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Commentary: The Limited Utility of the First Amendment as a Means of Securing Access by the Press and the Public to Proceedings in Criminal Cases

EDWARD L. BARRETT, JR.*

The author examines the models proposed in Gannett Co. v. DePasquale to provide constitutional protection of a public interest in access to judicial proceedings without impairing the interest of the defendant in a fair trial. Whether based on the first amendment or the sixth amendment, a constitutional approach requiring an immediate and delicate balancing of those interests by the trial court would be, in the author's view, unsatisfactory and unworkable. In the alternative, he suggests that legislative rather than judicial balancing may provide a more practical solution.

In his contribution to this symposium, Anthony Lewis argues that the first amendment should be construed to protect a public interest in access to information as needed to scrutinize public institutions and make them accountable.¹ He refers to "a minimum principle—a rock-bottom level of accountability"² and recognizes that the interest in access will need to be weighed by the courts against other important public interests. With his usual style and wit he makes an appealing case for the recognition of such a constitutionally protected interest.

On another occasion I reviewed the claims for such a first amendment right of access to governmental information, and concluded: "In the end, regulation of access in First Amendment terms might prove less effective and more costly than the current approach of relying on statutes."³ The eloquent argument by

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1. Lewis, *Right of Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793 (1980). The issue here is whether the press may compel access to judicial proceedings. It is generally recognized that the press may publish information it has already obtained. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). For an elaborate discussion of the many problems raised by *Nebraska Press*, including the use of "gag orders" to prevent police, prosecutors, defense lawyers, and others from disclosing information to the press (an issue not addressed here), see *Symposium, Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 383-626 (1977).

2. Lewis, *supra* note 1, at 805.

3. Barrett, *Freedom of the Press, American Style*, in LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 214, 243 (1977).

Anthony Lewis might have convinced me to modify my stand had it not been for the decision in *Gannett Co. v. DePasquale*,⁴ a case much discussed by the participants in this symposium. That case stands, in my view, as a classic example of the difficulties of administering a rule extending constitutional protection to an interest in access to governmental proceedings. True, the case arises in the context of access to pretrial proceedings in criminal cases and involves certain problems unique to its setting.⁵ But it amply demonstrates the limitations of relying on courts to determine access issues in constitutional terms, particularly in those situations in which the interest in access is defeated if not granted immediately.

In *Gannett*, the Court held that the trial judge had ruled correctly in closing a hearing on a pretrial motion to exclude evidence from a pending criminal trial.⁶ A majority of five of the justices held that the sixth amendment protected only the interest of the defendant in a public trial and did not guarantee any right of access by the press or the public.⁷

Justice Stewart's majority opinion refused to decide whether the first amendment protected any public interest in access to proceedings in criminal cases, saying only that if such an interest did exist, it had been amply protected by the trial judge.⁸ Justice Powell, however, a member of the majority, wrote a concurring opinion in which he argued that the first amendment did protect a public interest in access. Four dissenting justices, per Justice Blackmun, agreed that the Court had not found a first amendment interest in

4. 443 U.S. 368 (1979).

5. Access problems here are different from those in which the information sought is within the control of the executive. In one way it is easier for the courts to administer these claims of access because the claims relate to proceedings under the direct control of the judges. But in other ways the problems are more difficult. First, the claim of access typically must be resolved immediately because the proceedings cannot be delayed pending extensive hearings on the access issue. Second, the claims usually involve tension between the public interest in being informed about the conduct of criminal proceedings and the defendant's interest in a fair trial. Courts are more likely to be sensitive to the latter interest than they are to claims of privilege made by the executive branch.

6. Preliminary hearings would presumably be governed by similar rules. The Court did not, however, decide whether the criminal trial itself can be closed on the request of the defendant, although the majority opinion can be read as providing an affirmative answer to that question. Professor Younger discusses these ambiguities of the opinion. Younger, *In Search of Premises*, 34 U. MIAMI L. REV. 807 (1980).

A case decided after the completion of this symposium held it unconstitutional to close a criminal trial on agreement of the participants without further proceedings. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980). See 34 U. MIAMI L. REV. 937 (1980).

7. 443 U.S. at 380.

8. *Id.* at 393.

access,⁹ and argued solely for recognition of a sixth amendment guarantee of a public interest in access to proceedings in criminal cases.¹⁰

What makes *Gannett* particularly interesting is that both Justice Powell and Justice Blackmun discussed at some length the procedures and standards which would be employed in administering a constitutional guarantee of access. Hence, those opinions provide a basis for determining whether and how effectively recognition of a first amendment protection of an interest in access to judicial proceedings would advance the public accountability of the judicial system.

Justice Powell framed the question under the first amendment as "whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and the public are present and free to report" on the proceedings.¹¹ If a defendant requests the trial court to exclude the public, the judge should consider whether alternative means are reasonably available to protect the defendant's interest in a fair trial and should permit exclusion to the extent "likely" to achieve the goals of protecting a fair trial and any state interest in confidentiality.¹²

Justice Powell added: "If the constitutional right of the press and the public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion."¹³ But this opportunity to be heard is limited to those persons actually present at the hearing who make a timely objection, "for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to

9. *Id.* at 411.

10. *Id.* at 427.

11. *Id.* at 400.

12. *Id.* This first amendment analysis derives from the standards set in *Nebraska Press*, 427 U.S. at 562, which reversed a state court order that had prohibited reporting or commentary on judicial proceedings held in public. There the Court examined "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Id.* at 562. Concurring in *Nebraska Press*, Justice Powell said he would allow a prior restraint only when there is a showing that "(i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available." *Id.* at 571 (Powell, J., concurring). Even with such a showing, he would not allow a prior restraint if "previous publicity or publicity from unrestrained sources" would "render the restraint inef-ficacious." *Id.* Justice Powell felt the Court sufficiently addressed this apparently higher standard. *Id.*

13. *Gannett*, 443 U.S. at 401 (Powell, J., concurring).

the public.”¹⁴ At such a hearing the defendant has the responsibility “to make some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings.”¹⁵ The state, if it joins the motion to exclude, will be given the opportunity to show that public access “would interfere with its interests in fair proceedings or preserving the confidentiality of sensitive information.”¹⁶ Members of the press and the public objecting to closure “have the responsibility of showing to the court’s satisfaction that alternative procedures are available that would eliminate the dangers shown by the defendant and the State.”¹⁷

The sixth amendment model presented in the dissent differed from Justice Powell’s first amendment model primarily because it placed the burden of establishing the insufficiency of alternatives to closure on the party seeking closure. Justice Blackmun opined that the defendant who seeks closure must establish that it is “strictly and inescapably necessary in order to protect the fair trial guarantee.”¹⁸ He proposed a three-part test to justify closure under the sixth amendment. First, the defendant must provide “an adequate basis to support a finding that there is a substantial probability that irreparable damage to his fair trial will result from conducting the proceeding in public.”¹⁹ Second, he must show “a substantial probability that alternatives to closure will not protect adequately his right to a fair trial.”²⁰ Third, he must demonstrate “that there is substantial probability that closure will be effective in protecting against the perceived harm.”²¹

Justice Blackmun said that the trial court should begin with the assumption that the hearing be conducted in the open, obviat-

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Although recognizing a first amendment right of access, Justice Powell agreed with the four other justices in the majority that “the procedure followed by the trial court fully comported with that required by the Constitution.” *Id.* at 403 (Powell, J., concurring). Permitted to present written and oral arguments to the court challenging its closure order, counsel for the newspaper simply failed to persuade the Court that an open proceeding would not be prejudicial. Although the trial court did not consider alternatives to closure, Justice Powell declined to find error in its proceeding for two reasons. First, the newspaper’s counsel only weakly urged the court to consider alternatives to closure and thus failed to carry the burden of establishing the existence of effective alternatives. *Id.* at 402. Second, Justice Powell concluded that, given the unsettled state of the law on the subject, the trial judge did not deviate materially from the proper course. *Id.* n.4.

18. *Id.* at 440. (Blackmun, J., dissenting).

19. *Id.* at 441.

20. *Id.*

21. *Id.* at 442.

ing any need for a representative of the public to demonstrate that the public interest is legitimate or genuine.²² He did conclude, however, that some opportunity should be given to the press or the public to contest the defendant's motion. His conception of the relevant procedure is brief enough to justify quotation in full:

As a final safeguard, I would conclude that any person removed from a court should be given a reasonable opportunity to state objections prior to the effectiveness of the order. This opportunity need not take the form of an evidentiary hearing; it need not encompass extended legal argument that results in delay; and the public need not be given prior notice that a closure order will be considered at a given time and place. But where a member of the public contemporaneously objects, the court should provide a reasonable opportunity to that person to state his objection. Finally, the court should state on the record its findings concerning the need for closure so that a reviewing court may be adequately informed.²³

If the Court were to adopt either the Powell or the Blackmun approach, what would it accomplish? Consider the formidable difficulties involved in according protection to a public interest in access through judicial balancing of competing interests in the context of ruling on motions to close pretrial proceedings in criminal cases. The motion for closure normally will be made orally without prior notice or briefing, at the beginning of a hearing scheduled before a busy judge. The judge will be expected to make a sophisticated ruling based largely on predictions of future events.²⁴ Will this case be one of the few which will be disposed of by a jury trial? How likely is it that publicity flowing from an open hearing will affect the fairness of the trial? To what extent will the trial judge be able to protect the defendant's fair trial interest by devices such as continuances, changes of venue, careful jury selection, and sequestration of the jury?²⁵

22. *Id.* at 443.

23. *Id.* at 445.

24. Some issues that require only perception of existing facts will be pertinent. For example, the nature and extent of publicity prior to the motion to close, the size of the potential jury pool, and the extent to which the information to be suppressed is already known to the public are easily determinable. Many other issues, however, will relate to an unknown and largely unknowable future.

25. In *Gannett* the motion was heard by a judge of the court with jurisdiction to try the case. In many jurisdictions such pretrial motions will be before a judge of an inferior court—a judge whose duty in serious cases is to decide preliminary matters and then pass the case on to another court for trial. Such a judge's role in the criminal justice system typically is that of volume processing of cases and does not include presiding over jury trials

These difficult issues of fact and prophecy are to be resolved by the judge in an essentially nonadversary context. The norm would appear to be an oral motion by the defendant made without prior notice, supported by oral assertions of evidence, and argued by defense counsel, whose client load likely precludes effective advance preparation. If the prosecution joins in the motion, there will be no contest.²⁶ The judge will be expected to rule on the spot, stating findings (for purposes of review) on the need for closure, based on nothing but the oral presentation of the defendant. Even Justice Blackmun concedes that a person who objects to the closure need not be given an opportunity to provide evidence or to engage in extended legal arguments.²⁷ Justice Powell states only that the person objecting must be afforded "a reasonable opportunity to be heard."²⁸ And, since both justices agree that no prior notice of the intent to move for closure need be given,²⁹ it will be the unusual case indeed in which serious arguments against closure will be made by the press. Lawyers will seldom accompany reporters to pretrial hearings unless there is some reason to expect the closure issue to arise.

How would one expect a judge to act in the ordinary situation, on a motion to exclude the public made by the defense and joined by the prosecution, with at most an objection asserted by a reporter who happened to be present? Applying any standard likely to be adopted by a majority of the Supreme Court, the judge can be expected to grant the motion as a matter of course because of the pressure upon him to ensure a fair trial for the defendant. The majority indicated in *Gannett* that although failure to close a pretrial hearing would not necessarily require such an extreme remedy as reversal of a conviction, still "our criminal justice system permits, and even encourages, trial judges to be overcautious in ensur-

in cases in which press coverage might involve a possibility of prejudice to the defendant. To the extent those judges are less familiar with the subtleties of the jury trial process, judicial determination of access questions would be even more problematic.

26. The *Gannett* dissent notes that this is the effect of the Court's "inflexible *per se* rule." 443 U.S. at 406-07 (Blackmun, J., dissenting). Justice Rehnquist, concurring in *Gannett*, goes even further: "[T]he Sixth Amendment does not require a criminal trial or hearing to be opened to the public if the participants to the litigation agree for any reason, no matter how jurisprudentially appealing or unappealing, that it should be closed." *Id.* at 404 (Rehnquist, J., concurring).

27. *Id.* at 446 (Blackmun, J., dissenting).

28. *Id.* at 401 (Powell, J., dissenting).

29. *Id.* at 446 (Blackmun, J., dissenting); *id.* at 401 (Powell, J., concurring) (by implication).

ing that a defendant will receive a fair trial."³⁰ Even Justice Powell's proffered first amendment standard, requiring a showing that a fair trial "is likely to be jeopardized by publicity,"³¹ suggests that the trial court should be more concerned with the interests of the defendant than with the interests of the public in access.

Justice Blackmun suggests a much higher standard for closure. He asserts that open pretrial suppression hearings are the norm,³² and that the judge should close a hearing only when it is clear that closure is the only possible remedy to prevent an unfair trial.³³ Perhaps if the Court were to adopt such a rule, some judges would resist the normal temptation to go along with the defense and the prosecution in order to avoid risks of prejudice at an eventual trial. But it is more likely that judges would, in many cases, merely create a better record to support their closure decision. Appellate review would be of little help in correcting this kind of trial court ruling. As Justice Powell noted, the burden of decision on motions to close hearings "necessarily falls almost exclusively upon the trial court . . . [f]or it would be entirely impractical to require criminal proceedings to cease while appellate courts were afforded an opportunity to review a trial court's decision to close proceedings."³⁴

A trial judge has little incentive to deny the motion to close a hearing. In most cases the matter will end at that point. Occasionally, the press may take the case to an appellate court, seeking a judgment that the court erred. But what can be accomplished by such a proceeding? If the only issue is closure of the hearing, the hearing will have been held; the appellate court cannot nullify the hearing and require the defendant to return and make his motion a second time. In some cases, as in *Gannett*, there may be the possibility of securing access to a sealed transcript of the hearing, but even that issue is likely to become moot before the closure issue is resolved by an appellate court.

In fact, *Gannett* itself illustrates the likely course of events. The judge issued his closure order on November 4. The press succeeded rather quickly—by December 17—in getting an intermediate appellate court to rule in an original proceeding seeking mandamus and prohibition. But by that time the defendant had pleaded guilty and a transcript of the hearing had been given to

30. *Id.* at 379 n.6.

31. *Id.* at 400 (Powell, J., concurring).

32. *Id.* at 442-43 (Blackmun, J., dissenting).

33. *Id.* at 440.

34. *Id.* at 398 (Powell, J., concurring).

the press. How often will the press expend the resources necessary to challenge closure orders, and how often will the courts, including the Supreme Court, take the time to rule in such cases, when the only result of a successful challenge to the trial court's ruling can be an opinion stating that that judge incorrectly balanced the conflicting interests in this case?³⁵

A judge interested in preserving the integrity of the proceedings in the particular case, and in avoiding the waste of judicial resources in retrials of criminal cases, is apt to find the alternative of denying closure motions much less attractive. On occasion, the defendant might seek a postponement of further proceedings, waiving his right to a speedy trial, while seeking appellate review of the judge's closure order.³⁶ Such review could result in an appellate court effectively ordering the judge to close the proceeding to the public. But even absent that review, the trial court will be aware of the risk that on appeal its refusal to close the hearing might reinforce the defendant's claim of a denial of a fair trial due to publicity that the trial court failed to prevent.

All of these considerations lead to the conclusion that a constitutional doctrine requiring a sophisticated weighing of important public interests will accomplish little if entrusted to judges who are required to make rapid, on-the-spot judgments based on summary presentations in a nonadversary context. Anthony Lewis speaks of

35. The Supreme Court has been willing to hear arguments from the press in situations where the underlying proceeding has terminated for the purpose of determining the governing standards. In addition to *Gannett*, the Court heard both *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980), long after the criminal proceedings were concluded. But how often will the press find it worthwhile to take appeals, and the courts to hear them, when the result can be no more than an advisory opinion that the trial court erred?

36. A current California case illustrates the difficulties. The defendant was charged in two courts with kidnapping two boys, one in Merced and the other in Ukiah. He was arrested in Ukiah and a preliminary hearing was scheduled there. The justice court judge granted the defendant's motion to close the hearing pursuant to CAL. PENAL CODE § 868 (West Supp. 1980), which authorizes closure on request of the defendant. The press took the issue immediately to a superior court judge, who declared the statute invalid and directed that the hearing be open. The defendant asked to have the hearing scheduled for a later date, pending his appeal seeking a stay of the superior court order. Meanwhile, he was taken to Merced for a preliminary hearing, which the judge closed and conducted in private over the objection of the press. The appellate court then granted a writ ordering the reclosing of the Ukiah hearing. The press unsuccessfully sought an emergency stay of the preliminary hearing from the Supreme Court of California. The hearing was held behind closed doors on April 15. *People v. Pompa-Ortiz*, 27 C. 3d 519 (1980). For newspaper accounts of the proceedings, which were not reported in detail in the supreme court decision, see *The Sacramento Bee*, Apr. 10, 1980, at A21, col. 3; *The San Francisco Chronicle*, Apr. 16, 1980, at 2, col. 2.

the Supreme Court weighing interests, looking at old problems in the light of contemporary reality, and understanding complicated, continuously changing sets of relationships.³⁷ Unfortunately, however, the effective resolution of these interests, which will determine whether the hearing is open or closed, will be made by a busy lower court judge without any genuine opportunity for the press or other public representatives to challenge the showing made in favor of the defendant.

What, then, should be the solution? Justice Rehnquist suggested one in *Gannett*: deny any constitutional protection to a public right of access and leave it entirely within the discretion of the judge to grant or deny defense motions seeking to close judicial proceedings.³⁸ Another option, not supported at this point by any of the justices, nor for that matter by Mr. Lewis, would be to assert that the first amendment means that pretrial hearings and trials may never be closed. Under this latter approach the defendant's fair trial interests would be protected by other options open to the trial judge and by the ultimate possibility of reversal in the extreme case where prejudice is manifest.

A third option, preferable in my view to either of the others, is to turn our attention away from the courts and toward the legislature—a forum which the press would likely find more congenial and often more responsive. All of the justices in *Gannett* agreed that the defendant does not have a constitutionally protected right to a private hearing or trial.³⁹ As a result, substantial room is left for legislative solutions. Although a defendant may raise objections under the sixth amendment whenever it is determined that a proceeding should be closed against his wishes, he cannot make a constitutional objection to a decision to open the proceeding. Thus, if a legislature is convinced that public access should be the norm, it may devise ways to ensure that result more efficaciously than the judicial solutions suggested in the various opinions in *Gannett*.

It is not my purpose in this brief comment to propose particular legislative solutions. But a few words may be in order to illustrate my conclusion that legislation is a better vehicle than the

37. Lewis, *supra* note 1, at 804-06.

38. Concurring in *Gannett*, Justice Rehnquist asserted that the law now is that if the parties agree on a closed proceeding the trial court is not required to extend any rights of notice and hearing to the press or to advance any reasons for closing the hearing. 443 U.S. at 404 (Rehnquist, J., concurring). He concluded that the Court in *Gannett* rejected both first amendment and sixth amendment protections for any claim of access. *Id.* at 403, 405.

39. 443 U.S. at 382; *id.* at 416-26 (Blackmun, J., dissenting). Both cite as authority *Singer v. United States*, 380 U.S. 24 (1965).

first amendment for resolution of the competing interests involved in closing judicial hearings and trials. First, the courts must be somewhat general in establishing constitutional norms; the legislature can be much more specific. It might, for example, forbid the total closure of hearings and instead specify particular kinds of evidence which may be presented in private.⁴⁰ It can decide whether certain witnesses should have the privilege of testifying in private—*e.g.*, the victim of a rape or homosexual assault testifying at a preliminary hearing. It can determine if there are legitimate governmental interests in preserving confidential sources which should permit presentation of particular evidence in private, and it can specify those interests. Second, the legislature can provide more detailed procedures to govern the closure decision. For example, it would be possible to construct a system requiring prior notice of an intention to move for closure or exclusion given in a way that would permit the press to have an attorney present if it wished. Perhaps the motion could be required to be made and heard in advance of the particular hearing for which the closure or exclusion is sought. In addition, an expedited single level of appellate review could be provided in time to resolve the closure issue prior to the scheduled hearing. Third, the legislature can experiment better than the judiciary. If the legislative solution does not work satisfactorily, it can be changed.

In conclusion, I agree with Anthony Lewis that “public institutions must be publicly accountable.”⁴¹ I agree that the press cannot perform its function of holding government accountable without access to information.⁴² My point of disagreement comes with his argument that the Constitution should be construed to guarantee some minimum level of access. I have illustrated with the *Gannett* case the inherent limitations of securing access by depending on the balancing of interests in individual cases in the lower courts, which are the front line in any attempt to compel access in constitutional terms. My advice to the press seeking access to judicial proceedings is to shift their focus from the courts to the legislatures, which have far greater capacity to achieve balanced and workable standards and procedures for dealing with claims of access.

40. For example, the legislature might specify that the contents of a defendant's confession may be presented at a closed pretrial hearing.

41. Lewis, *supra* note 1, at 803.

42. *Id.* at 804.