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THE PUBLIC, THE MEDIA AND THE CRIMINAL DEFENDANT: ACCESS TO COURTROOMS PREVAILS OVER FEARS OF PREJUDICIAL PUBLICITY

Public access to criminal trials historically has been an institutional feature of the Anglo-American system of jurisprudence.¹ The West Virginia Supreme Court of Appeals reaffirmed this tradition in *State ex rel. Herald Mail v. Hamilton*.² The court held that Article 3, sections 14 and 17,³ of the West Virginia Constitution guaranteed a right of access for the *public* and the *press* to attend criminal proceedings. Closure of such proceedings effectively has been precluded except in certain extraordinary cases when a defendant can show that public access will irreparably harm the constitutional right to a fair trial.⁴ However, the burden of proof placed on defendants seeking closure is so stringent that it may be impossible to meet.⁵ The Supreme Court of Appeals has left for future determination the extent to which its "access" ruling extends to *all* judicial proceedings, including civil and juvenile

¹ In *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980), the United States Supreme Court traced the historical development of public criminal proceedings. Their public nature began in England before the Norman Conquest when freemen were required to attend trials and render judgments. The jury system developed after the Norman Conquest, but openness remained a fixed concept in criminal proceedings. This "presumptive openness of the trial" was transferred to colonial America. The Court concluded that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials, both here and in England, had long been presumptively open." See also the majority and dissenting opinions in *Gannett v. DePasquale*, 443 U.S. 368 (1979). See generally F. POLLOCK, *English Law Before the Norman Conquest*, 1 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 89 (1907); E. COKE, 2 INSTITUTES OF THE LAW OF ENGLAND 121 (6th ed. 1681).

² 267 S.E.2d 544 (W. Va. 1980). The court handed down a unanimous judgment; however, Justice McGraw's concurring opinion stated that the right of access should be absolute. *Id.* at 552.

³ W. VA. CONST. art. 3, § 14 reads: "Trials of crimes, and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public. . . ." Art. 3, § 17 provides that "the courts of this State shall be open. . . ."

⁴ 267 S.E.2d 544.

⁵ The difficulties faced by a defendant in justifying closure are discussed in material contained in footnotes 39-49, *infra*.

matters. Cases dealing with the right of the public and the press to attend juvenile hearings, adoption proceedings, invasion of privacy suits, and the media's right to report sexual assault testimony of minors and women likely will come before the court as journalists and litigants clash over acquisition and publication of information.

In *Herald Mail*, a defendant charged with two murders asked that the public and press be excluded from certain pretrial hearings.⁶ The newspaper company challenged the request. The trial judge granted the defendant's request after an evidentiary hearing. The judge barred public and press attendance at a hearing concerning admissibility of certain statements made by the defendant.⁷ Granting of closure came despite defense counsel's admission that local media had not prejudiced the defendant's right to a fair trial through prior reporting.⁸ The newspaper appealed the closure motion, asking the Supreme Court of Appeals for a writ of prohibition. The court issued the writ, holding that the state constitution guaranteed open court proceedings.⁹

Although a case of first impression in this state, *Herald Mail* represents a problem facing courts with recurring frequency.¹⁰ Federal and state courts are being asked to decide whether, and when, a criminal defendant may deny the public and press access to criminal proceedings by alleging that such attendance will impair his ability to obtain a fair trial. This issue was faced directly in 1979 by a fragmented United States Supreme Court in *Gannett Co. v. DePasquale*¹¹ and partially solved by a more harmoni-

⁶ 267 S.E.2d at 545.

⁷ *Id.*

⁸ *Id.*

⁹ 267 S.E.2d 544.

¹⁰ See, e.g., *Pennsylvania v. Hayes*, 6 MEDIA L. REP. 1273 (BNA) (Pa. S. Ct., May 1, 1980), *cert. denied*, 49 U.S.L.W. 3365, Nov. 18, 1980. The court held that the trial court erred in closing a pretrial suppression hearing when other alternatives were available. The Reporters Committee for Freedom of the Press documented 272 attempts at closure from July 2, 1979 to Aug. 15, 1980. Besides prejudicial publicity, grounds for closure have included state closure laws, danger to defendant's life, privacy and safety of jury, and embarrassment to the witness, victim, attorney, potential jurors, third parties, family and the public itself. Court Watch Summary, Reporters Committee for Freedom of the Press (August, 1980).

¹¹ 443 U.S. 368 (1979). Justice Stewart authored the Court's opinion finding no right of access in the sixth amendment. Chief Justice Burger and Justices Pow-

ous Court in 1980 in *Richmond Newspapers, Inc. v. Virginia*.¹² *Herald Mail* must be examined in light of these two cases.

Gannett and *Herald Mail* are similar in that both cases involve public and press attendance at a pretrial criminal hearing. In *Gannett*, a trial judge barred the public and press from attending an evidence suppression hearing in a murder case.¹³ The defendant and the prosecutor had agreed to closure, and a reporter

ell, Rehnquist and Stevens, joined the opinion to form the majority. Chief Justice Burger and Justice Rehnquist wrote concurring opinions concerning the sixth amendment. Justice Powell, while concurring with the majority opinion, argued that while the first amendment provided a right of access, such access was not absolute and the trial judge had followed permissible procedures in limiting the right of access. Justice Blackmun, joined by Justices Marshall, Brennan and White, dissented, arguing that the sixth amendment created a right of access in the public and the press.

¹² 100 S. Ct. 2814 (1980). Chief Justice Burger, joined by Justices White and Stevens, wrote an opinion in which he concluded that the first and fourteenth amendments guaranteed the right of the public and the press to attend criminal trials, except where the defendant could show an overriding fair trial right articulated in the findings. Justice Brennan, joined by Justice Marshall, concurred in the judgment, concluding that the first amendment, as applied to the states by the fourteenth amendment, secured the public a right of access. Justice Brennan did not reach the question of when the presumptive openness of trials could be overcome. Justice Stewart, in a separate concurring opinion, argued that the first and fourteenth amendments gave the public and press the right to attend criminal and civil trials, but that such a right was not absolute. Justice Blackmun also concurred in the judgment, but reiterated his view expressed in the *Gannett* dissent that the sixth amendment created the right of access. However, he concluded that the first amendment, as a secondary measure, afforded protection of public access to trials and that closure had violated these first amendment interests. Justice Rehnquist dissented, arguing that neither the sixth nor first amendments required that a state's reasons for denying access be subject to constitutional review as long as the defendant, prosecutor and judge agreed to closure. Justice Powell did not participate in the case.

¹³ 443 U.S. 368, 392 (1979). *Gannett* arose from a murder trial in New York State. A Rochester area resident disappeared while on a fishing trip, last seen in the company of two young men. His bullet-ridden canoe was found in the lake, but the body was not recovered. A *Gannett*-owned newspaper reported the disappearance and the police theory that the man had been murdered. Two men were arrested in Michigan soon afterwards. Their capture was reported as well as the police theory that the victim had been robbed and murdered. Several other stories were printed about the suspects' extradition to New York and their backgrounds. Other stories reported the suspects' arraignment and indictment for second-degree murder and larceny. At a pretrial suppression hearing, the defendant's counsel contended that this reporting constituted an "unabated buildup" of adverse publicity "which had jeopardized his [defendant's] right to a fair trial." *Id.* at 371-76.

for the Gannett newspaper chain did not object until after the motion was granted.¹⁴ The Supreme Court refused to consider the newspaper's "right of access" first amendment arguments, but decided the case by interpreting the sixth amendment public trial guarantee. The Court defined the issue "*as whether members of the public have an enforceable right to a public trial that can be asserted independently of the parties in the litigation.*"¹⁵ Reading the sixth amendment literally, a very divided court found that the amendment's guarantee of a public trial was a personal right of the accused and did not confer a right of access to the public and press.¹⁶ Even though the Court recognized a "strong societal interest in public trials,"¹⁷ the majority held that the common-law tradition of open trials had not been included in the Constitution.¹⁸ Additionally, the majority found that even if a right of access existed to trials, pretrial hearings constituted a separate and distinct proceeding from the trial itself.¹⁹ Thus, any right of access would not extend to pretrial hearings.

The *Gannett* dissent, however, argued that English and American history showed pretrial hearings to constitute part of the actual trial, and that the sixth amendment created a right of access.²⁰ The dissent, following the majority's lead, based its views solely on the sixth amendment.

The media and some constitutional scholars virulently attacked the *Gannett* decision as another attempted emasculation of the first amendment by the Burger court.²¹ The media raised the spectre of justice being subverted in closed courtrooms while a powerless press was stymied in newsgathering efforts. Closure

¹⁴ *Id.* at 392.

¹⁵ *Id.* at 382-83 (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.* at 383.

¹⁸ *Id.* at 385. While the Court found that the public could not compel a public trial, the Court also stated that the defendant could not compel a private trial. *Id.* at 382.

¹⁹ *Id.* at 387-91.

²⁰ *Id.* at 406 (Blackmun, J., dissenting).

²¹ Allen Neuharth, Gannett president, called the ruling "another chilling demonstration that the majority of the Burger court is determined to unmake the Constitution." The Washington Post, July 3, 1979, at 10, col. 1. The Post editorialized: "The Supreme Court has forgotten the wise words of Lord Acton: Everything secret degenerates, even the administration of justice." *Id.*

orders multiplied as defendants and judges turned to closure to avoid the constitutional difficulties involved in prior restraint of the press.²² Confusion reigned as lawyers and judges tried to interpret *Gannett's* multiple opinions.²³ Individual justices took the unusual step of publicly trying to explain the decision.²⁴ Thus the stage was set for *Richmond Newspapers*.

The case began in an historic Virginia courtroom as the State tried for the fourth time to convict the defendant of murder.²⁵ The defendant's conviction in the first trial had been overturned on appeal. Two subsequent trials ended in mistrials. The defendant sought closure in the fourth trial to prevent dissemination of testimony to potential witnesses waiting outside the courtroom.²⁶ He made no allegation that prior publicity existed which would be aggravated by a public trial. The prosecutor voiced no objection, and the trial judge, citing a Virginia closure statute,²⁷ approved closure. The trial judge made no findings that an open trial would harm the defendant's right to a fair trial.²⁸

²² Professor Laurence Tribe, who was to successfully argue the press' case in *Richmond Newspapers*, anticipated this development. After the *Gannett* decision was handed down, he labeled it "a threat to a free press and an informed citizenry . . . there will be no need to gag the press if stories can be choked off at the source." *Id.* at 1. See note 10 *supra*.

²³ See note 11 *supra*.

²⁴ Chief Justice Burger explained in an interview with the *Gannett News Service* that the decision applied "to pretrial proceedings only." *N.Y. Times*, Aug. 9, 1979, at A17, col. 1. Three weeks later, Justice Blackmun told federal judges in South Dakota that the opinion authorized closure of all trials. *N.Y. Times*, Sept. 4, 1979, at A15, col. 1. Justice Stevens followed with a speech implying he would limit *Gannett* to pretrial proceedings. Justice Powell told an American Bar Association gathering that judges might be "a bit premature" in interpreting *Gannett* to authorize exclusion of the press, but not the public. *N.Y. Times*, Aug. 14, 1979, at A13, col. 1. *The 1979 Supreme Court Term - Constitutional Law*, 93 HARV. L. REV. 62, 65, n. 32 (1979).

²⁵ 100 S. Ct. 2814, 2818 (1980).

²⁶ *Id.* at 2819.

²⁷ VA. CODE § 19.2-266 (1975 Replacement Vol.). "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"

²⁸ 100 S. Ct. at 2819. After the judge approved closure, the defendant moved for another mistrial, claiming that certain evidence should not have been admitted. The judge directed a verdict of not guilty. *Id.* at 2820.

The newspaper company appealed the closure order, but the Virginia Supreme Court denied the appeal, as well as petitions for writs of mandamus and prohibition.²⁹

The United States Supreme Court reversed the lower courts, but did so on first amendment grounds rather than *Gannett's* sixth amendment rationale. The Court held that the first amendment, as applied to the states by the fourteenth amendment, provided an independent right of public access to criminal trials.³⁰ Trials are to be open except when a defendant can show a substantial probability that an open trial will irreparably damage the right to a fair trial.³¹ The Court's opinions made clear that closure will be granted only after a trial judge has determined that less drastic measures will be insufficient to protect the defendant's fair trial right.

Chief Justice Burger distinguished *Gannett* by reasoning that it concerned access to pretrial hearings only.³² *Gannett* also had been decided on sixth amendment, not first amendment, grounds. At the present time, therefore, a distinction remains at the federal level between access to pretrial and trial proceedings. It remains to be seen whether the *Gannett* dissenters will join other members of the *Richmond Newspapers* majority to find that the first amendment also provides a right of access to pretrial hearings.³³ It is arguable that *Gannett* is now moot. In *Gannett*, Justice Powell specifically found that the first amendment provided a right of access to pretrial hearings.³⁴ The *Gannett* dissenters, who were willing to find such a right in the sixth amendment, all concurred in the *Richmond Newspapers* judgment that the first amendment provided a right of access to trials. Assuming those Justices would extend such a right to pretrial hearings, as they indicated in *Gannett*, a five-person majority exists for a first amendment right of access to pretrial hearings.

However, unlike the federal system, no such distinction exists

²⁹ *Id.*

³⁰ *Id.* at 2829.

³¹ *Id.*

³² *Id.* at 2821.

³³ For an early discussion of *Richmond Newspapers'* impact on *Gannett*, see 6 MEDIA L. REP. (BNA) No. 11 cover sheet, News Notes (July 15, 1980).

³⁴ 443 U.S. 368, 399-400 (1979) (Powell, J., concurring).

in West Virginia. *Herald Mail* provided for access to both trial and pretrial hearings.³⁵ The Supreme Court of Appeals specifically adopted the *Gannett* dissenters' viewpoint that pretrial hearings are part of the actual trial process; therefore, this right of access applied to all stages of the criminal trial process.³⁶

However, similar to *Gannett* and *Richmond Newspapers*, the *Herald Mail* decision allows closure in certain situations.³⁷ An examination of the requirements for closure as set out in those cases, however, reveals that the West Virginia Supreme Court of Appeals has made it difficult, if not impossible, for a defendant to prove the need for closure.

In *Gannett*, under the sixth amendment, closure was a matter of agreement between defendant, prosecutor and judge.³⁸ Although the Supreme Court stated that open criminal hearings are preferable, a defendant did not have to show irreparable harm to the right to a fair trial. Justice Powell stated that a trial judge, in order to approve closure, had to determine whether public access was *likely* to jeopardize a fair trial.³⁹ Thus, under *Gannett*, the defendant was in the favored position, reflecting the Court's finding that the sixth amendment was a personal right of the accused.

Herald Mail, decided three weeks before *Richmond Newspapers*, adopted a much more stringent burden of proof. In West Virginia, a defendant must show that adverse publicity already exists at the time of the judicial proceeding sought to be closed.⁴⁰ Next, he must show a *clear likelihood* that an open proceeding will result in irreparable damage to the right to a fair trial.⁴¹ Proving this latter requirement is to be accomplished by showing the extent of prior hostile publicity, the probability that the issues involved in the proceeding will further aggravate adverse publicity, and that *traditional judicial techniques to insulate a jury from the consequences of such publicity will not alleviate the problem.*⁴²

³⁵ 267 S.E.2d 544, 550 (W. Va. 1980).

³⁶ *Id.*

³⁷ *Id.*

³⁸ 443 U.S. 368 (1979).

³⁹ *Id.* at 400.

⁴⁰ 267 S.E.2d at 551.

⁴¹ *Id.*

⁴² *Id.* (emphasis added).

The *Herald Mail* test resembles that adopted by the Supreme Court in *Richmond Newspapers*. In the latter case, Chief Justice Burger stated only that a defendant show that his right to a fair trial will be impaired by access in order to justify closure, but implied that closure should be available only in unusual cases.⁴³ Justice Blackmun, author of the *Gannett* dissent, spelled out the actual test in his concurring opinion.⁴⁴ Now, a defendant must show a *substantial probability* that an open trial will result in irreparable harm to his right to a fair trial, that traditional alternatives will not protect this right, and that closure will prevent prejudicial information from becoming public.⁴⁵

Thus, *Herald Mail* and *Richmond Newspapers* have shifted the burden of proof to the defendant, with the burden approximating that levied against a defendant seeking prior restraint of the press.⁴⁶ This is appropriate since closure has become a method of avoiding prior restraint.⁴⁷ Closure technically is not prior restraint because the latter involves restraint of publication of information already possessed by the media, not a blocking of newsgathering efforts. However, closure accomplishes the same result as prior restraint—prevention of dissemination of information usually in the public sphere of knowledge.

⁴³ 100 S. Ct. 2814, 2830 (1980).

⁴⁴ *Id.* at 2841 (Blackmun, J., concurring).

⁴⁵ The Supreme Court recently denied review to an 8th Circuit case which held that a criminal trial cannot be closed without a showing of substantial probability of harm to a defendant's right to a fair trial, that no alternatives are available and that closure will be effective against the perceived harm. *United States v. Powers*, 622 F.2d 317 (8th Cir. 1980), No. 79-1960, *cert. denied*, 49 U.S.L.W. 3222, Oct. 6, 1980.

⁴⁶ Judicial hostility to prior restraint has been a continuing first amendment theme in the 20th century. *Compare* *Near v. Minnesota*, 283 U.S. 697 (1931) (law making it a public nuisance to maliciously criticize local government officials struck down); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (federal government's attempts to halt publication of Pentagon Papers barred); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (lower court order forbidding the press to report open court proceedings overturned). *But see* *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975); *Snapp v. United States*, 100 S. Ct. 763 (1980). These cases approve the use of prior restraint contractual secrecy agreements which require former CIA employees to submit *all* planned publications to the agency for prepublication review.

⁴⁷ *See* note 22 *supra*.

It is accurate to say, then, that *Herald Mail* will deny closure to defendants except in the most extensively publicized cases. Even in these cases, the burden of proof may be so great that it will be impossible for the defendant to justify closure. The key to proving the need for closure lies in showing that traditional techniques of insuring a fair trial will not work.

Such traditional techniques, as developed in various fair trial and prior restraint cases, include change of venue, extensive and searching voir dire, delay of trial and sequestration of the jury.⁴⁸ These techniques are used to lessen any possible effect of prior publicity upon potential or actual jury members as an alternative to restraining the media from informing the public about judicial activities. The burden of providing defendants with fair trials is a necessary task of the judiciary, not the press.

All these techniques, however, go to insuring fairness during the actual trial. Consequently, a defendant trying to close a pre-trial hearing will have to prove that these procedures will not effectively insulate a jury *at some future time* from publicity occurring before the jury selection process even begins. Proving irreparable damage, therefore, becomes very unlikely. This difficulty of justifying closure will exist also during trial. Exposure to past publicity does not automatically preclude selection of an impartial jury.⁴⁹ Once a trial has commenced, sequestration is a useful method of preventing undue influence on the jury. Sequestration obviously is unavailable as to pretrial hearings.

Yet even if the burden of proof is very great, it will be a rare case in which a defendant cannot employ the insulation techniques to his benefit, at least in West Virginia. Media coverage in this state is limited in comparison with more urban states. Only one newspaper circulates statewide and no television or radio station broadcasts throughout the state.⁵⁰ Associated Press and United Press International provide wire services to newspapers and broadcast media in West Virginia, but few media outlets subscribe to both organizations. Therefore, proving existence of widespread hostile publicity to the extent that even a change of venue

⁴⁸ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

⁴⁹ *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

⁵⁰ *The Charleston Gazette* maintains statewide circulation.

would not result in a fair trial will be difficult. Only in the most notorious crimes, such as the "Son of Sam"-type slayings or cases involving recognized statewide figures, will sufficient statewide coverage occur to possibly justify a finding that closure alternatives are infeasible.

Herald Mail, while settling the question of closure in criminal trials, leaves other issues unanswered. The Supreme Court of Appeals held that the state constitution guaranteed a right of access to criminal trials.⁵¹ The court did not specify whether the right of access was to extend to all judicial proceedings. The "open court" language contained in the state constitution does not distinguish between criminal and civil cases. A fair reading of the decision indicates that *all* court proceedings are to be conducted in view of the public, except when extreme prejudice to the defendant can be shown. Consequently, this case provides support for members of the public and press seeking access to such proceedings as juvenile and adoption hearings,⁵² invasion of privacy civil suits, domestic cases highly embarrassing to one or both of the parties, the testimony of juveniles and women in sexual assault cases,⁵³ and pretrial civil suit settlement conferences. Defining the extent of the right of access may result in a case-by-case review of which interests are to be balanced against the access right. For example, protection of a juvenile from trauma and embarrassment while testifying is a recognized responsibility of the judicial system.⁵⁴ However, such an obligation has been held not to constitute sufficient grounds to justify closing a trial because of the compelling interest in insuring that the public maintains confidence in the integrity and credibility of the trial process.⁵⁵ Another legitimate basis for requiring open proceedings in all matters is the wording of the state constitution. Unlike the sixth amendment to the Constitution, West Virginia's open court provision is a public right, not a personal one to the accused.⁵⁶

⁵¹ 267 S.E.2d 544, 546-47.

⁵² See *State ex rel. Oregonian Publishing Co. v. Deiz*, 6 MEDIA L. REP. 1369 (BNA) (Oregon S. Ct., June 18, 1980). Court ruled that state statute providing for closure of juvenile court violated open court provision of state constitution.

⁵³ See *Lexington Herald Leader Co. v. Tackett*, 6 MEDIA L. REP. 1436 (BNA) (Ky. S. Ct., June 24, 1980).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 267 S.E.2d at 547. The court specifically found that article 3, section 14

Herald Mail, while dealing specifically with a right of access to the courts, may have additional implications in the media's continuing battle to gain judicial recognition of a constitutional right of access *for the media* in their newsgathering efforts. This battle has been waged primarily in the federal courts, with the media losing in almost every case.⁵⁷ The Supreme Court's position has been that, although some protection needs to be afforded newsgathering rights,⁵⁸ the media may claim no greater rights than the general public.⁵⁹ Thus, the media have lost in efforts to prevent disclosure of confidential sources⁶⁰ or to gain access to places not normally accessible by the public.⁶¹

Both *Richmond Newspapers* and *Herald Mail* contain language reiterating the idea that the media's right of access is only that of the public.⁶² But at least one Supreme Court justice specifically recognized in *Richmond Newspapers* that "for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment."⁶³ Indeed, *Richmond Newspapers* will be cited by media lawyers in the future as support for a press right of access.⁶⁴

It is arguable that *Herald Mail* may be used to support the proposition that the Supreme Court of Appeals should recognize such a specific media right of access to important information under the state constitution's "freedom of the press" clause.⁶⁵

confers a broader right than the sixth amendment to the Constitution.

⁵⁷ See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). The Supreme Court held that the press did not have a superior right of access than that of the public; therefore, if access was denied the public to tour a jail, the media could not demand access.

⁵⁸ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

⁵⁹ 438 U.S. 1 (1978).

⁶⁰ 408 U.S. 665 (1972).

⁶¹ 438 U.S. 1 (1978).

⁶² 100 S. Ct. at 2825; 267 S.E.2d at 549.

⁶³ 100 S. Ct. at 2831 (Stevens, J., concurring).

⁶⁴ *Richmond Newspapers* has been cited in briefs before the Supreme Court in a case challenging the constitutionality of allowing cameras in the courtroom. *Chandler v. Florida*, 366 So.2d 64 (Fla. 1978), *appeal docketed* No. 79-1260 (U.S. Supreme Court Aug. 26, 1980).

⁶⁵ W. VA. CONST. art. 3, § 7 states: "No law abridging the freedom of speech, or of the press, shall be passed. . . ."

The court has been cognizant of the special role played by the press in ferreting out information which the public may not otherwise receive.⁶⁶ If the court is willing to find a specific right of access by the public and press under the state constitution's judicial clauses, recognition of a media right of access under the free press provision requires only a slight extension of the press' rights and obligations. Expansion of these rights under the state constitution would not be the first time this court has afforded greater protection to fundamental rights than that provided by the Supreme Court under the federal Constitution.⁶⁷ Given the Supreme Court's hesitancy to recognize explicitly a first amendment right to gather news as well as publish it, perhaps it is time the media directed their efforts toward the state level.

This right of access is viewed by journalists as a logical extension of their ability to publish without governmental interference. Without the freedom to gather newsworthy information from all sources, the right to publish loses some of its value, at least in the eyes of reporters barred from meetings or forced to reveal sources.⁶⁸

The developing "structural" model of the media's societal role advocates protection of the newsgathering process. This method of analysis "focuses on the relationship of the press to the communicative functions required by our democratic beliefs."⁶⁹ Traditional first amendment theory has not focused on this structural approach, but rather has emphasized such values as freedom of individual belief and the desire to create a marketplace of ideas.⁷⁰ Adoption of the structural method will require expansion of first amendment protection to the newsgathering process. "The press is [then] not only shielded when it speaks out, but when it

⁶⁶ 267 S.E.2d at 549.

⁶⁷ See *State ex rel. McLendon v. Morton*, 249 S.E.2d 919 (W. Va. 1978). The court ruled that entitlement to tenure constituted a sufficient property interest to a college teacher to require a procedural due process hearing before tenure could be denied. In *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979), the court held that education was a fundamental right under the state constitution; therefore, any discriminatory classification found in the school funding system was invalid unless the state demonstrated a compelling interest to justify unequal treatment.

⁶⁸ 408 U.S. 665 (1972).

⁶⁹ Brennan, *Address*, 32 RUTGERS L. REV. 173, 177 (1979).

⁷⁰ Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUNDATION RESEARCH J. 523, 524 (1977).

performs all the myriad tasks necessary for it to *gather and disseminate* the news."⁷¹

In summary, *Herald Mail* has decisively guaranteed the public's and press' right of access to the courts. It does so by requiring the defendant to meet a heavy burden of proof before closure of courts will be considered. This is a valid burden of proof because of the American democratic system's traditional openness. Mere reporting of crime and the subsequent judicial process does not automatically jeopardize a defendant's right to a fair trial. Publicity is a necessary adjunct of a democratic, open society. During a trial, it helps to insure the accuracy and completeness of testimony⁷² as well as insure fairness to the criminal defendant.⁷³ A vigorous press is as necessary to a fair trial as an unbiased jury.⁷⁴ A trial's purpose is not just to adjudicate facts, but to fulfill a larger societal role of public catharsis.⁷⁵

It remains to be seen, however, how far the media and courts will develop this right of access. Civil suits and other sometimes-closed proceedings may become more open to public scrutiny. Furthermore, the media may attempt to use *Herald Mail* as a springboard to judicial recognition of a media right of access and newsgathering independent of the public's right of access. Development of the idea that the media has "a *structural* role to play in securing and fostering our republican form of self-government"⁷⁶ likely will determine the limits of *Herald Mail*.

W. Martin Harrell

⁷¹ 32 RUTGERS L. REV. 173, 177.

⁷² J. WIGMORE, 6 WIGMORE ON EVIDENCE § 1834 (Chadburn ed. 1976).

⁷³ 100 S. Ct. 2814, 2839 (Brennan, J., concurring).

⁷⁴ *Id.* at 2837-38.

⁷⁵ *Id.* at 2832.

⁷⁶ *Id.* at 2833 (emphasis added).

