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Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.: The Second Circuit Concludes that New York State Courts Have Exclusive Jurisdiction Over Private Rights of Action Asserted Under § 227 of the Federal Telephone Consumer Protection Act of 1991

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RECENT DEVELOPMENTS IN NEW YORK LAW

Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.: *The Second Circuit concludes that New York State courts have exclusive jurisdiction over private rights of action asserted under § 227 of the Federal Telephone Consumer Protection Act of 1991.*

In 1991, Congress explicitly prohibited the use of telecommunications technology¹ by the telemarketing industry² to for-

¹ The new technology includes automatic dialing systems, which can be programmed to dial as many as 1000 phone numbers per day and, after a connection is made with the recipient's line, can "seize" that line until a prerecorded message has been played. Prior to the conclusion of the message, the recipient cannot break the connection, even by hanging up the phone. See H.R. REP. NO. 102-317, at 10 (1991).

Facsimile machines, a second type of regulated technology, are regularly used to transmit written messages instantaneously to the recipient's line, to which another facsimile machine is connected which will process all incoming messages and print them out. See *id.*; see also David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1004 (1997) (explaining that unsolicited fax ads began in the 1980s).

² Congress found that "[o]ver 30,000 businesses actively telemarket goods and services to business and residential customers," resulting in 18,000,000 Americans receiving calls each day and \$435,000,000,000 in total telemarketing sales. 137 CONG. REC. 36290, 36297 (1991).

Recently, another type of invasion of consumer privacy has become more troublesome: the use of electronic mail to send unsolicited advertisements via computer. See generally Sorkin, *supra* note 1, at 1005-08 (explaining the basics of e-mail and its increased use over the Internet). There has been a similar outcry to restrict this so-called "spamming." See generally Anne E. Hawley, Comment, *Taking Spam Out of Your Cyberspace Diet: Common Law Applied to Bulk Unsolicited Advertising Via Electronic Mail*, 66 U. MO. KAN. CITY L. REV. 381 (1997) (demonstrating that spamming may be controlled by theories in tort law). Some have pondered whether "spam" falls under the language of the "junk fax" provision of the Telephone Consumer Protection Act of 1991. Compare Steven E. Bennett, Comment, *Canning Spam: CompuServe, Inc. v. Cyber Promotions, Inc.*, 32 U. RICH. L. REV. 545, 562-63 (1998) (arguing that both the plain meaning of the TCPA and its legislative history

ward unsolicited advertisements to consumers.³ Congress recognized that the facsimile ("fax") machine's basic design, to process and print any message sent to its number, allowed the recipient of unsolicited fax advertisements to be harmed in two direct ways. "First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax."⁴ To prevent such harm, Congress prohibited telemarketers from sending unsolicited advertisements via fax machine⁵ and provided private individuals and entities with a right of action to seek both an injunction and damages against those sending future advertisements.⁶

In *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Services, Ltd.*,⁷ the defendant, Telecommunications Premium Services ("TPS"), purchased a list containing the telephone numbers of over 66,000 fax machines used by businesses in the metropolitan tristate area,⁸ including that of the plaintiff, Foxhall Realty Law Offices, Inc. ("Foxhall").⁹ TPS sent unsolicited fax advertisements to Foxhall and other businesses whose fax numbers appeared on the list.¹⁰ Foxhall filed a class action suit in federal court on behalf of those New York residents who received fax advertisements from TPS without prior consent.¹¹ The complaint alleged that TPS's action violated § 227 of the

call for the conclusion that "junk fax" does not extend to unsolicited e-mail) *with Sorkin, supra* note 1, at 1016 ("The legislative history [of the TCPA] does indicate the reasons behind the ban on unsolicited fax advertising . . . and for the most part those reasons are equally applicable to unsolicited e-mail.").

³ See 47 U.S.C. § 227 (1991).

⁴ H.R. REP. NO. 102-1096, at 100-01 (1992) (explaining the automatic process by which a fax machine prints messages sent to its number and the ability of automatic dialing systems to "seize" a telephone line until it has played its message).

⁵ Not all unsolicited commercial facsimiles are violative of the TCPA. See, e.g., Bennett, *supra* note 2, at 563 (discussing *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181 (E.D. Pa. 1994), which held that a facsimile message sent by a previous employee to his former place of employment in an attempt to hire its current employees is not a prohibited use of a facsimile machine as defined in the TCPA).

⁶ See 47 U.S.C. § 227(b)(3).

⁷ 156 F.3d 432 (2d Cir. 1998).

⁸ The tristate area includes New York, New Jersey, and Connecticut.

⁹ See *id.* at 434.

¹⁰ See *id.*

¹¹ See *id.* Foxhall alleged a violation of 47 U.S.C. § 227, which prohibits the transmission of unsolicited advertisements through a fax machine. See *id.*

Telephone Consumer Protection Act of 1991 ("TCPA"), which provides, in pertinent part, that "use [of] any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine" is prohibited.¹²

Under review in *Foxhall Realty*, was the proper interpretation of the word "may"¹³ within § 227(b)(3) that creates the private right of action.¹⁴ The provision states:

A person or entity *may*, if otherwise permitted by the laws or rules of [sic] court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.¹⁵

More precisely, the court sought to determine whether Congress, in choosing the word "may,"¹⁶ intended to create concurrent federal and state jurisdiction, or place exclusive authority with state courts to decide private actions brought under the TCPA.¹⁷ The United States District Court for the Southern District of New York granted TPS's motion to dismiss, and held that Congress did not intend to confer upon federal courts the authority to decide the private claims.¹⁸ The district court found

¹² 47 U.S.C. § 227(b)(1)(C).

¹³ 47 U.S.C. § 227(b)(3).

¹⁴ The TCPA also provides a right of action for state attorneys general to pursue those who violate the provisions of the Act in federal court. *See* 47 U.S.C. § 227(f)(1)–(2) (1991). In addition, the Federal Communications Commission may intervene in any action brought by a state attorney general. *See* 47 U.S.C. § 227(f)(3). The facts of the present case seem to clearly establish a violation of the "junk" fax provision of the TCPA. Had Foxhall been able to establish standing in federal district court, it would have likely won the case.

¹⁵ 47 U.S.C. § 227(b)(3) (emphasis added).

¹⁶ *See Foxhall Realty*, 156 F.3d at 435 (stating that a proper "analysis begins with the text of the provision in question") (quoting *Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

¹⁷ *See id.* The reason for such an inquiry is that federal courts are of limited jurisdiction, and "thus require a specific grant of jurisdiction." *Id.*

¹⁸ *See Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd.*, 975 F. Supp. 329, 331 (S.D.N.Y. 1997) (stating that in the Communications Act

that federal courts, because they are of specific jurisdiction,¹⁹ must be granted the power by Congress to review claims arising under a federal act.²⁰ The absence of language denying the federal courts jurisdiction, however, does not prove that Congress intended the federal courts to adjudicate claims arising under the TCPA. The Second Circuit Court of Appeals affirmed,²¹ and in so doing, "reach[ed] 'the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by' a federal [act]."²² As a result, private individuals and entities are precluded from seeking redress in federal court for injuries resulting from violations of the "junk" fax provision of the TCPA.²³

It is submitted that the Second Circuit Court of Appeals erred when it held that state courts possess the exclusive right to adjudicate private claims brought under the TCPA. First, the court incorrectly found that federal question jurisdiction²⁴ does not apply to § 227(b)(3) of the TCPA. Second, the court offered a

of 1934, which the TCPA amended, Congress explicitly provided for concurrent jurisdiction).

¹⁹ See U.S. CONST. art. III, § 2.

²⁰ See *Foxhall Realty*, 156 F.3d at 435 (quoting *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1151-52 (4th Cir. 1997)). "If a statute authorizes suit in state courts of general jurisdiction through the use of the term 'may,' that authorization cannot confer jurisdiction on a federal court because federal courts are competent to hear only those cases specifically authorized." *International Science*, 106 F.3d at 1151-52.

²¹ See *Foxhall Realty*, 156 F.3d at 436 (noting that legislative history and purpose of the TCPA support contrary propositions). The Fourth, Fifth, and Eleventh Circuits have also been asked to determine whether the TCPA provides for concurrent or exclusive state jurisdiction. All three found that state courts have exclusive jurisdiction over private rights of action under the TCPA, and were used as support by the Second Circuit in the present case. See *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1288-89 (11th Cir. 1998) (adopting the reasoning of the Court of Appeals for the Fourth and Fifth Circuits and finding that the private plaintiff lacked subject matter jurisdiction); *International Science*, 106 F.3d at 1151 (holding that the language of the TCPA expressly grants state courts jurisdiction over private rights of action, but does not implicitly provide the federal courts with such jurisdiction); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 511 (5th Cir. 1997) (ending its analysis after finding that Congress did not intend to grant federal courts implied concurrent jurisdiction over federal claims).

²² *Foxhall Realty*, 156 F.3d at 434 (quoting *International Science*, 106 F.3d at 1150).

²³ See 47 U.S.C. § 227(b)(3)(C) (1991).

²⁴ See 28 U.S.C. § 1331 (1994). "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

tortured analysis of congressional intent when it provided such a limited outlet for private redress, and misapplied the distinction that exists between the federal courts' specific jurisdiction and the state courts' general jurisdiction. Finally, the Second Circuit lacked support for its finding that Congress sought to sever § 1331 federal jurisdiction. It should have relied more heavily upon its recognition of the limitations of the legislative history regarding the private right of action provision and should have looked more closely at the legislature's purpose, which was to allow for an avenue of redress.

What follows seeks to establish that *Foxhall* did meet the subject matter jurisdiction requirement and, therefore, the case should have been decided on its merits. First, one must determine whether federal question jurisdiction is applicable. Once shown, it must be established that Congress did not intend to limit cases arising under the TCPA to state courts.

The court in *Foxhall Realty* had precedent for finding concurrent jurisdiction. In *Kenro, Inc. v. Fax Daily, Inc.*,²⁵ the United States District Court for the Southern District of Indiana conducted the proper analysis and found that the private right of action provided for in § 227(b)(3) may be brought in state or federal court.²⁶ The court acknowledged the applicability of § 1331 federal question jurisdiction, and noted that it "will not assume that the language in the TCPA providing for a private right of action in state court was meant to repeal federal question jurisdiction which exists under 28 U.S.C. § 1331."²⁷ In fact, it is not within the court's discretion to remove federal question jurisdiction granted under § 1331. Although the *Kenro* court's application of the federal question jurisdiction statute to the TCPA was correct, it stopped short of examining the legislative history of the private right of action, which sheds light on Congress's intent.

The *Foxhall Realty* court had federal question jurisdiction

²⁵ 904 F. Supp. 912 (S.D. Ind. 1995).

²⁶ See *id.* at 913-15. The court spoke of the "well-pleaded complaint" rule. *Id.* at 913. The rule states that "for federal question jurisdiction to exist over an action, federal law must create the cause of action, or some substantial, disputed question of federal law must be an element in the plaintiff's claim." *Id.* (quoting *Commercial Nat'l Bank v. Demos*, 18 F.3d 485, 488 (7th Cir. 1994)).

²⁷ *Id.* at 915 (finding that "Kenro's complaint clearly presents a federal question").

under 28 U.S.C. § 1331. This section provides "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."²⁸ The precise meaning of "arising under" has never been determined. In *American Well Works Co. v. Layne & Bowler, Co.*,²⁹ however, Justice Oliver Wendall Holmes found federal question jurisdiction to exist where the suit "arises under the law that creates the cause of action."³⁰ Foxhall claimed it established jurisdiction within the meaning of § 1331 because the suit arose under the TCPA, a federal law. The *Foxhall Realty* court, however, found that "Foxhall's argument misunderstands the nature of [§ 1331],"³¹ and stated that the federal jurisdiction statute must be " 'construed more narrowly.' "³² "Inferior federal courts' 'federal question' jurisdiction ultimately depends on Congress' intent as manifested by the federal statute creating the cause of action."³³ Even conceding a narrow construction of § 1331, the legislative history establishes the intent to create concurrent jurisdiction.

The legislative history surrounding the inclusion of the private right of action does not offer a clear pronouncement of whether Congress intended concurrent jurisdiction over the claims of private individuals and entities.³⁴ In fact, the private right of action was added as an amendment to the bill subsequent to the issuance of the committee reports on the TCPA.³⁵ The only authoritative voice to be heard with regard to the private right of action is that of Senator Hollings, the bill's sponsor.³⁶ The Senator remarked:

The [private right of action] provision would allow consumers to

²⁸ 28 U.S.C. § 1331.

²⁹ 241 U.S. 257 (1916).

³⁰ *Id.* at 260.

³¹ *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs. Ltd.*, 156 F.3d 432, 436 (1998).

³² *Id.* (quoting *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 511 (5th Cir. 1997)).

³³ *Chair King, Inc.*, 131 F.3d at 511.

³⁴ See S. REP. NO. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. The committee stated its belief that federal jurisdiction is necessary in a situation such as this because of the possibility of a disruption to interstate commerce. See *id.*

³⁵ See 137 CONG. REC. 30816, 30821 (1991) (statement of Sen. Hollings).

³⁶ See *id.* (stating that the senator's proposed bill contains a "private right of action provision," whereas the original bill did not have such a provision).

bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. The consumer outrage at receiving these calls is clear.³⁷

This statement does not reflect upon the issue of federal jurisdiction. Instead, it discusses the advantages of allowing consumers to seek redress on their own in state courts. The Senator's reference to small claims court arose out of the desire to have consumers avoid the legal fees that would likely result from a suit in the higher courts.³⁸ Congress's recognition of the benefits of bringing a suit in state court, however, is a far cry from showing its intention to preclude federal jurisdiction altogether. The only clear goal of the legislature was to "make[] it easier for consumers to obtain damages from those who violate this bill."³⁹ It stands to reason that if Congress wanted to provide an easy path to file suit, it would not have intended to restrict the commencement of such suits to state courts.

Having looked at the lone authoritative statement that deals specifically with the private right of action, the only remaining question is whether Congress would have conferred exclusive jurisdiction upon the states under the policy set forth in Senator Hollings's statement. It seems unlikely that Congress would have limited the private right of action to state courts while simultaneously allowing the states to opt out of the provision. More reasonable is the interpretation that Congress prefers that state courts decide private right actions, but allows federal courts jurisdiction where the plaintiff chooses to bring the action in district court. Perhaps the strongest support for concurrent jurisdiction is the fact that the Supreme Court has very rarely found that a right of action created under a federal statute did

³⁷ *Id.*

³⁸ *See id.* (stating that "[s]mall claims court or a similar court would allow the consumer to appear before the court without an attorney"). The Senator also stated that if attorney's costs are greater than the amount that may be recovered from the actual case, the purpose of the entire act would be defeated. *See id.*

³⁹ *Id.*

not fall within the "arising under" language of § 1331.⁴⁰ Where the Court has so clearly avoided cutting off § 1331 jurisdiction, there must be clear and powerful evidence of Congress's intent for lower courts to even contemplate the same. The ambiguous and neutral language spoken by Senator Hollings failed to provide the Second Circuit with the ammunition it needed to reject concurrent jurisdiction with regard to the TCPA, a federal act.

In order to truly eradicate the personal invasions that result from unsolicited fax advertisements, private individuals and entities injured by "junk" faxes must be permitted to assert their rights to redress in federal court. Congress recognized this when it amended the bill to include a private right of action. The Second Circuit Court of Appeals's finding of exclusive state jurisdiction, taken together with the freedom of the states to opt out of this TCPA provision, may actually help to perpetuate the invasion of privacy and cost shifting of advertising that Congress sought to avoid. Therefore, federal courts ought to open their doors to those who have been harmed as a result of unsolicited fax advertising.

Jeffrey Danile

⁴⁰ See generally *Alexander v. Polk*, 459 F. Supp. 883 (E.D. Pa. 1978) (recognizing the need for federal court to hear federal claims if they are not frivolous); *Bela Seating Co. v. Advance Transp. Co.*, 344 F. Supp. 854, 855 (N.D. Ill. 1972) (interpreting § 1331 to require a federal district court to hear a case if it comes from a federal law).

People v. Perez: The Second Department concludes that the exclusion of defendant's sister from the courtroom during the testimony of an undercover officer violated defendant's constitutional right to a public trial.

The right to a public trial¹ "is fundamental, but neither absolute nor inflexible. Trial courts unquestionably have discretionary authority to exclude the public, but must exercise that discretion 'sparingly . . . and then, only when unusual circumstances necessitate it.'"² The discretionary power judges have to close courtrooms to the public often extends to the testimony of undercover police officers engaged in buy-and-bust³ operations.

¹ See U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"); see also N.Y. CIV. RIGHTS LAW § 12 (McKinney 1992) (providing that "[i]n all criminal prosecutions, the accused has a right to a speedy and public trial"); N.Y. JUD. LAW § 4 (McKinney 1983) stating:

The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

Id.

² *People v. Martinez*, 624 N.E.2d 1027, 1030 (N.Y. 1993) (quoting *People v. Hinton*, 286 N.E.2d 265, 267 (N.Y. 1972)) (omission in original), *rev'd*, *Pearson v. James*, 105 F.3d 828 (2d Cir. 1997), *aff'd*, *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997) (in banc), *cert. denied*, 118 S. Ct. 2380 (1998); see also *Hearst Corp. v. Clyne*, 409 N.E.2d 876, 878 (N.Y. 1980) (stating that "all judicial proceedings, both civil and criminal, are presumptively open to the public"); *People v. Jones*, 391 N.E.2d 1335, 1339 (N.Y. 1979) (stating that, although a trial court has discretion in courtroom closure, a "defendant's right to a public trial is not [to be] sacrificed for less than compelling reasons"); *People v. Brown*, 569 N.Y.S.2d 208, 209-10 (App. Div. 1991) (concluding that a compelling reason to close the courtroom exists where an undercover cop has pending cases or continues to actively work undercover).

³ One commentator has noted:

[A] 'Buy-and-Bust' begins with the deployment of a team of plainclothes officers to a drug trafficking location (the "set"). The undercover member of the team purchases ("makes buys") from dealers, usually with marked currency ("pre-recorded buy money"). Occasionally the undercover wears a radio transmitter (a "wire") to record and/or transmit the transaction to the rest of the unit (the "backup team"), which waits just out of sight. Sometimes another officer (the "ghost") keeps the undercover in visual contact. After the buy, the undercover transmits a description of the seller to

In 1972, the New York Court of Appeals held that excluding the public from a courtroom during the testimony of an undercover narcotics officer did not violate a defendant's right to a public trial.⁴ Seven years later, the Court of Appeals further established that courts may not close the courtroom during the testimony of undercover officers for "less than compelling reasons."⁵ Finally, the United States Supreme Court, in *Waller v. Georgia*,⁶ developed a stringent four-part test to determine whether closure was proper during a suppression hearing:⁷ (1) the party seeking to close the courtroom must advance an overriding interest that is likely to be prejudiced;⁸ (2) closure must be

the backup team, which detains those who match the undercover's radio description. Some time later, the undercover views and makes a confirmatory identification of the suspect, either at the scene (a "drive-by") or in the precinct.

Michael Z. Letwin, *Report from the Front Line: The Benefit Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 823 n.152 (1990); see also Randolph N. Jonakait, *Secret Testimony and Public Trials in New York*, 42 N.Y.L. SCH. L. REV. 407, 442 (1998) (describing buy-and-bust operations).

⁴ See *Hinton*, 286 N.E.2d at 266 ("The issue . . . is whether this exclusion violated defendant's right to a public trial. We think not.").

⁵ *Jones*, 391 N.E.2d at 1339.

⁶ 467 U.S. 39 (1984).

⁷ See *id.* at 44-47. Although the issue in *Waller* was closure of a suppression hearing, the New York Court of Appeals and the Second Circuit have consistently applied the four-part test to the testimony of undercover officers. See *infra* notes 8-12 and accompanying text.

⁸ See *id.* at 45 (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984), and setting out the same tests in the context of the press's right to attend a trial). *Waller's* first prong is satisfied when a link is established between the undercover officer's concerns for his personal safety and the officer's testimony in open court. See *Brown v. Andrews*, No. 94 CIV. 3253 (LAP), 1998 WL 293994, at *2 (S.D.N.Y. June 5, 1998) (holding state did not prove it satisfied the first prong of the *Waller* test). The state must show a factual basis for closure including evidence supporting the officer's fear that his or her life and undercover work will be jeopardized by testimony in open court. The nexus is often established by combining three types of factors. The first factor is that the undercover officer is still actively engaged in the defendant's community and plans to return to the same location as the defendant's arrest. See, e.g., *People v. Bobo*, 653 N.Y.S.2d 617, 618 (App. Div. 1997) (refusing to permit closure based on officer's contentions that "he was not currently working in the area of the defendant's arrest, but could be assigned to that area 'on any given day'"); *People v. Caraballo*, 634 N.Y.S.2d 135, 136 (App. Div. 1995) (stating that courtroom closure was justified because the officer still worked undercover in the immediate vicinity of the defendant's arrest, had lost several subjects in the past, had ongoing investigations, routinely entered courthouses through the back door to conceal his identity, and the officer's safety and effectiveness depended on continued secrecy of his identity); *People v. Fuller*, 624 N.Y.S.2d 439, 440 (App.

no broader than necessary to protect that interest;⁹ (3) the trial court must consider reasonable alternatives to closing the proceedings;¹⁰ and (4) the court must make adequate findings to support such closure.¹¹ The party seeking closure must satisfy

Div. 1995) (concluding courtroom closure was warranted where officer continued to work undercover, and that the integrity of those operations as well as his own personal safety would be compromised if his identity were to become public); *People v. Anderson*, 620 N.Y.S.2d 417, 417 (App. Div. 1994) (allowing closed courtrooms where undercover officers were returning to same location as their prior assignments); *People v. Cepeda*, 619 N.Y.S.2d 128, 129 (App. Div. 1994) (failing to establish the necessary link because there was no evidence the officers "were still operating in the locale of the defendant's arrest nor that they expected to return there"). The second contributing factor is that other investigations are still pending and/or several subjects have been lost in the past. *See, e.g.*, *People v. Escobar*, 641 N.Y.S.2d 368, 369 (App. Div. 1996) (holding closure warranted where officer is to return to the area of the defendant's arrest and officer had ongoing investigations in the area); *Fuller*, 624 N.Y.S.2d at 440 (finding closure warranted where undercover officer was involved in several ongoing investigations including some in the area in which defendant was arrested); *Anderson*, 620 N.Y.S.2d at 417 (holding closure is proper when integrity of ongoing investigations, in vicinity of defendant's arrest, would be jeopardized if undercover officers' identities were disclosed). The final contributing factor is that the undercover officer has been threatened in the past. *See, e.g.*, *Escobar*, 641 N.Y.S.2d at 362 (allowing courtroom to be closed during undercover officer's testimony where defendant said if it were found out that the undercover was a police officer, he would kill him); *People v. Crowder*, 616 N.Y.S.2d 79, 79 (App. Div. 1994) (indicating closure justified where undercover officer testified that while acting undercover "[drug] sellers threatened that they would kill her if they were to find out that she was a police officer").

⁹ *See Waller*, 467 U.S. at 44-47. Although, under *Waller's* second prong, a courtroom may only be closed during the undercover officer's testimony, issues as to breadth of closure often arise where the defendant's family members are excluded from the courtroom. *See, e.g.*, *Vidal v. Williams*, 31 F.3d 67 (2d Cir. 1994) (holding that the exclusion of parents was not necessary to protect the officer); *People v. Gutierrez*, 657 N.E.2d 491, 491 (N.Y. 1995) (finding the exclusion of defendant's close family members was "broader than constitutionally tolerable and, thus, constituted a violation of defendant's overriding right to a public trial"); *People v. Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991) (stating that defendant "was deprived of her constitutional right to a public trial" due to the exclusion of her family).

¹⁰ New York courts have not focused much attention on suggesting alternatives to closure of the courtroom during the testimony of undercover officers. It has been established, however, that "those who object to closure bear the burden of suggesting alternative measures." *Pearson v. James*, 105 F.3d 828, 831 (2d Cir. 1997), *aff'd*, *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997) (in banc), *cert. denied*, 118 S. Ct. 2380 (1998); *see also Ayala*, 131 F.3d at 71 (stating that there is no requirement that the judge sua sponte consider alternatives to closure); *People v. Ramos*, 685 N.E.2d 492, 497-501 (N.Y. 1997) (holding that the trial court did not breach its duty to consider alternatives to closing the courtroom even though the record did not indicate express consideration of alternatives).

¹¹ *See Robin Zeidel*, Note, *Closing the Courtroom for Undercover Police Witnesses: New York Must Adopt a Consistent Standard*, 4 J.L. & POL'Y 659, 713 (1995)

all four prongs of the test.¹²

Recently, both New York state and federal courts have been facing difficult issues with respect to *Waller's* second prong.¹³ Objections as to the breadth of closure arise when the defendant's friends and family members are excluded from a courtroom, closed to the public during an undercover officer's testimony.¹⁴ A court will only consider excepting family members from the closure order if the defendant specifically raises the issue.¹⁵ Lower New York courts have ruled that to exclude a defendant's family members, the prosecutor must establish that "the family members live in or frequent an area in very close proximity to the undercover officer's current area of operations,

(finding that *Waller's* fourth prong allows a reviewing court to evaluate whether the court properly entered the closure order).

"[B]road and general" findings cannot justify closure; instead, "the court must consider the individual facts of the case." Accordingly, "the bare finding that an undercover officer will continue to operate in a given area and believes personal safety may be jeopardized from exposure of his or her identity does not, in and of itself, satisfy the Supreme Court's guidelines for the application of the Sixth Amendment." In order to make adequate findings that will survive review, a trial court must "substantiate its assumptions" about both the defendant's and the state's interests in a case.

Id. (footnotes omitted) (alteration in original).

¹² See *Ayala*, 131 F.3d at 69 (discussing the proponent's burden of proof); *Ramos*, 685 N.E.2d at 496-97 (analyzing whether the party seeking closure satisfied the first prong of the test).

¹³ See, e.g., *Vidal*, 31 F.3d at 69 (discussing whether exclusion of defendant's parents is broader than necessary); *Gutierrez*, 657 N.E.2d at 491 (holding closure excluding defendant's family broader than necessary); *Kan*, 574 N.E.2d at 1043 (stating that "exclusion of [defendant's] family from the courtroom, violated her constitutional right to a public trial"); *People v. Ocasio*, 628 N.Y.S.2d 651, 652 (App. Div. 1995) (discussing the exclusion of the defendant's wife during an officer's testimony); *People v. Green*, 627 N.Y.S.2d 21, 22 (App. Div. 1995) (reasoning that simply because the family's presence made the officer uncomfortable was insufficient to justify courtroom closure).

¹⁴ See *supra* note 13.

¹⁵ See *People v. Martinez*, 624 N.E.2d 1027, 1031 (N.Y. 1993) (holding trial court was not obligated to ask defendant to identify any family members who would like to attend the trial), *rev'd*, *Pearson v. James*, 105 F.3d 828 (2d Cir. 1997), *aff'd*, *Ayala v. Speckard* 131 F.3d 62 (2d Cir. 1997) (in banc), *cert. denied*, 118 S. Ct. 2380 (1998); *cf. id.* at 1027 (asserting that when the trial court is aware defendant's relatives have been attending the proceedings or that defendant would like to have certain family members present, exclusion of those individuals is only permissible when necessary to protect the interest advanced by the People in support of closure); *Kan*, 574 N.E.2d at 1044-45 (stating that defendant's attorney strenuously objected to excluding the family). In addition, a trial court's reasons for excluding the defendant's family must be "demonstrated and documented" in the record. *Id.* at 1044.

and the officer must have specific concerns regarding the family members."¹⁶ Thus, while the courts have established that the public can only be excluded if their presence presents a "substantial probability"¹⁷ that the interest sought to be protected by closure would be harmed by their presence, there have been no definitive rulings as to what would justify such an exclusion.¹⁸ In July of 1998, the Second Department decided the appeal in *People v. Perez*,¹⁹ exemplifying the problem with this standard.

In *Perez*, the defendant, Nelson Perez, was convicted of criminal sale of a controlled substance pursuant to an under-

¹⁶ Zeidel, *supra* note 11, at 710 (footnotes omitted); see also *Gutierrez*, 657 N.E.2d at 491 (excluding defendant's wife and children during testimony of undercover officer was unjustified when, although the undercover had fears for his personal safety and fears that ongoing investigations would be jeopardized if he testified in open court, "he never claimed to hold those fears with respect to defendant's wife and children and did not otherwise advance any valid ground for excluding defendant's family"); *People v. Feliciano*, 644 N.Y.S.2d 307, 308 (App. Div. 1996) (holding exclusion of defendant's mother and sister was justified because they lived in the same area that the undercover officer worked, and the officer reasonably believed they would divulge his identity in future operations); *People v. Johnson*, 635 N.Y.S.2d 49, 50 (App. Div. 1995) (reversing conviction where there was no evidence defendant's family members "posed a threat to the undercover officer"); *Green*, 627 N.Y.S.2d at 22 (ruling that the state's reason for excluding the defendant's family and girlfriend, that they "made the officer uncomfortable," was inadequate).

¹⁷ *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (applying substantial probability standard in a request for release of a copy of transcript of preliminary hearing in a sensational murder trial); see also *Torres v. Edwards*, No. 97 Civ. 0655 (JSM), 1998 WL 42573, at *1 (S.D.N.Y. Feb. 4, 1998) stating:

[T]he Supreme Court has used various formulations to describe the gravity of the interest that that will justify courtroom closure, as well as the degree of certainty that the asserted interest will be harmed. The interest has been described as "overriding," "compelling," and "cause shown that outweighs the value of openness." The Court has said that the asserted interest must be shown to be "likely to be prejudiced," and has more recently required "a substantial probability" that the interest will be prejudiced.

Id. (citations omitted).

¹⁸ See *People v. Nieves*, 683 N.E.2d 764, 767 (N.Y. 1997) (concluding the record was insufficient to establish a "substantial probability" that the officer's safety would be jeopardized by the presence of defendant's wife and children during his testimony because there was no evidence his wife was involved in the sale of drugs and the likelihood that she would reveal the officer's true identity was remote); see also *Gutierrez*, 657 N.E.2d at 491 (holding trial court erred in excluding defendant's family members where the undercover officer expressed no trepidation about testifying before defendant's wife and children, nor even mentioned defendant's family).

¹⁹ 676 N.Y.S.2d 215 (App. Div. 1998).

cover buy-and-bust operation.²⁰ Perez appealed, contending he was denied his right to a public trial because the court excluded his sister from the courtroom during the testimony of the undercover officer.²¹ The Second Department agreed with Perez and ordered a new trial, despite the fact that "the undercover officer would be immediately returning to the area in which the defendant was arrested and in which the defendant's sister resided."²² The Second Department reasoned that the defendant's sister did not pose a threat to the undercover officer.²³ Yet, the *Perez* court failed to explain what factual showings were made and what evidence would have been sufficient to exclude the defendant's sister.

New York courts, in general, have failed to establish guidelines²⁴ as to how the People can prove that defendant's family members or friends "threaten the safety of the witness."²⁵ Courts have required that the undercover officer "articulate[] a specific need for the exclusion of defendant's relatives."²⁶ The problem

²⁰ See *id.* at 215.

²¹ See *id.*

²² *Id.* at 216.

²³ See *id.* When the defendant requests that the trial court exempt certain people from the closure order, the prosecution must prove that "those individuals threaten an overriding interest of the witness." *People v. Johnson*, 635 N.Y.S.2d 49, 50 (App. Div. 1995) (reversing conviction where record did not demonstrate that defendant's family "posed a threat to the undercover officer"); see also *Nieves*, 683 N.E.2d at 767 (holding exclusion of defendant's wife and children from courtroom during testimony of undercover officer violated the defendant's right to public trial absent evidence "establish[ing] a 'substantial probability' that the officer's safety would be jeopardized by the presence of defendant's [family]").

²⁴ The New York decisions that have dealt with this issue provide only bits and pieces of the factors that may be considered in finding defendant's family members and/or friends pose a threat to the safety of the officer. See, e.g., *People v. Bobo*, 653 N.Y.S.2d 617, 618 (App. Div. 1997) (finding insufficient evidence to exclude defendant's family where officer "testified that he did not fear personal retaliation from the defendant or his family, nor had he received threats from persons associated with the defendant"); *Nieves*, 683 N.E.2d at 765-66 (noting that exclusion of defendant's wife was in error because "there was no indication that she was involved in any way with drugs or drug dealers and that 'it's somewhat of a large leap . . . that she would of course take note of this particular officer independently[] and spread it around the neighborhood' ") (omission in original) (alteration in original) (quoting trial court).

²⁵ *Perez*, 676 N.Y.S.2d at 215 (requiring that the People present evidence that those individuals to which they seek to exclude "threaten the safety of the witness").

²⁶ *People v. Powell*, 667 N.Y.S.2d 988, 988 (App. Div. 1998), *appeal denied*, 699 N.E.2d 449 (1998).

with such a standard is that it fails to take into consideration some of the most inherent dangers involved in allowing family members and friends to be present at trial. For example, many undercover officers, who must return to the same neighborhood where the defendant was arrested, fear that "the defendant's family or friends could very well point him out as he attempted to make another buy."²⁷ Furthermore, it may be unfair to require a specific showing that a threat to the undercover officer exists where the officer does not know whether the defendant's friends or family are involved in the neighborhood drug trade.²⁸ While both of these fears are usually well-founded, courts have refused to accept either as a sufficient basis for exclusion.²⁹

In addition, New York courts' opinions are contradictory.³⁰ Much of the case law regarding *Waller's* second prong, that closure be no broader than necessary, focuses on the geographic requirement that the officer will return to the same location as the defendant's arrest.³¹ This requirement seems to support the assumption that open court testimony leads to the following:

[A] substantial probability that at least some of these spectators will [learn that the officer operates as an undercover and will carry this knowledge back to the streets and personally endanger the officer's safety or damage his effectiveness or spread the knowledge to others who will consequently endanger or impair

²⁷ *People v. Dorcas*, 630 N.Y.S.2d 796, 797 (App. Div. 1995).

²⁸ See *People v. Aguayo*, 606 N.Y.S.2d 694, 695 (App. Div. 1994), *habeas corpus granted sub nom.* *Aguayo v. Headley*, No. 96 CIV. 2918 JGK, 1997 WL 217589 (S.D.N.Y. May 1, 1997) (holding that the defendant was denied his constitutional right to a public trial because the court failed to consider reasonable alternatives).

²⁹ Courts rarely justify the exclusion of a defendant's family and friends for less than specified and compelling reasons. See, e.g., *Woods v. Kuhlmann*, 977 F.2d 74, 77 (2d Cir. 1992) (upholding exclusion of defendant's family member where such person threatened the undercover officer); *People v. Hinton*, 286 N.E.2d 265, 267 (N.Y. 1972) (affirming closure where the very targets of the undercover officer's investigations were present in the courtroom, thereby constituting a peril to the agent's life).

³⁰ See *Jonakait*, *supra* note 3, at 439-46 (explaining that closure under the second prong requires the assumption that observers who discover the undercover officer's identity will most likely relay this information back to the streets, thus harming the undercover officer).

³¹ See *id.* at 439 (stating that in applying the second prong, "[t]he court's major premise seems to be that in cases when the officer returns to the same precinct as the crime, open testimony leads to a substantial probability that spectators will learn that the officer operates as an undercover").

usefulness.³²

Yet, the courts, in affirming the geographic requirement, have failed to follow such logic.³³ The courts disregard the fact that the family and friends of a convicted drug dealer probably have the *greatest* incentive to reveal the undercover officer's identity.³⁴ Such action on behalf of the defendant need not be malicious, but may simply be the family's or friends' way of warning other drug dealers in the neighborhood.³⁵ Thus, while the courts require a "special showing"³⁶ beyond the mere potential for danger, they do not provide any guidance as to what will be sufficient.

In 1997, the New York Court of Appeals, in *People v. Nieves*,³⁷ refused to exclude the defendant's family from the courtroom because there was no indication that the family was involved with drugs.³⁸ The court stated that it would be a "large leap" to conclude that the defendant's wife would broadcast the undercover officer's identity.³⁹ In addition, the *Nieves* court overruled the trial court's finding that the children should be banished "simply because they were children and did not understand the concept of confidentiality."⁴⁰ Thus, while the Court of Appeals made it clear that the standard requires a special showing to justify banishment of family,⁴¹ its holding did not explain what

³² *Id.*

³³ *See id.* at 440 (asserting that the New York Court of Appeals employs an unarticulated assumption that other drug dealers or their friends or family will observe trials in their precinct and reveal the identity of the undercover agent).

³⁴ *See id.* (implying that the courts must be concerned with more than the "casual observers" because if they were not, the geographic requirement would be rendered meaningless).

³⁵ *See id.* at 439 (discussing the notion that observers may reveal information regarding the undercover agent's identity to others in the neighborhood).

³⁶ *People v. Nieves*, 683 N.E.2d 764, 766 (N.Y. 1997) (holding "that trial courts should exercise their discretionary power to exclude members of the public sparingly, only after balancing the competing interests 'with special care'").

³⁷ *Id.*

³⁸ *See id.* at 766.

³⁹ *Id.*

⁴⁰ *Jonakait, supra* note 3, at 419.

⁴¹ *See Nieves*, 683 N.E.2d at 765 (holding that there must be a "substantial probability" that the undercover agent's safety would be compromised in order to exclude defendant's family); *see also* *People v. Gutierrez*, 657 N.E.2d 491, 491 (N.Y. 1995) (holding that an undercover officer failed to establish that defendant's wife and children should have been excluded when he did not claim their presence would jeopardize his life or career); *People v. Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991)

circumstances would justify such exclusion.

The issues surrounding courtroom closure—particularly, the breadth of the exclusion—have arisen at a time of heightened drug awareness.⁴² Under Mayor Rudolph Giuliani's administration, the New York City Police Department adopted a more aggressive crime fighting policy, particularly targeting low-level drug dealing.⁴³ As a result, more and more officers are participating in street level buy-and-bust operations.⁴⁴ These undercover tactics, while putting officers at considerable risk,⁴⁵ have

(acknowledging a special concern for guaranteeing the attendance of the accused's family members).

⁴² See Zeidel, *supra* note 11, at 673-75; see also Bob Kappstatter, *Launching a New Blitz in Drug War: Cops to Deploy in 3 Pcts.*, N.Y. DAILY NEWS, Apr. 29, 1998, at A1, available in 1998 WL 11031489 (commenting that "[i]n his January inaugural speech, Mayor Giuliani pledged to 'bring unrelenting pressure on all drug dealers . . . and drive them out of this city, once and for all.' Giuliani's drug war is being backed by a \$20 million federal grant to hire 1,600 cops to staff it.") (omission in original); Clifford Krauss, *Giuliani Sets New Policy to Spur Drug Arrests by Officers on Beats*, N.Y. TIMES, Apr. 7, 1994, at A1 (discussing new initiatives by the Police Department to "conduct aggressive buy and bust operations against illegal drug and gun dealers"); Elaine Rivera, *Campaign '93: Blast of Applause for Rudy's TNT Plan*, NEWSDAY, Sept. 22, 1993, at 28, available in 1993 WL 11395094 (quoting Mayor Giuliani who "promise[d] to return to the Koch [A]dministration policy of making massive arrests of street-level dealers" using undercover buy-and-bust operations).

⁴³ See Krauss, *supra* note 42, at A1.

⁴⁴ See *id.*

⁴⁵ See Zeidel, *supra* note 11, at 680. Zeidel discusses the inherent dangers involved in buy-and-bust operations:

Drug dealers often arm themselves to deter both robberies and rivals. In addition, the dealers are likely to be overly suspicious or high on drugs themselves. Criminals have overwhelmingly demonstrated their willingness to use weapons against police, but undercover police officers in buy-and-bust operations cannot wear bulletproof vests because they may be searched by the drug sellers they target. Further, undercover officers may be forced to follow drug dealers out of the view of their partners, and thus face potential danger alone.

Id. (footnotes omitted); see also Leonard Greene, *Bulletproof Vest Plan Criticized*, NEWSDAY, Mar. 11, 1998, at A34, available in 1998 WL 2662014 (criticizing increased purchases of bulletproof vests that "will not protect [undercover] cops whose lives are most at risk . . . [thus u]nless the city's plan includes a provision to buy protection equipment that can be easily concealed, undercover officers will miss out on what is otherwise a laudable idea"); Bob Kappstatter, *Deputy Chief Picked to Lead City Drug War*, N.Y. DAILY NEWS, Mar. 17, 1998, at A1, available in 1998 WL 5924936 (discussing New York City Police Department's plans to improve undercover narcotics tactics and equipment in response to recent officer fatalities); David Kocieniewski, *"Buy and Bust" Drug Tactics Raise Some Fears*, PATRIOT LEDGER (Quincy, Mass.), Jan. 24, 1998, at A9, available in 1998 WL 8072882 (despite the fatality of another undercover police officer, Mayor Guiliani "fiercely defended the

dramatically decreased violent crime in New York City.⁴⁶ Increased reliance on buy-and-bust operations necessitates the testimony of undercover officers when such cases go to trial. In fact, in many cases, the undercover officer is the only one who can identify the defendant as the seller.⁴⁷ Thus, an increasing number of drug convictions rely solely on the testimony of these officers; yet without closing the courtroom, such testimony potentially places the officer in danger.⁴⁸ While no one wants to infringe upon a defendant's constitutional right to public trial, it seems equally unfair to disregard the protection of undercover officers, who endanger their lives and careers in an effort to make our communities safer, drug-free places to live.

CONCLUSION

The Second Department has cast away yet another protective measure to ensure the safety of New York's undercover police officers. The court's failure to explain with specificity which factors are required to justify excluding a defendant's family members and friends from the courtroom, essentially defeats the

value of . . . buy-and-bust operations . . . [and] credit[ed] aggressive drug enforcement with contributing to the city's steep decrease in crime, [and] said he has no plans to curtail such operations"); Michelle McPhee & John Marzulli, *Drug Cop Wounded in B'klyn*, N.Y. DAILY NEWS, Feb. 28, 1998, at A6, available in 1998 WL 5923309 (noting four Brooklyn North narcotics cops have been shot in the past three months while conducting buy-and-bust operations).

⁴⁶ See Zeidel, *supra* note 11, at 675-76. Zeidel explains:

Police attribute New York City's recent steep decline in crime in part to [the] increased pressure on low-level criminals. By arresting low-level drug dealers in particular, police reduce the amount of violent crimes because most violent crimes are drug related. In 1994, for example, as narcotics arrests increased, crime fell 12.3% in New York City, while nationally the drop in crime was only 3%. Statistics show that felonies in New York City continue to fall at an unprecedented rate.

Id. at 675-76 (footnotes omitted); see also Kappstatter, *supra* note 42, at A1 (quoting a high-ranking commander at One Police Plaza stating: "if you address . . . narcotics complaints more . . . it'll have a positive impact in further reducing the [other types of] crime"); John Marzulli, *Crime Dips 10%, Slays 24%*, N.Y. DAILY NEWS, Aug. 5, 1998, at 45, available in 1998 WL 14331845 (finding major crime in New York City has dropped 43% in the past four years). First Deputy Police Commissioner Patrick Kelleher stated "[t]he continued, dramatic crime reduction is a result of the strategies and drug initiatives put into place by Mayor Giuliani and Police Commissioner Howard Safir." *Id.*

⁴⁷ See Jonakait, *supra* note 3, at 442 (describing buy-and-bust operations).

⁴⁸ See Krauss, *supra* note 42, at A1 (describing the inherent dangers of undercover narcotics work).

entire purpose of courtroom closure. By routinely allowing the defendant's family and friends to stay in the courtroom, courts are permitting the most potentially dangerous spectators to learn the identity of an undercover officer, who must then return to the same area where those family and friends reside. There is no question that this situation is extremely dangerous to undercover officers. Even worse, the courts have systematically failed to give these officers a workable standard with which to rebut the court's presumption of openness.

Ironically, "New York leads the country in denying public trials."⁴⁹ Unlike most other jurisdictions,⁵⁰ New York courts close their courtrooms during the testimony of undercover officers "almost routinely" in drug cases.⁵¹ The Second Department's de-

⁴⁹ Jonakait, *supra* note 3, at 407; see also Thomas M. Fleming, Annotation, *Exclusion of Public From State Criminal Trial in Order to Preserve Confidentiality of Undercover Witness*, 54 A.L.R.4TH 1156, 1160-75 (1987 & Supp. 1998) (citing over 200 New York cases which closed courtrooms compared to only three cases in other states).

⁵⁰ See Jonakait, *supra* note 3, at 407; Zeidel, *supra* note 11, at 662-63 ("The closure of courtrooms during the testimony of undercover police officers is strictly a New York phenomenon. In other jurisdictions, where undercover officers face the same dangers as those in New York, the pattern of closing the courtroom has not developed."); see also Ayala v. Speckard, 131 F.3d 62, 82 (2d Cir. 1997) (in banc) (Parker, J., dissenting), *cert. denied*, 118 S. Ct. 2380 (1998). Justice Parker argued:

In other jurisdictions where undercover officers may face the same dangers as those in New York, the reliance on courtroom closure has not developed on this scale. This is evidenced, in part, by the fact that very few other courts have addressed courtroom closure on a regular, on-going basis like New York.

Id. Judge Parker also stated:

A thorough search of every United States jurisdiction, including the District of Columbia, with no time restriction, reveals that no state requests courtroom closure for its undercover officers in narcotics cases as often as New York. Narcotics cases from other jurisdictions reveal that courtrooms are closed very rarely and on a case-by-case basis.

Id. at 82 n.7.

⁵¹ See Jonakait, *supra* note 3, at 408. In *Ayala v. Speckard*, the court noted that: In New York, however, courtroom closure during the testimony of an undercover officer in buy-and-bust cases is so common that trial closure has been the basis of appeal in numerous cases. Presumably, countless more were not appealed. At the state level, courtroom closure was upheld in all but five of the[] cases.

Ayala, 131 F.3d at 80-81 (footnote omitted); see also Gary Spencer, *Court of Appeals Limits Closing of Courtrooms*, N.Y. L.J., Sept. 20, 1995, at 1 (stating "[t]he closing of courtrooms during the testimony by undercover police officers has become a routine practice in New York drug cases"); Zeidel, *supra* note 11, at 662 (commenting that "the closing of courtrooms during such testimony has become a 'routine practice' in

cision in *Perez*, however, has proven this is no longer the case. Perhaps this is a response to the ease with which New York courts are generally closed. Yet, tightening the reins at the expense of undercover officers' lives cannot be the only equitable solution.

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