A FIRST AND NINTH AMENDMENT THEORY OF A RIGHT OF ACCESS TO CRIMINAL TRIALS

Charles W. Danis Jr.
COMMENT

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I. INTRODUCTION

Judicial intervention into the reporting of criminal proceedings is a relatively recent phenomenon. The last two decades have seen an increasing judicial sensitivity to the potential conflict between unhindered reportage of those proceedings and the sixth amendment fair trial rights of criminal defendants. In *Gannett Co. v. DePasquale*, the Supreme Court ruled that courts may close pre-trial proceedings to the press and public when prejudicial publicity

threatens fair trial rights. Since it was decided, the case's applicability to different circumstances has been widely controverted. This comment will examine what Gannett portends and will establish a theory of a right of personal access to criminal trials.

II. HISTORY OF THE ISSUE

A. Setting the Stage for Gannett

The bedrock on which modern courts have built the framework of permissible restrictions on the press is Near v. Minnesota. The Court ruled that liberty of the press demands immunity from previous restraints or censorship. The Court noted a few exceptions to this rule, but there was no doubt after Near that there was a heavy presumption against the validity of prior restraints on the press. Absent unusual circumstances, the press is free to publish what it knows.

If in the course of a criminal trial, however, the press learns of and publishes prejudicial information which would not be admissible as evidence, its right to publish what it knows squarely confronts the right of the defendant to a fair trial. In Sheppard v. Maxwell, the Court confronted such a case. Overturning Sheppard's conviction, the Court made it clear that Near did not prevent a trial judge from exercising control over sources of press information. Adverse effects on courtroom atmosphere created by the press were held to be directly controllable by the judge, as master of the premises. The Court further held that the release of information by the police, counsel and witnesses may be prohibited by the trial court. The Court declared that trial judges, other officers of the court and the police must place the interest of justice first, leaving the news media to the task of reporting cases as they

2. 283 U.S. 697 (1931) (statute which permitted publication of "a malicious, scandalous and defamatory newspaper, magazine or other periodical" to be enjoined held unconstitutional).
3. Id. at 716.
4. Id. The exceptions included publications that would hinder a war effort, offend decency, or incite acts of violence or overthrow of the government. The Court did not intend the list to be exclusive. It indicated that the list typified the genre of subject material which might legitimately be subject to prior restraint. Id.
6. During the murder trial the press had published clearly inadmissible material consisting of leads, information and gossip made available by police officers, witnesses and the counsel for both sides. Id. at 359.
7. Id. at 358.
8. Id. at 359.
unfold in the courtroom—not pieced together from extrajudicial statements.\textsuperscript{9}

In \textit{Nebraska Press Association v. Stuart},\textsuperscript{10} the Court addressed the constitutionality of an attempt to restrain the press from reporting prejudicial information which it possessed or might come to possess, as opposed to restraint on sources of that information. The trial court's gag order,\textsuperscript{11} issued at the request of both the prosecution and the defense, as finally modified by the Nebraska Supreme Court,\textsuperscript{12} forbade the reporting of confessions or admissions made to anyone except members of the press, and any other facts strongly implicative of the accused. The Supreme Court held that this was a prior restraint on publication and ruled that the heavy presumption against its validity imposed by \textit{Near} had not been overcome. First, the Court noted that even pervasive adverse pre-trial publicity does not inevitably lead to an unfair trial.\textsuperscript{13} The tone, extent and sources of the information, as well as the court's efforts to mitigate its effects, may determine whether the defendant receives a trial consistent with the requirements of due process.\textsuperscript{14} Even when there has been a finding of a substantial likelihood of impairment of fair trial rights by unchecked publicity, the Court said that alternative methods of protecting those rights must be found to be inadequate before prior restraint is justified. When prior restraint appears warranted, it must be shown to be manageable, enforceable and capable of reaching and stifling publications that could carry the target information into the court's jurisdiction. Finally, the court must find that without the restriction, there could not be a fair trial. To be valid, the restriction must be narrow and precise, reaching only that which would prejudice the defendant's rights and no more.\textsuperscript{15}

\textsuperscript{9} Id. at 362.

\textsuperscript{10} 427 U.S. 539 (1976) (gag order prohibiting publication of confessions, admissions and other facts strongly implicative of defendant is prior restraint, subject to heavy presumption against validity which was not overcome by fair trial interests in this case).

\textsuperscript{11} Defense attorneys tend to call court orders which restrain publication protective orders. Media counsel call them gag orders. The terms are synonymous.

\textsuperscript{12} State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975), rev'd sub nom. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The Nebraska Supreme Court found that prior restraint was justified by the possible effect of pretrial publicity on fair trial rights, and modified the trial court's gag order, which had forbidden dissemination of all testimony or evidence adduced in a pretrial hearing, into the form declared unconstitutional by the United States Supreme Court in \textit{Nebraska Press}. Id.

\textsuperscript{13} Nebraska Press Ass'n v. Stuart, 427 U.S. at 554.

\textsuperscript{14} Id. at 555.

\textsuperscript{15} Id. at 565-69.
Before discussing Gannett, a decision triggered by a court's attempt to deal with the limitations on press restraint imposed by Nebraska Press, one other strain of Supreme Court cases should be examined. Pell v. Procunier,16 Saxbe v. Washington Post Co.17 and Houchins v. KQED, Inc.18 all dealt with an asserted first amendment right of the press to gain access to prisons for purposes of gathering information and reporting on inmates and conditions in the rehabilitation system. The Court ruled that the press possesses no special right of access to prisons over and above that enjoyed by the general public. The Court rejected the idea that the Constitution imposes upon government an affirmative duty to make available to journalists sources of information not available to members of the public generally.19 Since the restrictions imposed on the general public were validly grounded in legitimate concerns for security and the integrity of the rehabilitative scheme, the press could not complain of being bound by the same strictures. The rule synthesized by the Pell, Saxbe and Houchins triumvirate is that the press has a right to gather information from any available source, but it may not successfully resort to the first amendment to compel anyone, including the government, to supply that information.20 Where a right of access to government-controlled sources of information has been granted the public, the rights of the press coincide, but do not extend further.

B. The Gannett Decision

After Nebraska Press, many trial courts despaired of ever being able to formulate a gag order that would pass muster under the stringent standards of that case.21 Faced with situations in which

17. 417 U.S. 843 (1974). Saxbe presented the same issue as Pell, although within the federal prison system. Id. The cases were decided on the same day.
18. 438 U.S. 1 (1978). A television station was denied permission to send a news crew into a prison to report on conditions which may have led to a suicide. The station and the NAACP filed suit, alleging a violation of first amendment rights, claiming that information on the jail was essential to permit public debate on conditions there. At the time, no public tours of the facility were permitted.
20. "The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right [of the press] to have access to particular government information, or to require openness from the bureaucracy." Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 636 (1975).
21. Although Chief Justice Burger's Nebraska Press majority opinion allows for
they perceived a danger to fair trial rights due to unrestricted reportage of criminal proceedings, trial judges began to turn to closure orders to protect defendants from the effects of prejudicial publicity, at least to the extent that the publicity originated in the courtroom. "You can't let 'em in and then tell 'em not to report what they see and hear," said Nebraska Press. "But nobody says you have to let 'em in," said Pell, Saxbe and Houchins. Or so it seemed. By closing the court to all but the participants in a criminal proceeding, the courts hoped to curtail press reports of those events which would arguably prejudice the ability of the fact finder to determine the defendant's innocence or guilt according to the proper standards of evidence and law.\textsuperscript{22} Coupled with the power, confirmed in Sheppard, to regulate courtroom atmosphere and sources of information within the control of the court, the closed courtroom appeared to close a significant chink in the judicially tailored armor protecting defendants' fair trial rights.

In Gannett, the Court upheld a trial court order which closed a pre-trial suppression hearing on prejudicial publicity grounds. A newspaper claimed a right of access based on the first, sixth and fourteenth amendments.\textsuperscript{23} Writing for a five-Justice majority, Just-


\textsuperscript{23} The hearing was on a motion to suppress incriminating statements and other evidence, including a revolver, in connection with a New York prosecution for a 1976 murder. Police theorized that the victim, whose body was never found, was shot with the revolver, his own gun, while with two defendants on his boat on a lake. The two fled with a 16 year old companion in the victim's truck. Police found the truck in Michigan, and arrested the trio shortly thereafter. One of them led police to the gun. Gannett operated a newspaper in the vicinity of the crime which duly reported all of this information. Gannett Co. v. DePasquale, 443 U.S. at 371-75.

At the hearing, the defendants claimed that they had made incriminating statements involuntarily and moved to suppress the physical evidence as the fruit of those involuntary statements. Defense attorneys argued that the unabated buildup of adverse publicity had jeopardized the defendants' ability to obtain a fair trial and moved that the press and public be excluded from the hearing. Neither the district attorney nor a reporter for the Gannett paper present at the hearing objected. The trial judge granted the motion. Id. at 374-75.

The next day, the reporter wrote to the judge, asserting a right to attend. The judge responded the same day, noted that the hearing was over and set a date for a hearing on Gannett's motion to set aside the closure order. He refused to vacate the order at the hearing, and Gannett started the appeal process, alleging violation of
tice Stewart said that the trial judge has an affirmative duty to minimize the effects of prejudicial publicity and may take protective steps even if they have not been shown to be strictly necessary. If one of those protective steps is the closure of the proceeding, the press may not successfully raise objections to it based on the sixth amendment right to a public trial. That right is personal to the defendant and may not be asserted by anyone else. Justice Stewart said that the adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation. This protection is largely a function of the duty of prosecutors to be servants of the law, placing justice before their interest in obtaining convictions. This duty requires sensitivity to the defendant's due process rights to a fair trial, a sensitivity also required of trial judges. The public interest in the fair administration of justice is thus protected by the judge and the prosecutor, who represent the public. The protection is still intact, therefore, when the court accedes to a request for a closed court.

It is clear from the context of the opinion, however, that the "public interest" of which Justice Stewart speaks is limited to the interest in affording the benefits which public trials are presumed to provide for the defendant. These are primarily due process guarantees, in Justice Stewart's view. The opinion does not address the public's interest in open trials beyond questioning whether an independent public interest in the enforcement of sixth amendment guarantees exists, and whether that putative interest alone creates a constitutional right on the part of the public to open proceedings.

The Court next addressed the history of the open trial, summarily declaring it to show no more than a "common-law rule" of open civil and criminal proceedings. The Court said that few such rules have been elevated to the status of constitutional

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24. 443 U.S. at 378.
25. Id. at 383-84.
26. While criminal defendants have a constitutional right to a public trial, they do not have the right to compel a private trial. The court may veto a waiver of the constitutional right. Singer v. United States, 380 U.S. 24 (1965).
27. 443 U.S. at 383.
28. Id. at 384. See also notes 60-66 infra and accompanying text.
rights\textsuperscript{29} and that the public trial rule was not one of them. The rule merely establishes the norm of openness which is presumed by the sixth amendment.\textsuperscript{30} This, of course, stops short of saying that the amendment requires openness. The Court found it unnecessary to rule on whether the amendment was intended by the Framers to incorporate the "rule" of openness as a requirement because it determined that the common law treated pre-trial proceedings, like the one under review, differently from full trials. They were never characterized by the same degree of openness as were actual trials.\textsuperscript{31} Therefore, even if the sixth amendment incorporated the common-law rule of openness, it would not extend to this case, a pre-trial hearing.

But to adhere to this reasoning, given the facts in \textit{Gannett}, one must exalt form over substance, because suppression hearings, like the one at issue here, took place \textit{at trial} in open court at common law.\textsuperscript{32} They, therefore, must be considered part of the trial for purposes of applying common-law or constitutional notions of openness. The pre-trial hearings to which the common law attached no presumption of openness were typically preliminary proceedings, on the order of probable cause hearings,\textsuperscript{33} held before an indictment was returned or before a person was bound over for trial.

\textsuperscript{29} 443 U.S. at 384. The Court cited the common-law right to a jury trial as an example of a common-law rule which was given constitutional recognition. The common-law rule that jurors could testify against a defendant is one which has been rejected. \textit{Id.} at 385.

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.} at 387-88.

\textsuperscript{32} \textit{Id.} at 437 (Blackmun, J., dissenting). The pre-trial suppression hearing is the close equivalent of a trial on the merits for purposes of applying public trial doctrine. It is often of critical importance, and may be decisive in the prosecution of a criminal case. Its outcome, especially where a confession is concerned, may virtually dictate the outcome of the case. \textit{Id.} at 434-37.

Moreover, such hearings are often the only judicial proceedings of importance that occur during a criminal prosecution, offering the public its only opportunity to view the legal and factual issues. This is because, nationwide, most felony prosecutions are terminated without a trial on the merits. \textit{Id.} at 434-35.

Perhaps most importantly, suppression hearings typically involve allegations of police or prosecution misconduct. Such misconduct by public officials is a matter for public concern. The hearing will usually be the only opportunity the public will have to learn of misconduct, since the evidence illegally produced will normally not be allowed to surface at trial. \textit{Id.} at 435-36.

\textsuperscript{33} \textit{Id.} at 437. The distinction between preliminary and non-preliminary proceedings is that the former lead to a trial \textit{vel non}, and the latter may lead to a conviction. \textit{Id.} at 394-95 (Burger, C.J., concurring).
Having decided to rely on the common-law trial/pre-trial distinction nonetheless, the *Gannett* majority announced, in a case which arose in a pre-trial hearing, that members of the public have no constitutional right under the sixth and fourteenth amendments to attend criminal trials. This declaration came despite the Court's misplaced reliance (since suppression hearings were historically held at trial) on English notions of pre-trial openness, the absence of need for such a broad ruling to decide the case, and the historically different treatment which the Court acknowledged was accorded to trials.

Curiously, while the Court's analysis of the sixth amendment public right to attend trials is long and detailed, study of the first amendment as a basis for the right, which was also urged by Gannett, was given short shrift. Assuming, without deciding, that the first and fourteenth amendments provided a guarantee of access in the case, the Court declared that the trial court had given appropriate deference to that right by balancing the constitutional rights of the press and the public against the defendant's right to a fair trial. The trial court's decision that there was a "reasonable probability of prejudice to these defendants" was enough to overcome a first amendment right of access, assuming, as the trial judge did, that that right existed under the circumstances.

The four-Justice dissent, written by Justice Blackmun, contains a long discussion of the history of the public trial guarantee, and concludes that the right is not personal to the defendant, but inheres in the public. Blackmun traced a rationale for the right based on the public interest in the impartial administration of justice and the necessity of safeguarding the truthfulness of testimony. The dissent found no evidence in the history of the common-law public trial right or the colonial public trial provisions that predated the Constitution to indicate that the Founders intended the sixth amendment to be invocable only by defendants. The dissent noted that the right to attend court proceedings is limited and may be overcome by a showing of strict and inescapable necessity to protect fair trial rights. The dissent found that that showing was

34. *Id.* at 443 U.S. at 391.
35. *Id.* at 392-93.
37. *Id.* at 418-33.
38. *Id.* at 439-40.
not made in *Gannett*. Since this point of view would be dispositive of the case, the dissent did not deem it necessary to address the first amendment issue.

C. Judicial Confusion Over *Gannett*

The reaction to *Gannett* in the nation's trial courts was quick, confused and pervasive. The decision was rendered on July 2, 1979. As of late August, trial judges had agreed to about half of some fifty requests to close courtrooms. A few judges barred the press but not the public, and others closed off not only pre-trial hearings but actual trials and sentencings.\(^{39}\) In one case, a trial court set aside its pre-trial closure order, but required a newspaper's counsel to attend the proceedings to advise its reporter as to what information could be published.\(^{40}\) In short, courts exhibited widely varying interpretations of what the *Gannett* decision had decided.

The most obvious problem confronting trial courts was *Gannett*'s applicability to full trials. The opinion said that there was no sixth or fourteenth amendment right to attend criminal trials. That language, however, was dicta in a case in which only the right to attend a pre-trial hearing was at issue. Some post-*Gannett* decisions closed full trials, citing potentially prejudicial publicity.\(^{41}\) Others allowed the court to remain open,\(^{42}\) even in cases where there had been no press objection to closure,\(^{43}\) apparently on the

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40. Keene Publishing Corp. v. Superior Court, 406 A.2d 137 (1979) (requirement that counsel advise the reporter as to what may be published is an unconstitutional prior restraint).
41. *E.g.*, State v. Hudspeth, No. 54534 (Dist. Ct., Travis County, Tex., Aug. 3, 1979) (murder trial was closed after defense motion on the grounds that the jury might be prejudiced by news accounts of an incriminating tape recording that was to be presented in court outside of the jury's presence).
42. *E.g.*, People v. Bartowsheski, No. 79CR-516 (18th Dist. Ct., Colo., 1979) (defense motion to close murder trial on grounds that news accounts might prejudice impartial jury was denied) (prosecution opposed the motion); United States v. Barber, 476 F. Supp. 182 (S.D. W. Va. 1979) (defense motion to close parts of rape trial to the press, but not to the public, or to gag the press on grounds that the jury might see news accounts of portions of trial conducted outside of their presence was denied) (prosecution and press objected).
43. *E.g.*, People v. Angus, No. 104-69-78 (Albany County Ct., N.Y., 1979) (motion by counsel for a witness to close a sodomy trial on grounds that news accounts of the witness' testimony would prejudice his fair trial rights during his own trial on related charges denied) (defense counsel joined motion; press did not oppose).
theory that Gannett does not compel closure upon motion where the judge finds little potential prejudice.44

It is not surprising that trial judges came to disparate conclusions as to the scope of Gannett, since even the Justices of the Supreme Court disagreed as to what it meant. In the months after the decision issued, four Supreme Court Justices made separate extrajudicial statements about the case's significance. Chief Justice Burger said that judges who barred the press and the public from actual trials were misreading the decision. He suggested that judges were reading newspaper reports on the case instead of the decision itself.45 Justice Blackmun, who wrote the dissent, told a group of federal judges that the opinion allowed full trials to be closed.46 Justice Powell emphasized that Gannett decided only the sixth amendment access question; there might be a first amendment right to attend criminal trials.47 Justice Stevens, however, declared the case to be consistent with previous Court denials of a right of the press to acquire information.48 Chief Justice Burger had what should stand as the final word on the extrajudicial explanations of Gannett. If jurists start publicly elaborating on their written opinions, he said, "we'll all be in the soup."49

III. Gannett Should Be Narrowly Construed

Many of these elements of the Gannett opinion, such as the narrow interpretation of "public interest," the misapplication of the common-law rule, the overbroad holding and the failure to address all the theories advanced in support of the right to attend, combined with the confusion following the decision, are good reasons for restricting the case to its facts. The Court did not reach the first amendment issue. The majority felt that the trial court's handling of closure did not abuse the asserted first amendment right, assuming arguendo that it existed. Arguably, a first amendment protected right of personal access to the courts should, in fact, be recognized.50 Indeed, Justice Powell's concurring opinion in Gannett51 does recognize such a right.52 Although Justice Powell

44. See note 26 supra.
45. N.Y. Times, Aug. 9, 1979, at 17, col. 1.
46. TIME, note 39 supra.
47. Id.
48. Id.
49. N.Y. Times, note 45 supra.
50. See notes 60-90 infra and accompanying text.
51. 443 U.S. at 397 (Powell, J., concurring).
52. See note 56 infra and accompanying text.
was the only member of the Court who expressed a first amend­
ment view, the four dissenters also found a right of access, albeit in
the sixth amendment; and three of the four members of the
Gannett majority\textsuperscript{53} did not rule out the possibility of a first amend­
ment right.\textsuperscript{54} All of this indicates that, given the right case, per­
haps one where the putative first amendment right is dismissed as
nonexistent without even the balancing act treatment accorded by
the Gannett trial court, the Court may well find at least a limited
first amendment right of access and begin the task of defining its
parameters.\textsuperscript{55}

\textsuperscript{53} Chief Justice Burger and Justices Stewart and Stevens; \textit{But see} Stevens,
says that the "general rule" developed by the Court in applying the first amend­
ment:

\begin{quote}

draws a sharp distinction between the dissemination of information or ideas,
on the one hand, and the acquisition of newsworthy matter on the other.
Whereas the Court has accorded virtually absolute protection to the former,
it has never squarely held that the latter is entitled to any constitutional pro­
tection whatsoever.
\end{quote}

\textit{Id.} at 602. Stevens finds many of the arguments advanced in favor of a right of access
"unpersuasive", but feels debate on the issue is "constructive", and "maximizes the
likelihood that legislators and other lawmakers will make constructive changes in the
rules relating to access to governmental proceedings." \textit{Id.} at 603-04. He appears to
be solicitous to a legislative resolution of the issue of access. \textit{Id.} at 605.

\textsuperscript{54} Justice Rehnquist's \textit{Gannett} concurrence contends that there is "no First
Amendment right of access in the public or press to judicial or other governmental

\textsuperscript{55} The Supreme Court has an opportunity to consider the issue of personal ac­
cess to criminal trials in \textit{Richmond Newspapers, Inc. v. Virginia}, 5 MED. L. RPTR.
(BNA) 1545 (Va., 1979), \textit{prob. juris. noted}, 100 S.Ct. 204 (1979) (No. 79-243). The
case involves a challenge to a Virginia statute which states that: "In the trial of all
criminal cases . . . the court may, in its discretion, exclude from the trial any persons
whose presence would impair the conduct of a fair trial, provided that the right of
the accused to a public trial shall not be violated. . . ." \textit{VA. CODE} \textsection{} 19.2-266(1975).

The trial court had excluded all members of the press and public from a murder
trial without notice, a hearing or any evidence being adduced that fair trial rights
were in jeopardy due to public attendance. The trial ended in two days. The court
found the defendant not guilty, by reason of the insufficiency of the state's evidence.
Virginia Supreme Court denied relief to the appellant newspapers and reporters with
a one-sentence reference to \textit{Gannett}, seven days after the Supreme Court handed
down that decision.

The newspapers are contending that the right of access to criminal trials is a fun­
damental constitutional right. They submit that although there is no agreement as to
the textual source of that right in the Constitution, the right is confirmed by shared
experience and common understanding, informed but not wholly defined by the first
and sixth amendments. \textit{Jurisdictional Statement of Appellant at 17, Richmond Newsp­
papers, Inc. v. Virginia}, \textit{prob. juris. noted}, 100 S.Ct. 204 (1979) (No. 79-243).

The newspapers also assert that the Virginia statute violates the first, sixth, and
fourteenth amendments by virtue of allowing closure without a showing of a threat
This is all the more likely because the *Gannett* majority is a fragile alliance. Chief Justice Burger and Justice Powell, who joined Justice Stewart's majority opinion, construe the power of the courts to restrict access to their proceedings more narrowly than does the majority opinion itself. Chief Justice Burger's concurring opinion emphasizes that trials and pre-trial hearings are different, historically governed by different presumptions of purpose and openness. He joined the Stewart opinion because the case dealt only with the pre-trial issue. Justice Powell concurred, but found a limited first amendment right of public access to criminal courts. To protect that right he would require, upon motion for closure: consideration of alternatives; a tailored closure order, extending no further than necessary to protect fair trial goals; an opportunity for those interested to be heard on the question of closure; and a showing by the defendant that public access will prejudice the fairness of the trial. Justice Powell concluded that the *Gannett* trial court procedure substantially complied with all of this, and he joined the majority opinion. The majority, however, requires only a balancing of fair trial and "putative" press rights of access; a "reasonable probability of prejudice to these defendants" defeats the asserted press rights. That certainly does not approach the level of protection provided by Justice Powell's apparatus. So the *Gannett* opinion is an unsteady construction whose architects had different concepts of the edifice they were building.

A final reason which militates for a narrow application of *Gannett* concerns the genesis of the majority opinion. Press reports indicate that the *Gannett* opinion was a result of a late-term vote switch that transformed the dissenting opinion into the majority. According to these accounts, both opinions were in nearly final form when the switch, attributed to Justice Powell, occurred. Justice Blackmun's long analysis of the significance of public trials in the Anglo-American legal tradition was transformed from the majority opinion into a dissent, and the opinion for the Court was built around Justice Stewart's former dissent. Supposedly, in the pressure of finishing the Court's work by the end of the term, the new majority opinion did not receive normal scrutiny by other members of the majority.

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56. 443 U.S. at 400-01 (Powell, J., concurring).
Since dissenting opinions are often more argumentative and more broadly worded than majority opinions, the apparent lack of close final editing meant that some members of the majority signed their names to language that went further than they intended.\textsuperscript{58} If this is true, it could explain the existence of the sweeping and unnecessary dicta in the \textit{Gannett} majority opinion\textsuperscript{59} which has been responsible for much of the confusion in interpreting the case. These factors indicate that it would not be wise to extend the holding in \textit{Gannett} beyond its facts. Under the circumstances, the opinion is simply not strong enough to support broader applicability.

\section*{IV. A First and Ninth Amendment Right of Access to Criminal Trials}

\subsection*{A. Common Law Origins of the Right of Access}

The citizen's right of access to full trials had its origin in the English common law. The practice of holding court proceedings in the open was already ancient and well established by Blackstone's time.\textsuperscript{60} It developed at a time when procedural safeguards for the accused were uncommon.\textsuperscript{61} The English cases indicate that the public trial was perceived as a device to serve the interest of members of the public in the integrity of the court system apart from and, if necessary, in opposition to the interests of the individual defendant.\textsuperscript{62} English courts recognized that such a policy could be to the disadvantage of defendants, but held that this effect was outweighed by the need to make the proceedings of the courts known to common citizens.\textsuperscript{63} The right of citizen access to trials was

\begin{itemize}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} See notes 28-34 \textit{supra} and accompanying text.
\item \textsuperscript{60} One commentator says the English rule of openness dates from time immemorial. E. Jenks, \textbf{The Book of English Law} 73-74 (6th ed. 1967). The public trial had its origins in the English custom of trial by the community, which predated the Norman invasion of 1066. Since that time, there has been a continuous tradition of community participation in English criminal trials. Even the trials of the notorious Star Chamber were always held in public, which probably led to its demise as public opinion was aroused against it. Note, \textit{Legal History: Origins of the Public Trial}, 35 \textit{Ind. L. J.}, 251, 251-54 (1960); See United States v. Gianfrani, 573 F.2d 835, 847 (3d Cir. 1978) (district court order excluding the public from a pretrial suppression hearing and sealing the record of the hearing reversed on first and sixth amendment grounds as being more restrictive than necessary under the circumstances).
\item \textsuperscript{61} \textit{Gannett Co. v. DePasquale}, 443 U.S. at 423 (Blackmun, J., dissenting).
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} See, \textit{e.g.}, The King v. Wright, 101 Eng. Rep. 1396, 1399 (K.B. 1799).
\end{itemize}
thought to be founded in public necessity, and was distinguished from the right to attend pre-trial hearings. This concept predates the development of the complementary notion of the public trial as a procedural safeguard of defendants' rights. The English cases indicate that the public necessity idea was the better developed one at the time of the formation of the American republic.

B. Purpose of the Right

In the abstract, the right to inspect the functioning of government institutions is concomitant to the inherent power of the citizenry to direct government, principally through the vote and the power to petition and to act through elected representatives. Direction cannot take place in a vacuum of information. The right to observe fosters the intelligent discussion of government affairs

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64. "[T]hese preliminary examinations have no such privilege. Their only tendency is to prejudice those whom the law still presumes to be innocent, and to poison the sources of justice." Rex v. Fisher, 170 Eng. Rep. 1253, 1255 (K.B. 1811). The English common law notion of "preliminary hearing" is limited to proceedings preceding the binding over a defendant for trial, however. It does not include suppression hearings. See notes 32-33 supra and accompanying text.


66. "Indeed the first public trial provision to appear in America spoke in terms of the right of the public, not the accused, to attend trials." Id. (citing CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY (1677), ch. XXIII, reprinted in 1 SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 129 (1971)).

67. See note 88 supra.

68. The first amendment embodies a system of freedom of expression. See note 83 infra and accompanying text. A "main function of a system of freedom of expression is to provide for participation in decision-making through a process of open discussion which is available to all members of the community." Everyone is entitled to participate in this process of formulating decisions. T. EMMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 8-9 (1966).
and allows the public to meaningfully exercise its powers. Public scrutiny has an even more direct effect on government conduct. Since the parties to that conduct must act in the open, any improprieties are immediately laid bare for public inspection. Acts may be done in private which the actor would not be bold enough to do in public.\textsuperscript{69} Publicity, therefore, has a deterrent effect on misuse of the institutions of government, thereby increasing their effectiveness and the public's respect for them.\textsuperscript{70}

In practice, as applied to the court system, this translates into an enhancement of the courts' fact finding function and a safeguard against abuses of the judicial system.\textsuperscript{71} Witnesses are more likely to overcome the temptation to perjure themselves in public proceedings.\textsuperscript{72} Publicly reported testimony is capable of bringing forth

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[S]uppression of information . . . prevents one from reaching the most rational judgment, blocks the generation of new ideas, and tends to perpetuate error." \textit{Id.} at 7. Society's judgments are made up of individual judgments. A judgment of society is therefore "vitaly conditioned by the quality of the individual judgments which compose it." \textit{Id.} at 8. Open discussion and access to the information that makes it possible are therefore imperatives for rational social judgments.

\textsuperscript{69}. "[A] witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal." 3 W. BLACKSTONE, \textit{Commentaries} \textsuperscript{*373}.


\textsuperscript{71}. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." \textit{In re Oliver}, 333 U.S. 257, 270 (1948). This was a habeas corpus proceeding brought by a defendant sentenced to jail for contempt by a Michigan "one-man grand jury," who ruled that contempt was in order because the defendant's story did not "jell" with other secret testimony. The summary manner in which the defendant was jailed, pursuant to a proceeding in the secrecy of grand jury chambers, was held violative of the fourteenth amendment due process clause. \textit{Id.} at 257.

\textsuperscript{72}. Bennett v. Rundle, 419 F.2d 599, 606 (3d Cir. 1969) (holding that a suppression hearing, held at trial with the jury sequestered, must be conducted as a public trial where there is a question of witness credibility and where the judge alone determines the ultimate outcome).
witnesses to dispute or add to what has been adduced. Biases of judges and abuses of their power may be discovered or tempered, and their fitness for office disclosed. Improper police activity will come to light, and abuses by other officers of the court will also be made public. More is involved here than an interest in protecting the fair trial rights of the particular defendant. Witnesses or non-parties may be abused by the judge, whose conduct may reveal much about his fitness to fill his office, even though the acts do not prejudice the defendant. The defendant himself may be the beneficiary of the misdeeds.

Open trials are in part based on the concern that nonparties with a stake in the litigation need an opportunity to observe the course of the trial or to read accounts of it in the press. This is part of a larger concern with the appearance of justice, which is enhanced by revelation of the testimonial and evidential bases upon which judicial determinations are founded. "This opens the processes of government to the citizenry, and builds confidence in the judicial system." Since everyone has a stake in the outcome of criminal trials, in that societal wrongs are redressed and members of the public are protected from those who have demonstrated a propensity to do them harm, every citizen has a need to observe the criminal justice system. This is an outgrowth of the necessity of public confidence in government institutions. Those institutions

74. Id. See also Mills v. Alabama, 384 U.S. 214, 219 (1966). The Court cited examples of the cleansing effect the press has on government to support its holding that a state act providing penalties for newspaper editorials on election day, urging people to vote a certain way, violated the Constitution's free press guarantee. Id. at 214.
77. Id. See note 71 supra. See also In re Oliver, 333 U.S. 257, 270 (1948).
78. The public has an independent right to be present to see that justice is fairly done. It is important that our citizens be free to observe court proceedings to insure a sense of confidence in the judicial process. Conducting trials behind closed doors might engender an apprehension and distrust of the legal system....

United States v. Lopez, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971). In a suppression proceeding relating to the secret airline "hijacker profile," the court ruled that exclusion of the public from the part of the proceeding dealing with the profile did not violate the right to a public trial. Id. at 1077.
can be fully effective only if there is respect for their decisions and for the people and methods involved in their formulation. If the institutions are not operating effectively, the people have the right to observe the ills and formulate a remedy under our system of government.

C. **The First Amendment**

There is practically universal agreement that a major purpose of the first amendment was to protect the free discussion and scrutiny of governmental affairs. Commentation and reporting on the criminal justice system is at the core of first amendment values.

For practical reasons, individual citizens are unable to personally gather all the information they need and are entitled to in order to make informed decisions about the courts. They depend on the press. The first amendment reflects the intent of the amendment's framers that the press be unhindered in its endeavors to report that which the public itself has a right to experience.
of the press to information has been restricted by the Court only where there is a restriction on the public.\textsuperscript{84}

A free press is the only guarantee a citizen has that he may effectively exercise his right to know what is going on in government.\textsuperscript{85} As applied to the criminal justice system, this means that members of the public are entitled to information about what is happening to the accused. There is no other way for the majority of citizens who cannot attend court and observe cases to evaluate the judicial system's administration of justice except through the media. Even while reviewing a case characterized as a "media circus," the Court was able to say that a responsible press is the "handmaiden of effective judicial administration," especially in the criminal field.\textsuperscript{86}

In light of this judicial recognition of the role of trial publicity as an element of the public's right to oversee government in action and the function of the first amendment in securing this right, it is beyond question that criminal trial closures implicate more than the sixth amendment public trial guarantee. Closure implicates an interest which has its roots in the first amendment. That amendment protects the free discussion of government affairs so that citizens can make intelligent appraisals of government institutions, their operation, and the people who run them.\textsuperscript{87} Ultimately, the

\textsuperscript{84} Emerson, supra note 68, at 59. One such judgment is that expression is to be freely allowed and encouraged. \textit{Id.} "Expression," as Emerson uses the term, encompasses more than mere verbalization or memorialization of ideas. It is part of a continuum along which an idea is formulated, discussed, refined, assigned a niche in the hierarchy of ideas and implemented. The first amendment protects "expression," as opposed to "action." The distinction rests on the immediacy and irremediability of the effect of the activity. The more immediate and irremediable the purported effect, (harm to fair trial rights, in the case of criminal trial access) the farther the activity shifts to the "action" end of the action/expression continuum. \textit{Id.} at 60. The right of access can be protected without immediate or irremediable adverse effect on fair trial rights. See notes 139-56 infra and accompanying text.

\textsuperscript{85} See notes 16-20 supra and accompanying text.

\textsuperscript{86} See State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 467, 351 N.E.2d 127, 134 (1976) (an order excluding the public and barring the press from publishing reports on a suppression hearing was held violative of the first and sixth amendments).

\textsuperscript{87} Sheppard v. Maxwell, 384 U.S. at 350. "Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." \textit{Id.}

\textsuperscript{87} Justice William Brennan says that there are two distinct and legitimate models of the role of the first amendment. The first is the "speech" model. "According to this traditional 'speech' model, the primary purpose of the First Amendment is
citizens' right to prompt change when they identify a need cannot be meaningful unless there is a right of access to the information which will allow intelligent, fully informed discussion. This interest is not too remote from the first amendment to benefit from constitutional protection. It militates for more than "a common-law

more or less absolutely to prohibit any interference with freedom of expression." Brennan, *Why Protect the Press?*, COLUM. JOURNALISM REV., Jan./Feb. 1980, 59, at 60.

The model which applies to trial closure, however, is the second, "structural," model. This model is based on the idea that:

[T]he First Amendment protects the structure of communications necessary for the existence of our democracy. This insight suggests the second model to describe the role of the press in our society. This second model is structural in nature. It focuses on the relationship of the press to the communicative functions required by our democratic beliefs. To the extent the press makes these functions possible, this model requires that it receive the protection of the First Amendment. A good example is the press's role in providing and circulating the information necessary for informed public discussion. To the extent the press, or, for that matter, to the extent that any institution uniquely performs this role, it should receive unique First Amendment protection.

Id. Brennan says that the protection accorded under the first model is absolute. That accorded under the "structural" model involves protection of interests which "may conflict with other societal interests and adjustment of the conflict on occasion favors the competing claim." Id.

88. The [First] Amendment therefore also forbids the government from interfering with the communicative process through which we citizens exercise and prepare to exercise our rights of self-government. The individual right to speak out, even millions of such rights aggregated together, will not sufficiently protect these social interests. It is in recognition of this fact that . . . the Court has referred to "the circulation of information to which the public is entitled in virtue of the constitutional guarantees."

Id. (emphasis supplied by Justice Brennan) (quoting Grosjean v. American Press Co., 297 U.S. 233, 250 (1936)).

Intelligent self-government requires that the electorate be sufficiently informed of the problems that face the country and of the potential solutions of those problems. The first amendment stands as a bar to government restrictions placed on the publication of information necessary for enlightened public policy and electoral decisionmaking. But if the citizenry has no effective means to gain this information, even an expansive right to disseminate available information is of little value. In other areas courts have recognized that simply granting a right to do something is not sufficient if it is impossible to take advantage of such a grant. For example, because the right to an attorney in a criminal action means little if one cannot afford to hire an attorney, government has fostered the right by providing appointed attorneys. The argument that the goals of the first amendment require an accompanying right to gather news proceeds on much the same analysis.

rule of open . . . criminal proceedings." The ninth amendment bestows constitutional protection on fundamental personal rights even if they are not specifically listed in the first eight constitutional amendments. The histories of the first and ninth amendments combine to indicate that the right of access to criminal trials is a fundamental personal right and is due constitutional respect under those amendments.

D. The Ninth Amendment

1. Purpose of the Amendment

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This, the ninth amendment, was a product of the apprehension of its author, James Madison, that the Bill of Rights might be construed as a denial of unenumerated rights or as a grant of federal power in the areas not covered by the enumeration. Madison inserted the amendment into the Bill of Rights out of caution, despite the fact that the framers of the Constitution upheld the English tradition that basic, natural, and fundamental individual rights were protected whether enumerated specifically in a constitution or not. But the amendment is more than an exclamation point on the doctrine that the federal government is one of delegated and enumerated powers. An amendment that protects unenumerated rights is pointless without unenumerated rights to

91. U.S. CONST. amend. IX.
92. Madison, who, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not signalled out, were intended to be assigned into the hands of the General Government and were consequently insecure.
93. Patterson, supra note 92, at 13.
94. Id. at 7.
protect. The Founders did not indulge in irrelevant exercise. Unenumerated rights must exist. The amendment underscores the idea that certain rights may have been unintentionally omitted from the Bill of Rights, and that the inadequacy of language to express certain ideals might adversely affect other rights intended to be included.

In short, there can be little doubt as to the existence of protected, but unenumerated rights. Madison’s writings indicate that the ninth amendment was borne of his belief in the impossibility of a comprehensive description of personal rights. Moreover, the English concept of inherent individual liberties, existing irrespective of government, was pervasive among the framers of the Constitution and the Bill of Rights. The last thought in their minds was to construct a constitution as a grant to the individual of inherent rights and liberties. It was a conveyance of powers to the federal government from the people and no more. Individual inherent rights and liberties were thought to antedate and occupy a level above constitutions; they were pre-constitutional rights. They inhere in the nature of man and subordinate his constitutions. Since the Constitution is incompetent to grant or fully describe a citizen’s rights, it cannot be evidence against the existence of a right, but can only indicate the undisputed recognition of some and the necessity of others, in light of the human condition.

In sum, the ninth amendment is notice both that the Bill of Rights is not all-inclusive, and that those rights listed may have

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96. It has been held that in interpreting the Constitution, every word must have its due force and meaning; that no word was unnecessarily used or needlessly added; that no word can be rejected as superfluous and unmeaning.

With this rule in mind we must therefore assume that in the minds of the framers of this amendment, other rights than those “enumerated” did, and supposedly do now, exist.

97. The ninth amendment: must be more than a mere net to catch fish in supposedly fishless water. . . . It must be a positive declaration of existing, though unnamed rights, which may be vindicated under the authority of the amendment whenever and if ever any governmental authority shall aspire to ungranted power in contravention of “unenumerated rights.”

Kelsey, supra note 95, at 313.


99. Patterson, supra note 92, at 19.

100. Id. at 20.
been inadequately or incompletely described. It stands for the concept that rights are not created by their expression in constitutional writings, but merely acknowledged, and, on occasion, without adequate description. The amendment sanctions the search for rights not enumerated. Of greater potential importance, however, is its sanction of intra- and extra-constitutional illumination of the enumerated rights beyond their black letters, where those letters do not by themselves convey the breadth and limits of the protection which the rights afford. The concern which gave birth to the amendment indicate that the term "unenumerated rights" was meant to encompass both concepts. 101

2. The Unenumerated Rights

The unenumerated rights may be identified through analysis of two paradigms. The first is the English concept of inherent personal rights, which were fought for in the Revolutionary War. 102 The rights listed by Blackstone are probably more exact statements of those rights which the Founders intended to protect in the Constitution and the ninth amendment than any other theoretical or philosophic compilation and classification of rights. 103 Blackstone said that these rights consist primarily of the free enjoyment of personal security, personal liberty and private property, with a supportive infrastructure of subsidiary rights. 104

The second pattern which may be used to identify unenumerated rights is the Constitution itself. The ninth amendment

101. "The fear that certain rights may have been omitted, and that the vagaries of language might adversely affect other rights intended to be included, led Madison to the Ninth Amendment." Redlich, supra note 98, at 805. An important factor to keep in mind with regard to the identification of unenumerated rights, be they rights unnamed in the Constitution, or emanations of enumerated rights, is that the rights protected by the ninth amendment are not fixed by the date of the amendment's adoption. The amendment was intended to be a living document. As the American nation and government grows and develops, the necessity of "new" rights may become apparent in the light of current history. The spirit of the constitution and the letter of the ninth amendment demand that these rights be recognized and protected. Patterson, supra note 92, at 53-56.

102. The Founding Fathers were children of the English political milieu. They were not concerned with fashioning a system of rights from whole cloth, but with perfecting the acquisition of English rights. "The Colonists had argued, petitioned and contended, and finally waged war, not for philosophic perfection of any utilitarian doctrine of rights, but for the rights of Englishmen." Kelsey, supra note 95, at 313.

103. Id. at 313-14. Blackstone's Commentaries were heavily circulated in colonial America. Id. at 313.

104. 1 W. Blackstone, Commentaries *143-44.
refers to rights retained by the people despite the enumeration of other rights in the Constitution, as opposed to the Bill of Rights. The whole text of the Constitution, therefore, becomes the standard for analysis of potential ninth amendment rights. The sense, the aura, the gist of what the Constitution establishes, the essence of the institutions it ordains, are as informative of the prerogatives of citizenship as the enumerations of the first eight amendments. For the Constitution establishes more than the pieces of government; it establishes an idea. That idea is an image of a free and open society. It is a system that was truly intended to be a government of and by the people. The constitutional scheme was designed so that the citizenry would have the right to the raw material, the knowledge, which is essential to the exercise of its ultimate power of government, reflected in the Constitution's portrayal of a free and open society.

But the ninth amendment recognized that it is impossible to fill in every detail of this image. For that reason certain rights were reserved to the people. The unenumerated rights, then, are those pieces necessary to complete the picture of the free, open society which is framed by the Constitution. These rights were retained by the people not because they were different from the rights specifically mentioned in the Constitution, but because words were considered inadequate to define all the rights which man should possess in a free society. So the ninth amendment fills in the blanks, defining rights adjacent or analogous to the pattern of rights which we find in the Constitution. It stands for the proposition that the enumerated rights and the essences of the society envisioned by the Constitution are not to be eviscerated by the non-enumeration of rights necessary to their fulfillment. To the extent that a putative right is necessary to give full effect to the social order of the Constitution, it exists and is due constitutional protection.

105. See text accompanying note 91 supra.
106. Redlich, supra note 98, at 810.
107. Id.
108. See U.S. CONST. amend. I.
109. Redlich, supra note 98, at 810.
110. Id. at 811.
111. Id. at 812.
112. One ninth amendment commentator, Bennett Patterson, has stressed the idea that the rights protected by the amendment are necessarily "personal" rights, as opposed to public or collective ones. "Personal" rights are those which actively confer the right to do or refrain from doing something, and provide that the force of gov-
3. The Ninth Amendment Protects Access to Criminal Trials

The right of access to criminal trials is a detail of the first amendment that was not filled in. The first amendment was enacted in part to allow effective and informed citizen participation in the exercise of the right of citizenship. Without the right to observe government in operation, the rights to discuss it, to form opinions about it, and to act on those impressions are gutted. This result cannot have been countenanced by the Founders in view of the open and free society the Constitution embodies. The Court has recognized that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. The right of access to criminal government stands behind the individual who asserts it, against all who would deny it. The ninth amendment protects rights which individuals must have if they are to fully develop their potentials as citizens in the framework of the Constitution. This contrasts with "public" rights, which are those characterized by government inaction in an area. The "public right" is merely a function of the absence of government regulation resulting in lack of restraint on the masses. It exists until government legally acts to deny, restrict or define it. Patterson, supra note 92, at 60-61. For example, the right to engage in the manufacture, sale or transportation of liquor was a public right, unrestrained by government, until the eighteenth amendment was adopted, denying it. It became such a right again when the twenty-first amendment removed the restrictions. Government restriction in an area of public right (e.g. health standards on manufacture of liquor; zoning standards on its sale) does not deny the right, but sets its boundaries. Patterson theorizes that collective rights are protected by the "General Welfare" clause, U.S. Const. art. I, § 8. Patterson, supra note 92, at 57. Other commentators call Patterson's "personal" rights "natural" or "inherent." Natural rights, such as are declared to be inalienable and which, as such, are personal to every individual as a citizen of a free community, include: the right to personal liberty, to personal security, to acquire and enjoy property, to religious liberty, to freedom of conscience, to freedom of contract, to freedom of the press, speech, assemblage, petition, to freedom to engage in a profession, trade, business, or calling, and the right of privacy. Kelsey, supra note 95, at 313 (and at 310 on the personal/public right distinction).

The right of access is a personal one. It has historically been recognized as incident to the citizen's right to inspect the government. It is not a right capable of exercise merely because of a lack of government regulation. To the extent that government has not acted to regulate access, it has been in recognition of the Court's own admission that "there is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.” Craig v. Harney, 331 U.S. 367, 374 (1947). To the extent that the courts do attempt to unduly restrict access, they act in derogation of the individual's right. It is a right of the type protected by the ninth amendment, because the individual claims an enforceable right to observe, born of necessity inherent in the concept of open government and his other rights under it. It is much more than a wish to be left unregulated as to an activity which has not been subjected to an exercise of government power.

trials properly belongs on the list of rights\textsuperscript{114} emanating from the first amendment. It is necessary to the fulfillment of the American constitutional scheme of openness and to the accomplishment of the informed discussion protected by the first amendment. It must, therefore, qualify for the protection of the ninth amendment, which confers constitutional status on emanations of enumerated rights when those emanations are necessary to the completion of the constitutional scheme. The right of access is a personal\textsuperscript{115} and fundamental\textsuperscript{116} right of the citizen, a detail of his first amendment rights, and necessary to that amendment's intended operation.

That the right of access to criminal trials was not specified in the first amendment is easily explained. The amendment would have been incredibly unwieldy had it spelled out every context in which a right of citizen access is necessary to a meaningful exercise of other first amendment guarantees. Yet it cannot be argued that the right of access is not "adjacent" to the amendment, that is, a right necessary to the fulfillment of first amendment intent. For what is a right of free speech, without a source of information for that speech? To what avail is one encouraged to discuss his government, and assured a free press to help him, if that government seals its institutions from observation? The right of access makes the first amendment meaningful, with regard to the criminal courts.

The final evidence that the right of access qualifies for constitutional protection under the ninth amendment umbrella is that access was a part of the system of English rights which the Founders intended to incorporate into the Constitution and Bill of Rights.\textsuperscript{117} Blackstone, the period's principal expositor of English rights, was perhaps the single most influential source of the Founders' concepts of personal rights.\textsuperscript{118} He posited three primary rights: personal security; personal liberty; and private property.\textsuperscript{119} These rights are secured and protected by a system of auxiliary subordinate rights.\textsuperscript{120} Blackstone saw the right of access to criminal courts as a

\begin{itemize}
  \item \textsuperscript{114} Id. at 482.
  \item \textsuperscript{115} See note 112 supra.
  \item \textsuperscript{116} The test of whether a right is fundamental is whether it has become so rooted in the nation's collective conscience that its denial violates fundamental principles of liberty and justice which lie at the base of our civil and political institutions. Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring). See Powell v. Alabama, 287 U.S. 45, 67 (1932), on the nature of fundamental rights.
  \item \textsuperscript{117} See notes 102-04 supra and accompanying text.
  \item \textsuperscript{118} Kelsey, supra note 95, at 313-14.
  \item \textsuperscript{119} 1 W. BLACKSTONE, COMMENTARIES *141.
  \item \textsuperscript{120} But in vain would these rights be declared, ascertained and protected
\end{itemize}
necessary outgrowth of the subordinate right of every Englishman to apply to the courts for redress of injuries.\textsuperscript{121} There are two bases for this construction. The first is that criminal offenses harm not only the victim of the crime, but the citizens of the government which formulates and enforces the laws defining the crime. Criminal offenses are an affront to the code of lawful behavior, established through the democratic process, which citizens use to govern the limits of their conduct in a sort of \textit{quid pro quo} exchange for the expectation that others will similarly honor the system. In the breach of that expectation every citizen is harmed, since the ability of the law to function as a code of civility upon which the citizen may rely for his safety, health and the protection of his property is undermined. In effect, then, the criminal prosecution becomes the application of \textit{all} citizens to the court for redress of injury to their reliance interest in the system of civility. Since every citizen is thus a party to every criminal action, he has a party's right to observe the court system's handling of it.

The second element which forms the right of access to the courts is the requirement that justice "be duly administered therein."\textsuperscript{122} Blackstone recognized the salutary effects of publicity in the conduct of justice;\textsuperscript{123} the echoes of that recognition still sound in the decisions of American courts.\textsuperscript{124}

by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has, therefore, established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers, to protect and maintain inviolate the three great and primary rights....

\textit{Id.} at *140-41.

\textsuperscript{121} "Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein." \textit{Id.} at *141. By his reference to the arbitration of life and liberty, Blackstone clearly includes access to the criminal courts within the scope of this right. \textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} [A]ll ... evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel and all bystanders, and before the judge and jury; ... exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. ... This open examination of witnesses ... , in the presence of all mankind, is much more conducive to the clearing up of truth than ... private and secret examination. ... [A] witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal.

3 W. BLACKSTONE, \textit{COMMEN TARIES} *372-73.

\textsuperscript{124} \textit{See} notes 71-77 \textit{supra} and accompanying text.
Even if one were to disbelieve that the Founders intended to incorporate their heritage of traditional English rights into the Constitution through the ninth amendment, the Constitution itself argues persuasively for a personal right of access to criminal courts. This is simply because the criminal courts are engaged in the formal conduct of government business, and the right of access to government proceedings by the people as a check on the function of the system is an integral and necessary part of our form of government. It is premised in the power of citizens to control, however indirectly through the legislative and elective process, the way in which the government will operate and to hold it accountable to them.

So the right of the common citizen to observe criminal trials is more than a mere "interest." It has an ancient origin and exists independently of defendants' rights to a fair trial. It is a way of protecting the integrity of our system and is incorporated into the Constitution by the ninth amendment. The abridgement by the states is constrained by virtue of the fourteenth amendment.

125. The ninth amendment has frequently been linked with the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Neither has seen extensive judicial use, although the tenth amendment is enjoying a limited revival of sorts. See, e.g., National League of Cities v. Usery, 426 U.S. 833 (1976) (minimum wage and overtime pay provisions of the Fair Labor Standards Act may not be applied to state employees); Fry v. United States, 421 U.S. 542 (1975) (wage "freeze" legislation may be applied to state employees). These cases reject the old idea that the tenth amendment is a mere "truism," stating merely that "all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941). The court in Fry held that the tenth amendment forbids the exercise of federal power "in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. at 547. The Court in Fry, however, did not address the amendment's last four words, which make it a complement to the ninth amendment:

The last four words of the Tenth Amendment must have been added to conform its meaning to the Ninth Amendment and to carry out the intent of both—that as to the federal government there were rights, not enumerated in the Constitution, which were "retained . . . by the people," and that because the people possessed such rights there were powers which neither the federal government nor the states possessed.

Redlich, supra note 98, at 807.

The reliance on the ninth amendment by Justice Goldberg in his concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring; joined by Warren, C.J. and Brennan, J.), is the lonely modern example of the use of either the ninth or tenth amendment to vindicate a right or power in the individual not specifically mentioned in the Constitution. The ninth amendment in particular remains one of the great unmined veins of American constitutional law.

126. Patterson contends that the amendment was intended to apply to the
E. Other Questions

The establishment of a constitutional right of access to criminal trials raises many subsidiary questions of interest, not all of which can be addressed here. Two issues, though, merit some discussion. The first is squaring the right with the Pell, Saxbe and Houchins line of Supreme Court cases,127 denying a public right of access to prisons. Prisons are, of course, an arm of government. Everything said thus far about a generalized right of access to government applies with equal force to prisons. Yet there is a difference which militates for applying the right of access to criminal trials and denying it for prisons. The difference is that prisons are generally closed, and courtrooms are generally open, for good reason. To say that because the press and public may be barred from one, they may also be barred from the other suggests a disturbing insensitivity to the different societal roles played by the two institutions.128 The prison system is not the preeminent institution charged with safeguarding the rights of citizens and society. The court system is. It determines the ultimate correctness and effect of all actions undertaken by law enforcement and prosecuting agencies in the name of justice. Therefore prisons cannot claim the traditional right of access that criminal courts can. The tradition does not exist as to prisons because of their different role, and the idea of a right to view them certainly was foreign to the Founders. Moreover, even the right of access to criminal courts is not absolute,129 and special problems of security inhere in prisons that do not exist to the same degree in criminal courts.130 One further distinction is that the right of access to criminal trials is a personal right of every citizen. It is not the special right of press access denounced by the Pell, Saxbe and Houchins triumvirate.131 Those cases are inapposite to this issue.

A second issue is the availability of transcripts as a substitute for personal presence in the courts. At best, transcripts provide a

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127. See notes 16-20 supra and accompanying text.
129. See notes 138-48 infra and accompanying text.
cold record of the proceedings, which are no longer news, but history.\textsuperscript{132} Because of the nature of the news media, reportage that is chronologically remote from the occurrence is not given the play it would normally deserve. Its value as news is diminished, and therefore much of it may never see print. Whatever does eventually become available may come at a time when publication is less desirable to the media. Yesterday's news is devalued currency in a business in which timing is of the essence.\textsuperscript{133} Even if the whole transcript is published, it is a sterile substitute for observing the actual conduct of a hearing, as reviewing courts are well aware. The demeanor, voice, and gestures of the participants are as informative to the press and public as they are to the juries which use these elements at trial to decide facts.\textsuperscript{134}

Reliance on transcripts is, therefore, an inadequate substitute for a personal right of access. First, it means that information about the proceeding may never get to the citizen, who relies on the press to gather his information.\textsuperscript{135} The press deals in current events, and may be unable, due to the press of current news, to devote adequate attention and space to the distillation and presentation of a stale transcript. Secondly, a transcript cannot convey the intangibles, such as atmosphere, speech intonations, gestures, and demeanor, which are important elements of comprehensive reportage of criminal trials.

Finally, before addressing the extent of the right of access, it should be noted that there has been judicial\textsuperscript{136} or legislative\textsuperscript{137} recognition of the public right to attend criminal trials in several states. The reasoning used by the courts to support the right traces much of what has been said in this comment.\textsuperscript{138}

\textsuperscript{132} Fenner & Koley, The Rights of the Press and the Closed Court Criminal Proceeding, 57 Neb. L. Rev. 442, 454 (1978).
\textsuperscript{133} Id. at 464.
\textsuperscript{135} See note 82 supra and accompanying text.
\textsuperscript{136} E.g., State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); Johnson v. Simpson, 433 S.W.2d 644 (Ky. 1968).
V. PARAMETERS OF THE RIGHT

A. Accommodation of Competing Rights

No one asserts that the right to be present at criminal trials is absolute, but there is agreement that it is due much more than lip service. Blackstone classified it among those rights and liberties which should be restrained only when and to the extent absolutely necessary to accommodate other rights. 139 This concept of accommodation of rights has carried through to American jurisprudence. When first and sixth amendment rights conflict, the trial court is required to resolve the conflict by protecting both rights when that can reasonably be done. 140 Because the right of access implicates a fundamental personal liberty, a compelling subordinating interest is required before the right may be overridden. 141 Courts have properly found such an interest, and have closed courts to some extent, in cases where the closure aids the court in the production of evidence necessary to the function of justice. 142 The press performs a fiduciary duty to the courts and to the defendants when it cooperates with this type of closure. 143

But the Court has held that justice does not require jurors to be kept in total ignorance of the circumstances of a case, save those which surface in court. Neither does it require that they refrain from forming opinions based on arguably prejudicial extrajudicial information. It is sufficient if the juror can lay aside his impression

139. [It is a right which] it is our birth-right to enjoy entire; unless where the laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and moderate, as will appear upon further inquiry, that no man of sense or probity would wish to see them slackened. For all of us ... are restrained from nothing, but what would be pernicious either to ourselves or our fellow-citizens.

1 W. BLACKSTONE, COMMENTARIES *144.


142. E.g., in cases involving young witnesses or victims of crime, rape victims, undercover police officers and similar cases where witnesses might be unwilling to present their testimony in public for judicially cognizable reasons, or are likely to be able to testify more freely with the public excluded. See, e.g., United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979) & United States v. Powers, 477 F. Supp. 497 (S.D. Iowa 1979), two cases in which it was asserted that witnesses or their families would be in physical danger if the public were admitted to hear their direct testimony. See also United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971), where the court closed the proceeding during discussion of secret airline hijacker profile.

or opinion and render a verdict based on the evidence presented in court.\textsuperscript{144}

The Court has recognized that even pervasive adverse publicity does not inevitably result in an unfair trial. The ability of a jury to decide a case fairly is shaded by the tone and extent of the publicity, which is often, in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage.\textsuperscript{145} This, in turn, is within the power of the judge to control.\textsuperscript{146}

In fact, courts and commentators have pointed out that it is the unusual criminal prosecution which generates publicity which could do harm to a defendant's rights.\textsuperscript{147} Closure itself may, in

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\item \textsuperscript{144.} Irvin v. Dowd, 366 U.S. 717, 722 (1961). The defendant, convicted of murder, sought habeas corpus on the grounds that publicity giving the sordid details of his past life, previous convictions and alleged confessions and plea bargaining prior to voir dire had biased the jury. The Court held that even a juror with a formed opinion of the defendant's guilt may be impartial, if able to lay the opinion aside and render a verdict on the evidence. The facts here, however, indicated a pattern of deep and bitter prejudice in the community that precluded impartiality. Habeas Corpus was directed. \textit{Id.} at 728-29.

\begin{itemize}
\item In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.
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\textit{Id.} at 722-23.

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\item \textsuperscript{145.} Nebraska Press Ass’n v. Stuart, 427 U.S. at 554-55.
\item \textsuperscript{146.} See notes 5-9 \textit{supra} and accompanying text.
\item \textsuperscript{147.} See, e.g., People v. Biggs, 5 MED. L. RPTR. (BNA) 1518 (N.Y. Suffolk County Ct., Aug. 15, 1979) (motion to close pre-trial hearing denied on grounds that the case had received little or no coverage).

Most judicial proceedings in criminal cases attract no attention or such little attention as to be insignificant. Even in the case which seems more "news-worthy," the court still must speculate as to the form of the publicity, its context, its intensity, its frequency, its longevity, and in short, all of those things which go to make up its impact.

Fenner & Koley, \textit{supra} note 131, at 516-17.

Judge Skelly Wright, of the D.C. Court of Appeals, has stated in discussing the issues of free press and fair trial that there is no problem at all in the great majority of the hundreds of thousands of criminal cases which are brought each year in this country because less than one percent of the cases are ever given a line of notice in the press and of that one percent seventy-five to ninety percent plead guilty. So, as Judge Wright has pointed out, what is involved is a small fraction of the less than one percent of the criminal cases brought.

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\item See also notes 43-44 \textit{supra} and accompanying text.
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some cases, have a detrimental effect on fair trial rights that out-
weighs the potential harm of publicity. All of this argues for ac-
commodation of competing rights. An order which implicates first
amendment rights must be couched in the narrowest terms that
will accomplish both the precise objective permitted by the Consti-
tution and the essential needs of public order. In other words,
accommodation of fair trial rights should be accomplished with as
little prejudice as possible to the right of the public to observe its
criminal court trials.

B. Closing the Trial

In the wake of the closure phenomenon spawned by Nebraska
Press, various courts, government bodies and organizations pro-
posed standards for closing criminal proceedings. A senate subcom-
mittee suggested that courts should be closed only when necessary
to protect the rights of the accused, upon a showing that no
alternative protective measures are likely to work. The proceeding
may then be closed only to the extent absolutely necessary to pro-
tect the endangered rights.

The American Bar Association proposed standards that allow
the exclusion of the public from that portion of a trial before an
unsequestered jury which takes place out of the hearing of the
jury. The standards require several conditions to be present before
even this limited closure is allowed: a clear and present danger to
the fairness of the trial posed by dissemination of the information
to be discussed; a lack of alternative means of avoiding the prejudi-

148. Closing a hearing would not restrict the press, in its various compo-
nent parts, from, for example, gathering news in other ways and then pub-
lishing that news, publishing whatever information by chance or by design
leaks out, however accurate or garbled the leaked information may be, or
even indulging in speculation or publicizing gossip or rumors—gossip
spawned in part perhaps by the secrecy surrounding the closed proceeding,
rumors which "could well be more damaging than reasonably accurate news
accounts."

Fenner & Koley, supra note 132, at 521 (quoting, in part, Nebraska Press Ass'n v. Stuart, 427 U.S. at 567).

149. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968)
(ex parte order restraining "white supremacist" rally set aside as not comporting with
procedural minima required in cases which reach first amendment rights); See notes
150-56 infra.

150. STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON

151. ABA, Standards Relating To The Administration of Criminal Justice—Fair
cial effect; and the defendant's consent. A transcript of the closed part of the trial should be made available to the public following the completion of the trial, or earlier if fairness permits. This is the only context in which the American Bar Association standards would allow closure. 152

A third formula is that of the Gannett dissent, which closely mirrors the Nebraska Press standards for gag orders. It would require a finding that there is a substantial probability that irreparable damage to the fair trial right will result from publicity, alternatives to closure would not protect the fair trial right, and that closure will protect the defendant from the perceived harm. 153

One proposed standard that would on its face appear to be incapable of cutting constitutional mustard is that of the Gannett majority. 154 It contemplates a “balancing” of the constitutional rights involved which would result in closure upon a showing of a “reasonable probability of prejudice.” This is an exceedingly vague and ill-formed approach to the resolution of a conflict between fundamental rights. The opinion does not discuss alternatives that could solve the conflicts without impinging on the rights of the public. Furthermore, its standard of “reasonable probability” does not approach the strict necessity, 155 the clear and present danger to another fundamental right, that should be required before such a right must yield.

Of these various approaches, the American Bar Association version approaches the ideal. Most importantly, it incorporates the clear and present danger test, which is the appropriate yardstick in a case of conflict between fundamental rights. 156 Secondly, it properly narrows the availability of closure to trials with an unsequestered jury, and the scope of closure to proceedings held out of the hearing of that jury. Finally, it requires the consideration of alternatives to closure. It is the best available accommodation be-

152. The commentary that accompanies the standards notes that:
Closure orders, like prior restraints on the press, have strong appeal as fair trial procedures because of their minimal cost, directness, and relative efficiency in terms of the use of the court's time. These administrative advantages, however, must be set aside in the face of the strong constitutional policy in favor of public trials.
Id. at 26.
153. 443 U.S. at 441-42 (Blackmun, J., dissenting).
154. 443 U.S. at 392-93.
156. Emerson, supra note 68, at 73.
tween the rights of citizens to attend criminal trials and the rights of defendants to have a fair trial. It restricts closure to the minimal intrusion on the right of access which will support a fair trial in the presence of prejudicial publicity.

C. Procedural Issues

The initial procedural issue raised by a closure motion is the question of who should make the decision. One view is that the trial judge is not qualified to decide because he is an interested party. In the face of allegedly pervasive prejudicial publicity, a closure order is an easy out. It eliminates the need to define the limits of the closure with neither over- nor under-inclusiveness. It allows the trial to proceed quickly. It obviates the need for continuing monitoring of the possible effects of publicity on the trial. The judge will be inclined to decide that in his court nothing will occur which needs public exposure. Lack of judicial detachment is inherent in this situation. The obvious way out of this dilemma is to provide that closure decisions are to be made at the next level up the appellate ladder. Closure decisions should be among the appellate courts' highest priorities.

Secondly, courts should not routinely grant uncontested closure motions. The fact that a motion is uncontested probably indicates that the level of prejudicial publicity will not reach the point where the right of access should be overridden. The right to be present deserves protection, even when it is not being asserted, because of its significant constitutional dimension.

The court must also provide the media with notice and an opportunity to participate in an adversary hearing. Realistically, this is the only way to assure that the court will hear both sides of the access issue. The prosecution is unlikely to be as interested in promoting the public right of access as the press would be. The

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157. " Judges are men, not angels. While some would exercise the power of censorship with high regard for the true interests of the judicial process, others might exercise it to prevent proper criticism of their own administration of office." Rifkind, When the Press Collides with Justice in SELECTED ESSAYS ON CONSTITUTIONAL LAW 651, 653 (Ass'n of American Law Schools ed. 1963) (quoted by Fenner & Koley, supra note 132, at 481).

158. Fenner & Koley, supra note 132, at 465.

159. See notes 147-49 supra and accompanying text.


161. Fenner & Koley, supra note 132, at 451, 455.
judge is likely to be antagonistic to it, at least on a subliminal level, because closure decreases the burden of monitoring fairness and elevates the risk of reversal attendant to open trials held in an atmosphere of heavy publicity.

Finally, there must be a mechanism for an accelerated appeal of a closure ruling. The right of access would be meaningless if courts were allowed to hold closed trials while appeal of the closure order was in process. If a restraint on access is sought which arguably works a deprivation of first amendment rights, it must be accompanied by immediate appellate review, and a stay must be granted in the interim. 162

VI. CONCLUSION

To the extent that Gannett has been used to justify criminal trial closure, it has been misconstrued. The case cannot extend beyond its facts because every citizen has a constitutional right under the first and ninth amendments to attend criminal trials. This right exists independently of the right of the defendant to a fair trial. It is an element of the right of the citizen to inspect the functioning of government institutions, a right with its origins in English common law. It is a right protected by the ninth amendment, both because it was considered an inherent natural right by the Founders and because it is a natural and necessary concomitant of the open society that the Constitution reflects. It also merits ninth amendment protection by virtue of being necessary to the fulfillment of the first amendment. It is a "detail" that was left out of a document that was not intended to be all-inclusive.

The first amendment's purpose is to allow citizens to meaningfully exercise their ultimate power of government. It allows them to evaluate government so they may act on that evaluation. By subjecting the courts to constant scrutiny, citizens are assured of the courts' just operation. The right to be so assured is an interest which inheres in every citizen.

But the right of access is not absolute. Courts need latitude to

162. National Socialist Party v. Skokie, 432 U.S. 43, 44 (1977) (state supreme court denial of stay pending appeal of injunction against parade by American Nazis reversed). In a per curiam opinion, the United States Supreme Court said that court orders which work a deprivation of asserted first amendment rights during the pendency of appeal require immediate appellate review. The opinion's context indicates that an "immediate" review is one which takes place before the petitioner's intended exercise of his asserted right. "Absent such review, the State must instead allow a stay." Id. at 44.
perform their duties efficiently in some cases. In others, the ability of a defendant to secure a fair trial may truly be prejudiced by publicity. The right of access, however, is due all the protection which can be afforded it, consistent with the protection of the defendant's rights. The gravest necessity should be shown before the right to attend may be overridden, and closure should not be resorted to unless it is the sole available method which will protect sixth amendment interests. The closure decision belongs in a disinterested court. Every procedural safeguard should be used to protect the integrity of the right of access, which lies at the root of the first amendment.

Charles W. Danis, Jr.