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FIRST & SIXTH AMENDMENTS: Closing the Courtroom to the Public: Whose Rights are Violated?

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CLOSING THE COURTROOM TO THE PUBLIC: WHOSE RIGHTS ARE VIOLATED?*

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INTRODUCTION

Recent years have seen a growing number of instances where the Sixth Amendment right to a fair trial and the First Amendment freedom of the press have come into conflict in cases concerning the right of access to criminal proceedings. The competing interests at stake in these cases have been called "two of the most cherished policies of our civilization."[1] The Supreme Court of the United States has tried to reach a balance between the rights that the two amendments grant and all of the policies they embody. They have done this against the backdrop of the firmly established principle that the "authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."[2] Yet, in deciding

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[1] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 611 (1976) (Brennan, J., concurring).

[2] *Id.* at 561 (White, J., concurring). Recently the public has observed a balancing of the competing rights of the media with the rights of the accused in United States v. McVeigh, 96-CR-68-M, 1997 U.S. Dist. LEXIS 3028 (D. Colo. March 17, 1997). *See* Robert G. Morvillo, *Television and the Public Trial*, N.Y.L.J., April 1, 1997 at 3 (this article describes the alternatives for full closure of the courtrooms as discussed by the Second Circuit in Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996), which are "(1) a strategically placed chalkboard that would have shielded

these cases, one amendment must be the victor; either the press receives access to the information it seeks and the defendant feels his right to a fair trial has been compromised, or the press is denied access and feels that it is the victim of government sponsored censorship.[3]

The result of the Supreme Court's efforts has been a line of cases that are often confusing to practitioners, and do not always lend themselves to certain application by lower courts. This Article contends that this has happened for three reasons. First, by trying to develop a unified theory for access to criminal proceedings, courts have failed to recognize that one amendment must ultimately win out over the other. Second, this lack of recognition has led the Supreme Court to apply First Amendment principles to cases properly decided on Sixth Amendment grounds and vice-versa. Finally, the facts of the cases addressing the issue have made the Court's job more difficult by presenting it with atypical situations when it needs to develop a theory that applies to all cases. This Article attempts to lend clarity to this muddled situation.

The author submits that the decisions in the area of access to criminal proceedings fall into two separate and distinct lines of cases that have developed side by side over time. The first line, which the author will call the *Estes* line, consists of cases where the press has previously been part of the criminal proceedings. In these instances, the press has had access to information contained in the proceedings, or the information they seek does not impact directly on the defendant. In this line

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the officer from view, (2) asking Ayala who he wanted to remain in the courtroom, then causing the prosecution to show why any such people should not be present, and (3) disguising the officer during his testimony." *Id.* at 7. However, in an en banc ruling, the Second Circuit aligned itself with "New York's highest court in declaring that trial judges who close courtrooms for the testimony of undercover police need not, on their own, consider alternatives to such closures," in Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996). *See also* Deborah Pines, *Closing the Courtroom Permitted: In Banc Ruling On Criteria Aligns the Circuit with State's Top Court*, N.Y.L.J., Dec. 4, 1997, at 1 ("Judge Newman also found that after the trial judges were asked to approve the closings for police testimony the judges had no additional obligation, on their own, to consider alternatives that were not proposed by the parties.") *Id.* at 6.

[3] *See* Thomas F. Liotti, *Witness Protection Can Threaten Due Process*, NAT'L L.J., Sept. 1, 1997, at A17 (suggesting that closing the courtroom violates the defendant's Sixth Amendment rights); *see also* Steven Fisher, *Closing the Court*, N.Y.L.J, Jan. 23, 1997.

there are the following cases: *Estes v. Texas*,[4] *Sheppard v. Maxwell*,[5] *Nebraska Press Association v. Stuart*[6] and *Press Enterprise Co. v. Superior Court of California, Riverside County* ("*Press Enterprise I*").[7] Here, First Amendment principles govern and there is a presumption of open proceedings. The defendant, asserting his Sixth Amendment rights, would have to overcome this presumption.

The second line, which the author will call the *Oliver* line, is composed of cases where the press has not gathered any information from the criminal proceedings. In this line there are the following cases: *In re Oliver*,[8] *Gannett Co., Inc. v. DePasquale*,[9] *Globe Newspaper Co. v. Superior Court for the County of Norfolk*,[10] *Waller v. Georgia*,[11] and *Press Enterprise Co. v. Superior Court of California, Riverside County* ("*Press Enterprise II*").[12] In these cases, Sixth Amendment principles should control and the press has the burden of showing that the public requires contemporaneous access to the proceedings.

In Part I, this Article will briefly discuss the two amendments that have come to fix the limits of the public's right of access to criminal proceedings. What are the general purposes of these amendments? Whom were the Framers of the Constitution seeking to benefit by enshrining these principles in the Bill of Rights?

Part II will chronologically outline the current law on public access to the courts. As the author does this, he will take note of the interests of the parties involved in the criminal proceedings, explain where the Court found the proper basis for deciding the case and where they went wrong, as well as how the Court could have decided the case to obtain the same outcome while developing a consistent line of jurisprudence. The author will address the cases in chronological order because he believes it is important to see how the right to

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[4] 381 U.S. 532 (1965).
[5] 384 U.S. 333 (1966).
[6] 427 U.S. 539 (1976).
[7] 464 U.S. 501 (1984) [hereinafter *Press Enterprise I*].
[8] 333 U.S. 257 (1948).
[9] 443 U.S. 368 (1979).
[10] 457 U.S. 596 (1982).
[11] 467 U.S. 39 (1984).
[12] 478 U.S. 1 (1986) [hereinafter *Press Enterprise II*].

access doctrine has developed. It is easier to see where the Court decided the cases correctly and where they did not.

In Part III, the author will outline how the law has been applied in both the Second Circuit and in New York State. Finally, the author will conclude by applying this paradigm to two cases: *Ayala v. Speckard*,[13] a case recently decided by the Second Circuit and currently awaiting an en banc reargument determination; and *People v. Ramos*[14] which is a case currently awaiting decision by the New York Court of Appeals. Both cases appear to be on their way to the Supreme Court of the United States.

I. THE CONSTITUTION

The Constitution, as originally ratified, was a reaction to the weak central government existing under the Articles of Confederation, which was determined to be inadequate for the new Union's needs. Still wary of the unlimited and arbitrary power of the King, the substance of the Constitution establishes a centralized government with precisely enumerated powers, separated among the branches of government so that none can dominate over the others. By designating the powers of government in this manner, the Framers were able to correct the shortcomings of the Articles while implementing the central purpose of the document: to restrain the exercise of these powers by government officials so that certain individual rights may be preserved.

The Bill of Rights maintained this theme[15] by subsequently adding a list of rights reserved for the people.[16] Some

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[13] 89 F.3d 91 (2d Cir. 1996).

[14] 1997 WL 362871 (1997). The case was heard with a companion case *People v. Ayala*.

[15] *See, e.g.*, Hon. Loren A. Smith, *Introduction To Symposium On Regulatory Takings*, 46 S.C. L. REV. 525, 526 (1995) (stating that "the very purpose of the Bill of Rights is to protect the citizen against the government"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (asserting that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

[16] It is interesting to note that the rights enumerated in the Bill of Rights were not new to the colonies. Eight state constitutions gathered these rights into separate provisions called a Declaration of Rights. Connecticut and Rhode Island, for example, had these rights in their original charter from England. The most

of these amendments detailed very specific rights,[17] while others were a conglomeration of specific rights expressing a larger idea. The two principal amendments at issue here, the First and Sixth Amendments, are in this latter category. It is important to note that these rights are conditional. For example, there is no First Amendment right to incite a riot, to urge another person to commit a crime, to unreasonably interfere with pedestrian or vehicular traffic by speaking and causing a crowd to gather, or to establish and practice a religion which causes the death of its believers through religious rituals. Thus, the rights of the First Amendment are constantly balanced against the good of the orderly administration of government.

A. *The Sixth Amendment*

The Sixth Amendment of the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Framers fashioned this amendment to protect against many of the excesses of the European governments.[18] The predominant principle expressed is that the government should safeguard fair trials[19] in order to provide for a reliable and

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influential of the states' Bill of Rights was the Virginia Bill of Rights of 1776 which greatly influenced the final document that was ratified by the thirteen new states.

[17] For example, the Third Amendment to the United States Constitution provides that "[N]o soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

[18] *See In re* Oliver, 333 U.S. 257, 268-69 (1948) (noting that the "Anglo-American distrust for secret trials" was born out of the experience of the Spanish Inquisition, English Court of Star Chamber and the French monarchy's use of the *lettre de cache*).

[19] *See* Strickland v. Washington, 466 U.S. 668, 689 (1984) (noting that the purpose of the Sixth Amendment is to ensure a fair trial).

impartial determination of guilt.[20] As will be seen in a brief survey of the rights embodied in the Sixth Amendment, these rights belong to the criminal defendant, rather than the public.

1. The Right to Counsel

Over the past sixty years, the Supreme Court has gradually expanded the reach of the Sixth and Fourteenth Amendments to ensure that individuals do not face the loss of liberty without being able to properly defend themselves against criminal charges. In 1938, the Court held that the Sixth Amendment required that individuals be provided counsel in all federal criminal cases.[21] In 1942 the Court held that counsel had to be provided to state court defendants if failure to furnish counsel would lead to denial of fundamental fairness.[22] In 1963, the Court held that the equal protection clause of the Fourteenth Amendment required states to provide counsel for indigents for at least one appeal.[23] In the same year, the Court held that the Sixth Amendment was applicable to the states, therefore, they had to provide indigent defendants counsel in felony prosecutions.[24] The right to counsel was then extended to include all misdemeanor cases which actually result in imprisonment.[25]

Waiver of the right to counsel rests solely in the hands of the defendant. The role of a court or the prosecution is to protect the defendant by making sure that the defendant's waiver is a knowing and intelligent one.[26] The prosecution must prove the "intentional relinquishment or abandonment of a

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[20] *See* Estes v. Texas, 381 U.S. 532, 557 (1965) (Warren, C.J., concurring).

[21] *See* Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

[22] *See* Betts v. Brady, 316 U.S. 455, 462 (1942).

[23] *See* Douglas v. California, 372 U.S. 353, 355 (1963).

[24] *See* Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963).

[25] *See* Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972); Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

[26] North Carolina v. Butler, 441 U.S. 369, 373 (1979). *See also* People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1976).

known right or privilege"[27] and courts are constitutionally required to "indulge in every reasonable presumption against waiver."[28]

2. Speedy Trial

The requirement that a criminal trial be conducted without delay must be balanced against the right of an accused as well as a prosecutor to prepare their respective cases before going to trial. What is interesting about the right to a speedy trial is that, depending on the facts and circumstances of a given case, a delay in trial proceedings could advantage either the prosecution or the defense.[29] As a result, the balancing test fashioned by the Supreme Court measures the conduct of both.[30]

However, for several reasons, it appears that the right to a speedy trial is meant to protect the defendant. First, the defendant may make a knowing and intelligent waiver of this right but the prosecution may not. Second, the purposes of a speedy trial enunciated by the Supreme Court focus on the impact of delay on the criminal defendant.[31] Finally, some legislatures have enacted statues that mandate that a defendant be brought to trial within a given time.[32]

3. Trial by Jury

The fundamental right to trial by jury was secured to Englishmen by the Magna Carta. Even before the United States Supreme Court began to constitutionalize the requirement of trial by jury, it was taken for granted in virtually all

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[27] Brewer v. Williams, 430 U.S. 387, 40- (1977) (citation omitted); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (citation omitted).

[28] *Brewer*, 430 U.S. at 404; Brookhart v. Janis, 384 U.S. 1, 4 (1966).

[29] *See* Barker v. Wingo, 407 U.S. 514, 530 (1972).

[30] *Id.* at 530.

[31] Smith v. Hooey, 393 U.S. 374, 378 (1969) (stating that the purposes of a speedy trial are: (1) that a person may suffer "undue and oppressive incarceration"; (2) a prisoner as well as an unconfined person could experience the "anxiety and concern accompanying public incarceration"; (3) imprisonment could impair an accused's ability to prepare a defense).

[32] *See* N.Y. CRIM. PROC. § 30.30 (McKinney 1992); 18 U.S.C. §§ 3161-3174 (1994).

jurisdictions as a matter of state law.[33] Even as a criminal defendant has become cloaked with numerous procedural protections, no one can doubt that a jury is still necessary to serve as a check against the exercise of arbitrary government powers.

The right to a jury trial is guaranteed to the extent it existed at common law, and is applicable to nonpetty offenses.[34] There is no constitutional right to waive a jury and be tried before a judge.[35] However, the Supreme Court has suggested that where a defendant may not waive a jury without the prosecution's assent, there are circumstances which would, as a matter of fundamental fairness, require a trial before a judge.[36] Moreover, some states allow a defendant to waive a jury as a matter of right and, as harsh as this may seem, a defendant may waive the right to be tried by a jury with a guilty plea.

B. *The First Amendment*

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Framers felt that this amendment would ensure a republican government and direct its benefits towards the public. The overriding principle expressed was that the government should safeguard for the public an uninhibited marketplace of ideas.[37] However, this is not an idle obligation. The govern-

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[33] *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[34] *Id.* at 161-62. Later, in Baldwin v. New York, 399 U.S. 66, 69 (1970), the Court defined petty offenses as a offense punishable by more than six months in jail.

[35] *See* Singer v. United States, 380 U.S. 24, 34-35 (1965).

[36] *See id.* at 37-38.

[37] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (affirming Holmes's rationale that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.").

ment must often take affirmative acts to ensure a healthy caldron of speech. The First Amendment requires the government to encourage attention to public issues and promote diversity of views. To this end, the government must protect the public's access to information.[38]

There is legal protection for the free flow of information between private citizens. The paradigm of protection of speech and publication is that of the shield. The government is prevented from affirmatively burdening the private flow in information, but there is no constitutional requirement to provide information for the knowledge of private citizens.

Within First Amendment doctrine, three commonly accepted rights suggest that the Supreme Court had tacitly acknowledged a public "right to know": a right to receive information over government objection, a right to gather information for purposes of publication, and a right of access to public facilities. Upon close examination, however, none of these rights truly provided the press or public with any entitlement to extract from a reluctant sovereign any information the sovereign did not choose to provide.[39]

The "right to receive" cases established that otherwise permissible speech could not be effectively restrained by denying a speaker an audience. In 1969 the Supreme Court announced that "[i]t is now well established that the Constitution protects the right to receive information and ideas."[40] But this right was never more than the right of a willing recipient to obtain information from a "willing speaker."[41] In no way had the Supreme Court recognized an affirmative right to obtain information on demand from an unwilling private or public source. In sum, the doctrine provided little authority for a right of access to a judicial proceeding intentionally closed by a trial judge pursuant to state statute.

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[38] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (stating that the government must defend access to a broad range of ideas so that each person can decide which deserve "expression, consideration, and adherence").

[39] *See* Lillian R. BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 497 (1980).

[40] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[41] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976).

The "right to gather" cases were equally unsuccessful in establishing an affirmative right of access to a criminal trial. Despite assertions by the Supreme Court suggesting an implicit recognition of an independent First Amendment right to gather information for purposes of publication,[42] the Court has never resolved a case on that basis. The direct claim that the information-gathering functions of the press were privileged was presented in three cases decided by the Supreme Court during the 1970s.[43] However, in each instance Court refused to extend such protection to an otherwise lawful process that did not directly restrain or punish the very act of publication.[44]

The seminal case which stands for this proposition is *Branzburg v. Hayes*.[45] Branzburg was an investigative journalist who received a grand jury subpoena compelling him to testify and reveal confidential sources for his news articles.[46] He argued that forcing him to reveal his anonymous informants would deter such sources from entrusting information in him, thereby imposing an indirect burden on the constitutional role of an informing press. Justice White, writing for the Court, appeared to concede much to the Free Press Clause argument, stating: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[47] However, in the final analysis the Court merely drew a line between the accumulation and publication of information.[48] The Court reasoned that the process of gathering information from confidential sources was entitled to no constitutional protection.[49] This was an explicit rejection of the press claim to an independent right to gather information.

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[42] *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

[43] *See* Rankin v. McPherson, 483 U.S. 378, 390-91 (1987); Connick v. Myers, 461 U.S. 138, 154 (1983); Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).

[44] *Id.*

[45] 408 U.S. 665 (1972). This case was followed by the Second Circuit in United States v. Scopo, 861 F.2d 339, 347 (2d Cir. 1988).

[46] *Id.* at 667-69.

[47] *Id.* at 681.

[48] *Id.* at 681-82.

[49] *Id.* at 708.

The most categorical rejection of using the First Amendment as a sword to gain access to a criminal trial occurred in three cases decided by the Supreme Court in the mid-1970s.[50] In each case, the press attempted to assert a right of access to prison facilities for the purposes of gathering information. *Pell v. Procunier*[51] and *Saxbe v. Washington Post Co.*,[52] decided together, concerned regulations prohibiting journalists from obtaining interviews with inmates of their choice. The press plaintiffs alleged that the effective denial of access to inmates having information relating to prison conditions was an unconstitutional burden on their right to gather and publish news. The Court found that access to such information was not totally denied in either case because the prisons in question permitted members of the press to visit the institutions and interview randomly selected inmates. Therefore, the Court reasoned that the press had access to information that was available to the public. The Court defined the issue as one in which the press sought to claim a privilege superior to the general public. Justice Stewart's opinion assumed that the general public had no constitutionally protected right of access to government facilities. Therefore, he inferred that the press, even when viewed as the representative of public, had no independent right to information that could be denied to the public.[53]

This issue arose again in *Houchins v. KQED, Inc.*[54] An inmate at a county jail had committed suicide in an area of a facility notorious for numerous "rapes, beatings and adverse physical conditions."[55] This area of the prison was not open to members of the public under any circumstances, and KQED

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[50] Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Houchins v. KQED, Inc., 438 U.S. 1 (1978).

[51] 417 U.S. 817, 819-20 (1974).

[52] 417 U.S. 843, 844-85 (1974).

[53] Justice Stewart asserted that:

> [i]t is one thing to say that a journalist is free to seek out sources of information not available to members of the general public . . . . It 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. That proposition finds no support in the words of the Constitution or in any decision of this Court.

Pell, 417 U.S. at 834-35.

[54] 438 U.S. 1 (1978).

[55] *Id.* at 5.

was denied permission to enter and film it. The trial court enjoined the prison from enforcing its no-access policy, ruling that the press had to be provided with access at reasonable times and under reasonable conditions.[56] The United States Court of Appeals for the Ninth Circuit affirmed the injunction, finding that the "no greater access" doctrine of *Pell* and *Saxbe* was not controlling in the circumstance of total closure to both press and public.[57]

The Supreme Court reversed the Ninth Circuit holding. Chief Justice Burger,[58] again cast the issue as one of mere comparative access.[59] The Chief Justice explained the "importance of informed public opinion and the traditional role of a free press as a source of public information"[60] did not amount to a press right of access to information. He noted that although there is protection afforded the media to communicate information once it is obtained, the government does not have to provide the media with information or access to it.[61] This seemed to repudiate any recognition of the press' claim to access.[62]

II. THE LAW ON PUBLIC ACCESS TO THE COURTS

A. *Supreme Court Cases*

In *In re Oliver*,[63] the defendant was testifying before a Michigan Circuit Court judge conducting a "one man grand jury" that was investigating gambling and official corrup-

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[56] *Id.* at 6.

[57] KQED, Inc. v. Houchins, 546 F.2d 284, 286 (9th Cir. 1976), *rev'd*, 438 U.S. 1 (1978).

[58] The case was decided by a 4-3 vote with Justice Stewart concurring separately. *Houchins*, 438 U.S. at 2. Justices Marshall and Blackmun did not take part in the decision.

[59] *Id.* at 3. *See also* The Nation Magazine v. U.S. Dep't of Justice, 762 F. Supp. 1558 (S.D.N.Y. 1991).

[60] *Id.* at 9 (citing Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Mills v. Alabama, 384 U.S. 214, 219 (1966)).

[61] *Id. See also* Heller v. Woodward, 735 F. Supp. 996, 998 (D. N.M. 1990).

[62] "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. Nor does the rationale of the decisions upon which respondents rely lead to the implication of such a right." *Id.*

[63] 333 U.S. 257 (1948).

tion.[64] The judge did not feel that the defendant's story "jell[ed]" with the story of prior witnesses.[65] As a result, the judge immediately charged the defendant with contempt, convicted him and sentenced him to jail for 60 days.[66] In its analysis, the Supreme Court began by tracing the history of the right to a public trial. It concluded that common law traditions showed that the right to a public trial developed in order to prevent the use of the courts as a tool of persecution.[67] This was accomplished by contemporaneous review; the public acting as a powerful deterrent upon the abuse of judicial power.[68] The Court concluded that, in this setting, the defendant was not a witness in a secret grand jury, rather, he was the accused in a contempt proceeding.[69] Therefore, the Court held that the method used to sentence the defendant had to comport with the Fourteenth Amendment and the procedural safeguards embodied in due process rights.[70]

The Court next addressed the right to a public trial in a very different setting. The funeral of President Kennedy displayed the ability of television to bring the American public emotional images. By 1965, television was no longer a new technology, having spread into most, if not all, corners of the country. Against this backdrop, the Court would decide two cases concerning the friction between publicity and the criminal trial.

In *Estes v. Texas*,[71] the defendant was on trial for swindling. The massive publicity the case received brought it national attention.[72] The trial was captured by television and

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[64] *Id.* at 258.

[65] *Id.* at 259.

[66] *Id.* The defendant did not have the benefit of counsel, time to prepare a defense, the ability to cross-examine other witnesses or call witnesses on his own behalf to rebut the charge against him. *Id.*

[67] *Id.* at 270.

[68] *Oliver*, 333 U.S. at 270.

[69] *Id.* at 265, 278. (noting that summary trials for contempt have not been regarded as an exception to the rule against secret trials).

[70] *Id.* at 273. The Court held that the defendant had been deprived of his liberty by the procedure used in the case, which did not afford the defendant these constitutional protections. *Id.* at 278.

[71] 381 U.S. 532 (1965). *See also* Zaehringer v. Brewer, 635 F.2d 734, 738 (8th Cir. 1980); United States v. Ramirez, 524 F.2d 283, 286 (10th Cir. 1975) (This case was never followed by the Second Circuit).

[72] *Id.* at 535. The pretrial hearings were covered by radio, television and news

newsreel photographers who were stationed in a booth specially constructed in the rear of the courtroom.[73] Portions of the trial and the preliminary hearings were regularly broadcasted.[74]

The Court began its discussion by laying out the competing interests in the case. First, the Court noted that the right to a public trial belongs to the criminal defendant, and that its purpose is to assure a fair trial.[75] Next, it grappled with the ability of the press to provide coverage of an event. It concluded that in order to safeguard the defendant's right to a fair trial, the privileges granted by the First Amendment, however important they may be to the functioning of our government, must not be allowed to interfere with the integrity of the criminal justice system.[76]

The Court focused on the importance of the character of criminal proceedings to the proper functioning of the trial process.[77] The Court noted that the intrusion of the press into the atmosphere of the trial prejudiced the defendant's fair trial rights. The majority observed that it would be difficult, if not impossible, to demonstrate actual prejudice in these situations.[78] However, it did not feel this was necessary.[79] Based

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photography. The Court noted that the pretrial publicity comprised eleven volumes of press clippings. *Id.* at 535-36.

[73] *Id.* at 537. The entire trial was allowed to be filmed without sound. However, because of continued objections live broadcasting was limited to opening and closing statements of the state as well as the return of the jury's verdict, although, at the defendant's request, the closing remarks of the defense counsel were not permitted to be filmed. *Id.*

[74] *Id.* at 537-38. The news anchors would use the footage as the backdrop of their report. On one occasion, the videotapes of the pretrial hearing were rebroadcast in place of the late movie. *Id.*

[75] *Id.* at 538-39.

[76] *Estes*, 381 U.S. at 539-40.

[77] *Id.* at 540.

[78] *Id.* at 546. However, the Court did detail four ways in which the presence of the press could prejudice a trial. First, the Court felt that the mere presence of the press cameras had the most prejudicial effect. The mere presence of television or still cameras tells the jury that this is not the average case. The Court noted that this type of notoriety enhances the chance of prejudice to the point where it was "highly probable that it will have a direct bearing on his [sic] vote as to guilt or innocence." Moreover, the press' presence adds to the distractions both inside and outside the courtroom. The actions of the press could influence the jurors had it not been for the press' coverage of the day's events.

Second, the Court noted that the press will affect the quality of testimony. Witnesses become more nervous or audacious, and focus on whether or not their

on this analysis the Court concluded that "[t]o the extent that the media shapes the sentiment of the public, it can strip the defendant of a fair trial."[80] This was such a case; therefore, the defendant did not receive a fair trial.[81]

The Court would ultimately decide the case on Sixth Amendment grounds. The author believes that, at this point in history, the Court was extending protections to the press in other areas[82] and did not want to set explicit limits in this particular one. The irony is that the decision would be based on the Court's critique of the media and First Amendment considerations. Placing limits on press coverage of criminal proceedings would have established a more coherent and workable set of rules.

The Court addressed very similar circumstances in *Sheppard v. Maxwell*.[83] Dr. Samuel Sheppard was accused of murdering his wife in their lakefront home. The publicity that surrounded the case from the time of the crime through the end of the trial is too numerous to recount here. Suffice it to

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pictures are being taken, instead of the questions counsel are presenting to them. Additionally, witnesses could alter their testimony to either support or refute prior testimony of other witnesses whom they have learned of through the press.

Third, the press gives judges extra responsibilities. A judge's primary responsibility is to insure that the defendant receives a fair trial. Television, in particular, must be supervised throughout the entire proceeding, and the mere awareness of television diverts the judge from the task at hand. Furthermore, there is an additional diversion for elected judges who must worry that their conduct at trial could be used as a political weapon.

Finally, the Court noted that the press has an oppressive effect on the defendant. The defendant receives coverage when there is a particularly notorious crime. With the lens of the media spreading the image of the defendant, he or she becomes instantly isolated and nefarious. Every reaction to testimony or facial expression the defendant makes would be dissected by the media. The defendant is stripped of his dignity and distracted from the proceedings before him. *Id.* at 546-49.

[79] *Id.* at 542 (noting that the showing of actual prejudice is not a prerequisite of reversal).

[80] *Id.* at 550.

[81] *Estes*, 381 U.S. at 552. *See also* Patterson v. Colorado, *ex. rel.* Attorney General of the State of Colorado, 205 U.S. 454, 462 (1907) (Justice Holmes stating that our system is premised upon the fact that conclusions of guilt or innocence are to be decided solely by the evidence and argument presented in open court).

[82] For example, see New York Times v. Sullivan, 376 U.S. 254 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967).

[83] 384 U.S. 333 (1966). This case was followed by the Second circuit in United States v. Cojab, 996 F.2d 1404 (2d Cir. 1993) and in United States v. Simon, 664 F. Supp. 780, 789 (S.D.N.Y. 1987).

say that the Supreme Court concluded that the trial judge allowed the press to create a "carnival atmosphere."[84] The excesses of the press were on display, not only doing the things that Justice Clark in *Estes*[85] suggested could prejudice a jury, but devising new ways as well. Sheppard's attorney repeatedly asked for a continuance, a change of venue and declaration of mistrial because of the press coverage of the case. All were denied by the trial judge and the defendant was convicted of murder.

Although, as in *Estes*, the case was decided under a Sixth Amendment rationale, the Court used it as an opportunity to place indirect restraints[86] on the press by placing an affirmative duty on the trial judge to ensure that the defendant received a fair trial.[87] The Court stated that it had tried to give the press as much freedom as possible, but it was concerned with the atmosphere of the trial.[88] Therefore, it again affirmed the principle that the press' freedom was bound by the defendant's right to a fair trial.[89]

Whereas in *Estes* and *Sheppard* the media permeated the courtroom, in *Nebraska Press Association v. Stuart*,[90] the press was completely excluded. The defendant was arrested and arraigned the morning after six members of the Kellie family were killed in their home.[91] By this time the case had already attracted massive amounts of media coverage.[92] Three days after the crime, the trial court entered a restrictive order preventing dissemination of information concerning the case at the request of both the county attorney and the defense.[93] Af-

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[84] *Id.* at 358.

[85] *See supra* notes 71-74 and accompanying text.

[86] 384 U.S. at 350 (refusing to place direct restraints on the news media).

[87] *Id.* at 363. It did this by enumerating various actions a judge could take to both limit the press' coverage and control the ability of the parties involved to try the case in the press. *Id.* at 357-62.

[88] *Id.* at 354-55.

[89] *Id.* at 350-51.

[90] 427 U.S. 539 (1976).

[91] *Id.* at 542.

[92] *Id.* (noting that local, regional and national newspapers, as well as, radio and television stations were covering the crime).

[93] *Id.* "[N]o attorney for members of the press appeared at this stage." *Id.* A preliminary hearing was held the same day, open to the public but subject to the order, and the defendant was bound over for trial in the state district court. *Id.* at 543.

ter several procedural steps,[94] the Nebraska Supreme Court approved an order prohibiting the reporting of, among other things, the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, although the defendant's confession had been introduced in open court during his arraignment.[95] The defendant was convicted of the murders and sentenced to death.[96]

Here, the Court began its struggle of combining First and Sixth Amendment rationales into a unified theory of access to criminal proceedings. It began by stating that there are no explicit or collateral writings to show that the Framers addressed the conflict between freedom of the press and the right to an unbiased jury.[97] Nevertheless, the extent of the Court's Sixth Amendment analysis was a survey of cases involving pervasive pretrial publicity. It concluded that even the most prevalent and hostile publicity did not automatically lead to an unfair trial.[98]

Having reached this conclusion, the Court chose to focus its analysis on First Amendment rights. *Nebraska Press* was tailor made for this approach because there was information already placed into the public domain at the defendant's arraignment,[99] and First Amendment rights have traditionally been afforded special protection from prior restraint.[100] However, this was a case of first impression for the Court with regard to protective orders issued to ensure a defendant's right to a fair trial.

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[94] *Id.* at 542. The county court entered an order prohibiting everyone in attendance from disseminating testimony given or evidence adduced and requiring that the press observe the Nebraska Bar-Press Guidelines. Thereafter, members of the press moved for leave to intervene at the district court, asking that the restrictive order imposed by the county court be vacated. *Id.* at 543. The district judge granted petitioners' motion to intervene and entered his own restrictive order. *Id.*

[95] *Nebraska Press*, 427 U.S. at 543.

[96] *Id.* at 546.

[97] *Id.* at 547. However, the Court did note that there is ample evidence that the Framers were aware that an unrestricted press posed risks to private rights. *Id.* Furthermore, it noted that modern communications technology aggravated the problem by creating a national media more beholden to faraway editors than local rules and customs. *Id.* at 547-50.

[98] *Id.* at 551-54.

[99] *See supra* note 94 and accompanying text.

[100] *Nebraska Press*, 427 U.S. at 556.

The Court recognized that First Amendment rights to freedom of the press are not absolute,[101] but that any prior restraint will be presumptively unconstitutional.[102] The Court held that prior restraint causes instant and irreversible damage, which is particularly great when it affects the communication of current events.[103] However, the Court, reaffirming its position in prior cases, stated that these special protections carry with them additional duties to exercise some effort to protect the rights of a defendant to a fair trial with an unbiased jury.[104] Moreover, the Court recognized that some news and most commentary can be delayed with little harm, but when these delays are not self-imposed editorial decisions, but instead are proscribed by the government, the specter of censorship arises.[105] As a result, the Court held that this order, as it related to information already made public at the open preliminary hearing, was unconstitutional.[106]

Implicitly, the result of the case was to inject into the debate a right of access based on the First Amendment. However, it would take a few more terms before the Court would directly address this issue. Further, *Nebraska Press* seemed to invite trial judges to experiment with new ways to control the publicity surrounding a trial. One such method was to close courtrooms to the press and public.[107] This method did not involve direct prior restraint and found authority in *Sheppard*'s instruction to judges to take affirmative acts to insure a fair trial.[108]

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[101] *Id.* at 557.

[102] *Id.* at 556-58.

[103] *Id.* at 559. *See also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492-93 (1975); *see, e.g.*, Craig v. Harney, 331 U.S. 367, 374 (1947).

[104] *Nebraska Press*, 427 U.S. at 560.

[105] *Id.* at 560-61. *See also* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring); *see, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). The Court felt that the government should look to measures that it had approved in Sheppard v. Maxwell to blunt the effect of prior restraint. Moreover, the Court expressed the view that most, if not all, restrictive orders are difficult to draft and, probably ineffective.

[106] *Nebraska Press*, 427 U.S. at 568.

[107] Brief of the American Civil Liberties Union and the New York Civil Liberties Union as Amicus Curiae in Support of the Petition for a Writ of Certiorari at 7-8, Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (No. 77-1301).

[108] Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

One such closure case asked the question of whether the public has a right to compel access to the court in order to make the information public, over the objection of both the defendant and the prosecuting attorney. In *Gannett Co. v. DePasquale*,[109] two men and a woman were arrested in connection with the disappearance of Wayne Clapp. The petitioners, who published two newspapers in upstate New York, provided extensive coverage of the events surrounding the trial.[110] The articles at issue stated that one of the defendants had led Michigan police to the supposed murder weapon, and that ammunition for the weapon was found in the motel room that two of the defendants occupied.[111] At their preliminary hearing, the defendants sought to suppress statements made to the police and the physical evidence seized as a result of the allegedly involuntary statements.[112] In addition, the defense attorneys requested, and the district attorney did not oppose, that the public and press be excluded from the hearing because the pretrial publicity jeopardized the defendants' right to a fair trial.[113] Finding that there was a "reasonable probability" of prejudice to the defendants, the judge granted the defense's motion.[114]

The Court began its analysis of the case by affirming the notion that pretrial publicity could jeopardize a defendant's right to a fair trial, and its command from *Sheppard* that a trial judge has an affirmative obligation to take protective measures to minimize the effects of prejudicial pretrial publicity, even when they do not appear necessary.[115] The Court noted the special purpose of suppression hearings, which is to

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[109] 443 U.S. 368 (1979). The Second Circuit did not apply this ruling until Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996).

[110] *Id.* at 371-74. These stories cover the dates of July 20 through August 6, 1976 and detailed the victim's disappearance, events leading to, and surrounding, the defendants subsequent arrest in Michigan and extradition back to New York, background stories about the victim and the defendants, as well as the details of the defendants' arraignment. *Id.* at 371-74.

[111] *Id.* at 373.

[112] *Id.* at 374-75.

[113] *Id.* at 375.

[114] *Gannett*, 443 U.S. at 376. During the time of the petitioners' appeal, the defendants plead guilty to lesser-included offenses and the transcript of the suppression hearing was released immediately thereafter. *Id.* at 376 n.4.

[115] *Id.* at 378. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1965); Estes v. Texas, 381 U.S. 532 (1965).

eliminate unreliable or illegally obtained evidence so that potential jurors do not become aware of evidence that is wholly inadmissible at trial.[116]

In its Sixth Amendment analysis, the Court noted that the rights enumerated therein, although not absolute, are personal to the accused.[117] The Court recognized that nowhere in the Constitution is there a right of access to criminal trials granted to the public[118] or a right of the public to demand a public trial.[119] This challenges the notion that the interests of the defendant and the public to a public trial are the same.

The Court then undertook a historical analysis similar to the one it had engaged in approximately forty years earlier in *In re Oliver*.[120] This time the Court reached a different conclusion. It stated that history fails to show that the Framers intended to create a constitutional right of access to pretrial hearings; all that was intended was to grant the defendant the right to demand a public trial.[121] And, even if the Sixth Amendment contained a common law right to attend criminal trials, there is no evidence that this right need be extended to pretrial proceedings.[122] For the above reasons, the Court held that the public, or the press in its stead, had no right to attend criminal trials.[123]

Finally, while the Court explicitly reserved the question of whether there was a First Amendment right of access, it did

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[116] *Gannett*, 443 U.S. at 378.

[117] *Id.* at 379-80. *See also* Farretta v. California, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting); *In re* Oliver, 333 U.S. 257, 270 n.25 (1948); *Estes*, 381 U.S. at 538-39 (Harlan, C.J., concurring). For instance, the Court noted that the defendant does not have the right to insist on a private trial, Singer v. United States, 380 U.S. 24, 35 (1965), and the public has interests in the guarantees extended to the defendant. *Estes*, 381 U.S. at 583 (Warren, C.J., concurring); Barker v. Wingo, 407 U.S. 514, 519 (1972); Patton v. United States, 281 U.S. 276, 312 (1930); *Gannett*, 443 U.S. at 382-83. However, the public must rely on the litigants to protect its interests in our adversary system. *Gannett*, 443 U.S. at 383.

[118] *Gannett*, 443 U.S. at 379.

[119] *Id.* at 381.

[120] *See supra* note 63 and accompanying text.

[121] *Gannett*, 443 U.S. at 385-86.

[122] *Id.* at 387-88. In fact, the court's historical analysis produced abundant proof to the contrary. Under English common-law, the public had no right of access to pretrial proceedings. *See, e.g.*, EDWARD JENKS, THE BOOK OF ENGLISH LAW 75 (6th ed. 1967). Similarly the press had no privilege to report information about pretrial judicial proceedings under English common-law. *Gannett*, 443 U.S. at 389 n.20.

[123] *Gannett*, 443 U.S. at 391.

address this issue briefly. The Court concluded that even if a right existed, the trial court took it into account in its ruling when it concluded that there would be a "reasonable probability" of prejudice to the defendant's right to a fair trial.[124] Second, the Court distinguished this case from *Nebraska Press* by noting that in *Nebraska Press* there was an absolute prohibition of publication, whereas in this case any denial of access was temporary.[125]

The specific answer to the First Amendment issue came one year later in *Richmond Newspapers, Inc. v. Virginia.*[126] The defendant was on trial for murder for the fourth time.[127] The presiding judge granted the defense counsel's request that the trial be closed for the sole reason that the public's presence might distract the jury.[128] For unknown reasons, the trial court struck the state's evidence and declared the defendant not guilty.[129] As soon as the trial was concluded, tapes of the proceedings were made available to the public.[130]

The 7-1 decision generated seven opinions, none commanding a majority. The two most influential opinions were written by Chief Justice Burger and Justice Brennan. Chief Justice Burger recast the legal issue as to whether a criminal trial may be closed to the public upon an unopposed request by the defendant, without a finding as to whether the defendant's Sixth Amendment right to a fair trial was in jeopardy, or whether some other overriding interest was at stake.[131]

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[124] *Id.* at 392-93.

[125] *Id.* at 393 n.25. Once the danger of prejudice subsided, the trial court released the transcript and the press could fulfill its function of reporting the information. *Id.* at 393

[126] 448 U.S. 555 (1980). *See also* Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16 (2d Cir. 1984); United States v. Carpenter, 526 F. Supp. 292 (E.D.N.Y. 1981).

[127] *Id.* at 559. His initial trial ended in a conviction which had been reversed on appeal because of improperly admitted evidence. The second trial ended in a mistrial when a juror asked to be excused and there was no alternate available. The third trial also ended in a mistrial because a prospective juror had read about the previous trials and had told other prospective jurors about the case. *Id.*

[128] *Id.* at 559-61.

[129] *Id.* at 561-62.

[130] *Id.* at 562 n.3. The Virginia Supreme Court denied all of Richmond Newspapers' petitions for mandamus, prohibition, and leave to appeal. *Id.* at 562.

[131] *Richmond Newspapers*, 448 U.S. at 564.

The Court's historical analysis stressed that criminal trials have traditionally been open to the public and that this tradition was well established at the time the First Amendment was adopted.[132] Chief Justice Burger listed several functions that open trials could serve and concluded that these guarantees would be rendered meaningless if there was no right to observe criminal trials.[133] Chief Justice Burger next wrote that the First Amendment principle of freedom of assembly supports the recognition of an access claim to criminal trials.[134] Therefore, although no right of access to criminal trials is explicitly granted by the First Amendment, these factors justified finding such a right implicit in that amendment.[135] As a result, absent an overriding interest specifically articulated in their findings, trial judges would be required to seek alternatives to satisfy the constitutional demands of fairness.[136]

Justice Brennan, joined by Justice Marshall and concurring in the judgment, characterized the issue as to whether the First Amendment, standing alone, guaranteed the right of access to trial proceedings over the objections of the trial judge and the parties.[137] In his view, the right of access stems from the fact that criminal proceedings have been traditionally open and, more importantly, this right coincides with the structural role the First Amendment plays in our system of governance.[138] According to this structural model, the purpose of the First Amendment is not to protect expression for its own

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[132] *Id.* at 566-69.

[133] *Id.* at 575-77. Open trials provide assurance that proceedings are being conducted fairly; create public confidence in the outcomes; have an educative effect; discourage perjury and the misconduct of participants and decisions based on bias and partiality; as well as offer therapeutic value to the community. *Id.* at 569-73. Chief Justice Burger stressed the importance of protecting the public's First Amendment interest in the right to discuss the criminal justice system, which includes both the right to speak about trials and the right to receive this information. *Id.* at 575-77.

[134] *Id.* at 578. Burger felt that the right to assemble in places traditionally open to the public has long been viewed as enhancing both the First Amendment freedom of expression and the integrity and quality of the proceedings. *Id.* at 577-78.

[135] *Id.* at 577, 579-80.

[136] *Id.* at 580-81. *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-65 (1976); Sheppard v. Maxwell, 384 U.S. at 357-62.

[137] *Richmond Newspapers*, 448 U.S. at 584-85.

[138] For an elucidation of the latter theory, see Justice William Brennan, *Address*, 32 RUTGERS L. REV. 173, 176-82 (1979).

sake; rather, the amendment aims to further our democratic system by assuring that the public has the information it needs to discuss the operations of government.[139] As such, the right of access acts as an additional check on the criminal justice system.[140]

This was, as Justice Stevens would remark, "a watershed case."[141] In fact, since *Gannett* the Court has not upheld any closure order. The Court would have been better off relying on the *Nebraska Press* decision by reasoning that, because this was the defendant's fourth trial, much of the evidence was already in the public domain. Therefore, closure of the proceedings amounted to prior restraint of publishing facts already in the press' possession. However, because *Richmond Newspapers* decided that the First Amendment created a qualified right of access for the press to criminal proceedings, it is important to note the faults in the logic which form its foundation.

The Court's conclusions, based on its historical review, are suspect. The Court failed to note that at the time the Bill of Rights was drafted, the practice was to record cases that reflected exceptions, not rules. Further, its reliance on history fails to take into account the enormous changes that have occurred in criminal procedure law since the writing of the Bill of Rights.[142] It has been the wisdom of both Congress and the courts to supplant the historical reliance on openness to ensure a fair trial by placing in the hands of defense counsel procedural tools to guarantee fairness.

Most criminal cases go from indictment to plea. There is usually no pretrial hearing, let alone a trial. Despite the decision in *Richmond Newspapers*, the workings of the system still happen behind closed doors, either at the charging stage or during plea negotiations. Yet, nowhere in *Richmond Newspapers*, or any of its progeny does the Supreme Court suggest we allow access to the prosecutor's office. Nor does it comment on

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[139] *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring).

[140] *Id.* at 592, 596. It allows the public to see that the defendant gets a fair and accurate adjudication of guilt or innocence and aids in the fact-finding process, while satisfying the appearance that justice is being done. *Id.* at 593-97.

[141] *Id.* at 582.

[142] *See, e.g.*, People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49, 359 N.Y.S.2d 582 (1974); People v. Goggins, 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571 (1974); People v. Hinton, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972).

the prejudicial effect of allowing the press to report the conditions under which the defendant would plead guilty.

Moreover, the Court's development of a structural role for the First Amendment fails for two reasons. First, this functional role for the First Amendment is "theoretically endless," as Justice Brennan himself points out.[143] What subject in the realm of public debate could not be better informed by increasing the flow of information? Although Justice Brennan recommends that the protection be invoked with "temperance,"[144] the strict scrutiny standard the Court uses to test this new presumption sets a hurdle so high that it has effectively discouraged to a nullity any opportunity for restraint.

Second, the creations of this structural model turn the First Amendment from a shield into a sword. Until *Richmond Newspapers*, the First Amendment allowed a willing recipient to obtain information from a willing speaker.[145] The claim that the precommunicative process of gathering information was protected by the First Amendment was rejected by the Supreme Court three times in the 1970s[146] and was echoed by Justice Stewart in *Gannett*.[147] However, by finding a public right of access guaranteed by the First Amendment, the Supreme Court abandoned earlier doctrine based on speech-based limitations. As a result, the Court gave the First Amendment a sharp edge to use in gaining access to other stages of criminal proceedings.

Upon this faulty reasoning and weak legal foundation, the Court moved forward. In *Globe Newspapers v. Superior Court*,[148] the Court firmly entrenched a strict scrutiny standard: access to criminal trials may be denied only if the denial is necessitated by a compelling government interest that is narrowly tailored to serve that interest.[149] *Globe* involved a

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[143] *Richmond Newspapers*, 448 U.S. at 588 (citing Brennan, *Address*, 32 RUTGERS L. REV. 173, 177 (1979)).

[144] *Id.*

[145] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976).

[146] *See* Branzburg v. Hayes, 408 U.S. 665 (1972); Herbert v. Lando, 441 U.S. 153 (1979); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post, 417 U.S. 843 (1974).

[147] *See Gannett*, 443 U.S. at 379.

[148] 457 U.S. 596 (1982).

[149] *Id.* at 606-07.

Massachusetts statute that contained a provision mandating the exclusion of the press and public from the courtroom during the testimony of any minor who is allegedly the victim of a sexual offense.[150] The defendant objected to the closure and the prosecution noted for the record that the closure order was not issued at its request.[151] The case proceeded to trial, where the defendant was acquitted.[152]

The Supreme Court closely adhered to the reasoning of Justice Brennan in *Richmond Newspapers*; that historical evidence of openness and the functional role the press plays in criminal proceedings creates a presumption of openness.[153] In addressing the state's reasons for requesting closure, the Court held that its interest in preventing further trauma and embarrassment to the victim was in fact compelling.[154] However, in the Court's opinion, the mandatory closure provision was too broad, preferring instead to have trial judges approach the issue on a case-by-case basis.[155] The Court found that the state's second interest, to encourage victims of sexual assaults to come forward to provide testimony, was speculative.[156] Moreover, the Court noted that the press was not barred from obtaining an account of the victim's testimony from other sources.[157]

Reliance on the First Amendment interpretation was not necessary to arrive at the Court's desired result. Since the defendant objected to closure, there was a basis for invoking his Sixth Amendment rights, which the Court had previously outlined in *Gannett*. Perhaps it decided as it did because it wanted to move away from its reliance on history. In fact, the Court completely disregarded the traditional practice of closing courtrooms during the testimony of minor rape victims.[158] The Court's holding both cemented in place the First Amend-

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[150] *Id.* at 598. The mandatory closure provisions in this case were sui generis in the United States. *Id.* at 608 n.22.

[151] *Id.* at 599. The Globe Newspaper Company was denied access to both the preliminary hearings and the trial. *Id.* at 598-99.

[152] *Id.* at 600.

[153] *Globe Newspapers*, 457 U.S. at 605-06.

[154] *Id.* at 607.

[155] *Id.* at 607-09.

[156] *Id.* at 609-10.

[157] *Id.* at 610.

[158] *Globe Newspapers*, 457 U.S. at 612-13 (Burger, C.J., dissenting).

ment "presumption of openness"[159] it had espoused in *Richmond Newspapers*, while resting its "right of access" jurisprudence on the new structural prong created therein.

The Court relied on this First Amendment rationale again in the case of a voir dire questioning of prospective jurors. In *Press Enterprise I*,[160] the Court created an even more stringent standard for overcoming the presumption of openness than it had in *Globe*. In this case the defendant was tried and convicted for the rape and murder of a teenage girl.[161] Press Enterprise moved for the voir dire to be open to the public and the press, asserting an absolute right to attend the trial and that the trial commenced with the selection of the jury.[162] The state objected, on the grounds that the press' presence would prevent it from getting candid responses from the prospective members of the jury.[163] The judge closed the voir dire proceedings to the public in order to protect the juror's right of privacy.[164] Thereafter, the trial court continually refused to release the transcripts of the voir dire, even after the trial was over.[165]

Once again, the Court began with a historical review and noted that jury selection has been traditionally open to the public and, therefore, it was presumptively an open proceeding.[166] The Court noted that closure should be rare.[167] It held that the presumption of openness may be overcome only where: (1) there is an overriding interest that may be prejudiced; (2) the closure is not broader than necessary to protect that interest; (3) the trial court has examined possible alternatives to closure; and (4) the court makes specific findings to facilitate appellate review.[168] The Court found that, even

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[159] *Id.* at 610. (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980)).

[160] 464 U.S. 501 (1984).

[161] *Id.* at 503.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 503-05. The voir dire process lasted six weeks, with roughly three days open to the public. *Id.* at 503.

[165] *Press Enterprise I*, 464 U.S. at 503-04.

[166] *Id.* at 505-08. The openness reassured those not attending trials that others were able to observe the proceedings and ensure that justice was being dispensed fairly and would contribute to the overall fairness of the process itself. *Id.*

[167] *Id.* at 509.

[168] *Id.* at 510.

though the right of an accused to fairness in the jury selection process was a compelling interest, the trial court lacked sufficient findings to order protracted closure.[169] Moreover, the trial judge did not consider alternative methods to protect the privacy of the jurors in this case. Without the consideration of alternatives, the closure of the voir dire was unconstitutional.[170]

Press Enterprise I rang the death knell of right of access jurisprudence based on Sixth Amendment principles. The Court seemed to desert the principle that Sixth Amendment rights belonged to the accused. It implicitly found that there is no right higher than the right to a fair trial.[171]

However, the Court would later return to the Sixth Amendment and the issue it faced in *Gannett* in the case of *Waller v. Georgia*.[172] As a result of wiretaps on several phones, thirty-five defendants were indicted and charged with violating the Georgia Racketeer Influenced and Corrupt Organization Act ("RICO"), engaging in commercial gambling, and communicating gambling information.[173] The petitioners and thirteen other defendants moved to suppress the wiretaps as well as other evidence seized during searches.[174] The state moved to close the suppression hearing because publication of the wiretap evidence would cause the evidence to be inadmissible and the content of the tapes involved some persons who were indicted but were not on trial, and other persons who were not yet indicted.[175] Over the defendants' objection, the trial judge ordered the suppression hearing closed to all persons except witnesses, court personnel, the parties and the lawyers.[176] The case was tried in open court and the petition-

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[169] *Id.* at 510-11.

[170] *Press Enterprise I*, 464 U.S. at 511.

[171] *Id.* at 508.

[172] 467 U.S. 39 (1984).

[173] *Id.*

[174] *Id.*

[175] *Id.* at 41-42.

[176] *Id.* at 42. The suppression hearing lasted seven days, but less than two and one half hours were dedicated to playing the wiretap recordings; the rest was dedicated to other evidence. As a result of the hearing, approximately ten boxes of evidence were suppressed and an equal amount were not. Prior to the trial of the remaining persons named in the indictment, the transcript of the suppression hearing was released. *Id.* at 42-43.

ers were found guilty of commercial gambling and communicating gambling information, but acquitted of the RICO charges.[177]

The Court began by eliminating any difference between its prior First Amendment and Sixth Amendment jurisprudence. It announced that the Sixth Amendment standard for access to suppression hearings was the same as the First Amendment right it had developed in the *Richmond Newspapers* line of cases.[178] The Court noted that the principal aim of a criminal proceeding is to see that the accused is treated fairly.[179] Furthermore, the public trial guarantee was created for the benefit of the accused.[180] The Court subsequently reviewed the nature of suppression hearings, this time reaching an opposite conclusion to those it had reached in *Gannett*.[181] It stated that closure objections of the defendant must satisfy the standard it had previously established in *Press Enterprise I*.[182]

Applying that standard to this case, the Court held that the closure of the entire suppression hearing was unjustified.[183] The Court recognized that the interests advanced by the prosecutor could be compelling. However, the state's proffer was not sufficiently precise as to whose rights would be infringed upon, what part of the tapes might infringe upon them, and what percentage of the evidence consisted of the tapes.[184] Therefore, the trial court's conclusions were unnecessarily broad and did not warrant closing the entire hearing.[185] Furthermore, the trial court did not comply with the third prong of

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[177] *Waller*, 467 U.S. at 43.

[178] *Id.* at 45-46.

[179] *Id.* at 46.

[180] *Id.* (quoting Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979)).

[181] *Id.* at 46-47. The Court noted that suppression hearings are often as important as trials themselves. A defendant would often reach a plea agreement after the suppression hearing, therefore, the suppression hearing was often the only "trial" he would receive. Moreover, the Court pointed out that suppression hearings resemble trials in the way they are conducted. The Court concluded that the feature of openness might be particularly important for suppression hearings, because often the methods for obtaining evidence as well as prosecutor and police conduct were challenged. Therefore, the public has an interest in unmasking these allegations. *Id.*

[182] *Waller*, 467 U.S. at 46-47.

[183] *Id.* at 48.

[184] *Id.*

[185] *Id.*

the test, because it did not consider reasonable alternatives to closure.[186] As a result, the Court reversed the decision and remanded with instructions.[187]

The right to a fair trial and an impartial jury is contained in the Sixth Amendment. Furthermore, Sixth Amendment rights are personal to the accused. In this case, whose Sixth Amendment rights were at stake? Certainly the defendants invoked theirs by objecting to closure. Yet, what about the defendants in the subsequent trial? The state certainly had the other defendants in mind when it requested closure, as evidenced by the reasons it gave for its request. The author does not know if the Court could have determined that issue in this case, because the other defendants were not represented, and the issue might have been moot since any prejudice that could have accrued towards them probably occurred when the transcripts of the hearing were released before the other defendants stood trial. However, the Court did not address the issue. This demonstrates how its focus has moved away from fair trials to expanding the right of access at any cost.

The Court's characterization of the value of openness in suppression hearings is perplexing. In this case, the jury could have been exposed to ten boxes worth of evidence. Is the public's interest in uncovering improprieties by the prosecutor and police worth the risk that the jury would be prejudiced? Probably not, if one considers that the public would have the same opportunity to uncover these acts as long as the transcript was released at some later date. Moreover, the Court's determination that the trial court did not consider alternatives short of closure is speculative. The fact that the trial court released the transcripts of the hearing after the current trial suggests that it had, and determined that this was the best alternative.

The Court's assessment of the prosecutor's proffer at the closure hearing is equally questionable. As previously indicated, the prosecutor clearly had the other trials in mind when he attempted to close the hearing. However, if he had released the information sought by the Supreme Court he would have had to release the names of the other defendants whose conversa-

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[186] *Id.*

[187] *Waller*, 467 U.S. at 50.

tions were contained in the tapes. Yet, the Court did not think to inquire into the effect of the defendants' names being associated with the current trial. Significantly, the Court recognized that suppression hearings may be as important or even more important than trials themselves. Therefore, the Sixth Amendment rights of the accused apply to all phases of the case where witnesses may testify and be cross-examined.

Yet, these cases do not address whether prosecution is entitled to closure of a courtroom for other aspects of the proceedings. For example, should the courtroom be closed or should there be a side-bar outside the hearing of the public where the prosecution makes its proffer as to why the hearing or trial should be closed? Should the record that is made be placed under seal or be available to the public at a later time? Should the defendant be permitted to participate in or hear the application? Should the court impose a gag order that would preclude the defendant and defense counsel from leaking or discussing the proffer with the public or the media? Should the court bar defense counsel from discussing the proffer with his/her client?

Rule 43(a) and (b) of the Federal Rules of Criminal Procedure require the defendant's presence at every stage of a criminal case. The right of a defendant to be present for "every stage of his trial is guaranteed by the Confrontation Clause of the Sixth Amendment and is binding on the states under the Fourteenth Amendment."[188] Rule 43 has codified the defendant's common law and constitutional rights to be present throughout a trial.[189] Therefore, any encroachment on those rights may include a closure of the courtroom, in whole or in part. Is the right of confrontation obliterated only when the public and the defendant cannot see the witness? Or, does the right apply only to what may be heard from testimony. Is the right of confrontation or the public's right of access implicated when the identity of a witness is concealed?

The Court returned to the First Amendment and applied its previously enunciated standards in *Press Enterprise II*.[190]

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[188] *See* 3A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 721 (2d ed. 1982).

[189] *See* Illinois v. Allen, 397 U.S. 337 (1970); Faretta v. California, 422 U.S. 806 (1975).

[190] 478 U.S. 1, 2 (1986).

The defendant, Robert Diaz, was charged with twelve counts of murder for allegedly injecting patients with the heart drug lidocaine while he was a nurse.[191] The defendant moved to exclude the public from the preliminary hearing based on a California statute which presumes openness, but allows closure to protect the defendant's right to a fair trial.[192] The magistrate granted the unopposed motion, finding that there was a threat to the defendant's rights because the case had attracted national attention.[193] The preliminary hearing lasted forty-one days.[194] The defendant did not offer any evidence but his counsel cross-examined the witnesses.[195] After the hearing had ended, Press Enterprise sought the release of the transcript.[196] The magistrate denied the request and sealed the record of the hearing.[197]

The state moved in Superior Court to have the transcript released to the public and Press Enterprise later joined in support of the motion.[198] The defendant opposed the motion on the grounds that release of the transcript would cause prejudicial pretrial publicity.[199] The Superior Court held that there was a reasonable likelihood of prejudice that would deny the defendant a fair trial.[200] At approximately the same time, the defendant waived his right to a jury trial and the Superior Court released the transcript.[201] The California Supreme Court concluded that there was no general right of access to preliminary hearings because *Press Enterprise I* and *Globe* applied only to trials.[202] Furthermore, in those cases, the reasons for requesting closure were different from the defendant's assertion of his fair trial rights.[203]

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[191] *Id.* at 3.
[192] *Id.* at 3-4.
[193] *Id.* at 4.
[194] *Id.* The testimony at the hearing was mostly medical and scientific, the remainder consisting of the testimony of co-workers who had worked the shifts with Diaz when the patients died. *Id.*
[195] *Press Enterprise II*, 478 U.S. at 4.
[196] *Id.* at 4-5.
[197] *Id.* at 5.
[198] *Id.*
[199] *Id.*
[200] *Press Enterprise II*, 478 U.S. at 5.
[201] *Id.*
[202] *Id.*
[203] *Id.*

The Supreme Court started with the structural assessment it had previously made in *Richmond Newspapers* and its progeny; a defendant has a right to a fair trial and an important way to assure that right is to allow the proceedings to be open to the public.[204] Next, the Court stated that it would move forward on First Amendment grounds because, although this was not in fact a trial, a determination of the rights of the parties involved in the proceeding did not depend on how the proceeding itself was labeled.[205] It concluded that the methods used to conduct preliminary hearings in California were so similar to trials that openness would further several goals.[206] Based on this analysis, the Court concluded that the qualified First Amendment right to access applied, and could only be overcome by passing the standard established in *Press Enterprise I*.[207]

The Court found that the California Supreme Court did not apply the proper test for the first prong of the *Press Enterprise I* standard.[208] It found that by requiring only a reasonable likelihood of prejudice, the California court placed a lower burden on the defendant than is called for under the First Amendment's substantial probability test.[209] After observing that pretrial publicity could create the risk of an unfair trial, the Court concluded that the risk did not warrant automatic closure.[210] Reiterating the mandate in *Sheppard*, the Court suggested other alternatives that the trial court could have used, short of closure.[211] Furthermore, even if it justified closure, closing the entire forty-one day hearing was not narrowly

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[204] *Id.* at 7.

[205] *Press Enterprise II*, 478 U.S. at 7.

[206] *Id.* at 12-13. The Court defined those goals as: (1) since the preliminary hearing was often the only hearing, it would be the only opportunity for public surveillance; (2) the lack of a jury at preliminary hearings made public access all the more crucial because of the role the public plays in guarding against misconduct by the prosecutor and judge; and (3) denying the public the transcript of the hearing frustrates the "therapeutic value" of openness. *Id.*

[207] *Id.* at 13-14.

[208] *Id.* at 14.

[209] *Id.*

[210] *Press Enterprise II*, 478 U.S. at 14-15.

[211] *Id.*

tailored to serve that interest.[212] Accordingly, the Court reversed the judgment of the California Supreme Court.[213]

In discussing the possibility of a Sixth Amendment right of the public to attend a suppression hearing, the *Gannett* majority concluded that, at common law, there is no evidence that the public has any right to attend pretrial proceedings. In fact, it found substantial evidence to the contrary. However, here, the Court looked more to the common practice of open preliminary hearings, and then fabricated the existence of some specifically recognized legal right of access.

Moreover, the Court failed to acknowledge the purpose of the preliminary hearing at issue: to determine reasonable cause, not guilt. However, the Court also failed to address the consequences of forty-one days of press coverage followed by the defendant being held for trial. Could the public, unschooled in the legal differences between probable cause and guilt, have confused the magistrate's decision to hold the defendant over for trial based on probable cause with a determination of guilt?

III. THE LOWER COURTS

Lower courts have interpreted this muddled right of access doctrine broadly. Based on *Richmond Newspapers* and its progeny, these courts have extended the right of access to: suppression hearings,[214] bail hearings,[215] sentencing hearings,[216] change of venue hearings,[217] plea hearings,[218] contempt hearings,[219] pretrial ex parte recusal hearings,[220] post conviction proceedings,[221] parole revocation proceedings,[222] pa-

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[212] *Id.* at 15.

[213] *Id.*

[214] *In re* Application of Herald Co., 734 F.2d 93, 99-100 (2d Cir. 1984); United States v. Brooklier, 685 F.2d 1162, 1169-71 (9th Cir. 1982).

[215] United States v. Chagra, 701 F.2d 354, 361-65 (5th Cir. 1983).

[216] United States v. Byrd, 20 Media L. Rep. 1804 (D.S.C. 1992).

[217] Charlotte Observer v. Bakker, 882 F.2d 850, 852-53 (4th Cir. 1989).

[218] *In re* Washington Post Co., 807 F.2d 383, 389-90 (4th Cir. 1986).

[219] *In re* Iowa Freedom of Info. Council, 724 F.2d 658 (8th Cir. 1983).

[220] Storer Communications v. Presser, 828 F.2d 330 (6th Cir. 1987).

[221] CBS, Inc. v. United States Dist. Court, 765 F.2d 823 (9th Cir. 1985).

[222] Herald Co. v. Board of Parole, 131 Misc. 2d 36, 499 N.Y.S.2d 301 (N.Y. Sup. Ct. 1985).

role release hearings,[223] executions,[224] bench conferences,[225] chambers conferences,[226] juvenile proceedings,[227] court martials,[228] civil case proceedings,[229] preliminary injunction proceedings,[230] and closure proceedings.[231] Instead of exercising the restraint Justice Brennan called for in *Richmond*, courts have thrown the courtroom doors wide open. However, as the following analysis of New York law and the opinions of the Second Circuit will demonstrate, this has not always led to consistent application.

A. *The Second Circuit*

In *Herald Co. v. Klepfer*,[232] the charges against the defendant arose from a Federal Bureau of Investigation background check of Raymond J. Donovan, President Reagan's nominee for Secretary of Labor.[233] The defendant filed several motions to suppress oral statements made to federal investigators. The motions were heard in open court and denied. Subsequently, defendant was granted permission to file supplemental suppression motions.[234] The new motions, filed under seal, renewed the motions to suppress and contained a motion to exclude the public from the suppression hearing. The government opposed the motion for closure, because it felt all information contained therein had already been made public at the prior hearing.[235] The district court judge granted the defendant's request for closure, citing *Gannett* and stating that the potential for harm outweighed the right of the public to attend the hearing.[236]

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[223] Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983).

[224] KQED, Inc. v. Vasquez, 11 Media L. Rep. 2323 (N.D. Cal. 1991).

[225] United States v. Valenti, 987 F.2d. 708 (11th Cir. 1993).

[226] CNN v. United States, 824 F.2d 1046 (D.C. Cir. 1987).

[227] *In re* Chase, 112 Misc. 2d 436, 446 N.Y.S.2d 1000 (N.Y. Fam. Ct. 1982).

[228] United States v. Hershey, 20 M.J. 433 (C.M.A. 1985).

[229] Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).

[230] Stanley Works v. Newell Co., 21 Media L. Rep. 1120 (D. Conn 1993).

[231] Storer Communications v. Presser, 828 F.2d 330 (6th Cir. 1987).

[232] 734 F.2d 93 (2d Cir. 1984).

[233] The defendant was charged with having made false statements concerning Donovan to the FBI and a special prosecutor. *Id.* at 95.

[234] *Id.*

[235] *Id.* At this time, the Herald Company joined the government in opposing the motion to close the proceedings. *Id.*

[236] *Id.* at 95-96. The hearing, lasting four days, was conducted in a closed court-

The Second Circuit began by distinguishing this case from *Nebraska Press Association*,[237] and casting the issue in the more general terms of whether the public and press had a First Amendment right to attend suppression hearings.[238] After a detailed review of *Press Enterprise I*, *Globe*, *Richmond Newspapers* and *Gannett*, the court noted the Supreme Court's shift from a historical to a structural argument which strongly suggests that there is a First Amendment right of access to pretrial proceedings.[239]

The court decided that closure of a suppression hearing could be overcome upon a showing of significant risk of prejudice to the defendant's fair trial rights; and that closure should be tailored as narrowly as possible to prevent those risks.[240] Stating that closure does not need to be the least restrictive means possible to protect the defendant's rights, the Second Circuit went on to note that the trial judge had an affirmative duty to consider alternatives.[241] Moreover, the court is required to give some form of notice so that the parties seeking access have an opportunity to express their objections to closure.[242]

The next time the Second Circuit addressed closure within the context of a suppression hearing was in *New York Times Co. v. Biaggi*.[243] The defendants filed sealed motions to suppress and the trial judge granted the motions and ordered that the motion papers be kept under seal.[244] The court began by recognizing that the public had a qualified First Amendment right of access to criminal proceedings; it then extended this qualified right to the suppression hearing.[245] However, it noted that the blanket closure order was not narrowly drawn to

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room. *Id.* at 95.

[237] The court did this by noting that this case did not concern the ability of the trial court to prevent publication information already in its possession. *Herald*, 734 F.2d at 95.

[238] *Id.*

[239] *Id.* at 97-98.

[240] *Id.* at 100.

[241] *Id.*

[242] *Herald*, 734 F.2d at 101.

[243] 828 F.2d 110 (2d Cir. 1987).

[244] *Id.* at 111-13.

[245] *Id.* at 113-14.

protect the defendant's interests, vacated the order, and remanded.[246]

The final case where the Second Circuit had an opportunity to address pretrial hearings was *United States v. Cojab*.[247] The petitioner and several other news organizations covered the investigation, arrest and court proceedings involving the defendant, who had been implicated in a drug ring murder.[248] The petitioner complained about a prior pretrial hearing which was closed to the public and where the transcript had been sealed.[249] The petitioner reasoned that since information contained in the news coverage was public, no further harm could occur from a disclosure of the same facts contained in the pretrial hearing.[250] The defendant and the government opposed the motion, both filing memoranda under seal.[251]

The Court began its analysis by noting that the press' right to attend criminal tribunals should not be allowed to override a defendant's right to receive a fair trial from an impartial jury, and that it is within a court's discretion to close a courtroom and seal the records to protect the defendant's fair trial rights.[252] Where the defendant and government seek closure of a trial and the sealing of the records, they must demonstrate that the press is likely to prejudice the fair trial guarantee and that the closure is narrowly tailored to further those interests.[253] Moreover, the trial court's findings supporting closure must be in sufficient detail for an appellate court reviewing the closure order to be able to determine whether it was properly entered.[254]

The Second Circuit also addressed the propriety of closing a criminal trial during a witness' testimony in *Woods v.*

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[246] *Id.* at 114-16.

[247] 996 F.2d 1404 (2d Cir. 1993).

[248] *Id.* at 1406-07.

[249] *Id.* at 1405. As far as the petitioner was aware, there was no public notice announcing that the government had moved to close the hearing or seal the record and that no member of the press was given an opportunity to contest the closure. *Id.* at 1405-06.

[250] *Id.* at 1406.

[251] *Id.*

[252] *Cojab*, 996 F.2d at 1405.

[253] *Id.* at 1407-08.

[254] *Id.* at 1408.

Kuhlmann.[255] In this case, a witness for the state was to testify that she observed the defendant Woods inflict violence on the victim.[256] The prosecutor asked the trial judge to close the courtroom while the witness was testifying, after the witness informed the court that a member of the defendant's family had approached her and threatened her with physical violence if she testified.[257] The trial judge granted the prosecutor's request and excluded all members of the defendant's family from the courtroom during the testimony.[258]

The court applied the standard developed by the Supreme Court in *Waller* regarding the defendant's Sixth Amendment rights.[259] However, in applying the first prong of the *Waller* test, the court adopted the same standard as that in the Ninth, Tenth and Eleventh Circuits; closure of the court was permissible on a "substantial reason" basis, rather than on *Waller's* "overriding interest" grounds.[260] The court reasoned that the standard was justified because the prosecutor was only requesting a partial closure not the total closure as that which occurred in *Waller*.[261] Thereafter, the court determined that the prosecution had satisfied the "substantial reason" criteria to exclude members of the defendant's family and concluded that it satisfied the rest of the *Waller* test.[262]

The Second Circuit addressed the same issue in *Vidal v. Williams*.[263] There, the defendant was charged with selling a controlled substance and arrested in a buy-and-bust operation.[264] As the undercover officer was about to testify, the prosecution requested that the judge close the courtroom in order to protect the identity of the undercover officer, because the officer was still operating in the vicinity where defendant

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[255] 977 F.2d 74 (2d Cir. 1992).

[256] *Id.*

[257] *Id.* at 74-75. Immediately before the witness testified, the trial judge briefly asked her if she had any fear for her or her family's safety and the witness responded that she did. *Id.* at 75.

[258] *Id.*

[259] *Id.* at 76.

[260] *Woods*, 977 F.2d at 76.

[261] *Id.*

[262] *Id.* at 77-78.

[263] 31 F.3d 67 (2d Cir. 1994).

[264] *Id.* at 68.

had been arrested.[265] The defense counsel requested that the accused's parents, who were present at the time, be allowed to remain in the courtroom during the undercover officer's testimony.[266] The court granted the prosecution's request and closed the courtroom.[267]

At issue in this case was the second prong of the *Waller* test: whether the exclusion of the defendant's parents was no broader than necessary in order to protect that interest.[268] Based on the record, the court determined that in this particular case such closure was overly broad, and unnecessary to protect the undercover's identity.[269] Moreover, the trial court was unable to meet the third prong of the *Waller* test because it gave no consideration to less restrictive alternatives.[270]

Finally, the court again addressed this issue again in *Guzman v. Scully*.[271] During the trial, prior to cross-examination of a prosecution witness, the state requested that the trial court exclude four women who were apparently either members of the defendant's family or his friends.[272] Based on a brief inquiry, the trial court granted the prosecution's request in order to facilitate the witness's ability to testify without fear or concern for her safety.[273]

The court began by noting that the trial court had not specifically asked the witness about the nature of his fear. Thus, it was unable to evaluate whether it was an "overriding interest" within the meaning of *Waller*, or at least a "substantial reason" within the meaning of *Woods*.[274] The court held that this violated the defendant's rights to a public trial, because by relying on the unsubstantiated statements of the prosecutor rather than conducting an inquiry of its own, the trial court could not be sure whether the state had proffered a

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[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Vidal*, 31 F.3d at 69.
[269] *Id.*
[270] *Id.*
[271] 80 F.3d 772 (2d Cir. 1996).
[272] *Id.* at 774. These spectators had not been present in the courtroom the previous day, when the witness completed his direct testimony. *Id.* at 774 n.1.
[273] *Id.* at 774.
[274] *Id.* at 775.

reason sufficient to justify closure.[275] Moreover, since the satisfaction of the first prong is questionable, it necessarily follows that the court was uncertain as to the application of the other prongs of the *Waller* test.

With this arsenal of cases in hand, the Second Circuit decided *Ayala v. Speckard*.[276] In *Ayala*, the defendant was arrested in a buy-and-bust operation in Bronx County, New York.[277] During the trial, the prosecutor requested that the courtroom be closed during the testimony of an undercover police officer who was the principle witness at the trial. Similar to the concerns presented in *Vidal*, closure was requested in order to protect the undercover officer's safety as well as to ensure the effectiveness of the officer's future undercover operations.[278] The state court judge granted the closure.[279]

The court began its analysis by noting that the Sixth Amendment right to a public trial is not absolute and that the Supreme Court had advanced a presumption of openness for policy reasons.[280] Applying the first prong of the *Waller* test, the court concluded that the state failed to meet its burden.[281] The court recognized that the state has an overriding interest in the safety and anonymity of its undercover officers.[282] However, the state failed to demonstrate a sufficient nexus between the officer's testimony and the danger that testifying in open court would blow his cover.[283] The court felt that the mere possibility that he would be discovered did not overcome the defendant's constitutional right to a public trial.[284]

The court recognized the larger picture. Affirming the state court's decision would have created a per se rule of closure, which the Supreme Court had rejected in *Globe*. This could not be sanctioned in light of the presumption of openness

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[275] *Id.*
[276] 89 F.3d 91 (2d Cir. 1996).
[277] *Id.* at 92.
[278] *Id.*
[279] *Id.* at 93.
[280] *Id.* at 94.
[281] *Ayala*, 89 F.3d at 95.
[282] *Id.*
[283] *Id.*
[284] *Id.* at 95-96.

and the high hurdle erected for closure.[285] Moreover, the court demonstrated that closure was possible if the state was able to show, with specificity, a sufficient nexus between the officer's testimony and direct threats to his safety.[286] In dicta, the court noted that the trial judge had not considered alternatives to closure during the undercover's testimony even though the trial court had an affirmative obligation to consider reasonable alternatives to closure.[287]

Upon rehearing,[288] the court stated that in its original opinion it had straightforwardly applied the standard enunciated by the Supreme Court.[289] However, the court would address a different interest proffered by the state: an interest in preserving the capability of law enforcement personnel operating in an undercover capacity.[290] However, it did not address this issue, finding instead that the same conclusion could be reached based on *Waller*'s directive to the trial court to sua sponte consider alternatives to closure.[291]

The Second Circuit listed five separate reasons for this contention. First, it looked to the specific language in *Waller*. It noted that in *Waller* the defendant had raised only a general objection to closure. Therefore, when the Supreme Court raised the issue of alternatives itself, it meant that the consideration of alternatives was part of a trial judge's affirmative obligation.[292]

Second, it articulated that the Supreme Court had adopted a standard concerning the right of access; that is, since *Richmond Newspapers*, the Court recognized a qualified First Amendment right of access, and in *Waller*, as the author has noted *supra*, it applied the same standard to a Sixth Amendment claim. Moreover, the Second Circuit noted that *Press Enterprise II* had been reversed in part for the failure of the trial judge to consider alternatives to closure.[293]

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[285] *Id.* at 96.
[286] *Ayala*, 89 F.3d at 96.
[287] *Id.*
[288] Ayala v. Speckard, 102 F.3d 649 (2d Cir. 1996).
[289] *Id.* at 652.
[290] *Id.*
[291] *Id.*
[292] *Id.* at 653.
[293] *Ayala*, 102 F.3d at 653.

Third, the Court noted that orders must be narrowly tailored to serve the compelling interests that precipitated closure.[294] Implicit in that command was the fact that trial courts must consider alternatives. Moreover, the Court stated that it would be "odd" to have the defendant suggest alternatives to closure to preserve his own constitutional right to a public trial.[295] Fourth, the Court noted that there were many alternatives that easily could have been employed but were never considered by the trial court.[296] Finally, the Court invoked the presumption of openness established by the Supreme Court.[297] If that presumption was to have any substance, the trial court must employ all reasonable steps short of closure, even if it must have raised them sua sponte.[298]

In its suggested alternatives to full closure, partial closure of the courtroom was also an apparent compromise. The *Ayala* Court noted that trial judges might consider: (1) a strategically placed chalkboard; or (2) asking defendants whom they wished to remain in the courtroom; and (3) compelling the prosecution to show cause why any such persons should not be present; and (4) the possibility of disguising the witness, including giving him an altered voice by the use of a technical device capable of modifying the distinctive qualities of a person's speech.

Naturally, all of this hocus pocus is not without serious flaws. For example, the very act of asking the defendant who he or she wants in the courtroom may have a chilling effect on that defendant, the defense and the friends, family and others that the defendant may wish to attend. The alternatives suggested by the court in *Ayala* are in some respects more like a screen test at central casting. Before long, courtroom observers will have to submit to questionnaires, fingerprinting and photographs before they are allowed into the courtroom. In releasing their names and confirming their identities, they may, in some cases, inculpate themselves or those named. Additionally, charges such as conspiracy or money laundering, if they are benefactors of the defendant or otherwise aligned with the case or being sought in connection with another investigation may

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[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.* at 654.
[298] *Ayala*, 102 F.3d at 654.

be brought. Will the courtroom observers be compelled to prove their citizenship and produce dates of birth and social security numbers? Will the prosecution then perform criminal background checks on them or otherwise investigate them? Will it check with the INS regarding possible deportation or Department of Immigration detainers? Does this compulsory process to obtain public access to the courtroom suggest violations of the First Amendment's Freedom of Association Clause or the defendant's right to assert the Fifth Amendment? If asked about whom he would like in the courtroom, can a defendant stand mute or be compelled to assert the Fifth Amendment? If he does the latter, may his observers remain in the courtroom?

How should the courtroom be closed? Should the entire public be excluded? Should the jury and defendant see the witness's face or should there be a screen instead? If there is a screen, how does this affect the defendant's right of confrontation? How does this ominous setting impact jurors, especially if they are not permitted to see the witness's facial features and body language in response to questions? If a defendant is permitted to see the witness's face, he may be able to sketch it or describe it. Does his silence reflect consciousness of guilt?

B. *New York State*

The Court of Appeals of New York has had the opportunity to address the issue of access to pretrial hearings in its decision in *Gannett Co. v. DePasquale*.[299] *Gannett* dealt with a pretrial suppression hearing in a highly publicized murder trial in upstate New York.[300] Judge Wachtler, writing for the majority, stressed the presumption of openness in criminal proceedings. However, he noted that this is not an absolute right. Although the rights embodied in the Sixth Amendment belong to the defendant, he recognized that the public has interests in criminal proceedings.[301] However, the assumption that the public has such interests is based on the notion that those interests will not pose a threat to the integrity of the trial.[302] To that end, a judge, having an affirmative obligation

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[299] 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).
[300] *See id.* at 374-75, 372 N.E.2d at 546-47, 401 N.Y.S.2d at 758-59.
[301] *Id.* at 376, 372 N.E.2d at 547-48, 401 N.Y.S.2d at 759.
[302] *Id.* at 377, 372 N.E.2d at 548, 401 N.Y.S.2d at 760. *See also*, Estes v. Texas,

to ensure a balance of interests, needs the discretionary power to achieve that balance.[303]

In a suppression hearing, the trial judge's duty is to see that inadmissible evidence is not brought to the public eye.[304] Moreover, to allow the public to discover this evidence implicates the judge in potentially unconstitutional behavior.[305] The trial judge should give the public and press an opportunity for its interests to be heard. However, the fact that the transcripts were made available in this case satisfied the public's right to know and the defendant's right to a fair trial.[306]

The Court of Appeals had to consider the right of access to criminal proceedings in the pretrial context in *Westchester Rockland Newspapers, Inc. v. Leggit*.[307] This case concerned the rape and sexual assault of several girls and young women.[308] The defense counsel requested a preliminary hearing to determine whether the defendant was mentally fit to stand trial.[309] Before any testimony was given at this hearing, the defense counsel requested that the public and press be excluded throughout the hearing because pretrial reporting of the defendant's mental condition could prejudice his trial.[310] The district attorney did not oppose the defense counsel's motion,[311] and the court granted it.[312]

After noting the advantages of open proceedings, the Court of Appeals stated that media exposure does not always ensure a fair trial.[313] Pretrial suppression hearings often deal with evidence that is highly prejudicial and often not admissible; the court may therefore strike a balance in favor of the accused.[314] However, mental capacity hearings are not used to

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381 U.S. 532, 538 (1965); Craig v. Harney, 331 U.S. 367, 377 (1947).

[303] *DePasquale*, 43 N.Y.2d at 378, 372 N.E.2d at 548, 401 N.Y.S.2d at 761.

[304] *Id.* at 378-79, 372 N.E.2d at 549, 401 N.Y.S.2d at 761. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 351 (1966).

[305] *DePasquale*, 43 N.Y.2d at 380, 372 N.E.2d at 550, 401 N.Y.S.2d at 762.

[306] *Id.* at 381, 372 N.E.2d at 550-51, 401 N.Y.S.2d at 763.

[307] 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979).

[308] *Id.* at 435, 399 N.E.2d at 520, 423 N.Y.S.2d at 632.

[309] *Id.*

[310] *Id.* Furthermore, if he later chose not to use an insanity defense, potential jurors may have already learned of the defendant's mental problems. *Id.*

[311] *Id.*

[312] *Leggit*, 48 N.Y.2d at 436, 399 N.E.2d at 521, 423 N.Y.S.2d at 633.

[313] *Id.* at 437-38, 399 N.E.2d at 521-22, 423 N.Y.S.2d at 634-35.

[314] *Id.* at 439, 399 N.E.2d at 522, 423 N.Y.S.2d at 635.

establish innocence or guilt, therefore, the court cannot assume that public access to this hearing will endanger the defendant's fair trial rights.[315] Thus, if such a risk is possible, the defendant has a burden to establish it. The court concluded that the defendant failed to make this showing;[316] therefore, there was no sufficient basis to deny the public the right to attend the hearing.[317]

The Court of Appeals addressed the pretrial setting again in *Associated Press v. Bell*.[318] This was the well-known case concerning Robert Chambers, who was charged with the murder of Jennifer Levin while engaging in sexual intercourse in Central Park.[319] On the eve of the defendant's *Huntley* hearing, the defendant moved to close the courtroom on the grounds that any suppressed statements would threaten the partiality of a jury. The People objected to the closure, arguing that the substance of the defendant's statements had already been disclosed to the public.[320] The trial court granted the defendant's request on the grounds that such disclosure would prejudice potential jurors.[321] However, the court made no specific findings as to the nature or content of any non-public statements, the prejudice that closure would prevent, or any alternatives to closure.[322] The press immediately challenged the determination, and the appellate division granted its request.[323]

After noting that the Supreme Court had not specifically addressed the First Amendment right of access to pretrial hearings, the Court of Appeals noted that it had addressed a Sixth Amendment right, albeit one where the defendant opposed closure.[324] The court noted the interests in access to suppression hearings, namely, the defendant's interest in not exposing jurors to inadmissible and highly prejudicial evidence,

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[315] *Id.* at 441, 399 N.E.2d at 524, 423 N.Y.S.2d at 636-37.
[316] *Id.* at 441-42, 399 N.E.2d at 525-26, 423 N.Y.S.2d at 637.
[317] *Leggit*, 48 N.Y.2d at 443, 399 N.E.2d at 526, 423 N.Y.S.2d at 638.
[318] 70 N.Y.2d 32, 510 N.E.2d 313, 517 N.Y.S.2d 444 (1987).
[319] *Id.* at 35, 510 N.E.2d at 314, 517 N.Y.S.2d at 445.
[320] *Id.*
[321] *Id.* at 36, 510 N.E.2d at 315, 517 N.Y.S.2d at 446.
[322] *Id.*
[323] *Bell*, 70 N.Y.2d at 36, 510 N.E.2d at 315, 517 N.Y.S.2d at 446.
[324] *Id.* at 37-38, 510 N.E.2d at 316, 517 N.Y.S.2d at 447. *See also* Waller v. Georgia, 467 U.S. 39 (1984).

and the public's interest in scrutinizing the actions of the police and prosecutor.[325] The court concluded that the risk of prejudice could not excuse complete denials of public access; therefore, the defendant had the burden of supporting his motion for closure by demonstrating, with specific findings, that (1) there would be a substantial probability of prejudice; (2) that closure would have prevented that prejudice; and (3) that reasonable alternatives could not protect the defendant's right to a fair trial.[326]

The Court of Appeals has taken a slightly different approach in cases involving exclusion of the public and press during trials. Following the Supreme Court's decision in *Richmond Newspapers*, the court addressed the pretrial context in *Poughkeepsie Newspapers, Inc. v. Rosenblatt*.[327] In that case, the People sought to introduce evidence of the defendant's prior bad acts during the trial.[328] The defense objected and requested that a hearing be held out of the presence of the jury and closed to the public.[329] The trial judge granted the defense counsel's application and ordered the public excluded.[330]

The Court of Appeals noted that this was an unusual case, because the effect of inadmissible information is potentially more damaging, since remedies to exclude jurors exposed to this information are unavailable.[331] Therefore, the court held that the trial judge's actions were proper.[332] Moreover, by releasing redacted transcripts, the trial judge satisfied any First Amendment concerns raised by the press.[333]

In the case of trials where a party is seeking the partial closure of the trial for the testimony of a particular witness, there are different policy implications. For instance, the Court of Appeals has addressed several cases where the victim of a rape or sexual assault has sought to exclude the public or press. From its holdings in these cases we can establish that it

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[325] *Bell*, 70 N.Y.2d at 38, 510 N.E.2d at 316, 517 N.Y.S.2d at 447.
[326] *Id.* at 38-39, 510 N.E.2d at 317, 517 N.Y.S.2d at 448.
[327] 92 A.D.2d 232, 459 N.Y.S.2d 857 (2d Dept. 1983).
[328] *Id.* at 233, 459 N.Y.S.2d at 858.
[329] *Id.* at 233, 459 N.Y.S.2d at 858.
[330] *Id.* at 233, 459 N.Y.S.2d at 858.
[331] *Id.* at 233, 459 N.Y.S.2d at 858.
[332] *Poughkeepsie Newspapers*, 92 A.D.2d at 235, 459 N.Y.S.2d at 851.
[333] *Id.* at 237, 459 N.Y.S.2d at 860.

is permissible to close the court even when no one is present at the time,[334] or where the only spectators are the defendant's family and friends.[335] This has been justified on the grounds that it aids in the fact-finding process.[336] However, the court has stressed on several occasions that this use of the judge's discretion should not be taken lightly.[337] Therefore, it has placed on judges the affirmative obligation of inquiry into the exact nature of the witness' proffered reasons for closure.[338]

In the case of undercover officers, a whole new set of considerations arise. Balanced against the defendant's public trial right is the undercover police officer's concerns for his own safety as well as his continued ability to operate in those situations.[339] In such cases, the burden is on the state to establish a specific threat to the police officer.[340] Moreover, it is the judge's obligation to make specific inquiry into both the nature of the threat as well as the police officer's current duties in order to determine if closure is justified.[341] It has been the opinion of the Court of Appeals that this type of information satisfies the test in *Waller*.[342]

Against this backdrop, the New York Court of Appeals heard the case of *People v. Ramos*.[343] In this case, the defendant was arrested in a buy-and-bust operation, and, after a jury trial, was convicted of criminal sale of a controlled substance in the third degree.[344] The trial court closed the courtroom during the undercover agent's testimony.[345] The officer

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[334] People v. Glover, 60 N.Y.2d 783, 785, 457 N.E.2d 783, 784, 469 N.Y.S.2d 677, 678 (1983).

[335] People v. Joseph, 59 N.Y.2d 496, 499, 452 N.E.2d 1243, 1245, 465 N.Y.S.2d 915, 917 (1983).

[336] *Id.* at 499, 452 N.E.2d at 1245, 465 N.Y.S.2d at 917.

[337] People v. Clemons, 78 N.Y.2d 48, 52, 574 N.E.2d 1039, 1041, 571 N.Y.S.2d 433, 435 (1991).

[338] *Id.* at 52, 574 N.E.2d at 1041, 571 N.Y.S.2d at 435. *See also* People v. Mateo, 73 N.Y.2d 928, 929-30, 536 N.E.2d 1146, 1146-47, 539 N.Y.S.2d 727, 727-28 (1989).

[339] People v. Pearson, 82 N.Y.2d 436, 440-41, 624 N.E.2d 1027, 1029-30, 604 N.Y.S.2d 932, 934-35 (1993).

[340] *Id.* at 442-43, 624 N.E.2d at 1030-31, 604 N.Y.S.2d at 935.

[341] *Id.* at 443, 624 N.E.2d at 1031, 604 N.Y.S.2d at 936.

[342] *See* Waller v. Georgia, 467 U.S. 39, 47 (1984).

[343] 1997 WL 362871 (1997). The case was heard with a companion case *People v. Ayala*.

[344] People v. Ayala, 232 A.D.2d 312, 649 N.Y.S.2d 131 (1st Dept. 1996).

[345] *Id.*

had testified at a *Hinton* hearing that he was currently engaged in undercover operations in the area where he arrested the defendant, that the area was accessible to the courthouse, and that he (the officer), feared for his safety.[346] Moreover, the officer testified that he had previously been threatened outside the very same courthouse in an unrelated drug case.[347] The Appellate Division, First Department, affirmed the trial court's closure order and also held that the trial judge was not obligated to sua sponte consider alternatives to closure.[348]

Applying the first prong of the *Waller* test, the Court of Appeals concluded that by identifying certain precincts in which the undercover officer was recently active and expected to return imminently was sufficiently specific to demonstrate an overriding interest.[349] It reasoned that police officers cannot always have advance notice of the precise location to which they will be assigned, and the officer's specification of certain precincts was akin to identifying the particular neighborhoods in which he continued to be active.[350] Therefore, the record demonstrated a sufficient link between testifying in open court and being recognized by residents of those neighborhoods in which the officer worked undercover.[351] Moreover, the fact that the officer used a private entrance to enter the courtroom confirmed his claim that he feared being identified.[352]

Next, the court moved on to alternatives to closing the proceeding. First, it noted that *Waller* requires the trial court to consider reasonable alternatives to closure, and that the Second Circuit had concluded that this imposes an affirmative duty on trial courts to raise alternatives sua sponte and place their consideration of them on the record.[353] However, the Court of Appeals questioned whether *Waller* held that a trial

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[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] *Ramos*, 1997 WL 362871, *26-27. The overriding interest being that testifying in open court would compromise his effectiveness as an undercover and threaten his safety. *Id.* at *28.

[350] *Id.* at *27.

[351] *Id.*

[352] *Id.* at *27-28.

[353] *Id.* at *28. *See* Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1838 (1997).

court must consider alternatives on the record, or whether it addressed the issue of who had the burden of suggesting possible alternatives.[354]

The court concluded that *Waller* merely required that the trial court's factual findings be sufficient to support the closure.[355] It reasoned that only those parts of the proceedings that endangered the interests advanced could be closed. Therefore, the need to restrict closure further would be apparent from the record and the obligation to consider "alternatives" to accomplish this was inherent in the court's duty to ensure that the closure be narrowly tailored to protect those interests.[356]

On the record of the case, the Court of Appeals concluded that there were findings adequate to support closure during the entirety of the undercover's testimony, and that it could be implied that the trial court, in ordering closure, determined that no lesser alternative would protect the articulated interest.[357] The court noted that the defendant could suggest alternative measures for the court to consider.[358] The court was concerned that a sua sponte rule would place a heavy burden on trial courts, particularly in buy-and-bust cases, because a defendant on appeal could likely conjure up another method of concealing the witness's identity that the trial court overlooked.[359] Moreover, the procedure ultimately selected might not be considered reasonable by the trial court or the particular defendant, and their imposition sua sponte could raise other fair trial concerns.[360]

What is most interesting about this opinion is that the Court of Appeals qualified this decision by saying that the holding did not "constitute a green light for closing courtrooms in all buy-and-bust cases," and went on to condemn the routine practice of closing the courtroom during the testimony of undercover officers.[361] It appears to the author that it did so be-

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[354] *Ramos*, 1997 WL 362871, at *32.

[355] *Id. See* Waller v. Georgia, 467 U.S. 39, 48 (1984).

[356] *Ramos*, 1997 WL 362871 at *32.

[357] *Id.* at *34.

[358] *Id.* However, the burden would be on the defendant to show to the court's satisfaction that they would eliminate the dangers shown. *Id.*

[359] *Id.* at *36-37.

[360] *Id.* at *37.

[361] *Ramos*, 1997 WL 362871 at *37-38.

cause it understood the practical realities of criminal trial practice: faced with a possible sacrifice of his testimony and safety, a police officer will suggest more particularized fears in light of the fact that a generalized concern for safety will not rise to the level of a compelling interest. However, instead of demanding a more solid nexus between the testimony in open court and the particularized interest, thus demanding a more probative judicial inquiry, the Court of Appeals appeared willing to justify closure on the threadbare facts before it.

The Court of Appeals did not seek answers to the following questions, among others: Is there a connection between the previous case in which the officer was threatened and the current one? Has the officer received other threats since the previous case relating to other testimony he has given? Moreover, the question arises as to whether the officer or other court personnel have been able to identify anyone attending the current trial connected to the defendant that would pose a threat to the safety to the officer. Can the People proffer evidence that the current defendant is part of a larger organization that would seek to injure the officer?

If the answers to the above questions are in the affirmative, this would rise to the level of a compelling interest sufficient to justify closure.[362] If the People and the officer cannot answer yes to the above questions or establish a more particularized connection between the officer's testimony in open court and harm to the officer in some other way, the trial court should reject the closure motion.

The Court of Appeals ignored the fact that the third and fourth prongs of the *Waller* test work together to protect the defendant's right to a public trial. The court explained that, the fourth prong, which commands the trial court to make specific findings in order to facilitate appellate review, accents the third prong, which instructs the trial court to examine possible alternatives to closure. By concluding that the facts on the record implicitly suggest that the trial court examined and rejected alternatives, the court neglected to apply these principles. Moreover, by holding that the party objecting to the closure must suggest alternatives, the Court of Appeals turns the

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[362] *See* United States v. Doe, 63 F.3d 121, 130-31 (2d Cir. 1995); United States v. Scarpelli, 713 F. Supp. 1144, 1145-46 n.2 (N.D. Ill. 1989).

Sixth Amendment into a sword of the prosecution, instead of a shield for the defendant.

CONCLUSION

The Supreme Court should bring order to this area of the law. It could begin by separating its lines of reasoning. The defendant's rights, embodied in the Sixth Amendment, are his alone to use as a shield against those seeking to abridge his rights. The public's rights, contained in the First Amendment, belong to all. These rights are not implicated in every case. Yet, in developing a unified approach in the right of access cases, the Supreme Court invokes both sets of rights at all times. As a result, the Court has confused the distinct policies and purposes envisioned for each amendment by the Framers, and has improperly applied principles that belong to distinct areas of the law. The result has been a confusing maze of decisions, which raises more questions than it answers, while building a doctrine on a weak footing. Each successive case seeks to clarify the right of access, but never establishes a clear direction upon which practitioners may rely to adequately practice law.

One amendment must be the victor. Without one being superior to the other, there will never be a bright line test. Practically, this can be achieved by the Supreme Court recognizing that all cases fall within either the *Estes* line of cases or the *Oliver* line of cases.

The Supreme Court's failure to recognize a superior right has caused a lack of developing case law, and has resulted in decisions that offer no precedential value for lower courts or practitioners to follow. Until the Court recognizes the superior right, a consistent line of rulings will never be realized. The Supreme Court should recognize the practical problems its hodge podge of muddled reasoning causes to lawyers and dictate a bright line test.