Fordham Law Review

Volume 51 | Issue 6 Article 5

1983

Closure of Pretrial Suppression Hearings: Resolving the Fair Trial/ Free Press Conflict

Bernard P. Bell

CLOSURE OF PRETRIAL SUPPRESSION HEARINGS: RESOLVING THE FAIR TRIAL/FREE PRESS CONFLICT

"[T]he true measure of our society will not be judged by the freedom we grant to our great institutions as much as by the protection we provide for society's lowliest member. And none are more lowly—none more subject to potential abuse—and none with more at stake than those who have been indicted and face criminal prosecution in our courts. For them, freedom and fair trial are not abstractions." *

INTRODUCTION

Recent years have seen a growing number of cases in which the sixth amendment right of a criminal defendant to a fair trial by an impartial jury[1] conflicts with the first amendment interests of the public, and in particular the press,[2] in open judicial proceedings.[3]

---

* Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 444, 399 N.E.2d 518, 526, 423 N.Y.S.2d 630, 638 (1979).

1. U.S. Const. amend. VI. The sixth amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." This right has been incorporated by the due process clause of the fourteenth amendment to apply against the states. *See In re* Oliver, 333 U.S. 257, 272-73 (1948).

2. The press is viewed as the agent of the public. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring in judgment); Herald Ass'n v. Ellison, 138 Vt. 529, 540, 419 A.2d 323, 330 (1980) (Hill, J., concurring in part, dissenting in part); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 549 (W. Va. 1980); *see* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975) (individual in modern society relies upon press for knowledge of government functions); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.").

3. *E.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett Co. v. DePasquale, 443 U.S. 368 (1979); San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982); Cromer v. Superior Court, 109 Cal. App. 3d 728, 167 Cal. Rptr. 671 (1980); State v. Burak, 431 A.2d 1246 (Conn. Super. Ct. 1981); United States v. Edwards, 430 A.2d 1321 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982); State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904 (Fla. 1977); Iowa Freedom of Information Council v. Van Wifvat, 328 N.W.2d 920 (Iowa 1983); Kansas City Star Co. v. Fossey, 230 Kan. 240, 630 P.2d 1176 (1981); Ashland Publishing Co. v. Asbury, 612 S.W.2d 749 (Ky. Ct. App. 1980); State v. Birdsong, 422 So. 2d 1135 (La. 1982); State *ex rel.* Smith v. District Court, 654 P.2d 982 (Mont. 1982); Great Falls Tribune v. District Court, 608 P.2d 116 (Mont. 1980); State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977); State *ex rel.* New Mexico Press Ass'n v. Kaufman, 648 P.2d 300 (N.M. 1982); Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979); Commonwealth v. Hayes, 489 Pa. 419, 414 A.2d 318, *cert. denied*, 449 U.S. 992 (1980); Herald Ass'n v. Ellison, 138 Vt. 529, 419 A.2d 323

These competing interests were characterized by Justice Black as "two of the most cherished policies of our civilization";[4] any conflict between them has important implications for both the criminal justice system and the news media. A conflict between the right of the defendant to a fair trial and the demand of the press for access frequently arises at pretrial suppression hearings.

The typical conflict occurs with regard to a sensational murder prosecution that receives extensive press coverage.[5] Generally, at a pretrial hearing the defendant will move to suppress a confession or other highly incriminating evidence.[6] Evidence in a sensational case may be inadmissible despite being highly probative of the defendant's guilt.[7] As public outrage sparks interest in the case, the danger of permitting public access to such evidence multiplies.[8] In order to prevent the widespread publicizing of evidence that may later be inadmissible at trial, the defendant may also move to exclude the public and the press from the hearing.[9] Cases of this nature require

---

(1980); Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 281 S.E.2d 915 (1981); Seattle Times Co. v. Ishikawa, 640 P.2d 716 (Wash. 1982); Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 633 P.2d 74 (1981), *cert. denied*, 102 S. Ct. 2257 (1982); State v. Hughes, 8 Media L. Rep. (BNA) 2569 (Wash. Super. Ct. Oct. 4, 1982); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544 (W. Va. 1980); Williams v. Stafford, 589 P.2d 322 (Wyo. 1979).

4. Bridges v. California, 314 U.S. 252, 260 (1941).

5. *See, e.g.*, Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 750 (Ky. Ct. App. 1980); State v. Birdsong, 422 So. 2d 1135, 1138 (La. 1982); Great Falls Tribune v. District Court, 608 P.2d 116, 121 (Mont. 1980) (Sheehy, J., dissenting); Seattle Times Co. v. Ishikawa, 640 P.2d 716, 722 (Wash. 1982).

6. *E.g.*, State v. Birdsong, 422 So. 2d 1135, 1136 (La. 1982); Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 579, 281 S.E.2d 915, 917 (1981).

7. Brewer v. Williams, 430 U.S. 387, 406 (1977) (confession obtained in violation of defendant's right to advice of counsel inadmissible); Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (evidence obtained through interrogation inadmissible at trial unless prosecution demonstrates defendant's waiver of fifth amendment rights); Jackson v. Denno, 378 U.S. 368, 376-77 (1964) (involuntary confession inadmissible in state and federal trials); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (evidence seized in violation of fourth amendment inadmissible in state trials); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (evidence seized as an indirect result of fourth amendment violation inadmissible at trial); Weeks v. United States, 232 U.S. 383, 398 (1914) (evidence seized in violation of fourth amendment inadmissible in federal trials); *see* Nardone v. United States, 308 U.S. 338, 341-42 (1939) (evidence obtained as a result of knowledge gained from illegal wiretap inadmissible because it is "a fruit of the poisonous tree"); Fed. R. Evid. 403.

8. Gannett Co. v. DePasquale, 443 U.S. 368, 443 (1979) (Blackmun, J., concurring in part, dissenting in part) ("[A]s the public interest intensifies, so does the potential for prejudice.").

9. *E.g.*, State v. Birdsong, 422 So. 2d 1135, 1136 (La. 1982); Great Falls Tribune v. District Court, 608 P.2d 116, 118 (Mont. 1980); Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 579, 281 S.E.2d 915, 917 (1981). This Note does not consider the closure of hearings under rape shield laws, which are designed to protect victims from discussion of sensitive information and to encourage future

that the rights of the accused "be most zealously guarded,"[10] and yet it is in these cases that the public interest in an open proceeding is the greatest.[11]

The Supreme Court first considered the right of a defendant to close a pretrial suppression hearing in *Gannett Co. v. DePasquale*.[12] The Court held that the public trial provision of the sixth amendment exists solely for the benefit of the criminal defendant and does not confer any constitutional right of access to such hearings upon the media or the general public.[13] On behalf of four dissenters, Justice Blackmun disagreed. He argued that the sixth amendment public trial provision is the very foundation of the public's right to an open judicial proceeding.[14] He maintained that the sixth amendment serves societal interests existing alongside, and sometimes in opposition to, the defendant's right to a fair trial by an impartial jury.[15] An open proceeding, according to Justice Blackmun, deters perjury, serves as a check on judicial abuses, enables the public to scrutinize police and government conduct and educates the public in the operation of the criminal justice system.[16]

Seven members of the *Gannett* Court expressly reserved the question whether the first amendment guarantees the public any right of access.[17] Justice Powell, in a concurring opinion, was the only member of the Court willing to give explicit recognition to such a first amendment right.[18] Justice Rehnquist joined the *Gannett* opinion but wrote separately to reject Justice Powell's approach in favor of a broad rule, based on the sixth amendment, that would allow the defendant to close the proceeding without a stated reason, provided the prosecutor and judge consented.[19] With respect to pretrial suppression hear-

---

victims to testify, Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613, 2620-21 (1982), because the government interest in closure of such proceedings relates to the rights of the victim, not those of the accused.

10. State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 551 (W. Va. 1980).

11. Commonwealth v. Hayes, 489 Pa. 419, 447-48, 414 A.2d 318, 332-33 (Kauffman, J., concurring), *cert. denied*, 449 U.S. 992 (1980); Stern, *Free Press/Fair Trial The Role of the News Media in Developing and Advancing Constitutional Processes*, 29 Okla. L. Rev. 349, 358 (1976); *see* Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 587, 281 S.E.2d 915, 922 (1981).

12. 443 U.S. 368 (1979).

13. *Id.* at 394; *see id.* at 381 & n.9.

14. *Id.* at 436 (Blackmun, J., concurring in part, dissenting in part).

15. *Id.* at 415-16 (Blackmun, J., concurring in part, dissenting in part).

16. *Id.* at 427-29 (Blackmun, J., concurring in part, dissenting in part).

17. Justice Stewart wrote for the plurality and was joined in his reservation of the first amendment issue by Chief Justice Burger and Justice Stevens. *See id.* at 392. Justices Blackmun, White, Brennan and Marshall dissented, but they also reserved the first amendment issue. *Id.* at 447 (Blackmun, J., concurring in part, dissenting in part).

18. *Id.* at 397 (Powell, J., concurring).

19. *Id.* at 404 (Rehnquist, J., concurring).

ings, therefore, *Gannett* resolved one of the two constitutional questions regarding public access; the public may not use the sixth amendment to get its foot inside the courtroom door.[20]

One year later, the Court was presented with the same conflict, this time with respect to a trial. In *Richmond Newspapers, Inc. v. Virginia*,[21] the seven Justices who had reserved the first amendment issue in *Gannett*[22] concluded that the right of the public to attend a criminal trial[23] is implicit in the first amendment's guarantee of freedom of speech.[24] In finding this first amendment right of access, the plurality opinion written by Chief Justice Burger applied the same reasoning that the *Gannett* dissent used in the context of the sixth amendment.[25] Justice Powell took no part in the opinion,[26] and Justice Rehnquist reiterated his view that no right of access is conferred upon the press or public by either the first or sixth amendment.[27]

The opinions in *Gannett* and *Richmond*, as well as the factual differences in the two cases, leave two significant questions to be resolved with respect to pretrial suppression hearings. The first is whether the societal interests justifying the first amendment right of public access to trials will support the extension of that right to the pretrial suppression hearing. Assuming that the Court would recognize a strong public interest, if not a constitutional right, in free access to pretrial suppression hearings, the second question is what standard should govern the weighing of this public interest against the defendant's right to a fair trial. Part I of this Note examines the right of a criminal defendant to a fair trial under the sixth amendment. Part II explores the basis for the putative public right of access to pretrial proceedings. Part III suggests a balancing test to be applied when this interest conflicts with the defendant's right to a fair trial.

The defendant should be required to make a threshold showing of a reasonable likelihood that press coverage would jeopardize his constitutional guarantee of a fair trial. Given such a showing, the court should then examine reasonable alternatives to closure that would adequately protect this right, while also protecting first amendment

---

20. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 603 (1980) (Blackmun, J., concurring in judgment).

21. 448 U.S. 555 (1980).

22. Justice Rehnquist dissented in *Richmond*. *Id.* at 604. Justice Powell took no part in the decision. *Id.* at 581. See *supra* note 17.

23. The Court explicitly limited its decision to the actual trial; it did not consider hearings on pretrial motions. *See id.* at 563-64.

24. *Id.* at 580.

25. *Id.* at 569-78; *see* Gannett Co. v. DePasquale, 443 U.S. 368, 434-36 (1979) (Blackmun, J., concurring in part, dissenting in part).

26. 448 U.S. at 581.

27. *Id.* at 605 (Rehnquist, J., dissenting). See *supra* note 19 and accompanying text.

interests in access to judicial proceedings. If no such alternatives existed, closure would be justified. A record of these closed proceedings would be made and released to the public at the earliest time consistent with protecting the defendant's sixth amendment right.

I. The Right of the Accused to a Fair Trial

The sixth amendment guarantees the defendant in a criminal case the right to a fair trial by an impartial jury.[28] The trial judge is charged with preserving this right by minimizing the effects of prejudicial publicity.[29] Among his responsibilities are to avoid a "carnival atmosphere"[30] at trial and to ensure that each juror makes his decision solely upon evidence developed at trial.[31]

Pretrial publicity adverse to the accused poses a great threat to the impartiality of a jury and thus to the possibility of a fair trial.[32] This threat increases when the information publicized is obtained from a pretrial suppression hearing.[33] Such a hearing is held outside the presence of the jury to determine whether evidence implicating the defendant was illegally obtained.[34] If the prosecution fails to disprove allegations of impropriety, the evidence is inadmissible at trial despite its relevance and probative value.[35]

---

28. See *supra* note 1.

29. Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976).

30. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966).

31. *See* Irvin v. Dowd, 366 U.S. 717, 722 (1961); *id.* at 729-30 (Frankfurter, J., concurring).

32. As Justice Frankfurter noted: "How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused." *Id.* at 729-30 (Frankfurter, J., concurring).

33. Gannett Co. v. DePasquale, 443 U.S. 368, 443 (1979) (Blackmun, J., concurring in part, dissenting in part); United States v. Edwards, 430 A.2d 1321, 1345 (D.C 1981), *cert. denied*, 455 U.S. 1022 (1982). See *infra* notes 36-40 and accompanying text.

34. Sims v. Georgia, 385 U.S. 538, 543-44 (1967); Jackson v. Denno, 378 U.S. 368, 394-95 (1964); *see* Lego v. Twomey, 404 U.S. 477, 480 (1972).

35. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (evidence seized in violation of fourth amendment inadmissible in state trials); Jackson v. Denno, 378 U.S. 368, 376-77 (1964) (involuntary confession inadmissible in state and federal trials); Weeks v. United States, 232 U.S. 383, 398 (1914) (evidence seized in violation of fourth amendment inadmissible in federal trials). *See generally* 1 W. Ringel, Searches & Seizures, Arrests and Confessions §§ 3.1-.2 (exclusionary rule), 24.1-.5 (inadmissible confessions) (1982). The Supreme Court is considering, in Illinois v. Gates, a modification of the exclusionary rule which would make it inapplicable to evidence obtained when police officers had a reasonable belief that the search and seizure at issue was constitutional. Illinois v. Gates, 51 U.S.L.W. 3643 (U.S. Mar. 8, 1983) (No. 81-430) (argued Mar. 1, 1983).

Opening the pretrial suppression hearing to the public may expose the potential venire to this highly incriminating evidence. As a result, it may be difficult, if not impossible, to impanel an impartial jury.[36] As the Supreme Court stated in *Sheppard v. Maxwell*:[37] "[E]xclusion of such evidence in court is rendered meaningless when news media make it available to the public."[38] However, because the great majority of criminal cases, never proceed to a trial on the merits,[39] a pretrial suppression hearing is often the best, and sometimes the only, forum for public review of police, prosecutorial and judicial conduct.[40]

The pretrial suppression hearing may thus be the most critical stage of a criminal proceeding for both the defendant and the public. Because of the perceived threat to his fair trial right, the defendant may seek to have the hearing closed to both the press and public. At this point, the defendant's fair trial right stands in direct conflict with the public's putative right of access to pretrial proceedings.

II. The Basis for a Public Right of Access to Judicial Proceedings

A. *Common-Law Access to Judicial Proceedings*

Trials at common law were traditionally open to the public.[41] This publicity at common law was viewed not as a means of protecting the personal rights of the accused,[42] but rather as a means of improving the quality of testimony and the performance of officers of the court.[43] In *Richmond Newspapers, Inc. v. Virginia*,[44] the Court relied heavily on this common-law presumption of publicity in finding a first amendment right of access to trials.[45]

---

36. Gannett Co. v. DePasquale, 443 U.S. 368, 378-79 (1979); Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring); San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 512, 638 P.2d 655, 663, 179 Cal. Rptr. 772, 780 (1982).

37. 384 U.S. 333 (1966).

38. *Id.* at 360.

39. In the federal courts in 1980, over 80% of the criminal defendants had their cases disposed of without a trial on the merits. *See* Annual Report of the Director of the Administrative Office of the United States Courts 282 (1980).

40. See *infra* notes 73, 76 and accompanying text.

41. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980) (plurality opinion); *id.* at 589 (Brennan, J., concurring). *See generally*, 6 J. Wigmore, Evidence § 1834, at 435-42 (Chadbourn rev. ed. 1976) (discussing the advantages of providing public access to trial proceedings).

42. *Cf.* Gannett Co. v. DePasquale, 443 U.S. 368, 379-80 (1979) (sixth amendment rights are personal to the accused). See *supra* note 13 and accompanying text.

43. 6 J. Wigmore, *supra* note 41, § 1834, at 435, 438.

44. 448 U.S. 555 (1980).

45. *Id.* at 564-73 (plurality opinion). Writing for the plurality, Chief Justice Burger stated: "What is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe." *Id.* at 564; *id.* at 589 (Brennan, J., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 601 (Blackmun, J., concurring).

Yet the presumptive openness relied upon by *Richmond* did not apply to the pretrial hearings that existed at common law.[46] Moreover, the modern suppression hearing has no direct counterpart in the common law.[47] Consequently, the common-law presumption of access to trials is an inappropriate foundation for a public right of access to pretrial suppression hearings.

B. *A First Amendment Right of Access to Pretrial Proceedings?*

The strongest argument for a public right of access to pretrial suppression hearings is based upon the free speech and free press clauses of the first amendment.[48] Two themes appear central in judicial justifications of first amendment freedoms. The first is the informational function that freedom of expression has in individual fulfillment and self-expression.[49] The second is the structural value of freedom of expression in a system of representative democracy.[50] In

---

46. Gannett Co. v. DePasquale, 443 U.S. 368, 387 (1979); *id.* at 394-96 (Burger, C.J., concurring).

In Rex v. Fisher, 2 Camp. 563, 170 Eng. Rep. 1253 (N.P. 1811), the editor of a London newspaper was indicted for publishing the testimony given by an alleged rape victim in a preliminary examination. Lord Ellenborough held:

> If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. . . . Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice.

Id. at 570-72, 170 Eng. Rep. at 1255.

47. Gannett Co. v. DePasquale, 443 U.S. 368, 387 n.17 (1979); *id.* at 437 (Blackmun, J., concurring in part, dissenting in part).

48. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. Both clauses have been incorporated through the fourteenth amendment to apply against the states. Stromberg v. California, 283 U.S. 359, 368 (1931) (free speech); Fiske v. Kansas, 274 U.S. 380, 387 (1927) (free press).

49. Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J., dissenting); First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); Saxbe v. Washington Post Co., 417 U.S. 843, 861-62 (1974) (Powell, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 725-27 (1972) (Stewart, J., dissenting).

50. First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978); Branzburg v. Hayes, 408 U.S. 665, 726-27 (1972) (Stewart, J., dissenting); *see* Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."). *See generally* A. Meiklejohn, Political Freedom 19-28 (1960) (interpreting first amendment freedom of speech clause).

Richmond Newspapers, Inc. v. Virginia,[51] the Supreme Court held for the first time that the first amendment implicitly guarantees to the public, and therefore to the press, the right to attend a criminal trial.[52] The question remains, however, whether these judicial justifications support a constitutional right of access to pretrial suppression hearings.

1. The Informational Role of the First Amendment

Although the first amendment has traditionally protected the right of a speaker to disseminate information,[53] the correlative right of an audience to receive such information has recently been recognized as well.[54] Promotion of this free exchange presumes that the speaker is in possession of the information that he wishes to disseminate.[55] In the case of a pretrial closure, however, the government is unwilling to communicate and therefore the press is without information to publish. Because a closure order stems the flow of information at its source, it has been termed the "functional equivalent of a prior restraint on speech or publication."[56] While this right to speak and publish is protected from prior restraint,[57] it "does not carry with it the unrestrained right to gather information."[58]

Clearly, the informational role of the first amendment will be frustrated whenever obstacles are placed before those seeking to

---

51. 448 U.S. 555 (1980).

52. *Id.* at 580 (plurality opinion); *id.* at 584 (Brennan & Marshall, JJ., concurring in judgment); *id.* at 599 (Stewart, J., concurring in judgment); *see id.* at 604 (Blackmun, J., concurring in judgment).

53. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); Pell v. Procunier, 417 U.S. 817, 822 (1974); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 715-16 (1931).

54. Board of Educ. v. Pico, 102 S. Ct. 2799, 2808 (1982); Houchins v. KQED, Inc., 438 U.S. 1, 30 (1978) (Stevens, J., dissenting); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976); Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting); Pell v. Procunier, 417 U.S. 817, 832 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972).

55. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

56. Note, *The Free Press—Fair Trial Dilemma: New Dimensions in a Continuing Struggle*, 6 Hofstra L. Rev. 1013, 1031 (1978); *see* State v. Allen, 73 N.J. 132, 144, 373 A.2d 377, 382-83 (1977); Gannett Co. v. De Pasquale, 55 A.D.2d 107, 111, 389 N.Y.S.2d 719, 722 (1976) (per curiam), *modified*, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd*, 443 U.S. 368 (1979); Williams v. Stafford, 589 P.2d 322, 331 (Wyo. 1979) (Raper, C.J., dissenting).

57. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697, 718-19 (1931).

58. Zemel v. Rusk, 381 U.S. 1, 17 (1965).

gather information. The right to gather information directly from an unwilling source, however, has never been recognized in the context of a pretrial suppression hearing.[59] Indeed, while it cannot recapture information that is leaked to outside sources,[60] the government does enjoy "substantial latitude in deciding what information to hold secret and can enforce its policy of secrecy against itself and its employees."[61]

This distinction between the right to gather and the right to disseminate separates the closure of a pretrial suppression hearing from the prior restraint held unconstitutional in *Nebraska Press Association v. Stuart*.[62] In *Nebraska Press*, Chief Justice Burger, writing for the Court, made it clear that closure was not equivalent to prior restraint; in fact it was recommended as a less drastic means of safeguarding the defendant's right to a fair trial.[63] Closure of a pretrial suppression hearing is not a prior restraint because the prospective speaker has no information the publication of which is prevented. Accordingly, a right to gather, and thus disseminate, information from such hearings

---

59. *See* Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978) (plurality opinion) ("This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."). The press has no right of access to information not generally available to the public. *Id.* at 11 (plurality opinion); *accord* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 833-35 (1974); Branzburg v. Hayes, 408 U.S. 665, 684 (1972). The right to gather information from such a source, conferred in *Richmond*, was applied solely to the criminal trial. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563-64 (1980) (plurality opinion).

60. The press has a right to communicate information that has been leaked or stolen from an unwilling government source. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 849 (1978) (Stewart, J., concurring); *see* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam).

61. L. Tribe, American Constitutional Law 71 (Supp. 1979). Professor Emerson has argued: "On the basis of the employment relation, the government can instruct its officials on matters of expression and discipline them for failure to comply. This is the chief method for protecting an accused against government expression that may impair his right to a fair trial." T. Emerson, The System of Freedom of Expression 709 (1970); *see* Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (Stewart, J., concurring).

62. 427 U.S. 539, 570 (1976).

63. *Id.* at 564 & n.8. Clearly, Chief Justice Burger did not view closures as prior restraints because closure was discussed as an alternative means of blunting "the impact of pretrial publicity." *Id.* at 564. The majority opinion in *Gannett* dispelled any doubts with respect to the Court's view on this issue. Gannett Co. v. DePasquale, 443 U.S. 368 (1979). The Court stated:

> *Nebraska Press* . . . involved a direct prior restraint . . . prohibiting [the press] from disseminating information . . . . '[T]he chief purpose of the [First Amendment's] guaranty [is] to prevent previous restraints upon publication' . . . . The exclusion order in the present case, by contrast, did not prevent the petitioner from publishing any information in its possession.

Id. at 393 n.25 (citations omitted) (quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931)).

cannot be predicated on the first amendment's role in promoting the free flow of information.

2. The Structural Role of the First Amendment

In addition to the first amendment's informational role, Justice Brennan in *Richmond* noted its structural role[64] in securing and fostering the communication necessary for vital and intelligent participation in a representative democracy.[65] Examining this structural role, Justice Brennan, as had the dissenters in *Gannett*, focused on the importance of open judicial proceedings in our society.[66]

Several societal interests support a first amendment right of access to trials. The first of these, public confidence in the judicial system,[67] results from the "perception of fairness" promoted by access to judicial proceedings. [68] When members of the public, or of the press as the public's representative,[69] are able to observe these proceedings firsthand, they are assured that the proceedings are conducted fairly. Second, access to judicial proceedings educates the public about the nature of the judicial system.[70] A third interest served by public access to criminal proceedings is the beneficial venting of community hostility and emotion.[71] This outlet helps minimize the likelihood of self-help reactions on the part of the affected community.[72]

---

64. For a more detailed discussion by Justice Brennan of the structural model of the role of the press, see Address by William J. Brennan, Jr., 32 Rutgers L. Rev. 173 (1979). Professor BeVier has criticized Justice Brennan's structural model of the first amendment in BeVier, *Like Mackerel in the Moonlight: Some Reflections on* Richmond Newspapers, 10 Hofstra L. Rev. 311, 331-39 (1982).

65. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587-89 (1980) (Brennan, J., concurring).

66. *Id.* at 593-97 (Brennan, J., concurring); *see* Herald Ass'n v. Ellison, 138 Vt. 529, 536, 419 A.2d 323, 327 (1980) (Billings, J., concurring); *cf.* Gannett Co. v. DePasquale, 443 U.S. 368, 427-33 (1979) (Blackmun, J., concurring in part, dissenting in part) (importance of open judicial proceedings supports sixth amendment right of access).

67. 448 U.S. at 571-72 (plurality opinion); United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982); *see* Note, *The Right to Attend Criminal Hearings*, 78 Colum. L. Rev. 1308, 1310 (1978) [hereinafter cited as *Right to Attend*]; *cf.* United States v. Cianfrani, 573 F.2d 835, 851 (3d Cir. 1978) (importance of public confidence supports sixth amendment right of access).

68. 448 U.S. at 570 (plurality opinion) (noting "nexus between openness, fairness, and the perception of fairness"); Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part, dissenting in part) (importance of "appearance of justice"); Offutt v. United States, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

69. See *supra* note 2.

70. *See* 448 U.S. at 572 (plurality opinion); Gannett Co. v. DePasquale, 443 U.S. at 428 (Blackmun, J., concurring in part, dissenting in part).

71. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality opinion) ("When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the open processes of justice serve an

These societal interests are also furthered at pretrial suppression hearings. Typically these hearings are the best forum for reviewing the propriety of police conduct.[73] Because this conduct frequently occurs outside the public view, "beneficial public scrutiny may never take place if not at the hearing . . . ."[74] The overwhelming majority of criminal cases never reach trial;[75] therefore pretrial proceedings are also the principal forum for public scrutiny of judges and prosecutors.[76] Many criminal defendants virtually have their guilt or innocence determined at the pretrial suppression hearing.[77] For them, as well as the public, this is often the "most critical stage of a criminal proceeding."[78]

On the other hand, society's therapeutic interest in open proceedings is precisely the danger that closure seeks to reduce. By mobilizing potentially hostile public emotion, pretrial publicity makes it difficult to locate jurors who have not formed an opinion concerning the guilt of the accused.[79]

Lower courts disagree whether these common societal interests justify the extension of a constitutional right of public access to pretrial proceedings.[80] The Supreme Court, however, has displayed, in both

---

important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." (citation omitted)); *see* Note, *Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right*, 50 Fordham L. Rev. 551, 561 (1982) ("community cathartic effect in cleansing society of the criminal") [hereinafter cited as *Broadcasting Tape Evidence*].

72. 448 U.S. at 571 (plurality opinion).

73. Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part, dissenting in part); United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982); *Right to Attend*, *supra* note 67, at 1309-10 & n.11.

74. United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982) (citation omitted).

75. See *supra* note 39.

76. United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982); *Right to Attend*, *supra* note 67, at 1309-10; *see* Gannett Co. v. DePasquale, 443 U.S. 368, 428 (1979) (Blackmun, J., concurring in part, dissenting in part). *But cf. The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 75, 152 (1980) (open proceedings desirable but not properly the subject of first amendment guarantees).

77. Gannett Co. v. DePasquale, 443 U.S. 368, 434 (1979) (Blackmun, J., concurring in part, dissenting in part); *see id.* at 397 n.1 (Powell, J., concurring); United States v. Criden, 675 F.2d 550, 556-57 (3d Cir. 1982); United States v. Cianfrani, 573 F.2d 835, 850 (3d Cir. 1978); United States v. Clark, 475 F.2d 240, 247 (2d Cir. 1973); *Right to Attend*, *supra* note 67, at 1310 n.13. For examples of two such instances, see Herald Ass'n v. Ellison, 138 Vt. 529, 531, 419 A.2d 323, 324 (1980) (suppression motion denied, defendant entered plea); Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 581 & n.5, 281 S.E.2d 915, 918 & n.5 (1981) (same).

78. United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982).

79. Irvin v. Dowd, 366 U.S. 717, 729-39 (1961) (Frankfurter, J., concurring); *accord* Gannett Co. v. DePasquale, 443 U.S. 368, 378-79 (1979).

80. *Compare* United States v. Chagra, No. 82-1263, slip op. at 3429 (5th Cir. Mar. 14, 1983) (first amendment guarantees public right of access to bail reduction hearings) *and* United States v. Brooklier, 685 F.2d 1162, 1170-71 (9th Cir. 1982)

Gannett[81] and *Richmond*,[82] an increasing regard for the importance to our society of open judicial proceedings, although only Justice Powell has explicitly recognized a first amendment right of the public to be present at suppression hearings.[83] While the Court as a whole has given no indication that this societal interest will be elevated to a constitutional right,[84] it is likely to grant the interest enough protec-

---

(first amendment guarantees public right of access to pretrial suppression hearings) *and* United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982) (same) *and* United States v. Dorfman, 550 F. Supp. 877, 884 (N.D. Ill. 1982) (same) *and* United States v. Edwards, 430 A.2d 1321, 1344 (D.C. 1981) (first amendment guarantees public right of access to pretrial detention hearing), *cert. denied*, 455 U.S. 1022 (1982) *and* Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 751-52 (Ky. Ct. App. 1980) (first amendment guarantees public right of access to pretrial suppression hearings) *and* State v. Williams, No. A-140, slip op. at 18 (N.J. Apr. 26, 1983) (first amendment guarantees right of access to bail reduction and probable cause hearings) *and* Herald Ass'n v. Ellison, 138 Vt. 529, 536, 419 A.2d 323, 327-28 (1980) (Billings, J., concurring) (same) *and* Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 588, 281 S.E.2d 915, 922 (1981) (same) *with* San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 506, 638 P.2d 655, 659-60, 179 Cal. Rptr. 772, 776-77 (1982) (no right of access under federal constitution to pretrial suppression hearings) *and* State v. Burak, 431 A.2d 1246, 1248 (Conn. Super. Ct. 1981) (same).

81. Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979); *id.* at 427-36 (Blackmun, J., concurring in part, dissenting in part).

82. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-74 (1980) (plurality opinion). Although the *Richmond* Court relied in its holding on the "unbroken, uncontradicted history," *id.* at 573 (plurality opinion), of open judicial proceedings, the Court noted that the issue presented in *Richmond* was one of first impression. *Id.* at 563-64 (plurality opinion).

83. See *supra* note 18.

84. In order to avoid speculation whether the Supreme Court will apply the *Richmond* first amendment rationale to pretrial proceedings, many state courts rely on state constitutional provisions to support a more expansive right of access than that conferred by *Gannett* or *Richmond*. *E.g.*, Iowa Freedom of Information Council v. Van Wifvat, 328 N.W.2d 920, 923-24 (Iowa 1983); Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 751-52 (Ky. Ct. App. 1980); State v. Birdsong, 422 So. 2d 1135, 1139 (La. 1982) (Dennis, J., dissenting); Great Falls Tribune v. District Court, 608 P.2d 116, 119-20 (Mont. 1980); State v. Williams, No. A-140, slip op. at 22 (N.J. Apr. 26, 1983); Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 588, 281 S.E.2d 915, 922 (1981); Seattle Times Co. v. Ishikawa, 640 P.2d 716, 719 (Wash. 1982); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 546-47 (W. Va. 1980). *Contra* San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 506-09, 638 P.2d 655, 660-62, 179 Cal. Rptr. 772, 777-79 (1982) (no unqualified right of access granted by state constitution); Commonwealth v. Hayes, 489 Pa. 419, 426-28, 414 A.2d 318, 321-22 (same), *cert. denied*, 449 U.S. 992 (1980).

Such state interpretations may present constitutional problems. While the state is free to interpret its public trial provision more broadly than the corresponding federal guarantee, it may not use the state constitution to support the infringement of the defendant's federal guarantee of a fair trial. San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 507, 638 P.2d 655, 660, 179 Cal. Rptr. 772, 777 (1982) ("[S]tate-created rights may not, of course, be elevated above countervailing federal guarantees."); *accord* Great Falls Tribune v. District Court, 608 P.2d 116, 130 (Mont. 1980) (Sheehy, J., dissenting); The State Trial Judge's Book 266 (2d ed. 1969).

tion so that it must be accommodated whenever so doing will not jeopardize the sixth amendment right of the defendant.

III. Resolution of the Conflict

The right to a fair trial, "the most fundamental of all freedoms,"[85] is an essential requirement of due process.[86] Against this right must be set the interest of the public and the press in access to pretrial suppression hearings. Even those states that have recognized a constitutional right of access based on a state public trial provision have held that this right is not absolute,[87] and must be weighed against the fair trial right of the defendant. This fair trial right transcends the societal interest in access when both cannot be accommodated.[88]

A. *Closure—The First Alternative*

Closure is an appropriate method of reconciling these conflicting interests. It has the dual benefits of avoiding a prohibited prior restraint[89] and of shielding potential jurors from prejudicial information.[90] Additionally, any burden upon societal interests that is caused

---

But see State v. Williams, No. A-140, slip op. at 41 n.19 (N.J. Apr. 26, 1983) ("[W]e are confident that the defendant's countervailing right to a fair trial can still be preserved and will remain uncompromised."). Extended discussion of the constitutional implications of these state provisions is beyond the scope of this Note.

85. Estes v. Texas, 381 U.S. 532, 540 (1965).

86. *In re* Murchison, 349 U.S. 133, 136 (1955); *see* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

87. Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 751-52 (Ky. Ct. App. 1980); State v. Birdsong, 422 So. 2d 1135, 1137 n.2 (La. 1982); *id.* at 1139 (Dennis, J., dissenting); Great Falls Tribune v. District Court, 608 P.2d 116, 119 (Mont. 1980); Seattle Times Co. v. Ishikawa, 640 P.2d 716, 719 (Wash. 1982); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 550 (W. Va. 1980); *cf.* Gannett Co. v. DePasquale, 443 U.S. 368, 398 (1979) (Powell, J., concurring) (advocating federal constitutional right of access).

88. Cromer v. Superior Court, 109 Cal. App. 3d 728, 733, 167 Cal. Rptr. 671, 673-74 (1980); State *ex rel.* Smith v. District Court, 654 P.2d 982, 986 (Mont. 1982); Seattle Times Co. v. Ishikawa, 640 P.2d 716, 725 (Wash. 1982) (Dore, J., concurring); *see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980) (plurality opinion) ("defendant's superior right to a fair trial"); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966) ("ensure that the balance is never weighed against the accused"). As Professor Emerson has stated:

> Government expression, like private expression, at times must be reconciled with individual or social interests outside the system of freedom of expression. Thus government expression may . . . deny [a person] the right to a fair trial. . . . Regulation or prohibition of government expression having these effects would not appear to raise any problem under the First Amendment.

T. Emerson, *supra* note 61, at 708.

89. See *supra* notes 53-63 and accompanying text.

90. Gannett Co. v. DePasquale, 443 U.S. 368, 378-79 (1979); State v. Birdsong, 422 So. 2d 1135, 1136-37 (La. 1982).

by closure may be minimized by releasing the transcript of the hearing when the threat to the defendant's sixth amendment right has passed.[91]

1. Establishing the Threat to the Fair Trial Right

Trials are presumptively open.[92] Because the presumption of openness may apply to pretrial proceedings as well,[93] the party seeking closure should bear the initial burden of persuading the trial court that the threat to his fair trial right mandates the closure of his suppression hearing.[94] To establish such a threat, the defendant may introduce testimony concerning the extent of the hostile publicity already given his alleged crimes.[95] Inflammatory or distorted publicity is not the only threat to a fair trial. Even accurate reporting may be prejudicial if it causes a potential juror to predetermine the guilt of the accused.[96] Circulation and distribution statistics of the papers objecting to closure will also be considered in an effort to determine the extent of the possible prejudicial effect on potential jurors.[97]

The subject matter of the hearing is another factor to be weighed in considering the extent of the threat to a fair trial. Pretrial suppression hearings are often concerned with the procedural circumstances under

---

91. Gannett Co. v. DePasquale, 443 U.S. 368, 393 (1979); Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 753 (Ky. Ct. App. 1980). *But see* Gannett Co. v. DePasquale, 443 U.S. 368, 442 n.17 (1979) (Blackmun, J., concurring in part, dissenting in part) (transcript not always an adequate substitute for actual presence); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976) (time delay "not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly").

92. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 & n.17 (1980) (plurality opinion); *accord* Herald Ass'n v. Ellison, 138 Vt. 529, 543 419 A.2d 323, 332 (1980) (Hill, J., concurring in part, dissenting in part).

93. See *supra* notes 80–84 and accompanying text.

94. Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979) (Powell, J., concurring); *id.* at 443 (Blackmun, J., concurring in part, dissenting in part); Herald Ass'n v. Ellison, 138 Vt. 529, 542, 419 A.2d 323, 331-32 (1980) (Hill, J., concurring in part, dissenting in part); Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 590, 281 S.E.2d 915, 924 (1981); Seattle Times Co. v. Ishikawa, 640 P.2d 716, 720 (Wash. 1982); II American Bar Association, Standards for Criminal Justice 8-3.2, at 8·35 commentary (2d ed. 1980) [hereinafter cited as ABA Standards].

95. *E.g.*, San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 513 & n.15, 638 P.2d 655, 664 & n.15, 179 Cal. Rptr. 772, 781 & n.15 (1982); State v. Birdsong, 422 So. 2d 1135, 1138 n.7 (La. 1982); Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 447, 399 N.E.2d 518, 528, 423 N.Y.S.2d 630, 641 (1979) (Cooke, C.J., concurring); *see* State v. Burak, 431 A.2d 1246, 1247 (Conn. Super. Ct. 1981).

96. San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 512, 638 P.2d 655, 663, 179 Cal. Rptr. 772, 780 (1982); *see* Irvin v. Dowd, 366 U.S. 717, 725-28 (1961).

97. See *supra* note 95.

which evidence was obtained and not with its substantive content.[98] Access to this type of hearing, if carefully controlled, may present a lesser threat to the fair trial right of the defendant because the risk of disclosure of prejudicial information is reduced.[99]

2. Appropriate Standards for Closure

The American Bar Association (ABA) and the federal Advisory Committee on Criminal Rules (Advisory Committee) have advocated different standards for determining when the closure of a pretrial hearing by the trial judge is justified. The stricter view, set forth by the ABA, permits closure only upon a judge's finding that "the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial."[100] This standard reflects the positions taken by the Department of Justice in its guidelines for United States Attorneys and by Justice Blackmun in *Gannett*.[101]

The less strict standard, suggested by the Advisory Committee in the proposed amendments to the Federal Rules of Criminal Procedure,[102] would permit closure upon a judge's finding "that there is a reasonable likelihood that dissemination of information from the proceeding would interfere with the defendant's right to a fair trial by an impartial jury."[103] This standard is substantially similar to that advo-

---

98. Herald Ass'n v. Ellison, 138 Vt. 529, 542, 419 A.2d 323, 331 (1980) (Hill, J., concurring in part, dissenting in part); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 551 (W. Va. 1980); *see* State *ex rel.* Smith v. District Court, 654 P.2d 982, 988 (Mont. 1982).

99. State *ex rel.* Smith v. District Court, 654 P.2d 982, 988 (Mont. 1982); Herald Ass'n v. Ellison, 138 Vt. 529, 542, 419 A.2d 323, 331 (1980) (Hill, J., concurring in part, dissenting in part); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 551 (W. Va. 1980).

100. ABA Standards, *supra* note 94, at 8-3.2. This standard has been adopted in a number of jurisdictions. *E.g.*, Kansas City Star Co. v. Fosey, 230 Kan. 240, 247-48, 630 P.2d 1176, 1181-84 (1981); State *ex rel.* Smith v. District Court, 654 P.2d 982, 987 (Mont. 1982); Williams v. Stafford, 589 P.2d 322, 325-26 (Wyo. 1979); *see, e.g.*, State *ex rel.* Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 912 (Fla. 1977) (Sundberg, J., concurring); Iowa Freedom of Information Council v. Van Wifvat, 328 N.W.2d 920, 925-26 (Iowa 1983); *cf.* State v. Williams, No. A-140, slip op. at 29-30 (N.J. Apr. 26, 1983) (trial judge must be "clearly satisfied" that there is a "realistic likelihood of prejudice"); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 551 (W. Va. 1980) (clear likelihood of irreparable damage).

101. Gannett Co. v. DePasquale, 443 U.S. 368, 441 (1979) (Blackmun, J., concurring in part, dissenting in part) (substantial probability that alternatives to closure will not adequately protect fair trial right); 28 C.F.R § 50.9(c)(6)(i) (1982) (failure to close proceedings will produce substantial likelihood of denial of fair trial right); *accord* United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982).

102. Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289 (Prelim. Draft 1981) [hereinafter cited as Advisory Committee Standard].

103. *Id.* at 365-66.

cated by a federal judicial conference committee[104] and by Justice Powell, the only Justice to weigh the fair trial right of the accused directly against the first amendment interests of the press in the context of a pretrial closure.[105]

The Advisory Committee standard is superior to the "more rigorous"[106] ABA standard for two reasons: first, the crucial distinction between a prior restraint and a denial of access; and second, the unfairness to the defendant of requiring him to meet a clear and present danger test when the dissemination of information is not being wholly prevented, but merely delayed.[107]

The ABA standard is based upon the standard applied by the Supreme Court in *Nebraska Press Association v. Stuart*,[108] a prior restraint case.[109] The denial of access to a pretrial suppression hearing, however, is not a prior restraint upon the media.[110] This onerous standard of proof should therefore not be required of a defendant seeking to close such a hearing in order to protect his sixth amendment right. Moreover, this strict standard would in effect subordinate the constitutional right of the accused to the interests of the media and the public. As Justice Powell noted in *Gannett Co. v. DePasquale*,[111] "[i]t

---

104. Judicial Conference Committee on the Operation of the Jury System, Revised Report on the "Free Press—Fair Trial" Issue, 87 F.R.D. 518, 534-35 (1980) [hereinafter cited as Judicial Conference Report]. This standard has been adopted in a number of jurisdictions. *See, e.g.*, United States v. Chagra, No. 82-1263, slip op. at 3430-31 (5th Cir. Mar. 14, 1983); State v. Burak, 431 A.2d 1246, 1248 (Conn. Super. Ct. 1981) (likelihood of prejudice to defendant's fair trial right); State v. Birdsong, 422 So. 2d 1135, 1138-39 (La. 1982) (same); Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 589, 281 S.E.2d 915, 923 (1981) (same); *cf.* United States v. Edwards, 430 A.2d 1321, 1345-46 (D.C. 1981) (same for pretrial detention hearing), *cert. denied*, 455 U.S. 1022 (1982); Herald Ass'n v. Ellison, 138 Vt. 529, 542, 419 A.2d 323, 331 (1980) (Hill, J., concurring in part, dissenting in part) (advocating same).

Washington and New Mexico apply this less strict "likelihood" standard when closure is sought to protect a defendant's sixth amendment right, but apply a stricter standard to proponents seeking closure for other reasons. State *ex rel.* New Mexico Press Ass'n v. Kaufman, 648 P.2d 300, 304 (N.M. 1982); Seattle Times Co. v. Ishikawa, 640 P.2d 716, 720 (Wash. 1982).

105. Gannett Co v. DePasquale, 443 U.S. 368, 398-400 (1979) (Powell, J., concurring). The appropriate standard is "whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury." *Id.* at 400.

106. Advisory Committee Standard, *supra* note 102, at 372 advisory committee note.

107. *See id.*

108. 427 U.S. 539 (1976).

109. *Id.* at 570; ABA Standards, *supra* note 94, at 8-3.2, commentary at 8-35.

110. See *supra* notes 53-63 and accompanying text.

111. 443 U.S. 368 (1979).

is difficult to imagine a case where closure could be ordered appropriately under this standard."[112]

The ABA,[113] the Advisory Committee,[114] and many members of the Court[115] have recommended that if closure of the suppression hearing is ordered, a complete record of the events should be kept and released to the public "as soon as the threat to the . . . right has passed."[116] The trial court should indicate in the record the reasons for closure, thereby facilitating appellate review of closure decisions.[117] In this manner infringement on the societal interests in open proceedings will be kept to a minimum. For this reason, as well as the above, the "reasonable likelihood of prejudice" standard is more appropriate for closure of a pretrial suppression hearing.

B. *The Alternative to Closure*

Both the ABA and Advisory Committee standards require as a condition of closure that "the prejudicial effect . . . on trial fairness cannot be avoided by any reasonable alternative means."[118] When a

---

112. *Id.* at 399 (Powell, J., concurring). The facts of the *Nebraska Press* case illustrate this point. In that case, the pretrial publicity concerned the brutal slaying of a family in a rural Nebraska town of 800 people. The autopsy contained evidence of necrophilia, yet this publicity was found not to present a clear and present danger to the defendant's fair trial right. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 542-43 (1976); *see* L. Tribe, *supra* note 61, at 626 (1978).

113. ABA Standards, *supra* note 94, 8-3.2, at 8-32 ("record shall be . . . made available to the public following the completion of trial or earlier if consistent with trial fairness").

114. Advisory Committee Standard, *supra* note 102, at 366-67 ("record . . . shall be made available to the public following return of the verdict or at such other time as may be consistent with defendant's right to a fair trial").

115. Gannett Co. v. DePasquale, 443 U.S. 368, 393 (1979); *id.* at 400 (Powell, J., concurring); *id.* at 445 (Blackmun, J., concurring in part, dissenting in part); *accord* United States v. Dorfman, 550 F. Supp. 877, 887 (N.D. Ill. 1982); Poughkeepsie Newspapers, Inc. v. Rosenblatt, N.Y.L.J., Mar. 16, 1983, at 2, col. 1 (N.Y. App. Div. Mar. 14, 1983) (per curiam). *But cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 597 n.22 (1980) (Brennan, J., concurring in judgment) ("[T]he availability of a trial transcript is no substitute for a public presence at the trial itself.").

116. Gannett Co. v. DePasquale, 443 U.S. 368, 445 (1979) (Blackmun, J., concurring in part, dissenting in part).

117. Gannett Co. v. DePasquale, 443 U.S. 368, 446 (1979) (Blackmun, J., concurring in part, dissenting in part); United States v. Criden, 675 F.2d 550, 561-62 (3d Cir. 1982); State *ex rel.* Miami Herald Publishers v. McIntosh, 340 So. 2d 904, 912 (Fla. 1977) (Sundberg, J., concurring); Iowa Freedom of Information Council v. Van Wifvat, 328 N.W.2d 920, 926 (Iowa 1983); Kansas City Star Co. v. Fossey, 230 Kan. 240, 250, 630 P.2d 1176, 1184 (1981); State *ex rel.* Herald Mail Co. v. Hamilton, 267 S.E.2d 544, 552 (W. Va. 1980); Williams v. Stafford, 589 P.2d 322, 326 (Wyo. 1979).

118. ABA Standards, *supra* note 94, 8-3.2, at 8-32; *accord* Advisory Committee Standard, *supra* note 102, at 366; *see* Judicial Conference Report, *supra* note 104, at 535.

defendant requests a judge to close the pretrial suppression hearing and makes a sufficient showing of a threat to his fair trial right, the court must examine possible alternatives to closure.[119] Before being selected as preferable to closure, these alternatives, which may be suggested by the media[120] or considered *sua sponte* by the judge,[121] should be shown to preserve at least as well as closure the guarantee of a fair trial without infringing to any greater degree upon the interests of the public and the press in open proceedings.

One alternative suggested by the ABA encourages the use of "voluntary fair trial/free press agreements."[122] Under these pacts, members of the press agree to certain limitations on the timing and scope of trial coverage.[123] These agreements are not enforceable by contempt sanctions, however, and doubts exist about their efficacy.[124] Clearly, if a defendant is forced to rely upon a voluntary, unenforceable agreement he is no longer guaranteed a fair trial.

In response to this problem, the Advisory Committee would allow the court, in cases where closure would ordinarily be permissible, to condition media attendance upon an agreement limiting the timing and extent of disclosure of information.[125] This order is termed a "partial closure,"[126] violation of which would be punishable by contempt and would constitute grounds for excluding the violator from future "partial closures."[127]

While this novel proposal has not been tested judicially, it appears to possess characteristics of a prior restraint. Because the press cannot be enjoined from publishing information it has stolen or received through a leak,[128] it is difficult to imagine that, once a judge allows

---

119. United States v. Criden, 675 F.2d 550, 560 (3d Cir. 1982); United States v. Edwards, 430 A.2d 1321, 1345-46 (D.C. 1981), *cert. denied*, 455 U.S. 1022 (1982).

120. Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979) (Powell, J., concurring); *id.* at 445-46 (Blackmun, J., concurring in part, dissenting in part).

121. Failure to consider these alternatives may be reversible error. *See* Sheppard v. Maxwell, 384 U.S. 333, 335, 357-58 (1966); Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963); Irvin v. Dowd, 366 U.S. 717, 728-29 (1961). As the Court stated in *Sheppard*: "[R]eversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps . . . that will protect their processes from prejudicial outside interferences." 384 U.S. at 363.

122. ABA Standards, *supra* note 94, 8-3.2, commentary at 8.34.

123. *Id.*

124. *See* Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 21-22, 633 P.2d 74, 78 (1981), *cert. denied*, 102 S. Ct. 2257 (1982).

125. Advisory Committee Standard, *supra* note 102, at 373 advisory committee note.

126. *Id.*

127. *Id.*

128. See *supra* note 60 and accompanying text.

the press to be present at a hearing, he can then prevent the dissemination of information lawfully gathered at that hearing.[129]

Several other alternatives are suggested by the ABA: "(1) continuance, (2) severance, (3) change of venue, (4) change of venire, (5) intensive voir dire, (6) additional peremptory challenges, (7) sequestration, and (8) admonitory instructions to the jury."[130] These alternatives, however, are not always preferable to closure.[131] Continuance, for instance, may violate the defendant's right to a speedy trial.[132] Change of venue may infringe on the defendant's right to a jury trial in the vicinity where the crime occurred.[133] Intensive voir dire is ineffective in rooting out unrecognized or unadmitted prejudice.[134] Sequestration prior to trial is particularly costly to taxpayers and burdensome on jurors, and may make it difficult to get an adequate venire.[135]

CONCLUSION

The right of a criminal defendant to a fair trial may be jeopardized by media coverage of a pretrial suppression hearing. Closure of the

129. *Cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 542-43, 561-62 (1976) ("gag order" preventing publication of information gathered at trial held unconstitutional).

130. ABA Standards, *supra* note 94, 8-3·2, commentary at 8·34.

131. Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 16-18, 633 P.2d 74, 75-76 (1981), *cert. denied*, 102 S. Ct. 2257 (1982); Advisory Committee Standard, *supra* note 102, at 373 advisory committee note; *see Broadcasting Tape Evidence*, *supra* note 71, at 564-65.

132. Groppi v. Wisconsin, 400 U.S. 505, 510 (1971); Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 17, 633 P.2d 74, 75-76 (1981), *cert. denied*, 102 S. Ct. 2257 (1982); *see* Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 753 (Ky. Ct. App. 1980); Committee on the Operation of the Jury System, Report on the "Free Press—Fair Trial" Issue, 45 F.R.D 391, 413 (1968).

133. Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 753 (Ky. Ct. App. 1980); Herald Ass'n v. Ellison, 138 Vt. 529, 534, 419 A.2d 323, 326 (1980); Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 17, 633 P.2d 74, 76 (1981), *cert. denied*, 102 S. Ct. 2257 (1982); State v. Hughes, 8 Media L. Rep. (BNA) 2569, 2570 (Wash. Super. Ct. Oct. 4, 1982).

134. Irvin v. Dowd, 366 U.S. 717, 727-28 (1961); Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 753 (Ky. Ct. App. 1980); Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 17-18, 633 P.2d 74, 76 (1981), *cert. denied*, 102 S. Ct. 2257 (1982); *see* Groppi v. Wisconsin, 400 U.S. 505, 510 (1971).

135. Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 752 (Ky. Ct. App. 1980) (sequestration not a viable alternative at pretrial suppression hearings); Commonwealth v. Hayes, 489 Pa. 419, 475-81, 414 A.2d 318, 347-50 (Roberts, J., dissenting) (sequestration "impractical, unfair and burdensome"), *cert. denied*, 449 U.S. 992 (1980); Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 18, 633 P.2d 74, 76 (1981) (sequestration not a viable alternative for pretrial suppression hearing), *cert. denied*, 102 S. Ct. 2257 (1982); State v. Hughes, 8 Media L. Rep. (BNA) 2569, 2570 (Wash. Super. Ct. Oct. 4, 1982) (sequestration expensive and makes impaneling an impartial jury difficult); *see* Advisory Committee Standard, *supra* note 102, at 373 advisory committee note (sequestration may cause "juror resentment").

hearing may be sought by the defendant to prevent this harm. On the other hand, open judicial proceedings are of recognized societal importance. In cases in which the claims of the criminal defendant and the press conflict, a balance must be struck. If the trial court determines that a reasonable likelihood of prejudice to the defendant will result from an open pretrial suppression hearing, and that closure will be the most effective method to avoid this threat, the hearing should be closed to the press and the public.

Bernard P. Bell