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CLOSURE ORDERS: SAFEGUARD OF FAIR TRIAL OR PRIOR RESTRAINT?

I. Introduction

In 1976 the Supreme Court decided that a trial court could not constitutionally prohibit pretrial publicity by imposing a "gag order" on members of the press.[1] This ruling has since been hotly debated in the legal profession.[2] The source of the dispute stems from two constitutional guarantees in opposition. One insures the defendant a fair trial by his peers;[3] the other guarantees the press freedom to report information to the public.[4]

When the press publishes information which prejudices the rights of a defendant at trial, a difficult constitutional problem is created.[5] At any trial, the jury should be impartial and the verdict must reflect a determination of the facts as presented. If press reports are seen or read by the members of a jury, the fair trial guarantee is placed in jeopardy. At best, the jury is able to dismiss these reports and decide the case solely on its merits.[6] At worst, the jury allows

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1. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

2. *See, e.g.*, Symposium, *Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 383 (1977); Kaplan, *Free Press/Fair Trial Rights in Conflict: Freedom of the Press and the Rights of the Individual*, 29 OKLA. L. REV. 361 (1976). *See also* note 100 *infra*.

3. U.S. CONST. amend. VI.

4. U.S. CONST. amend. I.

5. The fair trial/free press controversy has posed a problem to the courts for a number of years. One of the first cases which demonstrated the dangers of prejudicial press coverage to the defendant was the Lindbergh kidnap-murder trial in 1933. Bruno Richard Hauptmann was tried in Flemington, New Jersey, amidst a deluge of cameramen and news reporters. *See* Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 454 (1940). The ensuing conviction was so predictable that a subsequent investigation by the American Bar Association on the effects of prejudicial publicity described the case as "perhaps the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial." *Id.*

Since that time a number of cases have repeatedly raised the "trial by press" issue before the Supreme Court. *See* Craig v. Harney, 331 U.S. 367 (1947); Stroble v. California, 343 U.S. 181 (1952); Marshall v. United States, 360 U.S. 310 (1959); Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Turner v. Louisiana, 379 U.S. 466 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966). The most recent important decision by the Supreme Court invalidated a "gag" order issued during trial. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). For a detailed discussion of the *Nebraska Press* decision, see text accompanying notes 130-43 *infra*.

6. Some commentators believe that a jury will function efficiently even in the face of prejudicial publicity. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977);

the newspapers to preordain the guilt or innocence of the defendant, and the trial is of little worth.[7]

In an attempt to protect the defendant at trial and simultaneously uphold the media's right to report newsworthy items without interference, courts have provided for several protective alternatives.[8] The most effective alternative may be to sequester the jury. The press is thereby free to report the events of a trial, and, at the same time, the jury members are insulated from any prejudice media coverage may invoke. However, the "free press/fair trial" controversy still remains when news articles are published prior to selection of the jury. For example, when a notorious murder case is closely covered by the press, it is not unusual that the majority of prospective jurors has been prejudiced by one or more news items.[9] Therefore a trial court will find it difficult to secure a fair trial for the defendant if it is initially impossible to impanel an impartial jury.

One solution, is for the court to restrict the ability of the press to publish such information until after a jury is impanelled. However, the Supreme Court ruled that a "gag" on the media violates the freedom of the press guarantee.[10] This decision was the last word from the Supreme Court on this issue. Recently, however, the Supreme Court granted certiorari in a case arising out of the New York courts which takes this question one step further. In *Gannett Company v. De Pasquale,*[11] the New York Court of Appeals held that upon a motion by the defendant, a trial judge may properly close a

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Simon & Marshall, *The Jury System,* in THE RIGHTS OF THE ACCUSED IN LAW AND ACTION 211, 220 (S. Nagel ed. 1972); R. Simon, *The Jury and the Defense of Insanity* 219 (1967). It would be difficult, if not impossible, however, to prove that a defendant's rights are always safeguarded by the jury in such a situation.

7. *See* the description of the publicity surrounding the Lindbergh kidnapping trial in Hallam, *Some Object Lessons on Publicity in Criminal Trials,* 24 MINN. L. REV. 453, 454 (1940). *See also* the Supreme Court's description of the intensity of news coverage of the murder trial of Dr. Sheppard in, Sheppard v. Maxwell, 384 U.S. 333 (1966).

8. For a compilation of these alternatives, see Erickson, *Fair Trial and Free Press: The Practical Dilemma,* 29 STAN. L. REV. 485, 491-94 (1977). Among those listed were closure of pretrial hearings, continuance, change of venue, voir dire of prospective jurors, preliminary admonitions of impartiality to each juror, final instructions to the jury, and sequestration. *Id.* at 492-93.

9. *See* note 7 *supra.*

10. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

11. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *cert. granted,* 98 S. Ct. 1875 (1978) (No. 77-1301).

pretrial suppression hearing to the public and press. In addition, a court may temporarily withhold the record from public scrutiny if "press commentary from those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue."[12] In so ruling the court relaxed the strict standard previously imposed on a trial judge before the issuance of a closure order is deemed proper.[13] More importantly, the court's ruling indirectly permits a New York trial judge to restrain the right of the press to publish the facts of a judicial hearing. In the past, this information was exempt from governmental interference under the first amendment freedom of the press guarantee.[14] The New York Court of Appeals upheld the closure order on the grounds that it was necessary in order to protect the defendants' right to a fair trial.

The *Gannett* case is the logical outgrowth of the Supreme Court's landmark holding in *Nebraska Press Association v. Stuart,* where the Court struck down a "gag" order imposed on the press during trial.[15] The Court announced that the constitutional validity of any type of restraint on the press would be upheld in only the most unusual circumstances.[16] Although *Nebraska Press* was undoubtedly a victory for the media,[17] the decision left a number of questions unanswered. Most importantly, because the Court specifically limited the ruling to "gag" orders, other more indirect restraints on the press continue to be issued at the trial level. The *Gannett* case upheld a "closure" order which excluded the press from a pretrial hearing.[18] A "closure" order differs from a "gag" order only in that the press is not restrained from *reporting* information; rather it is restrained from *obtaining* it.[19] Regardless of the labels that courts

12. 43 N.Y. 2d at 380, 372 N.E. 2d at 550, 401 N.Y.S.2d at 762.

13. *See* text accompanying notes 77-78 *infra.*

14. *See* text accompanying notes 111-29 *infra.*

15. 427 U.S. 539 (1976). The Court recognized the *Gannett* problem in its decision. *See id.* at 564 n.8; *cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975) (state may not extend cause of action for damages for invasion of privacy caused by publication of name of deceased rape victim which was revealed in connection with prosecution of a crime).

16. The requirements set forth by the Court strictly limit the impostion of any type of restraining order on the press. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562.

17. *See* Sack, *Principle and Nebraska Press Ass'n v. Stuart,* 29 STAN. L. REV. 411, 412 (1977).

18. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *cert. granted,* 98 S. Ct. 1875 (1978) (No. 77-1301).

19. While a "gag" order is a court-imposed restraint placed on the press *after* the information has been conveyed, the "closure" order prevents newsmen from entering the courtroom.

place on these orders, the result is the same. The media is effectively prevented from reporting information to the public.

This Note examines the *Gannett* decision and outlines the problems it presents to the United States Supreme Court. Part II[20] traces the history of the *Gannett* case in the New York courts. Part III[21] investigates the historically protected guarantee of the right to an open trial, and demonstrates that the stringent standard for excluding the public from any judicial proceeding has been relaxed by the *Gannett* case. Part IV[22] explores the right of the press to be free from any restraint on publication. This entails an examination of the "prior restraint" doctrine in past decisions of the Supreme Court. In addition, the failure of the *Gannett* court to consider this aspect of the case will be criticized. Part V[23] analyzes the ability of the Court to entertain the *Gannett* case although the suppression hearing and trial have been completed and the information made public. Part VI[24] suggests some of the inherent dangers to the criminal justice system if the *Gannett* ruling is liberally construed by courts in the future.

II. *Gannett Co. v. De Pasquale*

Petitioner, Gannett Company, owns and operates two daily newspapers and one television station in the Rochester, New York area.[25] As part of its news reporting activities, Gannett assigned a staff reporter to attend the pretrial suppression hearing held in connection with the highly publicized murder prosecution of Kyle Edwin Greathouse and Davis Ray Jones.[26] The grand jury of Seneca County

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As a result, media representatives are unable to obtain information concerning the proceedings of a trial. *See* Gannett Co. v. De Pasquale, 43 N.Y.2d at 383, 372 N.E.2d at 552, 401 N.Y.S.2d at 764 (1977) (Cooke, J., dissenting).

20. *See* text accompanying notes 25-41 *infra*.

21. *See* text accompanying notes 42-99 *infra*.

22. *See* text accompanying notes 100-59 *infra*.

23. *See* text accompanying notes 160-77 *infra*.

24. *See* text accompanying notes 178-82 *infra*.

25. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 374, 372 N.E.2d 544, 546, 401 N.Y.S.2d 756, 758 (1977).

26. *Id.* at 374-75, 372 N.E.2d at 546, 401 N.Y.S.2d at 758-59. The defendants were charged with robbing and murdering a former Seneca County police officer who disappeared while he was on a fishing trip. The victim's body was never recovered, but his boat was found laced with bullet holes, and both his truck and revolver had been stolen. A nationwide search for the defendants ended in Michigan after a three day chase which required the use of helicopters and tracking dogs. The defendants were found driving the victim's truck, and, after

returned an indictment charging the accused with second degree murder and larceny.[27] At the pretrial suppression hearing the defense attorney requested that the proceeding be held *in camera*[28] on the grounds that adverse publicity had jeopardized the defendants' right to a fair trial.[29] At trial, County Court Judge Daniel De Pasquale granted an oral order which enjoined the distribution of the record to the public and press, and closed the hearing, thus barring the Garnett reporter from the courtroom.[30] In response, Gannett Company requested postponement of the pretrial hearing until the press's right to be present and to gain access to any undisclosed transcripts was argued. Judge De Pasquale denied this petition.[31] After hearing oral argument, he again denied a request to vacate the order *nunc pro tunc* on grounds that there was a reasonable probability of prejudice to the defendant.[32]

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questioning, Greathouse led authorities to where he had buried the stolen revolver. Local newspapers had been reporting these facts on a daily basis. *Id.*

27. *Id.* at 375, 372 N.E.2d at 546, 401 N.Y.S.2d at 758.

28. The pretrial suppression hearing was held pursuant to N.Y. CRIM. PROC. LAW § 710.20 (McKinney Supp. 1975), which states in part:

> Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the grounds that it:
>
> . . . .
>
> 3. Consists of a record or potential testimony reciting or describing a statement of such defendant involuntarily made, within the meaning of section 60.45, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him.

Id.

29. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 375, 372 N.E.2d 544, 546, 401 N.Y.S.2d 756, 758 (1977).

30. *Id.* Judge De Pasquale allowed the closure order on the grounds that

> these matters are in the nature of a Huntley hearing and suppression of physical evidence, and is not the trial. . . . Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants, and for these reasons the court is going to grant both [defendants'] motions.

Id.

A "Huntley" hearing is a pretrial proceeding whereby the voluntariness of a defendant's confession is examined to insure that any information given by the defendant after apprehension, but before trial, has been legally obtained. *See* People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

31. Gannett Co. v. De Pasquale, 55 A.D.2d 107, 108, 389 N.Y.S.2d 719, 721 (4th Dep't 1976).

32. *Id.*

The Appellate Division of the New York Supreme Court reversed the trial court and granted the petitioner an Article 78 proceeding[33] vacating the closure order.[34] In a *per curiam* opinion, Judge De Pasquale's closure order was held to be defective in two respects. First, the defense failed to establish the extraordinary circumstances necessary to close a judicial proceeding.[35] Secondly, the exclusionary order infringed upon the petitioner's first amendment right to publish without interference from the government.[36]

The argument posed by Gannett Company on appeal to New York's highest court was twofold. The publisher claimed that the sixth amendment to the Constitution, as well as New York statutory law, permits any member of the public, including representatives of the press, to freely attend all judicial proceedings.[37] Furthermore, the restrictive order issued by Judge De Pasquale effectively pre-

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33. N.Y. CIV. PRAC. LAW art. 78 (McKinney 1963) provides in pertinent part:

§ 7801. NATURE OF PROCEEDING.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable be deemed to refer to the proceeding authorized by this article. . . .

§ 7802. PARTIES

(a) Definition of "body or officer." The expression "body or officer" includes every court, tribunal,. . . whose action may be affected by a proceeding under this article.

Id. §§ 7801-02.

34. Gannett Co. v. De Pasquale, 55 A.D.2d 107, 110, 389 N.Y.S.2d 719, 724 (4th Dep't 1976).

35. *Id.* It has been the practice of New York courts to impose a closure order only if the party making the motion is able to demonstrate to the court that extraordinary circumstances exist. *See* notes 76-77 *infra* and accompanying text.

36. 55 A.D.2d at 110, 389 N.Y.S.2d at 722. The court concluded that the effect of such an order "restricts media access to information ordinarily made available to the general public" and therefore "is merely a substitute for a prior restraint." *Id.* at 110-11, 389 N.Y.S.2d at 719.

In the past, the Supreme Court has consistently held that any type of governmental interference prior to publication violates the first amendment freedom of speech guarantee. Whenever possible, the Court has attempted to inhibit questionable publications by imposing criminal or civil sanctions after the publication has reached the public. In this way the Government is not forced to censor constitutionally protected speech. *See* Freedman v. Maryland, 380 U.S. 51 (1965). Since the 1930s, the Court has always viewed a "prior restraint" on publication as particularly offensive to the first amendment, Near v. Minnesota, 283 U.S. 697 (1931), and has consistently repeated that any system of prior restraint on expression bears a heavy presumption against its constitutional validity. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). For a more detailed discussion of the prior restraint doctrine, see notes 111-29 *infra* and accompanying text.

37. *See* 43 N.Y.2d at 373 (Points of Counsel).

vented the press from reporting the pretrial hearing to the public and thereby interfered with the first amendment freedom of the press guarantee.[38] In response, counsel for Judge De Pasquale argued that closure is properly ordered when necessary to insure the accused a fair trial.[39]

The New York Court of Appeals upheld the closure order primarily on the grounds that the defendants' right to a fair trial could only be achieved if the courtroom was temporarily closed.[40] The court's decision conflicts with New York statutes and prior case law upholding the open trial right.[41] To determine whether a restrictive order of this nature was merited in the *Gannett* case, it is necessary to examine the facts in view of the historical purposes of the public trial guarantee.

III. The Right To a Public Trial

The right to a public trial evolved from the English common law[42] and has been carefully protected in American jurisprudence.[43] The

38. *Id.* (Points of Counsel).

39. *Id.* at 372-73 (Points of Counsel).

40. *Id.* at 376-78, 372 N.E.2d at 547-49, 401 N.Y.S.2d at 759-61.

41. *See* pt. III *infra*.

42. The right to a public trial developed from an early Anglo-Saxon tradition proclaiming a duty in all freemen to participate and attend in the proceeding. F. POLLOCK, THE EXPANSION OF THE COMMON LAW 139, 142 (1904). In his *Second Institutes*, Lord Coke commented on the importance of a public trial in English law. " 'These words are of great importance, for *all causes* ought to be heard, ordered, and determined before the judges of the king's court *openly* in the king's court whither *all persons* may resort.' " United Press Ass'ns v. Valente, 308 N.Y. 71, 89, 123 N.E.2d 777, 786 (1954) (Froessel, J., dissenting) (quoting 1 COKE'S SECOND INSTITUTES 103 (1797) (emphasis added by Judge Froessel)). Sir William Blackstone also outlined the importance of the presence of spectators at trial:

> [A]ll this evidence is to be given in open court, in the presence of the parties, their attorneys, and all bystanders, and before the judge and jury: each party having liberty to accept to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country; which must curve any secret bias or partiality, that might arise in his own breast.

3 W. BLACKSTONE, COMMENTARIES *372.

In 1823 Jeremy Bentham stated one of the most frequently given reasons for the creation of this right. "The advantages of publicity are neither inconsiderable or unobvious . . . [t]he publicity of the examination or deposition operates as a check upon mendacity and incorrectness." 1 J. BENTHAM, RATIONALE FOR JUDICIAL EVIDENCE bk. 2, ch. 10, at 522 (1827).

43. Documentation granting a public trial right first existed in this country in the CHARTER OF THE FUNDAMENTAL LAWS OF NEW JERSEY in 1676. Chapter XXIII provided:

> [T]hat in all publick courts of justice for tryals of causes, civil or criminal any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or

sixth amendment to the Constitution embodies this right by providing that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."[44] Many state constitutions also grant this right in similar terms.[45]

Although the New York State Constitution does not specifically grant the right to a public trial, statutory provisions insure it to both the accused and all members of the public. A New York statute grants this guarantee directly to the accused. The New York Civil Rights Law provides:[46]

> In all criminal prosecutions *the accused* has a right to a speedy and public trial, by an impartial jury, and is entitled to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor.

However, the right to a public trial does not rest solely with the individual on trial. An open court also serves to instill a sense of trust in the judicial process.[47] The New York Judiciary Law states that, except in trials or proceedings concerning certain sex offenses, every court may be freely attended by every citizen.[48] Every member

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passed, that justice may not be done in a corner nor in a covert manner, being intended and resolved, by the help of the Lord . . . .

5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAW, 1492-1908, at 2551 (1909).

Soon thereafter, William Penn signed into law the FRAME OF THE GOVERNMENT OF PENNSYLVANIA which provided in part "[t]hat all courts shall be open, and justice shall neither be sold, denied nor delayed." 5 THORPE, *supra* at 3060. And, at the first congressional meeting which laid the foundation for the Bill of Rights, James Madison also requested this safeguard. F. HELLER, THE SIXTH AMENDMENT 30 (1951).

The right to a public trial is today specifically provided for in the sixth amendment to the Constitution. *See* U.S. CONST. amend. VI.

The Supreme Court has since held that the guaranty of a public trial is a due process right which is applicable to the states under the fourteenth amendment. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Duncan v. Louisiana, 391 U.S. 145 (1968); *In re* Oliver, 333 U.S. 257, 272 (1948).

44. U.S. CONST. amend. VI.

45. Most state constitutions contain language which grants the right to a public trial in terms which are similar to the sixth amendment. *Compare* U.S. CONST. amend. VI *with, e.g.*, MINN. CONST. art. 1, § 6. However, three states, Maryland, New Hampshire and Wyoming have no statutory backing for this right, but do acknowledge a common law heritage for an open trial. *See* State v. Holm, 67 Wyo. 360, 384, 224 P.2d 500, 508 (1950); *see also* Dutton v. State, 123 Md. 373, 91 A. 417 (1914); State v. Copp, 15 N.H. 212, 215 (1844).

46. N.Y. CIV. RIGHTS LAW § 12 (McKinney 1976) (emphasis added).

47. People v. Hinton, 31 N.Y.2d 71, 73, 286 N.E.2d 265, 266, 334 N.Y.S.2d 885, 887 (1972), *cert. denied*, 410 U.S. 911 (1973).

48. N.Y. JUD. LAW § 4 (McKinney 1968).

of the public[49] as well as the accused,[50] may object whenever a trial or proceeding is closed to spectators. In the past, the New York courts have strictly upheld this right. Nevertheless, the statutes do not place "a rigid inflexible straitjacket"[51] on the ability of a trial judge to close a courtroom whenever extraordinary circumstances threaten his ability to conduct the proceeding fairly.[52] For example, courts have excluded the public during a trial when the identity of the witness had to be concealed,[53] when spectators embarrassed[54]

49. Usually the members of the audience who will argue a court-imposed restrictive order are news reporters who are covering the proceeding. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

50. *See, e.g.*, cases cited in note 55 *infra*.

51. People v. Jelke, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954); *see also* People v. Nicholas, 35 A.D.2d 18, 312 N.Y.S.2d 645 (3d Dep't 1970).

52. *E.g.*, *In re* O'Connell's Estate, 90 Misc. 2d 555, 394 N.Y.S.2d 816 (Surr. Ct. 1977) (fact that decedent was eminent public figure was not appropriate unusual circumstance enabling surrogate court to close estate proceeding to public); State v. Genese, 102 N.J.L. 134, 142, 130 A. 642, 646 (1925) (trial judge in murder prosecution may exclude part of audience from trial when defendant's right to speedy and fair trial is not thereby infringed and such exclusion is necessary to secure administration of justice and facilitate orderly and proper conduct of trial).

53. United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975) (interest of state in preserving confidentiality of undercover agents in narcotics cases, preserving their future usefulness, and safeguarding their lives, provided adequate justification for excluding public from trial for limited period while agents were testifying); People v. Eason, 40 N.Y.2d 297, 353 N.E.2d 587, 386 N.Y.S.2d 673 (1976) (exclusion of public while undercover officers were testifying was not erroneous as a matter of law or in violation of Constitution); People v. Medina, 56 A.D.2d 582, 391 N.Y.S.2d 454 (Sup. Ct. 1977) (motion to set aside trial because identity of undercover agent was not revealed at trial denied); People v. Garcia, 51 A.D.2d 329, 381 N.Y.S.2d 271 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 861, 356 N.E.2d 480, 387 N.Y.S.2d 1009 (1977) (exclusion of public during testimony of undercover agent in trial of defendant for sale of dangerous drug was proper since officer was engaged in undercover narcotics investigations in which disclosure would have impaired his usefulness and might have jeopardized his life). *Contra*, People v. Richards, 48 A.2d 792, 369 N.Y.S.2d 162 (1st Dep't 1975) (ability of judge to close trial should be sparingly exercised and is not proper on the mere showing that identity of undercover officer should be protected because officer is still engaged in similar activities in same general area).

54. Reagan v. United States, 202 F. 488 (9th Cir. 1913) (defendant in prosecution for rape was not deprived of public trial by order clearing courtroom of spectators but permitting all court officials and persons connected with case in any way to remain); Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) (trial judge properly closed trial to spectators during testimony of ten year old rape victim when previous testimony by victim was unsatisfactory because she was frightened and embarrassed by presence of the crowd); Kirstowsky v. Superior Court of Sonoma County, 143 Cal. App. 2d 745, 300 P.2d 163 (1956) (trial judge in his discretion may exclude public and press during female defendant's testimony where judge feels that because of emotional disturbance caused by audience, defendant would not be able to testify freely and completely); People v. Smallwood, 38 A.D.2d 892 (2d Dep't), *aff'd without opinion*, 31 N.Y.2d 750, 290 N.E.2d 435, 338 N.Y.S.2d 433 (1972) (public was properly excluded during

or frightened a witness,[55] and when members of the audience repeatedly disrupted the trial.[56] However to avoid the traditional dangers of a secret tribunal, the power of the judge to draw the curtain over a trial has always been exercised sparingly.[57]

When a judge excludes spectators from a criminal proceeding, both the press and the accused may object to the procedure, claiming that specific statutes grant the right to an open courtroom.[58] Thus, in most instances, the interests of the press and the accused coincide. However, the *Gannett* case presented a somewhat different issue. The accused requested the trial judge to close the suppression hearing, while the press petitioned for an open proceeding.[59] Therefore the interests of the press and the accused were in opposition.

In evaluating the propriety of Judge De Pasquale's closure order with respect to the historically based open trial guarantee, the New York Court of Appeals considered two issues. Initially, the court balanced the right of the accused to close the hearing against the right of the press to keep it open.[60] The court then considered

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testimony of sixteen year old pregnant witness because she was afraid of defendant's friends in courtroom). *See also* United States *ex rel.* Smallwood v. La Valle, 377 F. Supp. 1148 (E.D.N.Y. 1974), *aff'd without opinion*, 508 F.2d 837 (2d Cir.), *cert. denied*, 421 U.S. 920 (1974).

55. United States *ex rel.* Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969), *cert. denied*, 397 U.S. 957 (1970) (order excluding spectators from courtroom did not deny accused public trial, where it appeared to trial judge that state's witness was being intimidated by certain persons in courtroom); United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965) (exclusion of public, except for members of press and bar, from trial was not unreasonable when it was apparent that defendant and his sympathizers were attempting to prevent orderly presentation of case by harassing and intimidating witnesses); People v. Hagan, 24 N.Y.2d 395, 248 N.E.2d 588, 300 N.Y.S.2d 835, *cert. denied*, 396 U.S. 886 (1969) (exclusion of press and public did not deprive defendant's right to public trial when lawyer for witness stated that witness feared for his life because threats had been made against him).

56. United States v. Kobli, 172 F.2d 919, 922 (3d Cir. 1949) (spectators who are admitted to trial must observe proper decorum and if their conduct tends in any way to interfere with administration of justice in courtroom, they may be removed). *See also* State v. Copp, 15 N.H. 212, 214-15 (1844); Bishop v. State, 19 Ala. App. 326, 97 So. 169 (1923); New York State Licensed Bail Agent's Ass'n v. Murtagh, 200 Misc. 1095, 107 N.Y.S.2d 380 (Sup. Ct. 1951), *aff'd*, 279 A.D. 851, 110 N.Y.S.2d 154 (1st Dep't), *appeal denied*, 279 A.D. 893, 111 N.Y.S.2d 606 (1st Dep't), *appeal denied*, 303 N.Y. 1009, 106 N.E.2d 284 (1952).

57. *See, e.g.*, People v. Hinton, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972); Gannett Co. v. Mark, 54 A.D.2d 818, 387 N.Y.S.2d 336 (4th Dep't 1976).

58. *Compare* People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954) *with* United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954). *See also* note 68 *infra*.

59. 43 N.Y.2d at 375, 372 N.E.2d at 546, 401 N.Y.S.2d at 758-59.

60. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 378, 379, 372 N.E.2d 544, 548, 401 N.Y.S.2d 756, 760-61 (1977).

whether the unusual circumstances presented in the criminal trial were adequate grounds to close a pretrial hearing.[61]

The court of appeals adhered to the prior New York view in deciding the first issue.[62] While various purposes have been attributed to the doctrine of the public trial in criminal cases,[63] the primary purpose has traditionally been regarded as a protective device insuring against prosecution and abuse of judicial authority over the accused.[64] Therefore, the public trial requirement "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned."[65] Past decisions in the New York courts have uniformly followed this rationale. For example, in *United Press Associations v. Valente,*[66] the New York Court of Appeals held that newspaper publishers had been properly barred from the proceeding. However, in the companion case of *People v. Jelke,*[67] the accused was granted a new trial. Contrary to its decision in *Valente,* the court held it improper to exclude spectators from the courtroom because the defendant's right to an open trial was thereby violated.[68]

The *Valente* court stated:[69]

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61. *Id.* at 380-81, 372 N.E.2d at 550, 401 N.Y.S.2d 756, 762-63 (1977).

62. *See* notes 70-71 *infra* and accompanying text.

63. *See* note 47 *supra* and accompanying text.

64. People v. Jelke, 308 N.Y. 56, 62, 123 N.E.2d 769, 771-72 (1954).

65. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927), *quoted in* United Press Ass'ns v. Valente, 308 N.Y. 71, 80, 123 N.E.2d 777, 780 (1954).

66. 308 N.Y. 71, 123 N.E.2d 777 (1954).

67. 308 N.Y. 56, 123 N.E.2d 769 (1954).

68. In People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954), the defendant was charged in the Court of General Sessions in the County of New York with committing various crimes including compulsory prostitution. *Id.* at 60, 123 N.E.2d at 770. The trial judge, Francis L. Valente, issued an order on his own motion to close the court to the general public on the grounds that the sordid and obscene details of the opening statements necessitated that the trial be closed. *Id.* The court permitted any friends or relatives of the accused to remain. *Id.* at 61, 123 N.E.2d at 771.

In the companion case, United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954), members of the media alleged that the closure order issued in *Jelke* had denied the press, acting as a representative of the public, the right to attend all judicial proceedings. *Id.* at 76-77, 123 N.E.2d at 778.

The New York Court of Appeals decided that the order in question should be affirmed as it applied to the press, *id.* at 85, 123 N.E.2d at 784, and the accused, People v. Jelke, 308 N.Y. 56, 68, 123 N.E.2d 769, 775 (1954). Therefore, since the court claimed that the right to a fair trial lay primarily with the accused, *id.* at 68, 123 N.E. at 775, it granted a new trial to the defendant in *Jelke, id.* at 68, 123 N.E.2d at 771, yet the press in *Valente* was denied relief. 308 N.Y. at 85, 123 N.E.2d at 783.

69. United Press Ass'ns v. Valente, 308 N.Y. 71, 81, 123 N.E.2d 777, 781 (1954).

> The public's interest is adequately safeguarded as long as the accused himself is given the opportunity to assert on his own behalf, in an available judicial forum, his right to a trial that is fair and public. The accused's defense is, in the very nature of things, more than likely to be adequate. Whatever concern the public may have for a defendant's right to a fair trial, it can seldom match that of the person whose life or liberty is at stake. . . . As long as the defendant is assured the right to invoke the guarantees provided for his protection, the public interest is safe and secure, and there is neither need nor reason for outsiders to interject themselves into the conduct of the trial.

The *Valente* and *Jelke* decisions illustrate how the courts hold the rights of the accused more dear than the corresponding rights of the media with respect to the open trial guarantee.

The *Gannett* court emphatically reaffirmed this proposition.[70] Since the interests of the public did not coincide with the interests of the accused, the court followed past precedent and held the accused's rights more important.[71] The court reasoned that while the press and the public certainly have a legitimate concern insuring an effective and fair proceeding, it is the defendant, after all, whose liberty is in jeopardy.[72]

In so deciding, the court took great liberties in order to dismiss the public's statutory right to be present at trial. The court made a distinction between a "mere curiosity" on the part of the public, and a "legitimate public concern" to insure the defendant received a fair judicial proceeding. According to the court, if a trial judge makes a determination that the public is merely "curious" instead of "legitimately concerned" about a trial, the proceeding may be closed in order to safeguard the integrity of its process.[73] However, the court did not explain the manner by which this determination is to be made.[74] It is questionable whether any judge can decide

70. 43 N.Y.2d 370, 376-77, 372 N.E.2d 544, 547, 401 N.Y.S.2d 756, 759.

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

72. *Id.* at 376, 372 N.E.2d at 547, 401 N.Y.S.2d at 759.

73. *Id.* at 381, 372 N.E.2d at 550, 401 N.Y.S.2d at 763.

74. After making the distinction between "curiosity" and "legitimate concern" the court stated:

> To safeguard the integrity of its process, the [trial] court was required at the outset to distinguish mere curiosity from legitimate public interest.
>
> In so doing, the court should, of course, afford members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest. This may be found to outweigh the risks of premature disclosures. In trials involving public officials, for instance, the public may have an overwhelming interest in keeping all proceedings open.

when public curiosity is *not* legitimate. As an event becomes more spectacular and newsworthy, public curiosity becomes more intense. The *Gannett* decision, however, allows the public's right to know to be dismissed in this instance. The court applied this vague standard to approve the closure order issued by Judge De Pasquale:[75]

> That level of legitimate public concern was not reached in this case. Widespread public awareness kindled by media saturation does not legitimize mere curiosity. Here the public's concern was not focused on prosecutorial or judicial accountability; irregularities, if any, had occurred out of State. The interest of the public was chiefly one of active curiosity with respect to a notorious local happening.

The *Gannett* court also decided that the unusual circumstances[76] of the case necessitated the removal of the hearing from public scrutiny. Prior to the *Gannett* decision, the burden to prove a serious and imminent threat to the integrity of the trial rested with the party requesting a closed trial.[77] However, *Gannett* significantly liberalizes the standard to be met by a criminal defendant seeking a closure order. Rather than follow the prior New York view, the court relied on the standard proposed by the American Bar Association. According to the ABA, a closure order should be allowed whenever "dissemination of the evidence may disclose matters that will be

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Id. at 381, 372 N.E.2d at 550, 401 N.Y.S.2d at 762-63.

75. *Id.* at 381, 372 N.E.2d 550, 401 N.Y.S.2d at 763.

76. The New York courts have allowed a closure order on these grounds in the past. *See* People v. Hinton, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885, *cert. denied*, 410 U.S. 911 (1972). Conversely, when a closure order was granted in situations where no unusual circumstances were demonstrated warranting the exclusion, the closure order has been nullified as a violation of the defendant's right to a public trial. People v. Tillery, 36 A.D.2d 928, 321 N.Y.S.2d 236 (1st Dep't 1971) (record must show "special circumstances" before public may be excluded); People v. Outcalt, 32 A.D.2d 971, 303 N.Y.S.2d 213 (2d Dep't 1969) (exclusion of anyone connected with defendant's case was not reasonable basis for closure order). *See also* Hearst Corp. v. Cholakis, 54 A.D.2d 592, 386 N.Y.S.2d 892 (3d Dep't 1976) (dealing with pretrial suppression hearing in same manner as trial). For an explanation of "unusual circumstances" and the manner in which they arise, see notes 52-56 *supra* and accompanying text.

77. In Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972), the court found that an order banning the press as well as the public from the court was improper. "[E]ven if we were to assume that such an order could ever be justified, . . . it could stand only upon a clear showing—similar to that required to sustain a contempt order—that it was necessary to meet 'a serious and imminent threat' to 'the integrity of the trial.'" *Id.* at 180-81, 282 N.E.2d at 310, 331 N.Y.S.2d at 413 (1972) (citing Craig v. Harney, 331 U.S. 367, 373, 377 (1947)).

inadmissable at trial and is therefore likely to interfere with his right to a fair trial by an impartial jury."[78] The new standard proclaimed by the *Gannett* court provides:[79]

> At the point where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are *presumptively* to be closed to the public.
>
> As the locus of public interest, this determination is to rest with the hearing judge. Of primary consideration is the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial.

The *Gannett* dissent criticizes the majority's view that an order to close a courtroom is now valid as long as a defendant can show a *possible* threat to an impartial jury.[80] Therefore, as long as some risk of prejudice from media coverage is present, the burden of proof for obtaining a restrictive order no longer rests with the defendant. Rather, according to the *Gannett* holding, this burden switches to those who have been denied access to the proceeding. This ruling is far afield of prior statutory and case law in New York State. Now a closure order will only be denied to a criminal defendant when the press is able to establish that the "magnitude of any genuine public

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78. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS § 3.1 (1968). The complete recommendation specifically concerning pretrial hearing states:

> It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:
>
> Motion to exclude public from all or part of pretrial hearing.
>
> In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed on the ground that dissemination of evidence or argument adduced at the hearing *may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury.* The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution.
>
> Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury. *Id.* (emphasis added).

79. 43 N.Y.2d 370, 380, 372 N.E.2d 544, 550, 401 N.Y.S.2d 756, 762 (emphasis added).

80. *Id.* at 386-87, 372 N.E.2d at 553, 401 N.Y.S.2d 756, 766 (1977) (Cooke, J., dissenting).

interest" requires the courtroom to remain open.[81]

The *Gannett* situation is distinguishable from past New York cases because it concerns the closing of a pretrial hearing rather than a trial.[82] The strict New York standard has traditionally required the defendant to establish a threat to the integrity of a trial before a closure order could issue.[83] However, in the criminal prosecution, Judge De Pasquale allowed the closure order without demanding proof of its necessity by the defendant.[84] Thus, the previous standard was not met. Apparently the court of appeals changed the standard in *Gannett*. The court believed the crucial factor to be the *pretrial* proceeding.

The closure order is necessary to insure that a trial judge can impanel an impartial jury.[85] This is a guarantee specifically provided in the sixth amendment to the Constitution.[86] While prejudicial publicity can be kept from a jury during a trial by a sequestration order, there is no analogous way to protect prospective jurors at a pretrial hearing. Prior to *Gannett*, only one New York case had questioned the closure of a pretrial hearing upon defendant's motion. In *Hearst Corporation v. Cholakis*,[87] the accused requested a suppression hearing to be closed to the media on the grounds that adverse publicity could endanger the fairness of the trial. The appellate division ruled the order improper and reversed the trial court.[88] The decision rested on the inability of the defendant to substantiate his claim at the trial level.[89] Thus, prior to the *Gannett* decision, the standard to close either a trial or a pretrial hearing was identical.

Closing the pretrial hearing may be the most equitable result, given the circumstances in *Gannett*.[90] However, in the past, courts

81. *Id.* at 381, 372 N.E.2d at 550, 401 N.Y.S.2d 762-63.

82. *Id.* at 378, 372 N.E.2d at 548-49, 401 N.Y.S.2d 761.

83. *See* note 77 *supra* and accompanying text.

84. *See* Gannett Co. v. De Pasquale, 55 A.D.2d 107, 110, 389 N.Y.S.2d 719, 722.

85. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 380, 372 N.E.2d 544, 550, 401 N.Y.S.2d 756, 762 (1977), *cert. granted*, 98 S. Ct. 1875 (1978) (No. 77-1301).

86. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial, by an *impartial jury*. . . ." U.S. CONST. amend. VI (emphasis added).

87. Hearst Corp. v. Cholakis, 54 A.D.2d 592, 386 N.Y.S.2d 892 (3d Dep't 1976).

88. *Id.* at 593, 386 N.Y.S.2d at 893.

89. *Id.*

90. The appellate division did not hold that Judge De Pasquale's order was entirely without merit. Rather, the court disallowed it due to the lack of factual basis within the record

have often overturned similar orders.[91] This was not because the accused lacked the ability to request a closure order. Rather, it is because he failed to establish circumstances proving the necessity for this remedy. Therefore, an important ramification of the *Gannett* holding is the relative ease by which a New York trial judge may now properly close a pretrial hearing.[92] In fact, under the terms proposed in *Gannett* nearly every pretrial hearing in New York State could be closed with little effort.[93] This result would greatly diminish the press's ability to report facts to the public, and, in addition, would go beyond the intent of the *Gannett* decision.[94]

Gannett has been sharply criticized in at least one circuit court. In *United States v. Cianfrani,* the Third Circuit invalidated an order which excluded members of the press from a pretrial hearing.[95] The defendant asserted that he had a sixth amendment right to close the hearing at his request. At oral argument the *Gannett* decision was cited to buttress this claim.[96] Chief Judge Seitz disagreed with the defendant's argument and rejected the reasoning in *Gannett.*[97] The court stated, "[w]e have studied the opinion of the New York Court of Appeals in *Gannett Co.*, and we find its analysis of the sixth amendment unacceptable."[98]

The United States Supreme Court has granted certiorari to review the *Gannett* case.[99] Apparently the Court recognized the need to establish a uniform balance between restrictive orders imposed on the press, and a defendant's sixth amendment right to a fair trial.

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to merit such an extraordinary remedy. *See* Gannett Co. v. De Pasquale, 55 A.D.2d 107, 389 N.Y.S.2d 719 (4th Dep't 1976).

91. *See, e.g.*, Craig v. Harney, 331 U.S. 367 (1947); Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972); Hearst Corp. v. Cholakis, 54 A.D.2d 592, 386 N.Y.S.2d 892 (3d Dep't 1976).

92. The pre-*Gannett* standard called for a showing of "unusual circumstances" or "a serious or imminent threat to the integrity of the trial" in order to close a pretrial hearing. *See* notes 52-56 *supra* and accompanying text. However, the *Gannett* court allowed an exclusionary order to stand whenever adverse commentary *would threaten* the impaneling of an impartial jury in the county of venue. *See* note 81 *supra* and accompanying text.

93. Goodale, *News Media and the Law: Fair Trial-Free Press—New Deluge of Cases*, N.Y.L.J., Jan. 26, 1978, at 1, col. 1.

94. *Id.*

95. 573 F.2d 835 (3d Cir. 1978).

96. *Id.* at 851.

97. *Id.* at 851 n.4.

98. *Id.*

99. 98 S. Ct. 1875 (1978) (No. 77-1301).

IV. The Freedom of the Press Guarantee

A second, and perhaps more controversial problem was presented in *Gannett*. When the New York Court of Appeals restricted the media from freely reporting information to the public, the first amendment freedom of the press guarantee was seriously curtailed.[100]

The first amendment to the Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or the press. . . ."[101] This protection applies to the states under the due process clause of the fourteenth amendment to the Constitution.[102]

The trial court in *Gannett* had granted the closure order specifically to curtail further press coverage.[103] Nevertheless, a weakness of the New York Court of Appeals decision in *Gannett* is the insufficient attention given in the opinion to the first amendment argument.[104] This is especially true after an examination of the surrounding circumstances in the case.[105]

The petitioner was a respected member of the press reporting the events of the criminal prosecution from the date of its inception.[106] In addition, the appellate division,[107] as well as Judge Cooke's dis-

100. The "Fair Trial/Free Press" issue has become one of the most controversial topics in the wake of Sheppard v. Maxwell, 384 U.S. 333 (1966). *See* note 5 *supra*. The Supreme Court in *Sheppard* departed from the "traditional view that the discretion of the trial judge . . . is extremely broad and that actual prejudice . . . must be shown in order to obtain release in cases which question the ability of the courts to inhibit press coverage on grounds that it infringes on a defendant's sixth amendment fair trial right." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS 112 (1968). Many commentators have written on this subject. *See, e.g.*, Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55 (1976); Warren & Abell, *Free Press—Fair Trial: The "Gag Order," A California Abberration*, 45 S. CAL. L. REV. 51 (1972); Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 WM. & MARY L. REV. 1 (1971); SPECIAL COMM. ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK—FINAL REPORT AND RECOMMENDATIONS (1967); Barnett, *The Puzzle of Prior Restraints*, 29 STAN. L. REV. 539 (1977); Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 497 (1977).

101. U.S. CONST. amend. I.

102. Near v. Minnesota, 283 U.S. 697, 707 (1931); Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936).

103. 43 N.Y.2d 370, 375, 372 N.E.2d 544, 546, 401 N.Y.S.2d 756, 758.

104. *See* Rothblatt, *Fair Trial-Free Press: The Recurring Theme*, N.Y.L.J., January 27, 1978, at 26, col. 2.

105. For a review of the facts presented before the New York Court of Appeals in the *Gannett* case, see the text accompanying notes 25-41 *supra*.

106. *See* 43 N.Y.2d at 374-75, 372 N.E.2d at 546, 401 N.Y.S.2d at 758-59.

107. The appellate division decision stated that "[t]he exclusionary order entered here

sent in the court of appeals,[108] relied heavily on first amendment reasoning to disallow Judge De Pasquale's order. Nevertheless, after recognizing the invalidation of "gag" orders by the Supreme Court in *Nebraska Press*,[109] the court of appeals side-stepped the first amendment problem with this statement: "This, of course, does not mean that trial courts are left powerless to stem improper revelation of facts that would present an imminent threat to the impaneling of a constitutionally impartial jury."[110] The New York Court of Appeals virtually ignored the media's strongest argument against restrictive orders. Since these orders indirectly restrict the press' ability to publish freely, they have the same effect, and should be treated in the same manner as "prior restraints" on the press.

A. The Prior Restraint Doctrine

An integral aspect of the first amendment freedom of the press guarantee is that all orders imposing prior restraints on the publication or broadcast of information carry a heavy presumption against their constitutional validity.[111] In fact, the Supreme Court has declared that "the main purpose of the First Amendment is to prevent all such previous restraints upon publications as had been practiced by other governments."[112] Although prior restraints have never been held to be unconstitutional *per se*,[113] the Supreme Court typically prohibits their use.[114] In order to justify the issuance of an order which has the effect of a prior restraint, the Court has always re-

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infringed petitioners First Amendment rights in that it constituted a violation of the rights of the press to publish free from unlawful governmental interference." 55 A.D.2d 107, 110, 389 N.Y.S.2d 719, 722 (4th Dep't 1976).

108. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 382, 372 N.E.2d 544, 551, 401 N.Y.S.2d 756, 763 (1977) (Cooke, J., dissenting). Judge Cooke stated: "A closed proceeding should be recognized for what it is—a 'serious backdoor threat to First Amendment interests.' " *Id.* at 384, 372 N.E.2d at 552, 401 N.Y.S.2d at 765 (Cooke, J., dissenting).

109. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) (citing Carroll v. Princess Anne, 393 U.S. 175 (1968)). *See also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

110. 43 N.Y.2d at 379-80, 372 N.E.2d at 549, 401 N.Y.S.2d at 762.

111. *Id.* at 380, 372 N.E.2d at 549-50, 401 N.Y.S.2d at 762. *See also* note 36 *supra.*

112. Patterson v. Colorado, 205 U.S. 454, 462 (1907), *quoted in* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 557 (1976). Similar statements have frequently been voiced by the Court. *See* Near v. Minnesota, 283 U.S. 697, 713 (1931); Grosjean v. American Press Co., 297 U.S. 233, 243 (1936).

113. The Supreme Court has often qualified the prior restraint doctrine in this manner. *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963); Near v. Minnesota, 283 U.S. 697, 713 (1931); Grosjean v. American Press Co., 297 U.S. 233, 249 (1936).

114. *See* notes 119 *infra* and accompanying text.

quired the strictest burden of proof.[115]

The Court has never delineated the precise parameters of a prior restraint;[116] yet, the concept has expanded continuously with the passage of time.[117] Originally, a prior restraint was defined by the English as prohibiting publication without advance approval of the government.[118] In this country, the doctrine has taken on the highest constitutional importance.[119] Any "trivial distinctions between types of government intrusion will not be relied upon when the effects impinge the Free Press guarantee."[120] Thus, the Supreme Court has held invalid a Minnesota statute which deemed any malicious, scandalous and defamatory publication a public nuisance,[121] and has struck down an injunction that prohibited demonstrators from picketing and distributing leaflets.[122] In addition, the Court did not permit the Government to enjoin the publication of excerpts from a top secret study of the Vietnam conflict,[123] nor allow a "gag" order to be placed on members of the press.[124]

The Court has not limited the prior restraint doctrine to direct infringements on the right to publish. In *Grosjean v. American Press Co.*,[125] a tax imposed on newspapers according to the number of copies in circulation was invalidated as a prior restraint. The tax

115. The Court so stated in *Nebraska Press*. "[I]t is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it." 427 U.S. at 561.

116. The Second Circuit recently explored the origins of the prior restraint doctrine in the Supreme Court. *See* Herbert v. Lando, 568 F.2d 974, 989 n.18 (2d Cir. 1977).

117. *See* text accompanying notes 112-23 *infra*.

118. 568 F.2d at 989 n.18 (2d Cir. 1977).

119. *Id.* at 989. The Supreme Court has held that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

120. 568 F.2d at 990 n.22. The Supreme Court has often acknowledged this view. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court held "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Id.* at 256.

121. Near v. Minnesota, 283 U.S. 697 (1931).

122. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). The Court also held an ordinance prohibiting the distribution of "circulars, handbills, advertising, or literature of any kind" invalid on its face as a prior restraint in Lovell v. Griffin, 303 U.S. 444, 450-51 (1938), and struck down an order prohibiting door-to-door canvassing of religious literature as a prior restraint in Martin v. Struthers, 319 U.S. 141 (1943).

123. New York Times Co. v. United States, 403 U.S. 713 (1971).

124. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). For a detailed discussion of this decision, see notes 130-39 *infra* and accompanying text.

125. 297 U.S. 233 (1936).

had the indirect effect of restricting circulation and lowering advertising revenues.[126] Recently, courts have explored the possibility that a newsgathering privilege,[127] and even an editorial process[128] may be considered a prior restraint on publication. Thus, the judiciary has increasingly expanded the meaning of "prior restraint", narrowly restricting if not forbidding any governmental restraints on publication.[129]

A major issue squarely presented by the *Gannett* holding is the effect on the freedom of the press guarantee of closing a pretrial hearing to the public; whether a denial to it of immediate access to the record can be considered a prior restraint on publication. The Court examined the constitutionality of a pretrial restrictive order in only one case, *Nebraska Press Association v. Stuart.*[130] In *Nebraska Press,* the Court was concerned with a restrictive order which enjoined the press from reporting the facts of a pretrial suppression hearing. The facts of the case are similar to those in *Gannett.*[131] In the state case underlying *Nebraska Press,* the Nebraska Supreme Court held constitutional a modified version of a trial court's "gag order," which restrained the members of the press from reporting events that had taken place at the hearing.[132] The trial judge granted the order at the request of the defendant's attorney. The court found a "reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an

126. *Id.* at 244-45.

127. *See* Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977) where the court reversed an order to compel discovery pursuant to 28 U.S.C. § 1292(b). The order sought to allow a public figure who was bringing a libel action to inquire into a journalist's thoughts, opinions and conclusions. Chief Judge Kaufman, writing for the majority stated:

> Invoking the broad words of the First Amendment, the Supreme Court has never hesitated to forge specific safeguards to insure the continued vitality of the press. It has repeatedly recognized the essentially tripartite aspect of the press' work and function in: (1) acquiring information, (2) 'processing' that information and (3) disseminating the information. The Supreme Court was aware that if any link in that chain were broken, the free flow of information inevitably ceases.

568 F.2d at 976.

128. *Id.* at 979.

129. For an historical analysis of the prior restraint doctrine see Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROB. 648 (1955).

130. 427 U.S. 539 (1976).

131. *Compare* 427 U.S. at 542-45 *with* Gannett Co. v. De Pasquale, 43 N.Y.2d at 374-75, 372 N.E.2d at 546, 401 N.Y.S.2d at 758.

132. *See* State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975).

impartial jury and tend to prevent a fair trial."[133] The United States Supreme Court reversed in *Nebraska Press.*[134]

The Court held that the trial court had not established that the "gravity of the evil" of prejudicial news, "discounted by its improbability" of harming the defendant at trial, justified such invasions of free speech as were necessary to avoid the danger of promoting an unfair trial.[135] The Court examined the record to determine the nature and extent of the prejudicial news coverage,[136] the possibility of mitigating the effects of unrestrained pretrial publicity in some other manner than a restrictive order,[137] and the effectiveness of the restraining order in preventing the threatened danger to the proceeding.[138] Since the record did not overcome the barriers established for justifying a restrictive order against the media, the Court held that the "gag" order was "clearly invalid."[139]

In *Nebraska Press,* the Court emphatically reaffirmed the strict standard demanded for the justification of prior restraints, even in face of a sixth amendment challenge.[140] However, the Court did not declare that the sixth amendment right of the accused to a fair trial is subordinate to the right of the press to publish.[141] Rather, the Court noted that there may be certain circumstances that would demand the use of a prior restraint;[142] although the decision did not specify what these circumstances would entail. Five Justices would

133. *See* 427 U.S. at 542.

134. 427 U.S. 539 (1976).

135. *Id.* at 562, *citing* United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd,* 341 U.S. 494 (1951). Although courts have generally used the Holmes-Brandeis "clear and present danger" standard when judicial restraints upon the press are at issue, the test applied in the *Nebraska Press* decision, first proposed by Learned Hand in *United States v. Dennis,* is slightly less demanding. *See* Barnett, *The Puzzle of Prior Restraint,* 29 STAN. L. REV. 539, 541 (1977).

136. 427 U.S. at 562-63.

137. *Id.* at 563-65. For a list of the ways a court may mitigate the effects of prejudicial publicity see note 8 *supra.*

138. *Id.* at 565-67. It is questionable as to whether a restrictive order which "gags" or excludes members of the media is an effective means to protect the defendant. *See* Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?,* 29 STAN. L. REV. 515 (1977).

139. 427 U.S. at 570.

140. *Id.* at 561. For the Court's language concerning the standard required for a prior restraint, see note 115 *supra.*

141. 427 U.S. at 561.

142. *Id.* at 570.

have maintained even a stricter standard, and expressed doubt as to the propriety of prior restraints under any circumstances.[143]

B. The *Gannett* Closure Order as a Prior Restraint

The *Gannett* ruling leaves the Supreme Court with a bifurcated issue: whether the restrictive order should be defined as a prior restraint in the wake of the *Nebraska Press* decision; and, if this restrictive order is held not to be a prior restraint on publication, whether the Court would consider the closure order a proper remedy.

When a court issues an order to prevent the press from publishing information in its possession, the order is usually considered a prior restraint on publication.[144] For example, in the *Nebraska Press* "gag" order case,[145] the media obtained the information at a pretrial hearing and a subsequent court order attempted to enjoin the press from publishing it.[146] The press was thereby "gagged" because it could not freely report facts in its possession. The Supreme Court struck down this order as an improper restraint on publication.[147]

However, in *Gannett,* the New York Court of Appeals recognized that any information in the possession of the media can be freely reported,[148] but distingushed *Gannett* from *Nebraska Press.* The media in the *Gannett* case had never been in possession of the restricted information, since the trial court closed the hearing to all spectators. Therefore, the *Gannett* court was not technically restraining publication; it was merely preventing the access of the

143. Justice White stated that "there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable." *Id.* at 570 (White, J., concurring). Justice Powell would have allowed a prior restraint only when prejudicial publicity "poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality." *Id.* at 571 (Powell, J., concurring). And two Justices joined with Justice Brennen's view that "resort to prior restraints on the freedom of the press is a constitutionally impermissable method for enforcing that right." *Id.* at 572 (Brennan, J., concurring in the judgment, in which Stewart and Marshall, J.J., joined).

144. In Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), Chief Judge Kaufman considered a prior restraint as simply "prohibiting government from censoring publications in advance." *Id.* at 989.

145. Nebraska Press Ass'n Stuart, 427 U.S. 539 (1976).

146. *Id.* at 541.

147. See notes 136-39 *supra* and accompanying text.

148. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 379, 372 N.E.2d 544, 549, 401 N.Y.S.2d 756, 761-62 (1977).

media to this information.[149] According to this interpretation, the *Gannett* closure order was not a prior restraint on publication.[150] In the *Gannett* dissent, Judge Cooke disagreed with this logic in that no fundumental difference in effect exists between a "gag" and closure order.[151] "[T]he right of free expression must encompass both the freedom to *convey* information about a public matter and the liberty to gain *access* to proceedings involving the same."[152]

If it is assumed the *Gannett* majority erred in distingushing a "gag" order from a closure order, the Supreme Court will not affirm

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149. The court made this distinction: "Defendants Greathouse and Jones sought to invoke these constitutional norms, not by excluding the public or the press from a highly sensationalized murder trial, but rather by excluding allegedly tainted evidence of guilt." Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 379, 372 N.E.2d 544, 549, 401 N.Y.S.2d 756, 761 (1977). This is similar to the view taken in *United Press Ass'ns v. Valente*, where the New York Court of Appeals emphasized that

> this is not a case of free speech or freedom of the press and that the right asserted by petitioner is not embraced within the constitutional provision guaranteeing those freedoms. . . . [F]reedom of the press is in no way abridged by an exclusionary ruling which denies to the public generally, including newspapermen, the opportunity to "see and hear what transpired.

308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). Nevertheless other courts have disagreed with the view that the first and sixth amendment rights exist as separate, distinct guarantees. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976). In Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), the court stated that an indirect restraint, as well as a direct one, acts to subvert publication and should be examined carefully. *Id.* at at 976-77. Finally, the dissenting opinion in *Gannett* specifically disagreed with the majority on this point.

> This court's recognition of an exclusion order as a general prophylactic against the influence of unknown and undocumented prejudices upon the tribunal's deliberative function suggests an almost casual acceptance of a prior burden on the freedom of the press, a burden presumptively repugnant to the ends of the First Amendment. . . . [T]he right to report the news is too vital to the nature of a free state to allow the press to be stifled under the pressure of direct "gag" orders, or even more subtle means of accomplishing the same illicit end.

Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 384, 372 N.E.2d 544, 552, 401 N.Y.S.2d 756, 756 (1977) (Cooke, J., dissenting).

See also the discussion of United States v. Cianfrani, 573 F.2d 835 (3rd Cir. 1978), at note 157 *infra*.

150. For a critical discussion of this view, see Goodale, *News Media and the Law: Fair Trial-Free Press—New Deluge of Cases*, January 26, 1978, N.Y.L.J., at 1, col. 1.

151. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 384, 372 N.E.2d 544, 552, 401 N.Y.S.2d 756, 764-65 (1977) (Cooke, J., dissenting). The dissent stated:

> the premise that there is any significant difference in denying access to information about a matter of public interest—upon undocumented, unproven and conclusory allegations of possible prejudice—assumes that the right to observe an otherwise public proceeding is severable from and of less value than the right to convey information about it. Any such distinction is without substance.

Id. (Cooke, J., dissenting).

152. *Id.* at 384, 372 N.E.2d at 552, 401 N.Y.S.2d at 765. (Cooke, J., dissenting).

the *Gannett* decision.[153] However the Court has not yet decided whether a closure order demands the same heightened scrutiny as "gag" orders and other prior restraints.

In *Nebraska Press,* the Supreme Court did make reference to the closing of a pretrial hearing on the motion of the defendant as a possible alternative to a "gag" order.[154] However, the Court did not specifically approve this procedure. Rather, the Court merely referred to closure orders "recommended in guidelines that have emerged from various studies."[155] Since the Supreme Court did not forbid the use of closure orders, the *Gannett* majority assumed the Court would permit such orders in the future.[156]

If a closure order is not considered a prior restraint *per se,*[157] the Court should still decide if the circumstances presented in *Gannett* should permit the exclusion of the press and the public. The Court has always demanded any final order restraining a first amendment right to be narrowly construed;[158] however, the rule established by

153. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (gag orders held "clearly invalid"). *See also* N.Y. Times Co. v. United States, 403 U.S. 713, 715 (1971). If the Court decides that the *Gannett* closure order should be treated as a prior restraint, it is unlikely that the Court will affirm its validity. *See* note 143 *supra* and accompanying text.

154. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 n.8 (1976).

155. *Id.*

156. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 380, 372 N.E.2d 544, 549-50, 401 N.Y.S.2d 756, 762.

157. In United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978), Chief Judge Seitz invalidated a pretrial restrictive order on sixth amendment grounds. *See* text accompanying notes 95-98 *supra.* In addition, the court rejected the theory that the closure order could be viewed as a prior restraint on the press.

> No prior restraint is involved. The press remains free to publish whatever it learns in open court or elsewhere. We therefore hold that the confined, in many instances temporary, and strictly regulated limits on access outlined above do not violate the first amendment rights of the press or of the public in general.

573 F.2d at 861.

However, Judge Gibbons disagreed with Judge Seitz's analysis of the first amendment. In the concurring opinion Judge Gibbons stated:

> Protection of that right of access, to the extent recognized in Chief Judge Seitz's opinion, should rest upon a broader constitutional foundation than is afforded by the sixth amendment. That foundation, I suggest, is the federal common law implied from the first amendment. Moreover, the public access right has a constitutionally protected minimum contact.

Id. at 862 (Gibbons, J., concurring).

The Supreme Court has also considered the right to gather information, and has held that this freedom is of critical importance. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

158. *See* note 115 *supra* and accompanying text.

Gannett relaxes the prior standard—possibly to an unconstitutional level.[159]

V. The Argument Against Mootness

The jurisdiction of the Supreme Court under Article III, section two of the Constitution extends only to actual cases and controversies.[160] If the effect of a decision at trial is short-lived, the Court may subsequently dismiss the appeal as moot when only an abstract question remains at the time of review.[161] Exceptions to the mootness doctrine do however exist.[162] This section briefly examines the *Gannett* holding in light of the mootness issue, and suggests that the Supreme Court will not dismiss the *Gannett* case on mootness grounds.

Before the New York Court of Appeals decided the *Gannett* case, both defendants in the connected criminal prosecution had received reduced sentences after plea bargaining.[163] The closure order remedy was no longer relevant with respect to that particular prosecution, and the court could have considered the ancillary issue moot.[164] However, the New York court decided to hear the case because the issue was of the nature that typically evades review.[165] At stake was

159. *See* notes 77-79 *infra* and accompanying text.

160. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975); Sosna v. Iowa, 419 U.S. 393, 397-403 (1975).

161. In Mills v. Green, 159 U.S. 651 (1895), the Court stated: "The duty of this Court, as of every other judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions. . . ." *Id.* at 653. For a detailed discussion on the ability of the Court to decide borderline cases see Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974); Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77, 78-79 (1955).

162. For example, when the litigation at bar is capable of repetition, the Supreme Court has often gone to the merits. *See* Southern Pac. Terminal Co. v. I.C.C., 219 U.S. 498, 514-15 (1910) (I.C.C. orders); Roe v. Wade, 410 U.S. 113, 124-125 (1973) (pregnancy litigation). *See also* Moore v. Ogilvie, 394 U.S. 814, 816 (1969); Carroll v. Princess Anne, 393 U.S. 175, 178-79 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953). *But cf.* DeFunis v. Odegaard, 416 U.S. 312 (1974) (issue concerning discriminatory law school admissions policy held moot because action was brought by individual and not class and thus not capable of repetition).

163. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376 n.1, 372 N.E.2d 544, 547 n.1, 401 N.Y.S.2d 756, 759 n.1 (1977).

164. 43 N.Y.2d at 376, 372 N.E.2d at 547, 401 N.Y.S.2d at 759.

165. *Id.* There have been numerous cases dealing with the rights of the public and press to an open trial where the New York courts have retained jurisdiction even though the relief sought was no longer appropriate. *See* Oliver v. Postel, 30 N.Y.2d 171, 177, 282 N.E.2d 306, 308, 331 N.Y.S.2d 407, 411 (1972); United Press Ass'ns v. Valente, 308 N.Y. 71, 76, 123 N.E.2d

a court's inherent ability to control its judicial proceeding.[166] This reasoning is in accord with other recent Supreme Court decisions.[167] Nevertheless, since the Court has granted certiorari to the *Gannett* case,[168] the issue of mootness is once again resurrected.

It would be inappropriate for the Supreme Court to dismiss the *Gannett* case on mootness grounds, especially in the wake of the Court's decision in *Nebraska Press.*[169] The Court entertained *Nebraska Press* although the "gag" order was no longer in force.[170] The mootness argument was dismissed on two grounds.[171] First, the Court reasoned that if the Nebraska Supreme Court reversed the defendant's conviction, and ordered a new trial, the judge could again impose a "gag" order to restrict prejudicial publicity.[172] The action was therefore capable of repetition. In addition, the lower decision authorized state prosecutors to seek restrictive orders in certain circumstances, therefore the same type of dispute could recur between the courts and the press at a later date.[173] The Supreme Court decided that this issue was capable of repetition, yet evading review[174] since the "gag" order was, by its nature, short-lived.[175]

The *Gannett* controversy poses a similar situation to the Supreme Court. As in *Nebraska Press, Gannett* liberalizes the ability of coun-

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777, 777 (1954). For a general discussion concerning the power of the New York courts to hear such cases, see H. COHEN & A. KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 420-21 (1952).

166. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 376, 372 N.E.2d 544, 547, 401 N.Y.S.2d 756, 759 (1977), *cert. granted,* 98 S. Ct. 1875 (1978). The court stated:

> [T]his is far from an ordinary appeal. It crystallizes a recurring and delicate issue of concrete significance both to the courts and the news media. And in its broadest implications, it presents a challenge to a fundamental precept of judicial administration—the courts' inherent power to control their own process.

43 N.Y.2d at 376, 372 N.E.2d at 547, 401 N.Y.S.2d at 759.

For a recent discussion of the courts' inherent power to close a judicial proceeding to the press see Note, *Protective Orders Against the Press and the Inherent Powers of the Court,* 87 N.Y.U. L. REV. 342 (1977).

167. *See, e.g.,* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546-47 (1976).

168. 98 S. Ct. 1875 (1978) (No. 77-1301).

169. *See* notes 130-39 *supra* and accompanying text.

170. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 546 (1976).

171. *Id.*

172. *Id.*

173. *Id.* at 546-47.

174. *Id.* at 547.

175. *Id.*

sel to seek closure orders against the press.[176] If an argument is made to dismiss the decision on mootness grounds the ability of this issue to be repeated at a later date is nearly identical to the situation presented to the Court in *Nebraska Press*. Although numerous inconsistencies plague the mootness doctrine,[177] precedent to hear a *Gannett*-like controversy has been established and should not be altered.

VI. Conclusion

If the *Gannett* decision is affirmed by the Supreme Court, the danger exists that New York courts will liberally construe it, greatly inhibiting future press coverage of pretrial suppression hearings. The press might then be dissuaded from attempting to report the facts of future suppression hearings. The media has always been "regarded as the handmaiden of effective judicial administration, especially in the criminal field."[178] A multiplicity of indiscriminate closure orders would portend disaster to press coverage of criminal judicial procedure.

Through the *Gannett* case the New York Court of Appeals liberalized the ability to issue closure orders. The decision has since been invoked to validate restrictive orders in the lower New York courts.[179] The most famous instance was at the competency hearing of David Berkowitz in the "Son of Sam" murder prosecution.[180] Given the existing notoriety of the Berkowitz case, a pretrial closure order may be the only effective method to protect the defendant's sixth amendment rights. However, the remaining examples of the *Gannett*-based restrictive orders rest on, at best, tenuous grounds.[181]

176. *See* notes 77-79 *supra* and accompanying text *supra*.

177. *See* Note, *Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974); Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77, 78-79 (1955). *Compare* Roe v. Wade, 410 U.S. 113 (1973) *with* Defunis v. Odegaard, 416 U.S. 312 (1974).

178. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966), *quoted in* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976).

179. *See* [1978] 3 MEDIA L. REP. 1560 (BNA); 46 U.S.L.W. 2381 (January 24, 1978); N.Y. Times, March 28, 1978, at 38, col. 1.

180. N.Y. Times, April 13, 1978, at B10, col. 3.

181. After *Gannett* was decided in the New York Court of Appeals, two trial courts invoked *Gannett* to limit the ability of the press to cover pretrial hearings. However, one trial judge subsequently lifted the closure order when he decided that the facts before him were not analogous to *Gannett*. *See* [1978] 3 MEDIA L. REP. 1560 (BNA).

The second situation involved a New York Supreme Court justice of Westchester County

In order to safeguard both the defendant's and reporters' rights, the Supreme Court may deem it proper to limit the scope of the *Gannett* decision. Clearly, restrictive orders must be allowed in cases where closure will enable a court to perform efficiently and fairly. Nevertheless, it should be essential for a defense attorney to support a closure motion with evidence proving the absolute need for this extraordinary remedy. The burden of proof should not be transferred to the press, as in the *Gannett* decision.[182]

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who barred journalists from reporting the facts of a pretrial suppression hearing during the murder prosecution of two Lewisboro women. *Id.* The reporters were not excluded from the hearing, but were enjoined from reporting on the substance of the testimony obtained therein. This restrictive order is technically a "gag" rather than a "closure" and is invalid under the United States Supreme Court ruling in *Nebraska Press*. This type of misapplication is an inherent danger of the *Gannett* rule. *See id.*

182. *See* notes 80-81 *supra* and accompanying text.