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# In Search of Premises

IRVING YOUNGER\*

I live in upstate New York in a house more than a century old. Older than the house is a huge oak tree, the lower branches of which come near touching my bedroom window. From the middle of April to the middle of October it is impossible for me to sleep past the moment of sunrise, for as the sun slips above the eastern hills to kiss the night a sweet adieu, some eight or nine crows, keen of intelligence, black of feather, and loud of voice, assemble in that oak tree to discourse collegially on their plans for the day.

As I attempt to fathom the Supreme Court's most recent pronouncement<sup>1</sup> on the closure of judicial proceedings, I cannot help but think of those politic crows. I hear them. In a general way I know the subject on which they make their music. But the wherefores and the whys, the joinery by which one proposition is made to support the next, these, alas, somehow escape me. It is as if I were receiving a message in code, unfurnished of the key. Or, to adopt perhaps a more lawyerlike style, I am the beneficiary of a set of elaborate arguments resting upon premises which remain unstated.

But enough. Let me temporize no further. Let us go to work.

Not long ago,<sup>2</sup> two men were indicted in Seneca County, New York, for robbery, murder, and grand larceny. They moved to suppress certain evidence, and a hearing was set to take testimony on the factual questions raised by their motion. At the hearing, defense counsel asked the judge to close the courtroom on the ground that publicity would threaten his clients' right to a fair trial later, before a jury, on the issue of guilt or innocence. The prosecutor said that he had no objection, and the judge closed the courtroom. The next day, the Gannett Company, which published two local newspapers, petitioned to set aside the order of closure. Recognizing a constitutionally protected right of access by the press to judicial proceedings but holding that right to be outweighed by the defendants' right to a fair trial, the judge denied Gannett's petition.<sup>3</sup> His order was vacated by the Appellate Division,<sup>4</sup> the inter-

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\* Samuel S. Leibowitz Professor of Trial Techniques, Cornell Law School. This article is an adaptation of remarks delivered at the Fifth Annual Baron de Hirsch Meyer Lecture Series, University of Miami School of Law, on February 22, 1980.

1. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

2. August 2, 1976. *Id.* at 374.

3. *Id.* at 376.

mediate appellate court, which held that closure constituted a prohibited prior restraint on freedom of the press. New York's highest court, the Court of Appeals, in turn reversed the Appellate Division,<sup>5</sup> holding that the threat to the fairness of the defendants' trial justified the action of the trial judge. The case then went to the United States Supreme Court, which last year, under the style *Gannett Co. v. DePasquale*,<sup>6</sup> affirmed the New York Court of Appeals.

Since it had already been settled by the Supreme Court that the first amendment prohibits any restraint on the right of the press to report what goes on in open court,<sup>7</sup> the question for decision in the *Gannett* case was the nature and limits of a court's power to close the courtroom in order to prevent press coverage which might impair the fairness of the trial. Of the subject of *Gannett Co. v. DePasquale* I am certain; of everything else about the case, I am unsure.

No small part of my difficulty is due, doubtless, to the number of opinions. There are five of them. Justice Stewart, writing for the Court with the concurrence of the Chief Justice and Justices Powell, Rehnquist, and Stevens, held that the sixth amendment's guarantee of an open trial extends to the accused, not to the public.<sup>8</sup> For this, he gave two reasons—first, that the text of the sixth amendment refers only to the accused, not to the public;<sup>9</sup> second, that in any event the public's right, if there be one, does not assure access to pretrial proceedings,<sup>10</sup> which is what *Gannett* involved. As to whether the first amendment might engender a public right of access to the courtroom, Justice Stewart's opinion expressly declines to decide.<sup>11</sup>

Chief Justice Burger's concurrence rested on the type of proceeding that had been closed: pretrial rather than trial.<sup>12</sup>

Justice Powell's concurrence agreed with the majority view of the sixth amendment and went on to address the first amendment:

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4. 55 A.D.2d 107, 389 N.Y.S.2d 719 (1976).

5. 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).

6. 443 U.S. 368 (1979).

7. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

8. 443 U.S. at 391.

9. *Id.* at 379.

10. *Id.* at 387.

11. *Id.* at 392.

12. *Id.* at 394 (Burger, C.J., concurring).

I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing. . . . The right of access to courtroom proceedings, of course, is not absolute. It is limited . . . by the constitutional right of defendants to a fair trial . . . .<sup>13</sup>

Justice Powell went on to say that the judge in *Gannett* struck the balance correctly.<sup>14</sup>

Justice Rehnquist's concurrence, like Justice Powell's, agreed with the majority view of the sixth amendment and went on to address the first amendment.<sup>15</sup> But, said Justice Rehnquist, the first amendment guarantees nothing to the public; therefore, any phase of a trial may be closed by the judge upon the participants' request.<sup>16</sup>

Justice Blackmun's opinion, concurring in part, dissenting in part, and joined by Justices Brennan, White, and Marshall, urged that the sixth amendment should be expanded beyond its textual reference to the accused to include a public right of access to the courtroom; further, the public's right ought to be outweighed by considerations of the fairness of the trial only if "strictly and inescapably necessary."<sup>17</sup>

What then is a trial judge to do? Perhaps forgo reading the *Gannett* opinions in favor of reading the newspapers. *Exempli gratia*:

On August 8, 1979, Chief Justice Burger, interviewed by a *Gannett* reporter, said, "The opinion referred to pretrial proceedings only."<sup>18</sup>

On September 3, 1979, Justice Blackmun, addressing a judicial conference in South Dakota, remarked, "Despite what my colleague, the Chief Justice, has said", the case authorizes the closing of all trials.<sup>19</sup>

On September 8, 1979, Justice Stevens, dedicating a new building of the University of Arizona College of Law, said that since "the normal reason for an *in camera* proceeding is to prevent the jury from having access to inadmissible matter, that reason

13. *Id.* at 397-98 (Powell, J., concurring).

14. *Id.* at 403.

15. *Id.* at 403 (Rehnquist, J., concurring).

16. *Id.* at 404.

17. *Id.* at 440 (Blackmun, J., concurring in part and dissenting in part).

18. N.Y. Times, Aug. 9, 1979, § A, at 17, col. 3.

19. N.Y. Times, Sept. 4, 1979, § A, at 15, cols. 5-6.

could not possibly motivate an order excluding the public from the proceedings that take place in the presence of the jury."<sup>20</sup>

On August 13, 1979, Justice Powell, addressing the American Bar Association in Dallas, suggested that judges might be a bit premature in reading *Gannett* to permit exclusion of the press from trials while allowing the general public to be present.<sup>21</sup>

Of course, I don't know what trial judges have been reading—the newspapers, the opinions, or nothing—but I do know that there is a broad diversity of belief as to the reach of *Gannett*. One state court judge in North Carolina has relied upon *Gannett* to hold a secret trial.<sup>22</sup> Another state court judge in Maryland closed a pretrial hearing over the prosecutor's objection.<sup>23</sup> Yet other state court judges, in West Virginia<sup>24</sup> and in New York,<sup>25</sup> have barred the press from the courtroom, but not the public.

And I, without the power or the inclination to bar anyone from anything, stand before you charged with the responsibility of explaining what it all means. The prudent thing would be for me to confess at once that I do not know what it all means, retire to my house in upstate New York, and get a few nights' sleep before the crows come home to roost.

But I abjure prudence. I embrace audacity. I shall not retire, and I shall impose upon your good nature yet a while more. I have a case to tell you about which, it is not entirely impossible, may furnish the beginnings of a key to help us decipher the coded message of *Gannett Co. v. DePasquale*.

The case is *Matter of Torsney*,<sup>26</sup> litigated through the New York courts in 1979. It began on November 25, 1976, when New York City police officer Robert Torsney shot and killed a young black man, fifteen years old. Indicted for second degree murder, Torsney admitted the act but defended on the ground of insanity. At his trial, he called two witnesses to attest to his mental state—a psychiatrist who testified that Torsney had a "psychosis associated with epilepsy" in consequence of which he did not "know or appreciate the nature, consequence and wrongfulness of his act," and a psychologist who said that Torsney's conduct was consonant with

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20. N.Y. Times, Sept. 8, 1979, § A, at 41, col. 1.

21. N.Y. Times, Aug. 14, 1979, § A, at 13, col. 4.

22. *State v. Leger*, No. 79 Cr. 6272 (N.C. Super. Ct. Aug. 21, 1979).

23. *People v. Beachem*, No. 22083 (Md. County Ct. July 13, 1979).

24. *People v. Warth*, No. 79-C13 (W. Va. Cir. Ct. July 24, 1979).

25. *People v. Sullivan*, No. 3721-79 (N.Y. Sup. Ct. Aug. 1, 1979).

26. 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).

the anxiety and bewilderment one would expect in an epileptic equivalent.<sup>27</sup>

The prosecution also called two witnesses on the dispositive issue—a psychiatrist who testified that Torsney was “prone to hysterical dissociation under stress” but was not psychotic and was criminally responsible for his act, and a psychologist who said that while Torsney “might well have responded in an impulsive and volatile manner to anticipated threat,” there was little to indicate “cognitive pathology, psychoses, or bizarre or disorganized intellectual or emotional processes.”<sup>28</sup>

On November 30, 1977, the jury found Torsney not guilty by reason of mental illness or defect.

New York law provides for automatic commitment upon such a verdict,<sup>29</sup> and so, a week later, on December 6, 1977, Torsney was admitted to the Mid-Hudson Psychiatric Center. On that day he was examined by the psychiatrist in charge, who found him to be without mental disorder. The next day the Center’s psychologist, after interviewing and testing Torsney, reported that Torsney was a “somewhat rigid, impulsive individual”<sup>30</sup> who ought not to be a policeman, but who did not suffer any psychosis, psychopathic disorder, or organic damage.

Over the next three months, Torsney was examined from time to time by psychiatrists and psychologists, each and every one of whom found him to be without mental illness.<sup>31</sup>

In March 1978, Torsney was transferred from the Mid-Hudson Psychiatric Center to the Creedmoor Psychiatric Center, where again he was found to be without mental illness. In April, the doctors at Creedmoor recommended his release. A special release committee of three psychiatrists concluded unanimously that Torsney was not psychotic, had no psychopathic or organic disorder, was not a danger to himself or others, and ought to be released.

The Commissioner of Mental Hygiene convened an independent review panel of two psychiatrists and a social worker. In July 1978, that panel recommended Torsney’s release.

The matter came before an able justice of the Supreme Court, which is New York’s general jurisdiction trial court. He appointed two more psychiatrists to examine Torsney. Each concluded that

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27. *Id.* at 677, 394 N.E.2d at 268, 420 N.Y.S.2d at 198.

28. *Id.*

29. N.Y. CRIM. PROC. LAW § 330.20.1 (McKinney 1971).

30. 47 N.Y.2d at 678, 394 N.E.2d at 268, 420 N.Y.S.2d at 198.

31. *Id.*

Torsney was not a psychotic, not a lunatic, and not a psychopath.

The justice held a hearing. Eighteen witnesses agreed that Torsney had no mental illness and could be released without endangering himself or others. Not surprisingly, the court ordered Torsney's discharge from Creedmoor, on condition that he not possess a gun, not be employed as a policeman, and make himself available for out-patient care at the hospital.<sup>32</sup>

The intermediate appellate court—the Appellate Division—made up of five judges, unanimously reversed,<sup>33</sup> ordering Torsney recommitted to Creedmoor and directing the Commissioner of Mental Hygiene to prepare a program of psychiatric treatment for Torsney. The Court of Appeals, by a vote of four to three, reversed the Appellate Division,<sup>34</sup> and there the *Torsney* case came to an end.

Reading over the opinions, packed with learning on the quantum of evidence, burden of proof, presumption of sanity, and the function of a commitment hearing, I cannot escape the sense that what is before me is a code of some sort, embodying a message it seems to be the effect of the code to conceal. In the very last paragraph of the last opinion in the case, that of the dissenters in the Court of Appeals, the veil is twitched to give us a glimpse of what is truly at stake. After pages of procedural arcana, the dissenters write:

[W]e agree, of course, that hospital confinement should never be abused to deprive someone of his liberty unfairly. However, when a person, driven by an explosive personality disorder, has proven by an act of senseless violence that he is a menace to others, so long as the psychological condition persists it is our obligation to protect the public from the further acts of violence that he may commit.<sup>35</sup>

In short, while on the face of it *Matter of Torsney* is about the necessary quantum of evidence, burden of proof, et cetera, its real significance involves the consequences that will attach in 1979 in New York City to the unjustified killing of a black youth by a white policeman. To some of the judges, those consequences must include punishment of some kind, even though it takes the form of confinement in a mental hospital. To other judges, perhaps, it is

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32. *Id.* at 671, 394 N.E.2d at 263, 420 N.Y.S.2d at 194.

33. 66 A.D.2d 281, 412 N.Y.S.2d 914 (1979).

34. 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).

35. *Id.* at 693, 394 N.E.2d at 277-78, 420 N.Y.S.2d at 208.

not acceptable that a man found by a jury on November 30 to have been insane should be found by a psychiatrist one week later to be entirely normal: surely the courtroom's process of finding facts is less flimsy than that. To yet other judges, the case of *People v. Tornsey* was merely a dispute of the sort modern life makes inevitable: let the jury resolve that dispute in compliance with the law, and the courts have no further interest in the matter.

Do you see that the nature of Torsney's trial changes with the viewpoint of the observer? The viewpoint is the unstated premise; and, as different conclusions follow from different premises, so different conclusions will follow from different viewpoints. In the empyrean of the ideal, there is a trial immutable and perfect, constant no matter the intellect, temperament, tastes, or experience of the man who contemplates it. In this sad world, however, the word "trial" denotes not a single thing but rather a class of things, each member in some respects like and in other respects unlike the rest of the class. Do not speak to me, then, of a "trial." I can't be sure what you mean. You convey insufficient information. Speak of the trial in *this* case. Tell me all there is to tell about it. Make me understand the kind of trial you take it to be, and I will have your premise. From your premise I can follow you to your conclusions. Ambiguities disappear. If the trial is just a way of resolving disputes, the dispute's been resolved: set Torsney free. If it's a kind of vent for outrage, punish him. If it's a method of ascertaining the truth, the jury found him to be sick: treat him.

I think this may be the key to the code of Robert Torsney's case. I wonder whether it might not also be the key to the problem of the *Gannett* case. First, though, we must clear the foreground.

Beyond argument, at least for a while, is the proposition that no public right of access to the courtroom may be found in the sixth amendment.<sup>36</sup> A majority of the *Gannett* court held that the sixth amendment expresses a right belonging to the defendant alone, and there the point must rest for now.<sup>37</sup> Whether such a public right may be found in the first amendment is fairly subject to argument, for a majority of the *Gannett* court reserved the question. Since we American lawyers, accustomed to a written Constitution, all too easily fall into the careless habit of debating whether some given constitutional text does or does not guarantee

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36. 443 U.S. at 387; *id.* at 394 (Burger, C.J., concurring); *id.* at 404 (Rehnquist, J., concurring).

37. *Id.* at 387.



a right unmentioned in the text, I expect the argument to be about whether the first amendment assures a right of public access to judicial proceedings.<sup>38</sup> We lawyers tend to forget that the words of the amendment speak in the shortest form grammatically possible and that they do not define or apply themselves. The question for discussion, consequently, should not be whether the first amendment *does* assure the right of public access. The question is whether the right *should* be assured. In a manner of speaking, we must forget the existence of the first amendment. We remember that ours is a government in the tradition starting with Socrates and extending through Milton, Jefferson, and Mill. We conclude that the enlightenment of the populace is a necessary condition to the proper administration of the public's business. We note, however, that popular enlightenment is not an all-justifying end. Some things the people have no right to know, and only a fanatic would argue the contrary. The deliberations of the Justices of the Supreme Court ought not to be covered by the Washington Post.<sup>39</sup> My income tax return is no business of the New York Times. Although Jacqueline Kennedy and Aristotle Onassis were undoubtedly a couple of interest to the public, their bedroom on their wedding night would be no place for a reporter from the National Enquirer.

So much for clearing the foreground. Now to the center of the composition. What is there to think about in trying to decide whether there should be a right of public access to the courtroom? What are the elements which come together in proportions varying in each instance but which collectively go by the name of "a trial"? What are the various viewpoints on the nature of a trial from each of which different conclusions may follow on the still-vexed subject of free press/fair trial?

*First.* All trials take place in a courtroom, an institution of government paid for with the public's money. The public thus has an interest in observing the operation of the institution, in knowing how its money is spent. This interest exists for every trial—civil or criminal, jury or nonjury, state or federal—but will count for much or for little depending on the weight assigned to the other factors.

*Second.* Every trial takes place because there is a dispute to be resolved. Given a case in which the resolution of a dispute is the

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38. See 443 U.S. at 397 (Powell, J., concurring).

39. But see generally B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979).

sole or principal purpose to be served, one might well conclude that the importance of publicity is too slight to justify a judge's denial of the parties' request that the doors be closed. Even adding in the first factor, the public's interest in seeing how its money is spent, the result is unchanged. The parties' desire for privacy so outweighs any public interest in observing the proceedings that the latter approaches the vanishing point.

*Third.* Some trials feature, as an aspect of the dispute to be resolved, the need to distribute the public's money or allocate some other public good—the adjudication of a Social Security claim, for example, or a challenge to the fairness of a civil service examination.<sup>40</sup> Given the relationship between an enlightened populace and the proper administration of the public's business, noted above, this third element will, where present, count heavily on the side of a general right to know.

*Fourth.* In many trials, what is chiefly involved is the assertion against the individual of the power of government. Since the assertion against the individual of the power of government is tyranny incipient, I should think it obvious that secret proceedings in this sort of case would be hateful to all believers in constitutionalism.

*Fifth.* I now make the obligatory reference to Tocqueville's *Democracy in America*.<sup>41</sup> In the United States, remarked the great Frenchman 150 years ago, virtually all political questions become legal questions and are decided by judges. So it is that in some trials the court performs political functions, which in less happy places are performed at best in the legislature, at worst on the barricades.<sup>42</sup> Should a lawsuit have a substantial political element, self-evidently in America the public and the press should be welcome.<sup>43</sup>

*Sixth.* Some people think that a trial is a method of determining the truth. I think that belief ill-informed. A trial is only in part, frequently in small part, a method of determining the truth. In assessing the weight assigned to this truth-determining function, one looks, I suppose, to the public importance of the "truth" being determined. Whether the transactions between Supplier Sam

40. An early and scholarly effort to examine law in terms of social interests is Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

41. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (R. Heffner ed. 1956).

42. For two famous cases in which the courts have performed political functions, see *Baker v. Carr*, 369 U.S. 186 (1962), and *Roe v. Wade*, 410 U.S. 113 (1973).

43. See generally McConnell, *Political Trials East and West*, 40 SASK. L. REV. 131 (1975).

and Customer Charlie amount to a running account or an account stated, for example, is a question of little or no public importance. Whether Whittaker Chambers' allegations about Alger Hiss are true, is a different matter entirely.<sup>44</sup>

To recapitulate: I believe that these six ways of looking at a trial permit a court to measure the importance of public access more precisely than do the unduly general formulations to be found in the Supreme Court's opinions. If they indeed possess this virtue, it is because they focus not upon "a trial," but upon the different things a trial in our system may be. They lay bare, in short, the viewpoints, the premises which usually go unstated and therefore lead to difficulties and confusion.

I turn now to a final aspect of trials, one I have not so far mentioned but which figures largely in the decisions. This is the litigant's interest, usually the interest of the defendant in a criminal case, in a fair trial. How is the defendant's interest to be accommodated with what may be a considerable public interest in the openness of the proceeding?

I try to answer that question with trepidation, doubtful that I will manage to convey my meaning with any exactitude and confident that, whatever I do, I shall be misunderstood. Recall with me the opinions of the psychiatrists and psychologists in the Robert Torsney case.<sup>45</sup> He was without psychotic disorder, free of bizarre or disorganized intellectual processes, not a danger to himself or others. But he had, on a street in Brooklyn, taken out his .38 police special and calmly shot to death a youngster who was taking a walk with his aunt. The lesson, I intimate, is that we not accept with undue solemnity the assertions by which we disguise our ignorance. The trial of a lawsuit, I whisper, involves a host of matters about many or most of which in fact we know nothing. In the law generally, I breathe in your ear, we deal much of the time in polite fictions which we pretend to believe are true simply because otherwise we could not function but which, in that desperate 2 a.m. of the soul we all sometimes experience, we must admit are nothing more than shots in the dark.

A homely example. Is there a single person in this room who does not have in wallet or purse a driver's license? Think of the

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44. W. CHAMBERS, WITNESS (1952); see *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *aff'd per curiam*, 345 U.S. 942 (1952). See generally W. JOWITT, THE STRANGE CASE OF ALGER HISS (1953); R. SETH, THE SLEEPING TRUTH: THE HISS-CHAMBERS AFFAIR REAPPRAISED (1968); J. SMITH, ALGER HISS, THE TRUE STORY (1976).

45. See text accompanying notes 30-31 *supra*.

enormous apparatus in each of the states devoted to administering the statutes on drivers' licenses. Why do we require such licenses? Why, mainly to assure the competence of drivers, we answer; and I submit that there is nothing, no shred of evidence, to show that the requirement that drivers be licensed does one whit to assure their competence. While most of us would not dream of driving if we did not know how, whether or not a license were needed, a few of us will drive no matter what, with or without a license.

Now, how about Robert Torsney? What explains him? Perhaps Shakespeare or Dostoyevsky knew,<sup>46</sup> but certainly not the psychiatrists and psychologists who purport to understand him, change him, cure him, speak some sort of ascertainable truth about him. The jargon at Torsney's trial and later hearings was absurd, and my speculation is whether "absurd" is not the word to describe the reasons so solemnly adumbrated by judges both high and low to explain why some proceedings should be closed to the public. Because jurors will be improperly affected by what they read or hear, we are told. And judges will not be? Are the man and woman in the street really so flammable as that, and the man or woman in the black robe so incombustible? Do people really remember everything they have read in the paper about a case or seen on television when, weeks, months, or years later, they are summoned to serve as jurors in that case? With respect, even if they do remember it, are people so quick to believe it? Do most people not know what I assume all of us know, that much of what the media report is false, incorrect, misleading, incomplete, or distorted? If a judge points these things out to jurors and tells them, so long as they are jurors, not to read newspaper accounts of the case or listen to broadcast coverage of it, will the jurors not comply? Is it so, in sum, that closing the courtroom is the only way to assure a fair trial? I know the courts say it. But is it so?

It must be understood, ladies and gentlemen, that these words of mine are anything but last words. I do not even pretend that they have any particular value. The only claim I make for them is that conceivably they point to some of the things judges might think about when asked to close a courtroom to the public. I confess to harboring a simpleton's faith in the power of drawing distinctions to help you say exactly what you mean. In that faith, I declare my firm belief that some day the Supreme Court will de-

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46. See, e.g., W. SHAKESPEARE, *OTHELLO* (1604); F. DOSTOYEVSKY, *CRIME AND PUNISHMENT* (1866).

side a case on the relation between free press and fair trial which reminds me not at all of what I hear in the oak tree outside my bedroom window at dawn from April to October.