CONSTITUTIONAL LAW—SIXTH AMENDMENT—EXCLUSION OF PRESS AND PUBLIC FROM PRETRIAL SUPPRESSION HEARING NOT VIOLATIVE OF SIXTH AMENDMENT—*Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979).

In July of 1976, an investigation was commenced in connection with the disappearance of a former Rochester, New York policeman.[1] Wayne Clapp was last seen on July 16, when he and two male companions took his boat out on Lake Seneca to go fishing.[2] Clapp's bullet ridden boat was subsequently recovered, leading to the arrest of his two companions.[3] The news of Clapp's disappearance and the arrest of the two suspects, Kyle Greathouse and Davis Jones, received extensive publicity in the Rochester newspapers, which were owned by petitioner Gannett Company, Inc. (Gannett).[4] At a pretrial hearing to suppress evidence, held before Judge Daniel DePasquale on November 4, 1976, defense attorneys argued that the "unabated buildup of adverse publicity had jeopardized the defendants' ability to receive a fair trial."[5] They requested that the hearing be

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[1] Gannett Co. v. DePasquale, 43 N.Y.2d 370, 374, 372 N.E.2d 544, 546, 401 N.Y.S.2d 756, 758 (1977), *aff'd*, 99 S. Ct. 2898 (1979).

[2] Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2901 (1979). The two companions returned from the boat trip without Clapp and left the area in his pick-up truck. *Id.*

[3] *Id.* at 2902. Clapp's body, however, was never recovered. *Id.*

[4] *Id.* at 2901–03. Gannett publishes the *Democrat & Chronicle*, a morning edition, and the *Times-Union*, an evening edition, both of which carried similar stories concerning the case. There were seven days on which the papers reported the case, resulting in a total of 15 articles. The July 20 papers carried the story of Clapp's disappearance. On July 22 the papers reported the details of the apprehension by Michigan police of the suspects, Greathouse and Jones (aged 16 and 21, respectively) and Greathouse's wife (age 16). These stories also reported the Seneca County police's theory that Clapp's body had been thrown into Lake Seneca after being robbed and shot with his own pistol. The reports of July 23 revealed that jurisdictional problems might be involved due to both the young age of Greathouse, and the fact that he was on probation in San Antonio, Texas. The succeeding reports in the papers stated that Greathouse had led police to the missing revolver and had made incriminating statements to the police. The papers reported that arraignment proceedings against the three suspects had been commenced, that the two men were indicted and charged with second-degree murder, robbery, and grand larceny, and that each man had pleaded not guilty to all charges. The last report of the case, prior to the pretrial motion, was on August 6. *Id. See also* Brief for Petitioner at 7–8, Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979).

[5] Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2903 (1979). During the ninety-day period before the pretrial hearing, the defense moved to suppress those statements allegedly made involuntarily. They also sought to suppress the gun which Greathouse had led the police to, on the grounds that it was the fruit of an involuntary confession. *Id.*

held *in camera*. The district attorney voiced no opposition, and the trial judge granted the motion.[6] Gannett subsequently submitted a motion to vacate the order *nunc pro tunc*,[7] but the court denied the relief, noting that since one of the two defendants was sixteen years of age, there was a reasonable probability of prejudice to the defendants.[8]

Gannett commenced an action in the Supreme Court of the State of New York, Appellate Division, to vacate and prohibit enforcement of the closure order.[9] That court unanimously held that the exclusionary order entered by the lower court encroached upon Gannett's first amendment right[10] "to publish free from unlawful governmental interference."[11] The supreme court vacated the or-

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[6] *Id.* A reporter employed by petitioner Gannett was present at the closure motion, but voiced no objection to it. The following day, however, Carol Ritter, a reporter for Gannett, challenged the court's ruling in a letter to the trial judge, requesting the right to cover the hearing. *Id.* In an oral ruling, the court concluded that "[c]ertain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants, and for those reasons the court is going to grant both [defendant's] motions." Gannett Co. v. DePasquale, 43 N.Y.2d 370, 375, 372 N.E.2d 544, 546, 401 N.Y.S.2d 756, 758 (1977), *aff'd*, 99 S. Ct. 2898 (1979).

[7] Gannett Co. v. DePasquale, 43 N.Y.2d 370, 375, 372 N.E.2d 544, 546, 401 N.Y.S.2d 756, 757 (1977), *aff'd*, 99 S. Ct. 2898 (1979). An order *nunc pro tunc* "applie[s] to acts . . . done after the time when they should be done, with a retroactive effect." BLACK'S LAW DICTIONARY 964 (5th ed. 1979).

[8] Gannett Co. v. DePasquale, 55 A.D.2d 107, 108–09, 389 N.Y.S.2d 719, 721 (1976) (per curiam), *modified*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 99 S. Ct. 2898 (1979). *See also* Brief for Petitioner, *supra* note 4, at 5.

[9] Gannett Co. v. DePasquale, 55 A.D.2d 107, 389 N.Y.S.2d 719 (1976) (per curiam), *modified*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 99 S. Ct. 2898 (1979).

[10] *Id.* at 110, 389 N.Y.S.2d at 720. The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

[11] Gannett Co. v. DePasquale, 55 A.D.2d 107, 110, 389 N.Y.S.2d 719, 722 (1976) (per curiam), *modified*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 99 S. Ct. 2898 (1979). The court further determined that the order constituted an unlawful prior restraint on the first and fourteenth amendment rights. Using standards enunciated in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the court examined

> "the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger."

Gannett Co. v. DePasquale, 55 A.D.2d 107, 112, 389 N.Y.S.2d 719, 723 (1976) (per curiam), *modified*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 99 S. Ct. 2898 (1979) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976)). The court also considered " 'whether the record supported the entry of a prior restraint on publication.' " *Id.* (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976)).

ders of the county court, determining that the trial court had not met the heavy burden imposed as a condition to securing a prior restraint, since no findings had been made with regard to " 'the nature and extent of pretrial news coverage.' "[12] In addition, the court noted that no inquiry had been made into " 'whether other measures would [have been] likely to mitigate the effects of unrestrained pretrial publicity.' "[13]

On appeal, the New York Court of Appeals held that the case was technically moot;[14] however, due to the important issues involved, the case was decided.[15] The court strongly advocated governmental "accountability through public legal proceedings,"[16] but recognized the inherent power of the courts to limit public access in particular cases as an integral part of due process. The court affirmed the trial court's exclusion of the press, stating that "[a]t the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumed to be closed to the public."[17] Furthermore, the court approved a balancing of the rights of the individual defendant and the interests of the public, and decided that the community was primarily interested in the event itself rather than prosecutorial or judicial accountability.[18]

Upon petition to the United States Supreme Court, certiorari was granted.[19] In *Gannett Co. v. DePasquale*,[20] the Court in a five-to-four decision affirmed the judgment of the New York Court of Appeals. Speaking through Justice Stewart, the Court rejected the

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[12] Gannett Co. v. DePasquale, 55 A.D.2d 107, 112, 389 N.Y.S.2d 719, 722 (1976) (per curiam), *modified*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 99 S. Ct. 2898 (1979).

[13] *Id.*

[14] Gannett Co. v. DePasquale, 43 N.Y.2d 370, 376 n.1, 372 N.E.2d 544, 547 n.1, 401 N.Y.S.2d 756, 759 n.1 (1977), *aff'd*, 99 S. Ct. 2898 (1979). The transcripts of the hearing had been made available to the petitioner. *Id.*

[15] *Id.* at 376, 372 N.E.2d at 547, 401 N.Y.S.2d at 759.

[16] *Id.* at 376, 372 N.E.2d at 548, 401 N.Y.S.2d at 760.

[17] *Id.* at 380, 372 N.E.2d at 550, 401 N.Y.S.2d at 762.

[18] *Id.* at 381, 372 N.E.2d at 550, 401 N.Y.S.2d at 762–63. Public interest in prosecutorial and judicial accountability is based upon an interest to see fair and effective enforcement of laws, to see that the accused receives a fair trial, and to ensure that judicial officials perform their functions in an appropriate and adequate manner. *Id.*

[19] Gannett Co. v. DePasquale, 435 U.S. 1006 (1978).

[20] 99 S. Ct. 2898 (1979).

mootness issue[21] and devoted its attention to an analysis of the sixth amendment right to a public trial. It held that the Constitution granted Gannett no affirmative right of access to the particular pretrial hearing in question, since the sixth amendment guarantee of a public trial is for the benefit of the defendant alone.[22] In rendering its opinion, the Court did not apply a balancing test between defendants' due process rights and the petitioner's first amendment rights as did the New York Court of Appeals. Rather, the Court dealt directly with the issue of whether members of the press and public have an independent constitutional right of access to pretrial judicial proceedings.[23]

The proper interpretation of the sixth amendment's public trial guarantee was a major issue before the Supreme Court in *Gannett*. The amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . a public trial."[24] The Eighth Circuit, in an early sixth amendment case, noted that it was enacted in response to "the historical warnings of the evil practice of the Star Chamber in England."[25] "The corrective influence of public attendance at trials was considered important to the liberty of the people," the court pointed out, and required safeguarding in order to avoid being "undermined and destroyed."[26]

At English common law, public trials were considered essential for a variety of reasons. The operation of a trial in public tended to improve the quality of testimony by discouraging the witness from making false statements through fear of exposure by those present or

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[21] *Id.* at 2904. Under the standards enunciated in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546–47 (1976), the Court agreed that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration and . . . there was a reasonable expectation that the complaining party would be subjected to the same action again." 99 S. Ct. at 2904.

[22] 99 S. Ct. at 2908. Justice Stewart did concede that the public had a strong societal interest in public trials, but he did not think a strong public interest existed in pretrial hearings. *Id.* at 2908–12. *See* notes 77–94 *infra* and accompanying text.

[23] *See* 99 S. Ct. at 2908-12.

[24] U.S. CONST. amend. VI.

[25] Davis v. United States, 247 F. 394, 395 (8th Cir. 1917). The Anglo-American distrust of secret trials was also attributed to the French monarchy's abuse of the *lettre de cachet*. This "was a document bearing the King's Private seal" and was used for "arbitrarily ordering the indefinite imprisonment of any particular person." *See* Note, *The Right to a Public Trial*, 6 TEMPLE L.Q. 381, 388 (1932).

[26] Davis v. United States, 247 F. 394, 397 (8th Cir. 1917).

others who learned of the testimony.[27] Furthermore, such proceedings guaranteed that public opinion was "brought to bear" on court activity, ensuring that the judge and jury would hear all aspects of the case.[28] This was viewed as the most effective means for securing "public confidence and respect."[29] The language of the Court of Exchequer, in *Daubney v. Cooper*,[30] exemplified the English attitude towards the public trial. In *Daubney*, the plaintiff was removed from a court of law after defendants contended that he had no right to attend the trial. On appeal, the court expressed the opinion that one of the essential qualities of trial proceedings is that they be public and that all parties interested in the trial process be given the right to attend.[31]

The common law recognized that the advantages which flowed from a public trial were for the benefit of the accused.[32] In allowing public participation in the trial process, the accused was guaranteed that the public would see he was "fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of responsibility and to the importance of their functions."[33] The acknowledgment that a trial be

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[27] 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 892 (1923). The reluctance to falsify was stimulated by fear of public scorn. *Id.*

[28] E. JENKS, THE BOOK OF ENGLISH LAW 91 (1949); *see also* 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 341 (Wendell ed. 1850).

[29] D. FELLMAN, THE DEFENDANT'S RIGHTS UNDER ENGLISH LAW 72–73 (1966). *See also* 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1978) in which Professor Bentham states:

> On the other hand; suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge, that judge will be at once indolent and arbitrary; how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate as cloaks than checks; as cloaks in reality, as checks only in appearance.

*Id.*

[30] 109 Eng. Rep. 438 (1829).

[31] *Id.* at 440.

The beneficial effect of the public's participation in the trial was viewed as having an educative value. The public gained a respect for the law, gained knowledge of methods of government and developed a great respect for judicial administration. 3 J. WIGMORE, *supra* note 27, at 894. These were things which could never have been attained through a system which functioned in secret.

[32] 1 T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 647 (1927).

[33] *Id.* at 894.

public, did not imply, however, that every person who saw fit to attend the criminal proceeding should be permitted to do so. At common law, trials were closed when the motives of the public in attending the trial were of the worst kind or where a regard for public morals and decency required that at least the young be excluded from hearing and witnessing sordid evidence which the trial would expose.[34] This tradition was continued in the United States.[35]

Framers of early state constitutions considered the factors recognized by the common law and were conscious of the need to safeguard the guarantee of a public trial. The protection of liberties, including the right to a public trial, was an important step in the development of the Bill of Rights.[36] Consequently, the passage of the sixth amendment specifically guaranteed to an accused a right which was believed to be an important individual liberty. All states have articulated this right in a specific constitutional provision, by passage of a statute, or by some form of recognition of the common law right expressed in case law.[37] Both federal and state courts have differed, however, over the extent to which a trial must be made public, and the extent to which the right accrues.[38]

The ability to restrict attendance at trials in this country is an inherent power of the court, subject to the conditions and cir-

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[34] 3 J. WIGMORE, *supra* note 27, at 849-50.

[35] *See generally* Tilton v. State, 5 Ga. App. 59, 62 S.E. 651, 652-53 (1908); Benedict v. People, 23 Colo. 126, 128, 46 P. 637, 638 (1896) (exclusion of persons except members of bar, law students, officers of court and witnesses during recitation of indecent facts during rape trial).

[36] *See generally*, 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971). In particular, *"The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of New Jersey"* was meant to serve as the common law of fundamental rights and privileges agreed upon to be the foundation of the government. In Chapter XXIII, The Concession of West Jersey specifically provided:

> That in all public courts of justice for trials 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 trials as shall be there had or passed, that justice may not be done in a corner nor in any covert manner.

*Id.* at 129.

[37] Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138, 1140 nn. 11-16 (1966). Additionally, the Federal Constitution's sixth amendment right to a public trial, at least in criminal cases, has been held applicable to the states. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

[38] *See, e.g.*, Lewis v. Peyton, 352 F.2d 791, 797 (4th Cir. 1965); Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944); People v. Bucks, 46 Cal. App. 2d 558, 561-62, 116 P.2d 160, 162-63 (1941).

cumstances of the case.[39] Consequently, trials have been closed or partially closed to the public for a variety of reasons. It is generally agreed that those who have no immediate concern with the trial, or who attend merely out of a morbid curiosity can be excluded from the proceeding.[40] In addition, those spectators who cannot maintain proper dignity and decorum or who impede the administrative process of the court may also be excluded.[41] Testimony which may prove to be embarrassing to witnesses or trial participants, or testimony involving explicit descriptions of sexual conduct will, at times, justify the exclusion of the public.[42] Courts, however, have not allowed the general indiscriminate exclusion of spectators from the trial court, ascertaining that "[o]ne of the main purposes of the admission of the public is the reasonable possibility that persons unknown to the parties or their counsel, but having knowledge of the facts, may be drawn to the trial."[43] It has been further noted that the corrective influence of public attendance at criminal trials is important to the liberty of the people.[44]

The sixth amendment guarantee of a public trial implies that the accused will receive a fair trial, free from bias and prejudice.[45] This raises the issue of what constitutes a fair trial when publicity seems to be adverse to the rights of the accused. While maximum freedom

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[39] 3 J. WIGMORE, *supra* note 27, at 895. *See also* Lewis v. Peyton, 352 F.2d 791, 797 (4th Cir. 1965) (right to public trial protects not only accused's, but public's rights to "know what goes on when [m]en's lives and liberty are at stake"); Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944) (reasonable probability that persons unknown to parties or their counsel, but having knowledge of facts, might be drawn to trial justifies publicness of the trial); Reagan v. United States, 202 F. 488, 490 (9th Cir. 1944) (courtroom cleared of all spectators in rape case except those connected with court or case); People v. Bucks, 46 Cal. App. 2d 558, 561–62, 116 P.2d 160, 162–63 (1941) (bailiff ordered to lock courtroom doors during instructions to the jury; done in attempt to obviate distraction made by spectators entering or leaving court).

[40] Reagan v. United States, 202 F. 488, 490 (9th Cir. 1944).

[41] *See, e.g.*, Lide v. State, 133 Ala. 43, 63, 31 So. 953, 959 (1902) (exclusion granted due to applause by spectators to remarks of counsel); People v. Bucks, 46 Cal. App. 2d 558, 561–62, 116 P.2d 160, 162–63 (1941) (bailiff ordered to lock courtroom doors during instructions to the jury; in attempt to obviate distraction made by spectators entering or leaving court); State v. Genese, 102 N.J.L. 134, 142, 130 A. 642, 646 (1925) (audience persisted in interrupting orderly proceedings); Grimmett v. State, 22 Tex. Crim. 36, 39–41, 2 S.W. 631, 633–34 (1886) (audience temporarily excluded when laughter disrupted proceedings and embarassed witnesses).

[42] Reagan v. United States, 202 F. 488, 490 (9th Cir. 1913).

[43] *Id.* at 490.

[44] *See* in re Oliver, 333 U.S. 257, 271-72 (1948).

[45] *Id.* at 268.

must be given to the press, fairness in the judicial process must always be maintained.[46] In *Marshall v. United States*,[47] the Supreme Court granted a motion for a new trial when newspaper articles which printed reports of the defendant's two previous felonies were read by a substantial number of jurors during the trial.[48] The Court acknowledged, however, that "[t]he trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial."[49]

The Supreme Court also found a denial of a fair trial where, due to extensive press coverage, a defendant had become the *cause celebre* of the community.[50] The Court viewed the test as " 'whether the nature and strength of the opinions formed are such as in law necessarily . . . raise the presumption of partiality.' "[51] This holding was based upon the assumption that a juror who has formed an opinion cannot be impartial.[52] The burden of proof, however, is upon the accused to show the " 'actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' "[53]

Massive pretrial publicity which includes extensive media coverage before and during trial has been found to unduly prejudice an accused's right to a fair trial.[54] The Supreme Court in *Estes v. Texas*[55] expressed the opinion that the televising of pretrial and trial proceedings adds an element of unfairness to the court proceedings

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[46] *See* Sheppard v. Maxwell, 384 U.S. 333, 350–51 (1966).

[47] 360 U.S. 310 (1959).

[48] *Id.* at 311–12.

[49] *Id.* at 312. The trial judge had ruled that evidence of the defendant's previous felonies was inadmissible and prejudicial; he maintained that no prejudice had inured to the defendant as a result of several jurors having read the newspaper accounts of his previous felony convictions. *Id.* at 311–12. The Supreme Court, however, used its supervisory powers and granted defendant a new trial. *Id.* at 313.

[50] Irvin v. Dowd, 366 U.S. 717 (1961). In extensive press coverage of six area murders, the defendant was portrayed as the "confessed slayer." *Id.* at 725. Defendant was granted a change of venue to a neighboring county where he was convicted of the murders. The defendant ultimately sought a writ of habeas corpus, and the Court granted certiorari, finding the build-up of prejudice clear and convincing. *Id. But cf.* Murphy v. Florida, 421 U.S. 794, 803 (1975) (petitioner failed to show setting of the trial was inherently prejudicial or that jury selection process permitted inference of actual prejudice).

[51] 366 U.S. at 723 (quoting Reynolds v. United States, 98 U.S. 145, 156 (1878)).

[52] *See* 366 U.S. at 723.

[53] *Id.* at 723 (quoting Reynolds v. United States, 98 U.S. 145, 157 (1878)).

[54] Estes v. Texas, 381 U.S. 532 (1965).

[55] *Id.* at 545–49.

by distracting jurors, inhibiting the defendant, impairing the quality of witness testimony, and placing undue additional responsibilities upon the judge. Furthermore, televising the trial was viewed as not pertinent to the ascertainment of the truth.[56] In *Sheppard v. Maxwell*,[57] the publication of the names of potential jurors, and the lack of privacy between accused and counsel, due to the presence of newspersons and press in the courtroom, rendered the trial violative of due process.[58] The pervasive nature of modern communications systems imposes on trial courts the duty to employ methods which will ensure that publicity is not weighted against the accused.[59] The *Sheppard* Court held that "the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged."[60]

The *Sheppard* decision gave great discretion to trial judges regarding a determination of prejudicial publicity.[61] In oft quoted dictum, the Court suggested that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters."[62] The public's interest in a trial is adequately safeguarded only as long as the accused is given the opportunity to assert, in his own behalf, his right to a trial that is fair and public.[63]

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[56] *Id.* at 549–50.

[57] 384 U.S. 333 (1966).

[58] *Id.* at 335. Petitioner had been arrested for the murder of his wife. The pretrial publicity was pervasive and incriminating. Three weeks before the trial, newspapers published the names of prospective jurors. During the trial, newsmen and the press, admitted to the courtroom, allowed the accused and his counsel no privacy. The jurors were not sequestered during the trial and had access to all media releases. *Id.* at 337–49.

[59] *Id.* at 362.

[60] *Id.* at 358 (citing Estes v. Texas, 381 U.S. 532 (1965)).

Pretrial publicity can be so inherently prejudicial that actual prejudice may be presumed. In Rideau v. Louisiana, 373 U.S. 723, 726 (1963), the accused confessed to a murder in a televised interview, and the Court assumed that Rideau's trial was prejudiced by the televising of his confession. The Court ascertained that the defendant had been denied his due process right to a jury drawn from a community that had neither seen nor heard his confession. *Id.* at 726–27.

In his dissent, Justice Clark stated that when jurors testify that they can discount the influence of external factors and uphold the fourteenth amendment, this should not be disregarded by the judge. He stressed the fact that only three of the twelve jurors had seen the televised confession two months before the trial, and those jurors testified that they could give the defendant the presumption of innocence. *Id.* at 732 (Clark, J., dissenting).

[61] 384 U.S. at 358–61.

[62] *Id.* at 361. *Cf.* Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55 (1976) (advocates rights of press to due process protection from restrictive orders).

[63] 384 U.S. at 350–51.

In addition to the public trial provisions of the sixth amendment, the argument has been posed that the first amendment provides the public and the press a constitutional right to attend criminal trials.[64] In *Nebraska Press Association v. Stuart*,[65] the Supreme Court overturned an order of the Nebraska Supreme Court which prohibited all persons in attendance at the preliminary hearing from releasing or authorizing any testimony or evidence adduced, deciding that the barriers which protect the press from prior restraints had not been overcome.[66] It was noted, however, that "those who exercise First Amendment rights in newspapers or broadcasting enterprises should direct some effort to protect the rights of the accused to a fair trial by unbiased jurors."[67] Thus, the Court recognized the impropriety of preventing the press from reporting on trial proceedings.

Despite acknowledging the role of the press in a public trial, the Court has expressly rejected the contention that the press has a right to attend all trials based upon a first amendment claim of special access to information. In *Branzburg v. Hayes*,[68] the Court stated "that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[69] The *Branzburg* Court specified several areas from which

[64] *See generally* Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308; *see also* Landau, *supra* note 62. Although most Supreme Court decisions on prior restraint issues have not involved restrictive orders entered to protect a defendant's right to a fair and impartial jury or to protect his right to a public trial, they provide some relevance on this issue. In *Near v. Minnesota*, 283 U.S. 697 (1931), the Court invalidated a Minnesota statute which provided for the curtailment "as a public nuisance [any] 'malicious, scandalous, and defamatory newspaper, magazine or other periodical.' " *Id.* at 701–02. Near published a newspaper which contained blatantly anti-Semitic articles, and its publication was enjoined pursuant to the statute. *Id.* at 703–04. The Court ruled that operation of the statute placed the publisher under *de facto* censorship. *Id.* at 713. The Court noted that "punishment for the abuse of the liberty accorded to the press is essential to the protection of the public," *id.* at 715, and "there is also the conceded authority [in the] courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions." *Id.* The Court stated that a statute which authorizes restraint of publication is inconsistent with the conception of freedom of the press, but this immunity from prior restraints is not absolute. *Id.*

[65] 427 U.S. 539 (1976).

[66] *Id.* at 555–63. An order of a Nebraska court in anticipation of a multiple murder trial restrained media publication of the confessions of the accused made to law enforcement officials. *Id.* at 542–44.

[67] *Id.* at 560.

[68] 408 U.S. 665 (1972).

[69] *Id.* at 684. The issue which the Court confronted in this case was "whether requiring newsmen to appear and testify before state and federal grand juries abridge[d] the freedom of speech and press guaranteed by the First Amendment." *Id.* at 667. The access issue evolved within the context of the discussion of freedom of the press and the extent of that right.

newsmen can be regularly excluded and to which they have no constitutional right of access.[70] These areas include grand jury proceedings, Supreme Court conferences, meetings of official bodies in executive session, meetings of private organizations, scenes of crimes or disaster if the general public is excluded, and trials.[71] It was noted that such restrictions are necessitated by a defendant's right to a fair trial before an impartial tribunal.[72]

As with the restrictions placed upon the general public, the limitations on access are applied against the press when a defendant's right to a fair trial before an impartial tribunal is impinged. In *Pell v. Procunier*,[73] the Supreme Court adopted a very narrow view regarding a special right of access afforded the press. The case dealt with prison regulations restricting the press from holding personal interviews with certain inmates.[74] The Court, in upholding the restrictions, would not entertain the press' assertion that it should be made privy to information not shared by members of the general public.[75] No constitutional basis was found to support the theory that the press should receive special access to sources of information within government control.[76]

While the courts have usually recognized the tradition of open proceedings in the trial itself, such a tradition has not been found to exist with regard to the preliminary stages of the trial process. At common law, there was no recognition of a right to a public pretrial hearing, since "publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefatory stages of the proceedings."[77] Therefore, the public could be excluded from these hear-

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[70] *Id.* at 664–65.

[71] *Id.* at 684–85.

[72] *Id.* at 685–86.

[73] 417 U.S. 817 (1974).

[74] *Id.* at 819–21. These regulations were justified since they protected inmate privacy and lessened the chances of inmates becoming celebrities. In addition, such regulations were essential to the maintenance of prison security. *Id.* at 830–32.

[75] *Id.* at 834–35. The Court applied the same rationale in subsequent cases which concerned similar circumstances. *See* Houchins v. KQED, Inc., 438 U.S. 1 (1978); Saxbe v. Washington Post, Inc., 417 U.S. 843 (1974). In *Pell*, the Court stated, "[i]t is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally." 417 U.S. at 834.

[76] 417 U.S. at 834–35.

[77] E. JENKS, *supra* note 28, at 93. "For example, proceedings such as the preliminary inquiry which takes place before an accused person is *committed for trial* on the charge of an indictable offense." *Id.* at 93.

ings if the magistrate thought that the best interests of justice would be served by such exclusion.[78] Publicity and public knowledge concerning pretrial proceedings were thought to prejudice the minds of the jury, who should "come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced."[79]

In the United States, it has been established that incidental or collateral discussions which occur outside the presence of the jury during a trial need not be public.[80] Indeed, many states have retained statutory provisions which provide for the closure of certain pretrial proceedings.[81] However, courts have recognized a right to have the public present at certain pretrial hearings. The court in *United States v. Rundle*,[82] held that a testimonial inquiry at which a trial judge must make a preliminary determination regarding a confession offered by the prosecution is, in a sense, a preliminary hearing which embodies the essence of a trial proceeding.[83] The court opined that a judge may question sworn witnesses in order to determine the voluntariness of a confession. If the judge determines that the evidence presents a fair question as to the reasonableness of the confession, the question should be permitted to go to the jury.[84] The court cited the benefits of a public trial, found that these benefits had significant application to the hearing, and stated that "it follows that such a hearing falls within the constitutional requirement that in criminal prosecutions all trials should be public."[85] Consequently,

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[78] F. MAITLAND, JUSTICE AND POLICE 129 (1885). Maitland noted, however, that the exclusion of the public was uncommon. *Id.*

[79] Rex v. Fisher, 170 Eng. Rep. 1253, 1255 (1811). The court went on to say that "[t]he publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal." *Id.*

[80] United States v. Rundle, 419 F.2d 599, 609 (3d Cir. 1969). These matters include "discussion regarding the appointment of counsel for an indigent defendant, a side-bar conference regarding a question of law, . . . or conference in chambers on other matters not properly for the jury." *Id.* at 605.

[81] *See, e.g.*, ARIZ. REV. STAT. ANN., Rule 9.3 (1973); CAL. PENAL CODE § 868 (West 1970); IDAHO CODE § 19-811 (1948); IOWA CODE § 761.13 (1975); MONT. REV. CODES ANN. § 95-1202(c) (1969); NEB. REV. STAT. § 171.445 (1959); N.D. CENT. CODE § 29-07-14 (1974); UTAH CODE ANN. § 77-15-13 (1953).

[82] 419 F.2d 599 (3d Cir. 1969).

[83] *Id.* at 604–05.

[84] *Id.* at 605; *see* Jackson v. Denno, 378 U.S. 368, 377 (1964).

[85] 419 F.2d at 606.

the court held that barring spectators from this type of hearing denied the accused his right to a public trial.[86]

Although the public has generally been allowed to attend suppression hearings, exclusions of the public from these hearings have been upheld in certain circumstances. In *United States v. Lopez*,[87] the evidence offered at the trial was the characteristic profile of a potential hijacker. This profile consisted of a list of distinguishing traits that had been statistically proven to be common to almost all hijackers.[88] The trial judge determined that the necessity of keeping a hijacker profile secret warranted the public's exclusion for a limited amount of time while that information was being conveyed.[89] However, the Court of Appeals for the Third Circuit, in *United States v. Cianfrani*,[90] held that even though the public trial guarantee of the sixth amendment assured a public trial only to the accused, "any deviation from the constitutionally established norm of open proceedings implicat[ed] strong societal interests."[91] In so ruling, the court recognized that the policies underlying the sixth amendment's public trial guarantee require that there be a strong presumption of public access to a pretrial hearing.[92] The court did specify instances where attendance at trial proceedings could be restricted even where such proceedings were subject to the sixth amendment public trial guarantee;[93] but the Court commented that even "when circumstances

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[86] *Id.*

[87] 328 F. Supp. 1077 (E.D.N.Y. 1971).

[88] *Id.* at 1086.

[89] *Id.* at 1088. This reasoning has been reiterated in subsequent cases. In United States v. Bell, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972), the court ruled that it was essential for the profile system to remain confidential. The court found "protection of the air travelling public" to be sufficient "justification for the limited exclusion" of the public. *Id.* at 670. The court distinguished the pretrial hearing from a trial in that the pretrial hearing was concerned with legality of seized contraband, while the trial was concerned with the question of defendant's guilt or innocence of the charge. *Id.* at 671. *See* United States v. Clark, 475 F.2d 240 (2d Cir. 1973), where, under similar circumstances, the court found that the testimony adduced from two witnesses at an *in camera* suppression hearing did not require protection from disclosure. The court found that the description of the hijacker profile encompassed such a "minute portion" of that testimony that the "risk of disclosure" did not justify exclusion of the defendant and of the public. *Id.* at 246.

[90] 573 F.2d 835 (3d Cir. 1978).

[91] *Id.* at 852.

[92] *Id.*

[93] *Id.* at 851–52.

permit[ted] such limitations . . . the court [should] not lose sight of the important public interests served by open proceedings."[94]

The constitutionality of the closure of a pretrial suppression hearing was considered by the Supreme Court in *Gannett*.[95] In upholding the decision of the New York Court of Appeals, the majority examined the history of the sixth amendment public trial provision,[96] and refuted Gannett's contention that the sixth amendment guarantees the public and the press a right of access to all trials and pretrial proceedings.[97] In reaching this conclusion, the Court gave weight to the fact that the public has an interest in open trial proceedings, but decided that this interest was not of constitutional stature.[98] As analyzed by the majority, the public trial guarantee exists specifically for the protection of the accused and confers no "correlative right in members of the public to insist upon a public trial."[99] With this in mind, the Court found no rationale upon which to base a right of the public to compel an open pretrial proceeding. Reliance was placed upon the fact that closed pretrial proceedings existed at common law and were incorporated into American judicial practice.[100] Consequently, the Court held that "the public had no constitutional right, under the sixth and fourteenth amendments, to attend a criminal trial."[101]

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[94] *Id.* at 854.

[95] 99 S. Ct. at 2904–12.

[96] *Id.* at 2904.

[97] *Id.* at 2911–12. *See* Brief for Petitioner, *supra* note 4, at 35–41. In stating that the sixth amendment right was vested in the public, the petitioner contended that the right to a public trial inured as much to the public as to the accused. Petitioner cited advantages of full, open trials, such as restraints upon judicial abuse, the deterrent effect upon potential abusers of the law and its educative effect upon the public. *Id.*

[98] 99 S. Ct. at 2907.

[99] *Id.* at 2905–09. The majority focused specifically upon two cases decided prior to *Gannett*. In In re Oliver, 333 U.S. 257 (1948), the Court had stated that a criminal contempt trial infringed upon the accused's right to a public trial and noted that the benefits which accrue from a public trial are for the protection of persons accused of the crime. *Id.* at 270 n.25. In Estes v. Texas, 381 U.S. 532 (1965), the Court ruled that massive pretrial publicity impaired the defendant's right to obtain a fair trial. The Court stated:

> We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused.' The purpose of the requirement of the public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned.

*Id.* at 538–39.

[100] 99 S. Ct. at 2910–11. For development of the historical analysis of the pretrial proceeding, see notes 77–94 *supra* and accompanying text.

[101] 99 S. Ct. at 2911. *See* notes 138–44 *infra* and accompanying text.

With regard to Gannett's claim that the first and fourteenth amendments guarantee the public and the press a right of access to trial proceedings,[102] the majority deferred to the judgment of the trial court and refrained from ruling on the issue.[103] In assuming that there might be a right of access, the Court commented that the actions of the lower court were consistent with any right of access that may exist.[104] The Supreme Court was in agreement with the trial court in holding that the function of a judge is to safeguard the due process rights of the accused and m nimize prejudicial pretrial publicity.[105] However, in reaching its conclusion, the trial court had balanced the rights of the accused in obtaining a fair trial against the rights of the public in an open proceeding.[106] While approving the lower court's balancing test, the Supreme Court, through independent reasoning, reached a similar result.[107]

Three concurring opinions were filed with the majority opinion. Chief Justice Burger based his concurrence upon the common law distinction between trials and pretrial proceedings,[108] and the fact that the drafters of the sixth amendment had not created a presumption of public pretrial hearings. These proceedings, he noted, were presumptively closed because there was no certainty that any pretrial evidence would actually be used at trial.[109] Therefore, the Chief Justice concluded that such proceedings are exclusive of the sixth amendment.[110]

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[102] Brief for Petitioner, *supra* note 4, at 11–20.

[103] 99 S. Ct. at 2912–13.

[104] *Id.*

[105] *Id.* at 2904.

[106] *Id.* at 2912.

[107] *Id.* at 2904–13. The Court determined that " 'the closure decision was based on an assessment of the competing societal interests involved . . . rather than on any determination that first amendment freedoms were implicated.' " *Id.* at 2912 (quoting Saxbe v. Washington Post, Inc., 417 U.S. 843, 860 (1974) (Powell, J., dissenting)).

[108] 99 S. Ct. at 2913–14. The Chief Justice placed emphasis upon the ruling in Daubney v. Cooper, 109 Eng. Rep. at 316–18, in which the court expressed the view that pretrial proceedings usually are preliminary inquiries into the case, and not inquiries which concern a conviction or a trial. *Id.* (Burger, C.J., concurring).

[109] 99 S. Ct. at 2913–14 (Burger, C.J., concurring). Chief Justice Burger did acknowledge that "[e]ven though the draftsmen of the Constitution could not anticipate the 20th century pretrial proceedings to suppress evidence, pretrial proceedings were not wholly unknown in that day." *Id.* at 2914 (Burger, C.J., concurring). He assumed, however, that those drafters were not unaware that some testimony was likely to take place before the trial. *Id.*

[110] *Id.* at 2914 (Burger, C.J., concurring).

Although Justice Powell concurred in the result of the majority, his opinion focused upon elements the majority had not addressed. Justice Powell reasoned that Gannett did have a first amendment right of access to the pretrial proceedings, due to the function of the press to act as a public agent in disseminating news. However, this right of access is limited by the accused's constitutional right to a fair trial.[111] These competing constitutional interests are not to be made subordinate to each other. Instead, the trial court must consider "whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury."[112]

Citing standards enunciated in *Nebraska Press*,[113] Justice Powell recommended a procedure to be followed in closure cases. Upon a request by a defendant to exclude the public, the trial court must consider alternative means of preserving the fairness of the trial without infringing upon the public's right to be informed of the proceedings.[114] Also, the court must afford those members of the press and public who object to the exclusion an opportunity to voice their views.[115] Justice Powell observed that these standards had been followed by the lower court in deciding that an open trial would substantially prejudice the defendant.[116] Since the prosecutor and defense attorneys had both endorsed the closure, and Gannett had not established a foundation for altering the trial court's views on the necessity for closure, this procedure complied with that mandated by the Constitution.[117]

Relying upon the majority's determination that the public has no sixth amendment right to attend criminal trials, Justice Rehnquist

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[111] *Id.* at 2914–16 (Powell, J., concurring).

[112] *Id.* at 2916 (Powell, J., concurring).

[113] 427 U.S. 539 (1976). *See* notes 65–67 *supra* and accompanying text.

[114] 99 S. Ct. at 2915 (Powell, J., concurring).

[115] 99 S. Ct. at 2916 (Powell, J., concurring). However, this right which accrues to the public and press applies only to those representatives present at the time the motion for closure is made. Only those present will be given an opportunity to be heard on the question of whether defendant will be deprived of a fair trial. *Id.* Any other method would cause substantial delays due to notice requirements. *Id.*

[116] *Id.* at 2916–17 (Powell, J., concurring).

[117] *Id.* at 2917 (Powell, J., concurring). In a note accompanying his opinion, Powell conceded that the "trial court did not give any explicit consideration to the alternatives to closure." *Id.* But Powell found this acceptable since Gannett had "only 'obliquely' suggested that the Court should consider alternatives." *Id.* at 2917 n.4 (Powell, J., concurring).

concurred, stating that "if the parties agree on a closed proceeding, the trial court is not required by the sixth amendment to advance any reason whatsoever for declining to open a pretrial hearing or trial to the public."[118] He concluded that it remains in the discretion of the lower courts to decide whether to open or close a proceeding.[119] In addition, Justice Rehnquist made reference to the first amendment right of access, noting that the Court has not recognized such a right for either the press or public.[120] He emphasized that "[t]he Constitution does no more than assure the public and the press equal access once the government has opened its door."[121]

In a partial concurrence, Justice Blackmun engaged in an extensive analysis of the history of the public trial. He sought to ascertain whether the sixth amendment implicated interests other than those of the accused or afforded a defendant the right to compel a private proceeding.[122] Although Justice Blackmun acknowledged that "[b]y its literal terms, the sixth amendment secures the right to a public trial only to 'the accused,' "[123] he stressed that the public trial concept is "a fundamental and essential feature" of the American system of criminal justice,[124] and that publicity plays an important role in the administration of criminal proceedings.[125] In determining that public trials are deeply embedded in English common law and American history, and in establishing the essential nature of publicity as a safeguard of testimony, Justice Blackmun stated that "[i]t is most

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[118] *Id.* at 2918 (Rehnquist, J., concurring).

[119] *Id.* at 2918–19 (Rehnquist, J., concurring). Justice Rehnquist stated that trial courts would not be constitutionally bound to follow any procedure set by the Supreme Court in determining the validity of a closure order. *Id.* at 2919 (Rehnquist, J., concurring).

[120] *Id.* at 2918–19 (Rehnquist, J., concurring). Justice Rehnquist cited Saxbe v. Washington Post, Inc., 417 U.S. 843, 850 (1974), Pell v. Procunier, 417 U.S. 817, 834 (1974), Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972) and Estes v. Texas, 381 U.S. 532, 539–40 (1965), to support this opinion. 99 S. Ct. at 2918 (Rehnquist, J., concurring).

[121] 99 S. Ct. at 2918 (Rehnquist, J., concurring).

[122] *Id.* at 2919–33 (Blackmun, J., concurring in part, dissenting in part). Justices Brennan, White and Marshall joined this opinion. The opinion disagreed with a major part of the majority opinion dealing with public access to trial and pretrial hearings.

[123] *Id.* at 2934 (Blackmun, J., concurring in part, dissenting in part).

[124] *Id.* at 2923 (Blackmun, J., concurring in part, dissenting in part).

[125] *Id.* at 2922–23 (Blackmun, J., concurring in part, dissenting in part). Justice Blackmun quoted Sheppard v. Maxwell, 384 U.S. 333, 350 (1966), where the Court stated "publicity of judicial proceedings, 'has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.' " 99 S. Ct. at 2923 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)). *See also* notes 57–63 *supra* and accompanying text.

doubtful that the tradition of publicity ever was associated with the rights of the accused."[126] He reasoned that there was no evidence in the history of the public trial concept to indicate the right of an individual to compel a private proceeding. Further, Justice Blackmun found no support in the sixth amendment from which an individual could demand such a proceeding. Claiming that no benefit adhered to a private proceeding and that secret hearings were generally viewed as suspect, he reasoned that the public trial provision serves public interests as well as those of the accused.[127]

Justice Blackmun next analyzed the sixth amendment in relation to the pretrial suppression hearing and concluded that the public trial provision is fully applicable to that type of hearing.[128] This conclusion was based on the following: first, the suppression hearing is equivalent to the full trial in almost every respect; second, the pretrial suppression hearing is often essential in the criminal proceeding, and all aspects of this proceeding should be open to public scrutiny; third, the issues contemplated at these hearings extend beyond their importance to the outcome of the particular case; and fourth, the suppression of evidence will often involve highly relevant material.[129]

Justice Blackmun criticized the majority's finding that the right to a public trial is an accused's right only, since this would allow "[c]losed trials . . . without providing for any standards to insure that 'the public['s] . . . right to be informed as to what occurs in its courts' has been protected."[130] He reasoned that the sixth and fourteenth amendments protect the right of the public to a public trial and "prohibit a State from conducting a pretrial suppression hearing in private, even at the request of the accused, unless full and fair consideration is first given to the public's interest."[131]

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[126] 99 S. Ct. at 2927. (Blackmun, J., concurring in part, dissenting in part).

[127] *Id.* at 2924–25. The opinion analyzed Singer v. United States, 380 U.S. 24 (1965), Faretta v. California, 422 U.S. 806 (1975) and Barker v. Wingo, 407 U.S. 514 (1972), and stated that the sixth amendment right to a public trial does not give an accused the power to compel the opposite of that right. 99 S. Ct. at 2924–25. (Blackmun, J., concurring in part, dissenting in part). *See also* note 38 *supra* and accompanying text.

[128] 99 S. Ct. at 2933–36 (Blackmun, J., concurring in part, dissenting in part).

[129] *Id.* at 2933–34 (Blackmun, J., concurring in part, dissenting in part). The opinion noted that the suppression hearing is often the only hearing of any magnitude which takes place before a trial. *Id.* at 2934–36 (Blackmun, J., concurring in part, dissenting in part).

[130] *Id.* at 2935 (Blackmun, J., concurring in part, dissenting in part) (quoting Estes v. Texas, 381 U.S. 532, 541 (1965)).

[131] 99 S. Ct. at 2934 (Blackmun, J., concurring in part, dissenting in part). Justice Blackmun cited to the ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and

Justice Blackmun considered the fact that some public proceedings may generate such harm and publicity as to deny the defendant a fair trial.[132] He felt the burden of proving the closure of a presumptively open proceeding should be placed upon the defendant.[133] If the defendant carries the burden of proof in this situation, then the court is allowed to limit public access.[134] This closure could be limited, however, to what the circumstances reasonably require, such as a limitation upon access to certain portions of the proceeding or temporary closure.[135] Both actions become subject to the requirement that a record of such proceedings be released as soon as the need for closure abates.[136] Finding that the rights of the press are synonymous with the public's right of access to a trial proceeding, Justice Blackmun did not feel it necessary to reach the first amendment right of access issue raised by Gannett. Rather he felt that the standards enunciated under the sixth amendment were sufficient to protect the press' right.[137]

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Free Press Standard. *Id.* at 2933–34 (Blackmun, J., concurring in part, dissenting in part). The standards adopted by the ABA place a burden upon the accused to prove: (1) a clear and present danger to the fairness of the trial would exist, if information were publicly disclosed and (2) the prejudicial effect of such information on the fairness of the trial cannot be avoided by reasonable alternative means. American Bar Association, Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press, Standard 8–3, 2 at 16. The moving party "may move that all or part of the proceedings be closed"; but in the case of closure, a complete record of the proceedings must be "made available to the public following the completion of the trial or earlier." *Id.* at 14.

[132] 99 S. Ct. at 2936 (Blackmun, J., concurring in part, dissenting in part).

[133] *Id.*

[134] *Id.* When sought by the accused, this closure must be subject to the following criteria: 1) the accused must demonstrate that irreparable harm will accrue to his rights as a result of conducting the proceeding in public; 2) the accused must demonstrate that alternatives to closure will not adequately secure a fair trial; and 3) the accused must effectively demonstrate that closure will protect against the harm alleged. *Id.* at 2937 (Blackmun, J., concurring in part, dissenting in part).

[135] *Id.* at 2939 (Blackmun, J., concurring in part, dissenting in part).

[136] *Id.* (Blackmun, J., concurring in part, dissenting in part).

[137] *Id.* at 2939–40 (Blackmun, J., concurring in part, dissenting in part). In evaluating the action taken by Judge DePasquale in granting the exclusion order, Justice Blackmun noted that the order was not justified. The opinion stated that there had been a total of fourteen different articles printed regarding the Clapp case. These articles consisted of almost entirely straightforward reporting—no editorializing or sensationalistic reporting was evidenced. It was also noted that for a period of ninety days prior to the suppression hearing, no publicity surrounding the case had been printed at all. *Id.* at 2919–21 (Blackmun, J., concurring in part, dissenting in part). Consequently, Justice Blackmun disagreed with the closure, which had been based upon an agreement by the accused, prosecutor, and the trial judge. He found no evidence of an unabated buildup of adverse publicity which needed to be prevented " 'in order to assure a fair

In focusing its concern upon the rights of an accused, the majority in *Gannett* reasoned that the sixth amendment confers the right to compel a public trial only upon the defendant in a criminal case.[138] Notwithstanding this finding, the Court recognized a strong presumption in favor of the common law right of open judicial proceedings and acknowledged that the sixth amendment permitted such proceedings.[139] The Court, however, failed to accord proper weight to the important function that public attendance serves at trial proceedings and failed to consider the public interest in maintaining open proceedings.[140] As a result, the Court could find no persuasive evidence for granting constitutional status to this presumption.

The *Gannett* majority implied that public concern was not sufficient to outweigh a defendant's rights and that an open hearing would not sufficiently serve the interests of the accused, noting that "[t]here is not the slightest suggestion . . . that there is any correlative right in members of the public to insist upon a public trial."[141] The majority was not persuaded by the history of open judicial proceedings in England and the United States, or by recent federal court decisions which indicate that a right to attend trial proceedings does accrue to the public. Nor did the majority indicate that this right had become a constitutionally established norm.[142] The strong societal interests in the maintenance of public proceedings and the constitutional requirement that trials in criminal cases be public indicate that publicity is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."[143] Consequently, recognition of a right of attendance would

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trial.' " *Id.* at 2920 (Blackmun, J., concurring in part, dissenting in part). Blackmun commented "that the only fact not known to Gannett prior to the suppression hearing was the content of the confessions." *Id.* at 2940 (Blackmun, J., concurring in part, dissenting in part).

[138] *Id.* at 2906.

[139] *Id.* at 2907.

[140] *See* notes 27–38 *supra* and accompanying text.

[141] 99 S. Ct. at 2906 (footnote omitted).

[142] In United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978), the Third Circuit traced the history of the public trial and determined that "we believe that any deviation from the constitutionally established norm of open proceedings implicates important societal interests." *Id.* at 852. *See also* United States v. Clark, 475 F.2d 240 (2d Cir. 1973), in which the court of appeals implied that "[b]arring the public from the entire hearing was likewise an error of constitutional magnitude." *Id.* at 246. The court also stated that this right should be extended to suppression hearings. *Id.* at 247.

[143] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

benefit both the public and the accused. Public attendance at judicial proceedings would promote the protective policies of the sixth amendment, which the accused seeks.

In contrast to the majority, Justice Blackmun correctly recognized that "the tradition of our system of criminal justice [is] that a trial is a 'public event.' "[144] This tradition of openness strongly suggests that the right of the public in securing a public trial is equally as compelling as the right of the accused in seeking a public trial. The pretrial hearing has evolved to become a critical stage of the judicial proceeding. Decisions which are made at suppression hearings are often critical to the outcome of the case, since only a small number of prosecutions go beyond this point.[145] These decisions concern both infringement by improper police conduct upon the constitutional rights of the defendant, and determinations of whether the exclusionary rule should be invoked. The hearing is one in which a judge must make both legal and factual conclusions, either of which may determine the disposition of the case.

In *Gannett*, the pretrial hearing concerned the suppression of statements made involuntarily to the police and the suppression of a gun seized as a fruit of the allegedly involuntary confession.[146] Taking into consideration the fact that the corpse was never recovered and the fact that there were no witnesses to the crime, the decision as to whether to suppress this evidence played a vital role in the outcome of this case. As such, the public was owed the duty to attend the proceeding, in order to witness fair and impartial administration of the law.

By determining that the sixth amendment confers no constitutional right of access to the public to attend trial proceedings and by deciding that judicial proceedings can be closed, the Court has created a situation replete with confusion. The majority failed to explicitly indicate to which proceedings the decision applies.[147] The

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[144] 99 S. Ct. at 2922 (Blackmun, J., concurring in part, dissenting in part).

[145] Brief for Petitioner, *supra* note 4, at 13. Counsel for Petitioner noted that in Seneca County, 100% of all felony dispositions in 1975 and 1976 took place without a trial. *Id.*

[146] 99 S. Ct. at 2903.

[147] The Court stated, "We hold that members of the public have no constitutional right under the sixth and fourteenth amendments to attend criminal trials." *Id.* at 2911. Throughout the opinion the majority consistently failed to use specific language pertaining to pretrial or trial proceedings.

confusion has been exacerbated by the conflicting opinions of two Justices who concurred in the majority decision. Chief Justice Burger attempted to distinguish between a pretrial and trial proceeding, implying that the majority opinion specifically referred to pretrial proceedings.[148] Justice Rehnquist opined that, since the Court had recognized no constitutional right of access to judicial proceedings, this suggested that the decision could be extended to include trials.[149] As a result of this lack of specificity in delineating standards, a great number of courtroom closings have occurred in the country since *Gannett* was decided.[150]

The Supreme Court also left unanswered the question of whether the defense and prosecution must agree to the closure. In contrast, the New York Court of Appeals placed emphasis upon the fact that both parties had agreed to the closure. Considering that an accused cannot waive the right to a jury trial without the consent of the government,[151] this is a minimum standard which should be complied with in any closure proceeding.

While acknowledging that the New York Court of Appeals correctly balanced the " 'competing societal interests involved,' "[152] the Court did not mandate that this balancing standard be utilized as a means against which closure proceedings should be measured. The Court implied that closure should be left to the discretion of the trial court. However, with no standards for judging when closure is necessary, the decision becomes subject to the arbitrariness of the trial judge. The Supreme Court further implied that it is the public's burden to prove a vital interest in maintaining the openness of the trial.[153] The problem which arises in conjunction with placing the

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[148] *See* notes 108–10 *supra* and accompanying text.

[149] *See* notes 118–21 *supra* and accompanying text.

[150] Olson, *Comments by Burger, Powell Viewed as Attempts to Dilute Anti-Press Decision*, 104 N.J.L.J. 267 (1979). The author stated that there had been at least 52 court proceedings closed between the time of the *Gannett* ruling and the publication of the article.

[151] FED. R. CRIM. P. 23; *see* note 38 *supra* and accompanying text.

[152] 99 S. Ct. at 2912 (quoting Saxbe v. Washington Post Co., 417 U.S. 843, 860 (1974)). The Court phrased the question facing the Court as:

> whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.

99 S. Ct. at 2901.

[153] 99 S. Ct. at 2912.

burden of proof upon the public is that the trial court is left to determine the magnitude of the public interest. The failure to specify standards by which the trial judge could weigh the public interest is likely to create confusion in future closure proceedings.

In his analysis of the public trial provision, Justice Blackmun concluded that the states are prohibited from excluding the public from a trial proceeding without weighing the public's interest in maintaining the openness of the trial. Emphasizing the strong societal interests involved in such judicial proceedings, he reasoned that the rights of the public and those of the accused require strong consideration in a decision to close a proceeding. By placing the burden of proof upon the defendant and enunciating standards by which a court could judge the necessity for closure, Justice Blackmun appropriately balanced the rights of the accused against those of the public and press.[154] Under this approach, the defendant's right to a fair trial are not disregarded because the presumption of openness may be overcome upon a showing by the defendant that harm will occur if the proceeding is public. Since the significance of the suppression hearing renders it a part of the trial proceeding it should be made subject to the same standards which govern trial proceedings.

With regard to the first amendment issue, the majority opinion summarily rejected the petitioner's assertion that the first amendment serves as a protective device for insuring that a flow of information reaches the public.[155] In so doing, the Court disregarded the important function that the press serves with respect to judicial proceedings. The purpose of the press' ability to publish and distribute information about trials is to subject the judicial process and its administrators to extensive publicity and criticism. As the Court observed earlier in *Nebraska Press*, "[c]ommentary and reporting are at the core of first amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government."[156] Without this information provided by the press, the public would have no basis upon which to observe and judge governmental proceedings.

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[154] *Id.* at 2937–39 (Blackmun, J., concurring in part, dissenting in part).

[155] Brief for Petitioner, *supra* note 4, at 13–16.

[156] Nebraska Press Ass'n v. Stuart, 427 U.S. at 587 (Brennan, J., concurring).

Case law has not recognized an unlimited first amendment right of access for the press. However, decisions since *Nebraska Press* have advocated a presumption in favor of open proceedings, placing the burden of closure upon the defendant.[157] The *Nebraska Press* case defined stringent standards which must be met in order to justify a prior restraint upon publication. Although closure and gag orders differ in certain respects,[158] they each have the ultimate effect of preventing the press from publishing news and the public from receiving news. Consequently, the standards applicable to the recognition of a prior restraint should also be the standards relevant to a closure proceeding. The ABA has promulgated standards relating to the Administration of Criminal Justice: Free Trial and Free Press recommending a presumption of open proceedings and recognizing the important role the press and public possess in judicial proceedings.[159] The decision of whether to close a proceeding is left to the discretion of the trial court after the party presenting the motion has fulfilled the burden of establishing the necessity for the requested closure.

A literal reading of the sixth amendment evidences that the right to a public trial is one which accrues only to the accused. However, the trial proceeding has been subject to public scrutiny since common law. The advantages of the public trial are viewed as beneficial to the accused and the public, since both parties possess a vital interest in the functioning of the proceeding. In balancing the interests of the public and accused, both seem interested in the fairness of the trial itself. Although the Constitution does not grant to the public a constitutional right of access to judicial proceedings, the historical background of the public trial necessitates a presumption in favor of open proceedings.

The public trial concept, however, is not without its limitations. It "has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect

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[157] *See* United States v. Cianfrani, 573 F.2d at 854; Keene Publishing Corp. v. Keene Dist. Court, 380 A.2d 261, 263 (N.H. 1977) (sweeping exclusion of press and public not favored under proposed ABA Standards and courts' preference towards open proceedings). *See also*, ABA Standards, 1978, *supra* note 131.

[158] A gag order prevents the press from publishing information it already has in its possession, while a closure procedure prevents the press from attaining the information. *See* United States v. Gurney, 558 F.2d 1202, 1208 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 1606 (1978).

[159] *See* note 131 *supra* and accompanying text.

the rights of parties and witnesses, and generally to further the administration of justice."[160] Since trial proceedings have historically been subject to closure, the Supreme Court in *Gannett* did nothing more than affirm an acknowledged and accepted procedure by which a judge allows closure of a trial proceeding under certain circumstances. The Court was remiss, however, in failing to enunciate standards for determining the need for such an action. These standards would require that a defendant demonstrate a reasonable probability of threatened prejudice which closure would prevent and that other methods would be ineffective to avoid prejudice. Furthermore, the request for closure should address the objections of the public. More importantly, however, in its failure to recognize that a pretrial suppression hearing falls within the constitutional purview of a public trial, the Court has thereby vested in trial judges the power to close all types of proceedings. Such a situation has the potential of undermining a compelling societal interest in assuring the fair administration of justice.

*Eve Costopoulos*

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[160] People v. Jelke, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954).