When the first ten amendments were proclaimed on Dec. 15, 1791, James Madison, the brilliant Virginian who was more than any other person responsible for drafting them, securing their adoption in Congress, and obtaining their ratification by the states, had fulfilled the federalist promise to satisfy those who opposed the Constitution because it had no bill of rights. James Madison, no doubt would be astonished, were he alive today, to discover that now there are people who think the First Amendment and the Sixth Amendment are in contradiction. That argument did not appear (so far as I can discover) in the debates in the first Congress, in the fight for ratification, or anywhere else in the country.

It is astonishing that this "conflict", now widely perceived, did not occur to anyone in 1791.

The Anti-Federalist opponents of the Constitution did not say anything I can discover about the failure of the Constitution to afford protection of a fair trial, but they were eloquent about the protection for a free press. George Mason thought Congress: "would oppress the people; and if anyone dared to defend them could not Congress, pretending to act for the general welfare, construe their action as sedition?" He worried that Congress could "restrict
the press, and try cases arising from that restriction within its own ten-mile jurisdiction". (P 125, The Anti-Federalists, Jackson Turner Main)

Silas Lee suggested Congress might silence criticism of an administration. (P 154, The Anti-Federalists)

The New York Journal thought that: "if preachers and printers are troublesome to the new government, and that in the opinion of its rulers, it shall be for the general welfare to restrain or suppress both the one and the other, it may be done consistently with the new Constitution". (P 200, The Anti-Federalists) Others voiced the same anxiety that the federal government might prosecute citizens for utterance in the federal courts.

Anxiety about the Sixth Amendment rights seemed nowhere near as important to the Anti-Federalist critics.

Chief Justice Burger said on July 2, 1980, in Richmond Newspapers v Commonwealth of Virginia, "here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public on the unopposed request of a defendant, without any demonstration that closure is required to protect the defendants superior right to a fair trial, or that some other over-riding consideration requires closure".

In his opinion, which in the future, in my view, will take its place alongside Near v Minnesota, as a fundamental statement of American constitutional doctrine, Burger went back beyond Madison and the Constitutional Convention and the Bill of Rights, to cite
the origins of our modern theories on the criminal trial. He then made the assertion that: "What is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe".

From the earliest times, and through all changes in the law, he pointed out, "one thing remained constant: the public character of the trial at which guilt or innocence was decided".

He quoted Sir Thomas Smith who wrote in 1565 that beyond the indictment "all the rest is done openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositories and witnesses what is saide".

The Chief Justice concluded that the court had "found nothing to suggest that the presumptive openness of the trial was not also an attribute of the judicial systems of colonial America". He cited the colonial practice in Virginia and adverted to the 1677 Concessions and Agreements of West New Jersey, which provided 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 a covert manner".

The Chief Justice also cited the Pennsylvania Frame of Government of 1682 which provided that "all courts shall be open"
and noted its reafirmation in section 26 of the Constitution adopted by Pennsylvania in 1776.

He might also have noted that architectural monument to the doctrine of the open court — the court room in Independence Hall in Philadelphia. When you enter that building, the old Pennsylvania State House built in 1735, you proceed on a central corridor, to the left of which is the chamber where the Constitutional Convention met, and to the right of which, separated only by open marble arches, and with no door at all, is the court room where the Pennsylvania court convened.

In summary the Chief Justice noted that, "at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open". He added that, "in guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees". He then cited First National Bank of Boston v Bellotti, which said: "the first Amendment goes beyond protection of the press... to prohibit government from limiting the stock of information from which members of the public may draw."

He also cited Kleindienst v Mandel, which held that there is a "first amendment right to receive information and ideas".

He quoted from Branzburg v Hayes which said that "without some protection for seeking out the news, freedom of the press could be eviscerated".
Chief Justice Burger met head on the State's assertion that the Constitution does not spell out a guarantee for the right of the public to attend trials. He noted that the U.S. Supreme Court had acknowledged that "certain unarticulated rights are implicit in the enumerated guarantees".

The Chief Justice said: "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment, without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated".

And finally, the Chief Justice said: "Absent an over-riding interest articulated in findings, the trial of a criminal case must be open to the public".

Justice Stevens, in his concurring opinion, said: "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever".

At another point, he said: "Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedom of speech and of the press protected by the First Amendment".

Justice Blackman's concurring opinion was especially interesting in that he hailed the Court's reliance upon legal
history in determining the fundamental public character of the criminal trial. At the same time he regretted the Court's ruling in Gannett which he said apparently was to the effect that there is no Sixth Amendment right on the part of the public — or the press — to an open hearing on a motion to suppress. He held that in error and said he remained convinced that the right to a public trial is to be found where the Constitution explicitly placed it — in the Sixth Amendment".

Gannett v DePasquale, of course, still stands. There the Court upheld the closure of pre-trial proceedings upon agreement of prosecution and defense to a closed proceeding. The dissenting justices in that decision made many of the arguments against closure that were made by the majority in Richmond Newspapers v Virginia. And there is some language in the Burger opinion that gives it a narrow application. It refers to the issue as being "whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure". It leaves open, to be sure, for future debate what happens if closure is sought to protect the defendant's right or for "some other overriding consideration".

The decisive closing sentence is "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public".
We may hear more about these exceptions in the Boston Globe case and the Washington Post case now before the United States Supreme Court.

Nevertheless, an overwhelming, almost unassailable argument has been made for the general philosophy and the basic assumption that trials must be openly conducted. It is hardly possible to reconcile with this sweeping generalization in favor of open trials any narrow contention for closed court proceedings. Ultimately, it seems likely that DePasquale will be brought more in line with this opinion. As long as 85 percent of all criminal proceedings are disposed of in pre-trial proceedings, the principles of Richmond Newspapers v Virginia, must prevail if criminal justice is to be administered with the openness that the Supreme Court has defended in this historic opinion.