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Constitutional Law--The Public's Right of Access to Pretrial Proceedings

Philip Hof

RECENT DEVELOPMENT

CONSTITUTIONAL LAW—THE PUBLIC'S RIGHT OF ACCESS TO PRETRIAL PROCEEDINGS. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979).

On July 2, 1979, the United States Supreme Court decided *Gannett Co. v. DePasquale*,[1] a recent development concerning the public's right of access to a criminal proceeding. Delivering the plurality opinion, Justice Stewart framed the issue as "whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial."[2] The Court held that the public does not possess this right.[3]

In August, 1976, a Seneca County, New York, grand jury indicted two men, Greathouse and Jones, on charges of second degree murder.[4] Judge DePasquale heard the defendants' motion to exclude the public and press from a pretrial suppression hearing. Defense attorneys urged that because the intense buildup of damaging publicity had threatened their clients' ability to receive a fair trial, the press and the public should be excluded from subsequent proceedings. No objections were made and Judge DePasquale granted the motion. Gannett Company's subsequent motion to vacate the order was refused. The trial judge held that the interest of the press and the public was outweighed by the defendants' right to a fair trial.[5]

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1. 99 S. Ct. 2898 (1979) (5-4 decision).
2. *Id.* at 2901.
3. *Id.* at 2907.
4. *Id.* at 2902. Wayne Clapp disappeared at a lake in July, 1976, about 40 miles from Rochester, New York. His two companions returned in the boat the same day and drove away in Clapp's pickup truck. Clapp's family reported his absence to police who began an investigation. An intensive search revealed an abandoned boat, laced with bullet holes. *Id.* at 2901.

Gannett Company, Inc., publishes a morning and an evening newspaper. Each paper carried the story of Clapp's disappearance and both noted that the police were looking for Clapp's companions, Greathouse and Jones. Later stories reported the capture of Greathouse and Jones. "[P]olice theorized that Clapp was shot with his own pistol, robbed, and his body thrown into Lake Seneca." *Id.* at 2902. The morning newspaper noted that Greathouse was on probation in Texas. *Id.* One day later, an article in the morning paper stated that "Greathouse had led . . . police to the spot where he had buried a .357 magnum revolver belonging to Clapp . . . ." *Id.* Finally, the papers carried stories of the indictments and arraignments. *Id.* at 2902, 2903.
5. *Id.* at 2903.

Gannett commenced a prohibition and mandamus proceeding in the Appellate Division of the Supreme Court of the State of New York. The court held that under the circumstances, the public's vital interest in open judicial proceedings was paramount and vacated the trial court's order.[6] The New York Court of Appeals subsequently held that the case was technically moot,[7] but retained jurisdiction because of the importance of the issues.[8] Reaching the merits, the court upheld the exclusion of the press. It reasoned that although criminal trials are presumptively open to both the public and the press, the danger posed to the defendants' ability to receive a fair trial, in this situation, overcame this presumption.[9] In response to this ruling, Gannett successfully petitioned for a writ of certiorari from the United States Supreme Court.[10]

I. PLURALITY OPINION

Although the Supreme Court was sharply divided[11] on both the result and its underlying rationale, all the Justices agreed that the controversy was not moot.[12] The plurality articulated the bounds of the sixth amendment[13] with an analysis aided by two Supreme Court deci-

6. Gannett Co. v. DePasquale, 55 App. Div. 2d 107, 389 N.Y.S.2d 719 (1976).

7. A transcript of the hearing had been made available to Gannett. 99 S. Ct. at 2904 n.4.

8. Gannett Co. v. DePasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).

9. The court stated that the following situation endangered the defendant's right to receive a fair trial:

> The public knew that [the] codefendants had been caught "red-handed" by [the] police with the fruits of the crime. And it was widely known that the defendants had made incriminating statements before being returned to . . . [New York]. The details, however, were not known and public curiosity was intense. To safeguard the integrity of its process, the court was required at the outset to distinguish mere curiosity from legitimate public interest.

Id. at 380-81, 372 N.E.2d at 550, 401 N.Y.S.2d at 762.

10. 435 U.S. 1006 (1978). The Court granted certiorari "[b]ecause of the significance of the constitutional questions involved . . . ." 99 S. Ct. 2904 (1978).

11. Justice Stewart delivered a plurality opinion, in which Chief Justice Burger and Justices Powell and Rehnquist filed concurring opinions. Justice Blackmun filed an opinion concurring only with the plurality's holding on mootness. His dissent on all other parts was joined by Justices Brennan, White and Marshall.

12. The plurality articulated a test for mootness. An issue is not moot "if the underlying dispute between the parties is 'capable of repetition, yet evading review.' " 99 S. Ct. at 2904. To meet the test, two conditions must be satisfied. First, the challenged action must have been too short in its duration for full litigation. Second, there must have been a "reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* The Court unanimously found both conditions satisfied. *Id.* at 2904, 2919.

13. The sixth amendment provides:

> 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 and cause of the accusation, to be confronted with the witnesses against him;

sions.[14] This analysis was subdivided into an examination of an accused's right to a public trial and the public's correlative right to an open trial. Examining the first of these issues, the Court discussed two cases.

In *In re Oliver*,[15] the Court was faced with a due process challenge to a secret proceeding.[16] The defendant appeared before a secret one-man grand jury investigation of official misconduct. As a result of the judge's belief that the defendant's testimony was false, the defendant was sentenced to sixty days in jail for contempt. Although the defendant was sentenced without the presence of counsel, the Supreme Court of Michigan rejected his claim that he had been deprived of a right to due process.[17] After granting a writ of certiorari, the United States Supreme Court held that regardless of the due process issue, the deprivation of the defendant's right to a public trial required a reversal.[18] The Court recognized that the constitutional guarantee of a public trial is for the defendant's benefit and that the proceedings in question violated that right.[19] The Court pointed to the practice of guaranteeing a public trial as having its roots in English common law.[20] "[T]he guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."[21]

The *Gannett* opinion also discussed *Estes v. Texas*[22] to demonstrate that the right to a fair and public trial belongs to the accused. In *Estes*, the defendant was indicted on a swindling charge by a Texas

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to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. AMEND. VI.

14. Estes v. Texas, 381 U.S. 532 (1965); *In re* Oliver, 333 U.S. 257 (1948).

15. 333 U.S. 257 (1948).

16. *Id.* at 265. Michigan law provided for a one man grand jury to conduct investigations into alleged misconduct of public officials. If the judge presiding at the investigation believed the witness to be giving false, evasive or deliberately misleading testimony, he was empowered to find the witness guilty of contempt.

17. *Ex parte* Oliver, 318 Mich. 7, 27 N.W.2d 323 (1947).

18. 333 U.S. at 266-73.

19. *Id.*

20. *Id.* at 266-69. The Court pointed to institutions which have symbolized threats to liberty. "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*." 333 U.S. at 268-69 (footnotes omitted).

21. 333 U.S. at 270. The plurality in *Gannett* found the purposes of the public trial to be: "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause . . . participants to perform their duties more conscientiously, and . . . give the public an opportunity to observe the judicial system." 99 S. Ct. at 2907.

22. 381 U.S. 532 (1965).

grand jury.[23] Tremendous pretrial publicity had flooded the community and television cameras were permitted to film the courtroom proceedings. The Supreme Court held that the defendant's right to a fair trial was violated by the broadcasting. Initially, this holding may seem paradoxical because increased publicity would seem to make the trial more fair.[24] The *Estes* Court rationalized its result with four justifications.

First, the most significant danger is the effect that the in-courtroom media might have on the jury.[25] As soon as the trial judge announces that the trial will be televised, it becomes a sensational event. The Court believed that such sensationalism cannot help but permeate the juror's mind. As the effect of this permeation cannot be evaluated, it is a potentially prejudicial variable in the trial and, therefore, such broadcasting is impermissible.[26] Second, the Court maintained that the presence of cameras may be distracting to a juror.[27] The knowledge that he is being televised may make the juror self-conscious and preoccupied. A third element of unfairness to the defendant is the possibility that a witness could view parts of the proceedings before being called upon to testify.[28] By this action, a witness could frustrate the purpose of invoking the rule against witnesses being in the courtroom prior to rendering their testimony. Fourth, the Court discussed the effect of in-courtroom publicity on both the defendant and the judge. The Court indicated that the job of the trial judge is made more difficult because the presence of cameras creates an additional area requiring supervision.[29] The judge is, therefore, unable to devote full attention to the actual court proceedings. As a result, the defendant is prejudiced by the problems which inhere in the televising of proceedings.[30] The Court stated that the impact of courtroom television "is a form of mental—if not physical—harassment, resembling a police line-up or the third degree."[31]

The *Estes* justifications relate to potentially prejudicial activity at the trial. The concept of public trial cannot, however, be separated from the accused's right to a fair trial. It may be forcefully argued that

23. *Id.* at 534.
24. *See* notes 20-21 *supra* and accompanying text.
25. 381 U.S. at 545.
26. *Id.*
27. *Id.* at 546.
28. *Id.* at 547.
29. *Id.* at 548.
30. *Id.* at 549.
31. *Id.*

the presence of cameras actually encourages conscientious participation in the proceedings and thereby ensures the defendant's right to a fair trial. *Estes*, however, rejected the proposition that publicity is an absolute assurance of a fair trial. The impact of *Estes* on *Gannett* relates to the interplay between the accused's right to a fair trial and his right to a public trial. This impact is that "[a] public trial is a necessary *component* of an accused's right to a fair trial and the concept of public trial cannot be raised to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt."[32]

After having reviewed the *Estes* and *Oliver* decisions, the *Gannett* plurality examined the policy behind granting the right to a fair trial to the accused. The plurality conceded that society has a strong interest in public trials.[33] The opinion recognized that the quality of testimony may be improved, that those involved with the trial will be more conscientious, and that the public will have an opportunity to observe the judicial decision.[34] The plurality differentiated, however, between the public's *interest* in an open proceeding and a constitutional *right* vested in the public.[35] "[O]ur adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation."[36] The plurality construed the public interest to be conditioned upon the system's ability to provide the defendant with a fair trial. The opinion noted that as long as the adversarial nature of the proceedings is sufficient to ensure a fair trial to the defendant, the public's interest is protected.[37] The plurality thus focused on the adversarial nature of the judicial system as the guardian of the public's right to observe the litigation.[38]

The plurality bolstered its opinion by demonstrating that the history of the sixth amendment does not reveal an incorporation of the common law rule of open criminal proceedings.[39] In contrast with

32. *Id.* at 583 (emphasis added).
33. 99 S. Ct. at 2907.
34. *Id.*
35. This point is expanded in Radin, *The Right to a Public Trial*, 6 TEMPLE L.Q. 381 (1932). The author's thesis is that the right to a public trial is designed to protect the defendant against the potentially prejudicial effect of closed door proceedings. If this right were construed to be vested in the public, rather than the defendant, the prejudice could still result if, for example, the hostility of the crowd were such that it could sway the jury. It is accordingly for the defendant to decide that degree of publicity which will assure him a fair trial. *Id.* at 394, 396-98.
36. 99 S. Ct. at 2908 (footnote omitted).
37. *Id.* at 2907-08.
38. *Id.* at 2908.
39. *Id.* at 2910-11.

early state constitutions that provided for a public right to open trials, the sixth amendment confers the right to a public trial only upon a criminal defendant.[40] Further historical support is derived from the fact that the *Gannett* case involved exclusion of the public from a *pretrial* proceeding. The plurality utilized authority from both legal scholars and English common law. Maitland has stated that regardless of the public's right to view the actual trial proceedings, the boundaries of the right do not extend to pretrial proceedings.[41] Common law support for the plurality's position that the provisions of the sixth amendment do not extend to pretrial publicity can be found in *Rex v. Fisher*.[42] In *Fisher* the court forbade the dissemination of information about a pretrial hearing in order to protect the accused's right to receive a fair trial.[43]

Having analyzed the accused's sixth amendment right to a fair trial, the plurality turned to the rights of the press under the first and fourteenth amendments. The Court avoided the issue because the trial court did not abridge the media's right of access to pretrial hearings.[44] The Court noted that the trial court had, in fact, safeguarded the right in two ways. First, the trial court found that although the press had a constitutional right, it was outweighed by the defendants' right to a fair trial.[45] Second, any denial of access was only temporary inasmuch as a transcript of the proceedings was available once the danger of prejudice to the defendants had dissipated.[46]

In sum, the plurality found that neither history, policy, nor prece-

40. *Id.* at 2908. "The history upon which [Gannett relies] totally fails to demonstrate that the Framers of the Sixth Amendment intended to create a constitutional right in strangers to attend a pretrial proceeding, . . ." *Id.*

41. "It must, of course, be remembered that the principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefactory stages of the proceedings . . . ." 99 S. Ct. at 2910 (*quoting* E. JENCKS, THE BOOK OF ENGLISH LAW 75 (6th ed. 1967)).

42. 2 Camp. 563, 170 Eng. Rep. 1253 (1811).

43. The court said:

> Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. The benefit they produce is great, and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice.

Id. at 571-72. 170 Eng. Rep. at 1255.

44. 99 S. Ct. at 2912. The Court was not required to decide whether the right, in fact, existed. *Id.*

45. *Id.*

46. *Id.*

dent evidenced any constitutionally enforceable right of public access to a criminal pretrial proceeding.

II. THE CONCURRING OPINIONS

The concurring opinions of Chief Justice Burger and Justices Powell and Rehnquist added considerable gloss to the plurality's demarcation. Chief Justice Burger demonstrated that the framers of the sixth amendment did not intend the public's right of access to extend to a criminal pretrial hearing.[47] He noted the framers' probable awareness of the function of pretrial proceedings.[48] Chief Justice Burger, therefore, focused on the plain meaning of the words and indicated that a reading of the sixth amendment clearly demonstrates what the framers intended.[49] His concluding remark emphasized this viewpoint: "For me, the essence . . . is that by definition 'pretrial proceedings' are exactly that."[50]

Justice Powell addressed the question reserved by the plurality[51] and would hold that the press has a first and fourteenth amendment right of access to pretrial proceedings.[52] His analysis would balance the defendants' right to a fair trial against the access rights of the press and the public.[53] This standard is met, according to Powell, if each group is given an opportunity to be heard on the question of public exclusion from the hearing.[54] The defendant would be given an opportunity to demonstrate that his right to a fair trial would be prejudiced.[55] The state would be afforded an opportunity to show that public access would either interfere with its interests in fair proceedings or reveal government secrets.[56] The press and public would have the responsi-

47. *Id.* at 2913 (Burger, C.J., concurring). While Chief Justice Burger's approach might be analyzed as part of one of the plurality's approaches, for the sake of analysis it is best to let it stand on its own.

48. *Id.* at 2914. The Chief Justice stated:

> Written interrogatories were used pretrial in 18th century litigation, . . . Thus, it is safe to assume that those lawyers who drafted the Sixth Amendment were not unaware that some testimony was likely to be recorded before trials took place. Yet, no one ever suggested that there was any "right" of the public to be present at such pretrial proceedings.

Id.

49. *Id.* at 2913-14.

50. *Id.* at 2914.

51. *See* note 44 *supra* and accompanying text.

52. 99 S. Ct. at 2916 (Powell, J., concurring).

53. *Id.* at 2915.

54. *Id.* at 2916.

55. *Id.*

56. *Id.*

bility to show that "alternative procedures are available that would eliminate the dangers shown by the defendant and the State."[57] Applying this standard, Justice Powell concluded that the press and public were not entitled to exercise their right of access in this situation.[58]

Justice Rehnquist was opposed to the analysis utilized in Justice Powell's balancing test. Justice Rehnquist referred to Powell's test as "some sort of constitutional 'sunshine law'."[59] He stated that "the lower courts are under no constitutional constraint either to accept or reject [Powell's] procedures."[60] While Rehnquist commented that the trial judge should carefully consider the competing interests, he is not constitutionally required to exercise this discretion.[61] Rehnquist stated that judges "remain, in the best tradition of our federal system, free to determine for themselves the question whether to open or close the proceeding."[62] Rehnquist interpreted the *Gannett* decision as holding that whenever the parties to litigation are in agreement that exclusion of the press and public is in order, the court may, within its discretion, close its doors. Rehnquist expressly would uphold this judicial discretion "no matter how jurisprudentially appealing or unappealing"[63] the parties' agreement may be.

III. THE DISSENTING OPINION

The dissent in *Gannett*, authored by Justice Blackmun, was responsive to the plurality's contentions inasmuch as it justified its posi-

57. *Id.*

58. Applying the test, Justice Powell said:

> At this oral argument, the trial court applied a standard similar to that set forth above. It first reviewed for petitioner's counsel the factual basis for its finding that closure had been necessary to preserve the fairness of the defendants' trial. In the court's view, the nature of the evidence to be considered at the hearing, the young age of two of the defendants, and the extent of the publicity already given the case had indicated that an open hearing would substantially jeopardize the fairness of the defendants' subsequent trial. Moreover, the court emphasized the fact that the prosecutor, as well as each of the defense lawyers, had endorsed the closure motion. On the other hand, the court found that petitioner had not presented any basis for changing the court's views on the need for closure. Throughout oral argument the court recognized the constitutional right of the press and public to be present at criminal proceedings. It concluded, however, that in the "very unique situation" presented to it, closure had been appropriate, and that the seal it had placed upon the transcript of the suppression hearing should continue in effect.

Id. at 2917 (footnote omitted).

59. *Id.* at 2918 (Rehnquist, J., concurring).

60. *Id.* *See* notes 51-58 *supra* and accompanying text.

61. *Id.* at 2919.

62. *Id.* (footnote omitted).

63. *Id.* at 2918.

tion with history, precedent and policy.[64] Couching the issue differently than did the plurality,[65] the dissent asked "whether . . . the Constitution prohibits the States from excluding, at the request of a defendant, members of the public from such a hearing."[66]

After disposing of a first amendment issue,[67] the dissent began its analysis by indicating that although the right to a public trial belongs to the defendant, he is not at liberty to waive this right at will.[68] The proscription of a criminal defendant's right to waive certain constitutionally guaranteed rights lends support to the dissent's position. For example, in *Faretta v. California*[69] the Court found that the sixth amendment right to counsel does not necessarily imply an independent right of self-representation.[70] Similarly, in *Singer v. United States*,[71] the Court decided that a defendant's right to a jury trial did not supply an automatic correlative right to a bench trial.[72]

The *Gannett* dissent found that the history and structure of the sixth amendment determine the defendants' right to a private hearing.[73] The dissenting Justices believed that *Gannett* was analagous to both *Faretta* and *Singer* and would hold that the defendant generally has a right to insist on a public trial, but lacks the correlative right to waive a public trial at his will. Blackmun pointed to Anglo-Saxon tra-

64. The dissent, before addressing the merits of *Gannett*, rendered its own accounting of some of the key facts leading up to the suppression hearing which the majority neglected to state. For example, 90 days before the hearing, there was no publicity whatsoever regarding Clapp's disappearance. Also, the dissent stated that the reporting by Gannett's newspapers was always straightforward. There was no sensationalism. *Id.* at 2919-20 (Blackmun, J., dissenting).

65. *Compare* 99 S. Ct. at 2901 *with id.* at 2921.

66. *Id.* at 2921.

67. The dissent stated that the Court has found, neither in *Gannett*, nor in prior cases, a first amendment right of access to judicial proceedings. *Id.* at 2922. "[T]his case involves no restraint upon publication or upon comment about information already in the possession of the public or the press." *Id.* at 2940.

This view is also expressed in a recent comment to a law school audience by Justice Stevens. The following is an excerpt from a magazine article recounting that event.

> Justice John Paul Stevens entered the *Gannett* fray by pointing out that the high court has never ruled that the First Amendment guaranteed a right of access to judicial proceedings. Stevens told an audience at the University of Arizona College of Law that while the court has protected the right to disseminate information, it has never upheld any right to acquire information. Whether that reasoning will continue to close courtroom doors to the press remains to be seen.

TIME, Sept. 17, 1979, at 82.

68. 99 S. Ct. at 2925.

69. 422 U.S. 806 (1975).

70. *Id.* at 807.

71. 380 U.S. 24 (1965).

72. *Id.* at 34.

73. 99 S. Ct. at 2925.

dition and common law to show why the defendant lacks this right.[74] Tracing the development of the royal courts, Blackmun stated that "[p]ublicity . . . became intrinsically associated with the sittings of the royal courts."[75] Blackmun appears, therefore, to be focusing on the inherent limits of the defendant's rights but he demonstrates these historical limits by showing that an open proceeding is still within the public's domain. Quoting from Bentham[76] and tracing criminal proceedings in the American colonies, Blackmun concluded that history has clearly shown that the public interest is sufficiently strong so as to rule out any possibility that a defendant has a right to demand closure.[77] The dissent stated that "[e]arly colonial charters reflected the view that open proceedings were an essential quality of a court of justice, and they cast the concept of a public trial in terms of a characteristic of the system of justice, rather than of a right of the accused."[78] The dissent added that no colonial court "recognized the right of an accused to compel a private trial."[79]

After concluding that history prevents a defendant from prohibiting public access to criminal proceedings, the dissent analyzed the sixth amendment and found that there are three societal interests in publicly held trials. The first of these centers around the fact that trials and suppression hearings often involve the legality of a State's action. Inasmuch as many of these actions occur hidden from the public scrutiny, it is of prime importance that a hearing concerning their propriety be open to the public.[80] Second, public judicial proceedings have an educational role.[81] Third, no matter how scrupulously fair a secret hearing is, it is, by nature, suspect. Closed doors can only contribute to an appearance of injustice.[82] These public interests exist "separately from, and at times in opposition to, the interests of the accused."[83]

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74. *Id.* at 2926.
75. *Id.*
76. "Bentham stressed that publicity was 'the most effectual safeguard of testimony, and of the decisions depending on it; it is the soul of justice; it ought to be extended to every part of the procedure, and to all causes.'" *Id.* at 2927 *quoting* J. BENTHAM, TREATISE ON JUDICIAL EVIDENCE 67 (1825).
77. 99 S. Ct. at 2929.
78. *Id.* at 2928.
79. *Id.*
80. *Id.* at 2930.
81. Elaborating upon the educative value of a judicial proceeding, the dissent said: "Judges, prosecutors, and police officials often are elected or are subject to some control by elected officials, and a main source of information about how these officials perform is the open trial." *Id.*
82. *Id.*
83. *Id.*

The dissent thus countered the plurality's holding with both historical and policy oriented justifications. The dissent then attempted to demonstrate that the public's right of access applies to a pretrial suppression hearing. Blackmun offered three reasons why the right should apply to both pretrial and trial proceedings. First, the suppression hearing resembles a full trial in many details.[84] Second, an evidentiary ruling at the suppression hearing could have the effect of deciding the entire case.[85] Third, statistics show that a great number of criminal cases are disposed of before they ever get to the trial stage.[86] These factors led the dissent to conclude that a pretrial suppression hearing "implicates all the policies that require that the trial be public."[87] A pretrial hearing, therefore, carries with it the same right of access as does a trial because of the great similarities between it and a trial.

Having established that the public does have a right of access to a criminal pretrial proceeding, the dissent qualified that right by stating that this right of access is not absolute. The dissent indicated that in balancing the parties' respective rights, there may be situations when closure is proper.[88] In order to justify closure, the accused would have to establish the presence of three criteria. First, he will need to show that the impact of an open trial will result in permanent injury.[89] This might involve a showing of an "impact on the jury pool."[90] Second, the accused must show that effective alternatives to banning the public are unavailable.[91] Thus, the accused would be required to show, for example, that a change in venue would be an ineffective alternative. Third,

84. The dissent offered the following elements of resemblance:

> Evidence is presented by means of live testimony, witnesses are sworn, and those witnesses are subject to cross-examination. Determination of the ultimate issue depends in most cases upon the trier of fact's evaluation of the evidence, and credibility is often crucial. Each side has incentive to prevail, with the result that the role of publicity as a testimonial safeguard, as a mechanism to encourage the parties, the witnesses, and the court to a strict conscientiousness in the performance of their duties, and in providing a means whereby unknown witnesses may become known, are just as important for the suppression hearing as they are for the full trial.

Id. at 2933.

85. *Id.*

86. In 1976, in the Supreme Court for the City of New York, 89.7% of all criminal cases were terminated by dismissal (25.6%) or by plea of guilty (64.1%). . . . In the Supreme Courts and County Courts outside New York City, 93.4% of the criminal cases were disposed of by dismissal (18.9%) or by plea of guilty (74.5%).

Id. at 2934 n.14 (*quoting* New York Judicial Conference, 22d Ann. Rep. 52, 56 (1977)).

87. 99 S. Ct. at 2934.

88. *Id.* at 2936-37.

89. *Id.* at 2937.

90. *Id.* "This showing will depend on the facts." *Id.*

91. *Id.*

the defendant must show that there is a strong possibility that closing the pretrial hearing will protect him against the harm.[92] If the press has already gained access to many of the facts, further access may not result in further harm.[93]

The dissent concluded that an application of these criteria did not reveal any justification for closure.[94] Given the fair and accurate reporting of the *Gannett* reporter,[95] closure was an extreme and unreasonable action.[96]

IV. CONCLUSION

It is apparent that Justice Powell's hope for a significant development in first amendment rights was not granted by the *Gannett* Court. This conclusion is based upon the refusal of the four dissenting Justices to even reach a first amendment issue,[97] coupled with Justice Rehn-

92. *Id.*

93. *Id.*

94. The dissent reached this conclusion by noting that Gannett's reporting was not sensational, *see* note 64 *supra*, that Gannett was already aware of the substance of the pretrial hearing, and that the accused never offered proof that there are no alternatives to banning the public. *Id.* at 2940.

95. The following was a public protest by Gannett of the Court's decision:

> SENECA FALLS, New York—In 1976, an expoliceman disappeared while fishing on Seneca Lake in Upstate New York. Two men were arrested and accused of his murder, even though the body was never found.
>
> Carol Ritter, court reporter for Gannett Rochester Newspapers, went to cover the pretrial hearing for the accused.
>
> When she arrived at the courtroom, Ritter and other reporters were barred from the hearing on the pretext that the accused would not be able to get a fair trial if the pretrial hearing was covered by the press.
>
> The Gannett Rochester Newspapers strongly disagreed and challenged the judge's right to close the doors of justice to the people, including the press. They took that challenge to the Supreme Court of the United States.
>
> Gannett believes no judge should have the right to shut the people and their free press out of such pretrial hearings, where an overwhelming majority of criminal prosecutions are resolved.
>
> Can you imagine up to 90 percent of all court cases being settled in secret? Gannett could not. But on July 2, 1979, the Supreme Court ruled it could happen.
>
> Gannett protests vigorously this abridgment of the First Amendment. Not only has the Court limited journalists' access to gathering and reporting the news for the public, but it has also trampled on the people's freedom to know, the cornerstone of our rights as a free people in a free society.
>
> The freedoms of the First Amendment must be cherished, not shackled.
>
> At Gannett, we have a commitment to freedom in every business we're in, whether it's newspaper, TV, radio, outdoor advertising or public opinion research.
>
> And so from Burlington to Boise, from Fort Myers to Fort Wayne, every Gannett newspaper, every TV and radio station is free to express its own opinions, free to serve the best interests of its own community in its own way.

TIME, July 30, 1979, at 1.

96. 99 S. Ct. 2940.

97. *Id.* at 2922. *See* note 67 *supra* and accompanying text.

quist's criticism of Powell's first amendment analysis.[98]

If the bare holding and Chief Justice Burger's concurring opinion in *Gannett* are reduced to their least common denominators, then it may be fairly said that the decision in *Gannett Co. v. DePasquale* is, perhaps, the Court's only rational choice between the vital interests[99] of the public to view a trial and those of the defendant to receive a fair trial. The plurality utilized precedent[100] and policy[101] to show that it is the accused who enjoys a constitutional right to a public trial. The sixth amendment confers no similar right upon the public. The public enjoys no more than a non-constitutionally rooted interest in judicial proceedings.[102] A reasonable inference from this holding is that there is a gap between the power of the public and the power of the accused to demand open proceedings. Accepting this premise, it must be *a fortiori* concluded that the public interest must be subordinate to the right of the accused to receive a fair trial. To hold otherwise would be to vest the public with a right to determine the degree of justice that the accused is to receive.

Chief Justice Burger,[103] and to some extent the plurality,[104] added a second dimension to the bare holding that the right to a public trial belongs to the accused.[105] The second dimension is that, aside from a consideration of who is vested with the right of access, this right should not be construed to apply to pretrial hearings. Burger defended this conclusion by inferring the intent of the framers of the sixth amendment.[106] He concluded that if the framers had intended to extend the right of access to include pretrial proceedings, they would have expressly included such a right in the amendment.[107] This conclusion is sound in light of the different functions served by trial and pretrial proceedings.[108]

The dissenting opinion concluded that it is the public who shall

98. *Id.* at 2918.
99. The very nature of the conflict demands a balancing approach and it is very doubtful, therefore, that Justice Rehnquist's statement that *Gannett* applies to all criminal trials, *Id.* at 2917, should be viewed as anything more than dicta.
100. *See* notes 14-32 *supra* and accompanying text.
101. *See* notes 33-46 *supra* and accompanying text.
102. 99 S. Ct. at 2907.
103. *Id.* at 2913-14.
104. *Id.* at 2909-10.
105. *Id.* at 2913-14 and 2909-10, respectively.
106. *Id.* at 2914.
107. *Id. See* notes 47-50 *supra* and accompanying text.
108. *See* note 21 *supra* and accompanying text.

decide whether the courtroom shall be open and that this right extends to pretrial proceedings. This analysis flies in the face of both policy and history and is, therefore, untenable. The public's right of access to pretrial proceedings should always be guaged by its effect on the accused's right to a fair trial. The borders of the public's right should extend no further than those which demarcate fairness and justice to the defendant. The fair trial rights of the defendant must never be subordinated to the interests of a curious public. For this reason, the language seems all too clear: "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility. . . ."[109]

Philip Hof

109. 99 S. Ct. at 2906 *quoting In re Oliver*, 333 U.S. 257, 270 n.25 (1948) *quoting* 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).