States* v. *Benson*, 79-30054 (M.D. Tex.) (bribery trial of former public official), and in two cases trial closure motions have been refused. *People* v. *Bartowsheski*, No. 79CR-516 (Colo. Dist. Ct.) (opposed by prosecution) (jury instructed not to read or listen to news accounts of trial); *People* v. *Angus*, No. 104-69-78 (N.Y., Albany County Ct.) (alleged possible prejudice to witness in future trial). This burgeoning series of cases strongly suggests that the unbounded authority conferred by the Virginia Closure Statute is far from unique. As the *Gannett* Court itself noted, many states have statutes that could be similarly construed. 99 S. Ct. at 2910 n.19. And the questions posed would not be materially different were closure ordered pursuant to purely judge-made rules.

ceedings." *Gannett*, 99 S. Ct. at 2915 (Powell, J., concurring). Such burdens, heavy enough when pretrial hearings are disrupted, will be heavier still if jury trials themselves become fragmented by incessant interlocutory appeals.

This appeal thus affords a timely opportunity for the Court to avoid all such unwelcome consequences. Moreover, because the public right to observe the conduct of criminal trials is uniquely important, and because the deprivation of that right is irreparable, it is vital to prevent any further misguided orders closing trials — not simply to criticize or condemn them after the fact. Thus Justice Powell's call for standards "for the guidance of trial courts," *id.* at 2915, a call anticipated by the trial court in this very case, App. E, at 16a, was prescient indeed. Unless this Court promptly provides such guidance, *Gannett* will be repeatedly misapplied to deprive the press and the public of timely access to criminal trials whose progress is of vital interest to all citizens.

I. The Virginia Closure Statute, Insofar As It Permits The Total Exclusion Of The Press And The Public From An Entire Criminal Trial, Violates The First, Sixth, And Fourteenth Amendments.

As construed by the courts below, the Closure Statute permits a trial court to order the wholesale exclusion of the press and the public for the duration of a criminal trial.[12] On its face, such an invocation of censorial power cannot coexist with the First, Sixth, and Fourteenth Amendments.

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[12] Although its words might have been read more narrowly, Va. Code § 19.2-266 comes to this Court "as authoritatively interpreted" by the Virginia Supreme Court's action in this case. See *Cox* v. *Louisiana*, 379 U.S. 536, 545 (1965). As so interpreted, it is "unconstitutionally broad in scope." *Id.*

A. *Public Access to Criminal Trials Is a Fundamental Constitutional Right.*

Writing separately in *Gannett*, Justice Blackmun, joined by Justices Brennan, White, and Marshall, persuasively grounded the right of public access to criminal trials in the Sixth Amendment's Public Trial Clause, as applied to the states through the Fourteenth Amendment. 99 S. Ct. at 2922-33 (concurring in part and dissenting in part).[13] With equal force, Justice Powell located that right in the First and Fourteenth Amendments and in the protection they afford those who seek "information needed for the intelligent discharge of [their] political responsibilities." *Id.* at 2914-15 (concurring opinion), quoting *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).[14]

Even if there were no agreed-upon textual source for such a right, however, its existence draws vital support from the First and Sixth Amendments and has been confirmed by its long and unbroken observance. Like many other rights of similar nature — such as the right to vote in state elections, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 665 (1966); the

[13] The contrary view taken in the majority opinion, *id* at 2905-09, was dictum, for *Gannett* involved only the closure of a *pre*trial suppression hearing. The Chief Justice, whose concurring vote was decisive, was careful to insist that nothing beyond a pretrial hearing was at issue. *Id.* at 2913.

[14] Although there may well be governmental proceedings and institutions to which there exists no right of public access, this Court has never squarely decided whether such a right may be found in the First and Fourteenth Amendments with respect to a criminal trial — a proceeding the Court has described as a "public event," saying that "[w]hat transpires in the court room is public property." *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). Cf. H. Kalven, "The Concept of the Public Forum: Cox v. Louisiana," 1965 Sup. Ct. Rev. 1. In *Gannett*, only Justice Rehnquist took the position that the First and Fourteenth Amendments secure no such right. 99 S. Ct. at 2918 (concurring opinion).

right to travel interstate, *United States* v. *Guest*, 383 U.S. 745, 757-59 (1966); the right not to be convicted without proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 361 (1970); or the right to live with the family members of one's choice, *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503-04 & nn.10-12 (1977) — the right of public access to criminal trials can be derived, even without explicit constitutional referents, from its central role in the "Anglo-American regime of ordered liberty," *Duncan* v. *Louisiana*, 391 U.S. 145, 149-50 n.14 (1968) — a role undeniably revealed in "this Nation's history and tradition." *Moore* v. *City of East Cleveland*, *supra*, 431 U.S. at 503 (footnote omitted). Cf. *Duncan* v. *Louisiana*, *supra*, 391 U.S. at 148-49 & n.14; *Johnson* v. *Louisiana*, 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring).

No less than the right to vote, the right of access to criminal trials must be "regarded as a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). No less than the right to proof beyond a reasonable doubt, the right of access to criminal trials has won "virtually unanimous adherence" throughout our history, reflecting "a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, *supra*, 397 U.S. at 361-62, quoting *Duncan* v. *Louisiana*, *supra*, 391 U.S. at 155. Like the reasonable doubt requirement, our system of open trials has proven itself "indispensable to . . . the respect and confidence of the community in applications of the criminal law." *In re Winship*, *supra*, 397 U.S. at 364.[15]

As with the right of interstate travel, there is thus no need "to ascribe the source of this right . . . to a particular constitutional provision." *Shapiro* v. *Thompson*, 394 U.S. 618,

[15] That this cannot as readily be said of access to *pre*trial proceedings may help explain not only the result in *Gannett* but also the more focused search in that case for a point of reference in the First or Sixth Amendment.

630 (1969) (footnote omitted). "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). "The tacit postulates" of the constitutional plan "are as much engrained in the fabric of the document as its express provisions." *Nevada* v. *Hall*, 99 S. Ct. 1182, 1195 (1979) (Rehnquist, J., dissenting).

Thus, the right of the individual to attend and observe any criminal trial, subject only to narrowly focused restraints to assure fairness and order, is "of constitutional dimension because [its] derogation would undermine the logic of the constitutional scheme," *id.* at 1197, a logic that relies crucially upon the publicity and openness of the state's ultimate confrontations with its citizens. Whatever its textual source, that right is confirmed by our "shared experience and common understanding," *id.* at 1194, an experience and understanding informed but not wholly defined by the First and Sixth Amendments.

Our "common understanding" makes it clear that we dare not rely solely on appellate review to expose abuses of judicial or prosecutorial power. Some secret trials, like the one in the instant case, will end in nonappealable acquittals. Even where appeals are possible, much judicial and prosecutorial misconduct will either be insulated from correction by such doctrines as harmless error, or become visible only through the pattern revealed by a series of cases. Nor can we depend wholly on the preparation of post-trial transcripts to bring the truth to light. Few can afford the expense, especially after a long trial. Moreover, the delay alone will often make the record stale, and matters like credibility are forever lost when only a cold transcript is available. Indeed, secret trials automatically defeat the right of neighbors, friends and relatives —

not only the accused's but the victim's — to judge for themselves who was lying and who was telling the truth.

More fundamentally, our "shared experience" teaches that the very spectre of secret trials is a source of public terror. Experience teaches, too, that secret trials encourage corruption and abuse of power, spawning both the reality and appearance of manipulation.[16] By avoiding secret trials, we have not only minimized these evils; we have also become known to the world as an informed people. Indeed, our political and legal history has been significantly shaped by the criminal trials our people have watched. Imagine an America in which secret trials had been held in the prosecutions of Aaron Burr, John Peter Zenger, or John Thomas Scopes; of John Wilkes Booth, James Earl Ray, or Sirhan Sirhan; of the Chicago Eight, the Watergate Seven, or the Wilmington Ten.

Nor need one focus on such historic trials to recognize the crucial importance of public access to criminal trials even in wholly non-political contexts. The case involved in this appeal makes the point with force: A man is tried in a small town for the murder of a local hotel manager; the case drags through three open trials; then a fourth trial is held — behind closed doors. Suddenly, the jury is excused and the defendant set free. Can there be any doubt that not only those close to the deceased, but all members of the community, are bound to feel deprived of a fundamental, time-honored right?

Given the well-founded "traditional Anglo-American distrust for secret trials," *In re Oliver*, 333 U.S. 257, 268 (1948), we can assure neither the accountability of government, nor any reasonable confidence that the guilty are indeed being punished and the innocent acquitted, if entire criminal trials

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

may be closed. Membership in the political community, given our form of government, thus entails a specially protected "liberty" interest in access to criminal trials — an interest whose abridgment requires "particularly careful scrutiny," *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), an interest that certainly cannot be sacrificed in gross.

B. *The Virginia Closure Statute Violates This Fundamental Right By Authorizing Its Wholesale Abrogation At The Trial Court's Uncontrolled Discretion.*

It is inconceivable as a general matter, and unproven as a matter of record in this case,[17] that the complete expulsion of the press and the public from an entire criminal trial could satisfy a test of "strict and inescapable necessity," *Gannett*, 99 S. Ct. at 2940 (Blackmun, J., concurring in part and dissenting in part), or indeed any other test that places the right of public access above the convenience of secrecy.

No doubt, to maintain order, judges may expel particular persons whose conduct imminently threatens disruption of the proceedings. And it has been argued that some testimony may be so sensitive as to justify the temporary exclusion of the public from the proceedings. *Gannett*, 99 S. Ct. at 2910 n.19; cf. *id.* at 2931-32 n.11 (Blackmun, J., concurring in part and dissenting in part).[18] But expelling orderly reporters and other observers for the entire course of a criminal trial can serve no legitimate interest. A jury trial is by its nature a public event. Unlike the pretrial suppression hearing involved in *Gannett*, a criminal trial is a proceeding in which the accused, the wit-

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[17] See Part II, *infra*.

[18] The very fact that the testimony will of necessity be heard by the jury, representing the public, casts doubt on the theory underlying even such limited expulsions.

nesses, and all other trial participants are *alrèady* being observed by a randomly chosen cross-section of the community — by a jury whose members, after the trial is over, will be free to disclose what they have seen and heard.

To justify closing an entire criminal trial would require a showing that fatally prejudicial information about the accused would otherwise reach the jurors themselves. But no such showing is possible — unless one treats all members of the public as potential jurors in every pending case in which a retrial might ever be ordered. As the Court noted in *Gannett*, "[a]fter the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means." 99 S. Ct. at 2905 (footnote omitted). "In addition to excluding inadmissible evidence, a trial judge may order sequestration of the jury or take any of a variety of protective measures." *Id.* at n.5. Since jurors, even if not sequestered under Va. Code § 19.2-264, can be admonished on pain of contempt against reading about or discussing the case during trial, and since a change of venue is always possible even if a retrial is ordered, conducting an entire criminal trial in total secrecy is never justifiable.

But even if some justification could be imagined, the wholesale sacrifice of the public's right of access would at least have to be ordered pursuant to a clear and specific set of statutory or judge-made criteria — not pursuant to an open-ended delegation of discretionary power to trial judges, acting with the equally discretionary acquiescence of the prosecution upon the motion of the accused. See *Cox* v. *Louisiana*, *supra*, 379 U.S. at 557-58; *Saia* v. *New York*, 334 U.S. 558, 560-62 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940); *Lovell* v. *Griffin*, 303 U.S. 444, 450-53 (1938). Cf. *Furman* v. *Georgia*, 408 U.S. 238 (1972).[19] As with uncontrollable dis-

[19] That the scheme of Va. Code § 19.2-266 reposes in the accused a power to object to secret trial cannot save it from this constitutional infirmity;

cretion generally, that conferred by the Virginia Closure Statute represents both an abdication of the public power to make explicit choices of policy, see *McGautha* v. *California*, 402 U.S. 183, 248-87 (1971) (Brennan, J., dissenting), and an invitation to abridge the rights of would-be trial observers for plainly impermissible and permanently invisible reasons.

These objections to the Virginia Closure Statute only underscore the pressing need for constitutional guidance recognized by Justice Powell in *Gannett*. 99 S. Ct. at 2915 (concurring opinion). Rather than attempt the enormous, and inevitably disruptive, task of providing such guidance by itself case by case, this Court should hold that states choosing to permit trial judges to close their courtrooms must at least promulgate precise criteria for the exercise of such extraordinary authority. But whether or not the Court takes such a step, this much at least is plain: by authorizing trial courts to use a bludgeon where a scalpel would do, the Virginia Closure Statute violates the First, Sixth, and Fourteenth Amendments.

II. The Virginia Closure Statute, Insofar As It Permits Secret Trials Without Any Showing That So Drastic A Step Is Required To Serve Significant Countervailing Interests, Violates The First, Sixth, and Fourteenth Amendments.

Even if the Virginia Closure Statute were not void on its face as an overbroad delegation of discretionary power to expel all observers from criminal trials, its application on the facts of this case demonstrates its constitutional infirmity. For

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from the perspective of the public and the press, this is simply a delegation, to a private party, of unbridled control over a protected right of access. Cf. *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.*, 99 S. Ct. 403, 420 (1978) (Stevens, J., dissenting).

no law could validly authorize the trial court's order on these facts. Any law construed to confer such authority is, at least to that extent, unconstitutional.

A. *The Closure Statute Is Unconstitutional As Applied Because It Permits Secret Trials With No Showing That Open Proceedings Would Threaten Any Significant Interest.*

When closure was initially requested on the morning of September 11, 1978, the only reason defense counsel offered was that he did not "want any information being shuffled back and forth when we have a recess as to what — who testified to what." App. D, at 7a. He made no showing that "any information" would be "shuffled back and forth" during recess. Nor did he explain who was to transmit and who was to receive the "shuffled" information, or how the defendant's right to a fair and impartial trial would be endangered thereby. The trial court asked for no such explanation, and required no showing whatever.

With little more justification, the trial court later that day ruled that its closure order would remain in effect for the duration of the trial — over the varied constitutional objections raised by counsel for appellants. To secure this ruling, defense counsel had alluded to "difficulty . . . with information . . . between the jurors" in prior efforts to try the defendant, App. E, at 15a, and had indicated that a secret trial might help him "avoid keep coming back up to the Court and keep having to try this case." *Id.* But the colloquy reveals nothing about what the prior "difficulty" was, why it should be expected to recur, or how it would impair a fair trial. Defense counsel had also voiced concern that jurors might "read the paper or . . . look at television." *Id.* Again, neither the

nature nor the degree of any resulting risk to a fair trial was elaborated.

Whether the court was moved by the vague assertions of defense counsel is impossible to tell. The only consideration adduced by the court in favor of closing the trial was a factor entirely outside defense counsel's presentation: given the courtroom's "layout," the trial court said, "having people in the Courtroom is distracting to the jury." Why that should suddenly have seemed a problem — after the same entirely typical courtroom had been used to conduct public criminal trials for nearly two and a half centuries — was not explained.[20]

Nothing further was shown or even claimed to justify closing the court in this case. By upholding that closure as a permissible exercise of power under Va. Code § 19.2-266, the court below interpreted that statute to permit secret trials even where no significant interest is endangered. Given the fundamental right of public access to criminal trials, see Part I-A, *supra*, a statute so interpreted cannot stand.

B. *The Closure Statute Is Unconstitutional As Applied Because It Permits Secret Trials With No Showing That Less Drastic Measures Are Unavailable Or Insufficient.*

Not even the most generous interpretation of the concerns articulated by defense counsel called for anything more drastic

[20] Part of this courtroom's history is recounted in note 1, *supra*. See also *Court House* 166 (R. Pare ed. 1978); *id.* at Plate 29. Although of modest dimensions, the courtroom's configuration parallels that of literally hundreds throughout the land, many of which have doubtless been patterned upon its classic design. A diagram and a photograph of the courtroom involved in this case are included as Appendices O and P, respectively. That these appendices, which were not before the court below, accurately portray the courtroom has been stipulated by the parties. A copy of the stipulation will be filed with the Court shortly.

than sequestering the jury, see Va. Code § 19.2-264, or perhaps excluding witnesses from the courtroom while not testifying, using the Closure Statute itself. See, e.g, *Yorke* v. *Commonwealth*, 212 Va. 776, 188 S.E. 2d 77 (1972); *Johnson* v. *Commonwealth*, 217 Va. 682, 232 S.E. 2d 741 (1977). See *Gannett*, 99 S. Ct. at 2905 & n.5. Counsel for appellants proposed precisely such measures, and others. App. E, at 13a-14a. Although defense counsel asserted "[t]here's no way" to prevent jurors from reading the papers or watching television, he utterly ignored the device of sequestration. And in ruling that the press and public should be expelled, the trial court did not once refer to the availability or efficacy of the less drastic means that had been suggested.[21]

By upholding closure on this record as a lawful invocation of Va. Code § 19.2-266, the court below construed that statute to allow secret trials even when less drastic alternatives would suffice. Since public access to criminal trials is constitutionally fundamental, see Part I-A, *supra*, no statute so construed can stand.

C. *The Closure Statute Is Unconstitutional As Applied Because It Permits Secret Trials With No Showing That Expelling The Public and the Press Would Prove Effective.*

Banishing the press and the public was a patently ineffectual answer to the concerns voiced by defense counsel in the trial court. That jurors might learn through press reports what others thought about the proceedings remained as great, or as small, a danger after the closure as before, since jurors

[21] Had the courtroom's design truly precluded public trial, but see p. 23 & n.20, *supra*, a change of venue would have been possible. In any event, a fundamental right of public access to criminal trials can hardly be defeated by government's deliberate use of a structure incompatible with such access. Cf. *Bounds* v. *Smith*, 430 U.S. 817, 824-25, 828-30 (1977).

were not prevented from discussing the case with others outside the courthouse. And any danger of prejudicing a possible future jury can hardly have been stilled by closure, since details about the trial could have been spread, by the jurors then impanelled themselves, to prospective jurors in any future trial.

To uphold closure on this record as permissible under Va. Code § 19.2-266 was to construe that statute as allowing secret trials without regard to the efficacy of the secrecy thereby decreed. A statute that sacrifices rights of public access without countervailing benefit is unconstitutional. See *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 565-67 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713, 733 (1971) (White, J., joined by Stewart, J., concurring).

D. *The Closure Statute Is Unconstitutional As Applied Because It Permits Secret Trials With No Attempt To Accommodate The Rights Of The Public And Of The Press.*

Although the trial court at one point noted that cases cited by appellants' counsel suggested a need to "weigh" the competing rights of the accused and the public, App. E, at 13a, defense counsel subsequently insisted that the interests of the accused supersede all other concerns, *id.* at 15a, and the trial court seemingly agreed. *Id.* at 16a. No other premise can explain the decision to conduct a secret trial on this record. Construed to permit that decision, the Virginia Closure Statute unconstitutionally subordinates rights of access to the interests supposedly served by closure. Cf. *Gannett*, 99 S. Ct. at 2912 (trial court "balanced" the competing rights); *id.* at 2917 (Powell, J., concurring) (same); *id.* at 2938-39 (Blackmun, J., concurring in part and dissenting in part) (attempt at accommodating competing interests required). And it bears repeating that no showing was made that these interests were im-

periled in this case, that less drastic means of protecting them were unavailable, or that closing the trial court would in fact protect them.

Conclusion.

The case from which this appeal arises began in the courthouse where Patrick Henry's name "was to become indelibly written for the first time upon the pages of American history." J. & M. Peters, *Courts of the Richmond Area: A Primer* 22 (1969). See note 1, *supra*. To a courthouse "crowded with an overwhelming multitude," *id.*, he there declaimed against the King's tyranny. How different was the trial of John Paul Stevenson, held in the same courthouse — emptied of all observers — more than 200 years later. It would be ironic indeed if the Hanover County Courthouse, long remembered in a brighter light, should find its place in American history as the seat of secret trials — the symbol of a dark period in the annals of justice. This Court's recent decision in *Gannett* need not foreshadow such a result.

For the foregoing reasons, probable jurisdiction should be noted, and the judgments of the court below should be reversed.

Respectfully submitted,

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