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Battle of the Priveleges: First Amendment vs. Sixth Amendment

Eileen F. Tanielian

BATTLE OF THE PRIVILEGES: FIRST AMENDMENT VS. SIXTH AMENDMENT

I. INTRODUCTION

"Extra! Extra! Read all about it!"

A white racist gang is tried for the murder of a black man and the savage beating of two other black men! An electrical engineer shoots four teen-agers who ask him for $5 on a New York subway, and he becomes a national folk hero — Berhnard Goetz, the "subway vigilante." A college dropout strangles an 18-year old woman during a sexual tryst in New York's Central Park, and it becomes a Big National Story and a made-for-television movie — "the preppie murder case." A young black woman says she was kidnapped and sexually abused by a gang of white racists in Newbourgh, N.Y., and it becomes a national civil rights cause — the Tawana Brawley case.[1] The media sensationalizes the individual defendant under the guise of freedom of the press; the defendant cringes at the thought of being in the headlines because he fears that prejudice will taint his right to a fair and impartial trial. Is extensive coverage of newsworthy defendants infringing upon the defendants' individual liberties?

In recent years, the media has become a "surrogate for the public."[2] The press is viewed as the guardian against the miscarriage of justice because it subjects the police, prosecutors and judicial processes to extensive public scrutiny and criticism. However, a defendant's fundamental right to a fair and impartial trial may conflict with the public's right to attend the trial. Although a public trial was originally a guarantee of fairness to the accused,[3] the newsworthy defendant is no longer convicted by a jury in the courtroom, but rather by the press in the daily papers.[4] What was once envisioned to be a guarantee of impartiality for the defendant has evolved into a guarantee of prejudice against the defendant.

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1. L.A. Times, Nov. 17, 1988, at 1, col. 1 (valley ed.).

2. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980) (citing 6 J. WIGMORE, EVIDENCE § 1834, at 436 (1976)). *See also* Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell J. dissenting) (the press as "agent of the public at large.") *See generally* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) (because individuals have limited time and resources, they rely on the press to provide them with information about governmental activity).

3. *See infra,* Historical Overview at p. 220.

4. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

The constitutional guarantees of free press and public trial both advocate public access to the governmental process.[5] Courts have recognized a century-long rebuttable presumption of open trials[6] and have drawn a balance between the weight accorded to each constitutional guarantee in favor of a presumption of an open trial. However, arguments against this presumption have arisen because of the press' impact on the accused's constitutional right to a fair and impartial trial.[7] Defendants no longer desire public trials. Instead they plead for closed proceedings in hopes of getting a fair and impartial trial untainted by the press.

Despite defendants' desires, courts have consistently accorded more weight to the press and have moved from a rebuttable presumption of openness to a conclusive presumption of openness.[8] In *New York Times Co. v. Demakos,*[9] *("Demakos")* the court addressed the issue of media access to plea proceedings and determined that the media should be allowed access to both pre-trial and trial proceedings.[10] The court stated closed proceedings were permissible only in rare instances where the defendant presented clear and compelling evidence for closure.[11] The *Demakos* decision, in conjunction with decisions in other circuits, illustrates how the press' first amendment right of access can impede the defendant's sixth amendment right to invoke closure.[12] However, in order to maintain public respect for the judicial process and public confidence in the integrity of the judicial system, closed proceedings should not be allowed. To permit otherwise will diminish the public's perception that justice has been done.

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5. [T]he right of a defendant to a fair trial and the first amendment guarantees of free speech and a free press . . . are not essentially in conflict. They are parallel and complementary . . . . Judges, like other normal human beings, find power delightful . . . but our system of government was designed to prevent any public official from experiencing the reality of that pleasure. That is why judges, who interpret the Constitution, are also bound by its commands.

L.A. Times, June 1, 1971, § IV (Editorial) at 8, col. 1-2.

6. *Richmond Newspapers,* 448 U.S. at 573. J. Burger concluded that the presumption of open trials is inherent in the nature of criminal trials conducted in the United States.

7. "In all criminal proceedings, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State . . . ." U.S. CONST. amend. VI.

8. For definition and analysis of presumption of openness, *see* Historical Overview *infra* p. 223.

9. 137 A.D.2d 247, 529 N.Y.S.2d 97 (A.D.2d Dept. 1988).

10. *Id.* at 99.

11. *Id.* at 100.

12. Gannett Co. v. DePasquale, 443 U.S. 368, 379-80 (1979).

II. THE FACTS

In December, 1986, a group of white youths attacked three black men in Howard Beach, Queens County, New York. One black man, age twenty-three, was chased onto an expressway where he was hit by a passing car and killed. The other black men were chased through the streets of Howard Beach and beaten with clubs.

Three of the youths involved were convicted of second degree manslaughter. A trial of the remaining seven defendants was scheduled to begin in May, 1988. A *New York Times* ("Times") reporter heard rumors that two of the defendants, Harry Buonocore and Salvatore DeSimone, were secretly negotiating with the prosecution and Judge Demakos ("Judge") to plead guilty to charges of riot[13] in the first degree.

When the reporter attempted to confirm the rumors, he was confronted with a gag order[14] barring all comment to the press on the plea bargain.[15] The Times contacted Judge Demakos requesting an opportunity to gain access to the plea proceedings or to be heard on the issue of the closure of the proceedings.[16] Judge Demakos refused to hold a closure hearing and thereafter one of the defendants pled guilty in the Judge's chambers with the press and public excluded.[17] The Judge ordered the proceeding transcript sealed, further precluding press access.[18] The Times sought a temporary restraining order to halt Judge Demakos from conducting any more closed plea proceedings and to direct him to disclose the transcript of defendant Buonocore's plea proceeding. As a result, the Times was given an opportunity to protest closure of defendant Buonocore's plea proceeding prior to defendant DeSimone's plea.[19] Judge Demakos denied the Times' request for both access to future plea

13. Riot means:

> a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual; or (2) a threat or threats of the commission of an act or acts of violence by one more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in, damage or injury to the property of any other person or the person of any other individual. 18 U.S.C.A. § 2102(a) (West 1984).

14. A gag order is an action taken by a court in a trial with a great deal of notoriety, ordering the attorneys and witnesses not to discuss the case with reporters — in order to assure the defendant a fair trial. BLACK'S LAW DICTIONARY 610 (5th ed. 1979).

15. *Demakos*, 529 N.Y.S.2d at 98.

16. *Id.*

17. *Id.*

18. *Id.* at 99.

19. *Id.*

proceedings of defendant DeSimone and for disclosure of the transcript of defendant Buonocore's plea proceeding.[20] He stated that the remaining defendants' rights to a fair and impartial jury trial could not be protected because of the extensive media publicity surrounding the case.[21] The Judge based his decision on the unique nature of the case and the prejudicial effect of any pretrial publicity on the remaining five defendants' rights to a fair and impartial jury.[22] Additionally, he denied any possible alternatives to closure.[23] The Times then commenced proceedings against Judge Demakos to prohibit him from conducting closed plea proceedings and to compel him to disclose the transcript of any prior closed plea proceedings.[24]

III. THE COURT'S ANALYSIS

In *Demakos,* the New York Supreme Court held that Judge Demakos improperly closed the plea proceedings[25] because the necessity for closing the proceedings was not sufficiently demonstrated to outweigh the constitutional right of public and press access.[26] The court emphasized the presumption of openness in trials and pre-trial hearings[27] and stated that open court proceedings "protect the accused from secret inquisitional techniques and unjust prosecution . . . [and] instill a sense of public trust in our judicial process."[28] The court further noted that the public and media's right of access extended to pre-trial hearings in criminal cases[29] and reasoned that secret proceedings would frustrate the public because the open courtroom forum provides a necessary outlet for

20. 529 N.Y.S.2d at 99.

21. *Id.*

22. Transcript In the Matter of the Proceedings With Respect to: Special Proceeding Number 8792 at 21, New York Times Co. v. Demakos, 137 A.D.2d 247, 529 N.Y.S.2d 97 (A.D.2d Dept. 1988).

23. *See generally* Sheppard v. Maxwell, 384 U.S. 333, 357-62 (1966). Alternatives to closure would be extensive voir dire to screen out prejudiced jurors, change in venue, postponement of trial, and sequestration of jurors.

24. *Demakos,* 529 N.Y.S.2d at 99.

25. *Id.* at 98.

26. *Id.* at 101.

27. The court stated that federal and state constitutions and a line of prior decisions advocate such a presumption. *Id.* at 99.

28. *Id.* at 99-100.

29. 529 N.Y.S.2d at 99 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Waller v. Georgia, 467 U.S. 39 (1984); Matter of Associated Press v. Bell, 70 N.Y.2d 32, 510 N.E.2d 313, 517 N.Y.S.2d 444 (1987) (access to pretrial hearings permitted); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (extended access to voir dire proceedings); and Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400 (1980) (permitted access to plea proceedings)).

public outrage.[30]

The New York Supreme Court qualified its holding by providing for closure in rare instances.[31] Thus, closed proceedings may be held when specific factual findings clearly outweigh the presumption of openness.[32] In addition, the trial judge must provide the interested parties with an opportunity to contest closure prior to making a decision.[33]

Applying the New York Supreme Court standard, the court held that Judge Demakos' gag order was improper because he failed to support his determination with specific factual findings and did not provide the interested parties with an opportunity to contest closure prior to the first defendant's plea proceeding.[34] The court determined that Judge Demakos' findings that closure and a sealed plea transcript were necessary to protect the remaining defendants' right to a fair trial were hypothetical and unwarranted.[35] Judge Demakos conceded that despite the extensive media coverage that preceded the first Howard Beach trial, he had been able to empanel a fair and impartial jury[36] through careful voir dire.[37] The court held that the "potentially prejudicial effect which the public disclosure of the instant plea proceedings would have . . . [can be] no greater than that which occurred from the [earlier pre-trial] publicity."[38] The court noted that witnesses' observations and their testimony in the preceding trial were included in the newspapers.[39] The court stated that the categorical exclusion of the press was not warranted

30. *Id.* at 100 (citing *Press-Enterprise Co.*, 464 U.S. at 508-09) (An open trial can have a "community therapeutic value" in that public proceedings can "vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.").

31. *Id.* at 100.

32. *Id.* The decision for closure must be supported by specific factual findings and not conclusory assertions.

33. *Id.* The court set forth the standard for closure as it was articulated in *Press-Enterprise Co.*, 464 U.S. at 510. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

34. 529 N.Y.S.2d at 101.

35. *Id.* (citing the argument set forth and rejected in Matter of Associated Press v. Bell, 70 N.Y.2d 32, 510 N.E.2d 313 (1987), 517 N.Y.S.2d 444. *Bell* involved the closure of the Huntley hearing in the widely publicized murder trial of Robert Chambers.).

36. *Id.*

37. This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to. BLACK'S LAW DICTIONARY 1412 (5th ed. 1979).

38. 529 N.Y.S.2d at 101.

39. *Id.* The Howard Beach tragedy was set in a context of racism not limited to the Howard Beach area but widespread all over urban America. Economic shifts, crime and disintegration of neighborhoods which feed racist fears and reactions provided the setting for the tragic

where the defendants were already front page news.[40] Categorical exclusion could lead to speculative news which would be more damaging to the defendants than first hand press coverage.[41] The court reprimanded Judge Demakos for his "subjective whims"[42] which had made the rights of the press under the first amendment a hostage in this case,[43] and granted the Times' petition for disclosure of defendant Buonocore's plea proceedings transcript.[44]

IV. HISTORICAL OVERVIEW OF THE FIRST AND SIXTH AMENDMENTS

Two factors must be considered in cases dealing with the press' first amendment right of access and the accused's sixth amendment right to a public trial. The first consideration is whether the place and process has historically been open to the press and the public.[45] The second consideration is whether public access occupies a significant positive role in the functioning of the process.[46]

A. Media Access to Public Trials

The right of the accused to an open and public trial was guaranteed with the passage of the sixth amendment.[47] Neither the Constitution nor the Bill of Rights however contain an explicit provision guaranteeing the public access to criminal trials.[48] Hence, the media's access right, as a surrogate for the public,[49] must be found elsewhere.

1. Historical Look at Media Access

Criminal trials have historically been open to the public dating back to the Norman Conquest of England.[50] When a lack of discipline in the

events which generated extensive publicity. *"Howard Beach: Judged and Prejudged,"* N.Y. Times, Dec. 23, 1987, at 20, col. 1 (city ed.).

40. 529 N.Y.S.2d at 101.

41. *Id.* At least one defense attorney voiced strong opposition to the closed proceedings because of a concern of prejudice to his client of speculative media reports of the closed proceedings.

42. *Id.* at 102.

43. *Id.*

44. *Id.*

45. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986).

46. *Id.*

47. U.S. CONST. amend. VI.

48. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

49. *Id.* at 572 (citing 6 J. WIGMORE, EVIDENCE § 1834, at 436 (1976)).

50. Prior to the Norman Conquest, cases in England were brought before moots and attended to by the freemen of the town acting in the capacity of jurors. *See generally Richmond*

courtroom created disrespect for the judicial system early courts resolved the problem by prescribing rules for courtroom conduct, but avoided closure.[51]

In *Gannett Co. v. DePasquale*,[52] ("*Gannett*") the United States Supreme Court addressed the issue of whether the public had an independent constitutional right of access to pre-trial judicial proceedings. In *Gannett*, the press claimed a sixth amendment right of access to a pre-trial evidence suppression hearing.[53] The Court limited the sixth amendment guarantee to the defendant as a personal right,[54] but indicated that the first amendment might provide the press with access to criminal proceedings.[55] Initially, the majority distinguished between pre-trial proceedings and the actual trial, stressing that pre-trial publicity might have a prejudicial impact on potential jurors and that the sixth amendment did not grant the public a right to attend *pre-trial hearings*.[56] However, in stating the holding the majority concluded that the public had no right to attend criminal trials under the sixth amendment and abandoned the distinction between pre-trial and trial proceedings.[57] Obviously, the scope of the holding was unclear. The court left unanswered the question of whether public access to criminal trials was guaranteed by the first amendment. The media criticized the *Gannett* holding because the

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Newspapers, 448 U.S. at 565-75 (elaborate history of the criminal trial). A moot refers to the local court or the county court. *Id.* at 565. Presumably, inherent risks existed in a town-meeting trial; the risk that the gathering might be moved by emotions or passions emanating from the nature of the crime. A lynch mob atmosphere is hardly the setting for reasoned decision-making based on evidence. *See generally* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986). After the Norman Conquest, although the duty of the freeman was no longer compulsory, criminal trials presumably remained open as there is no evidence to the contrary. 448 U.S. at 565. However, the King desired open trials so that the community could aid in the punishment of evildoers and establish a certain peace for the welfare of the realm and of the people. Over the centuries, although the procedural aspects of the criminal system evolved, the public character of the trial remained constant. *Id.* at 566.

51. 448 U.S. at 567.

52. 443 U.S. 368 (1979).

53. Defendants were accused of second-degree murder, robbery and grand larceny. Defendants moved to suppress involuntary statements allegedly made to police as well as physical evidence seized during the arrest. The press was excluded from the hearing to avoid publicity. *Id.* at 374-75.

54. *Id.* at 387. (Stewart, J.) ("[b]y the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant.").

55. *Id.* at 391-92. J. Stewart declined to decide in the abstract whether this right does exist in the first amendment. Justice Powell, in his concurring opinion, however, did find a right of access in the first amendment. *Id.* at 397 (Powell, J., concurring).

56. *See generally* 443 U.S. 368 (1979).

57. *Id.* at 391. Chief Justice Burger, noticing the ambiguity in Justice Stewart's language, stressed in his concurring opinion that the scope of *Gannett* is limited to pre-trial hearings. *Id.* at 394 (Burger, C.J., concurring).

decision led to a rash of courtroom closures throughout the nation without due regard for the public interest.[58]

In *Richmond Newspapers, Inc. v. Virginia*,[59] the Court limited its holding in *Gannett*[60] to pre-trial proceedings. The Court ruled that the first amendment affords the press a protected right of access to criminal trials.[61] The first amendment assures that courtroom proceedings are communicated to the public through the media,[62] thereby prohibiting the government from arbitrarily closing the courtroom doors.[63] Chief Justice Burger, in a concurring opinion, stressed that although the sixth amendment does not extend courtroom access to the press at criminal trials,[64] the first amendment gives the public a right to access in criminal trials absent an overriding interest.[65] Burger reasoned that the first amendment guarantees the right to receive information, as well as the right to speak or take action in public places.[66] The right to assemble, as an explicit guarantee of the first amendment, "is a right cognate to those of free speech and free press and is equally fundamental."[67] Such a right may be exercised in any public place for a "lawful purpose."[68] Burger further stated that the courtroom is a public place where people have a right to assemble "to enhance the integrity and quality of what takes place."[69] Consequently, the media, acting as an agent of the public, inherits the same right.[70] Thus, the sixth amendment explicitly grants defendants the right to a public trial,[71] but the press can gain access under

58. *See* Schmidt, *The Gannett Decision: A Contradiction Wrapped In An Obfuscation Inside An Enigma,* The Judge's Journal 13 (Fall 1979).

59. 448 U.S. 555 (1980). The case involved the fourth trial for a murder charge. The defendant moved for the exclusion of the public from the courtroom because he feared that a family member of the victim may inform potential witnesses of prior witness testimony.

60. 443 U.S. at 391.

61. 448 U.S. at 575-81.

62. *Id.* at 575.

63. Courts have stated that the first amendment should be read within the broadest scope that the context of society will permit. *See Richmond Newspapers,* 448 U.S. at 576 (citing Bridges v. California, 314 U.S. 252, 263 (1941)). The right to speak and publish events that occur at a criminal trial would lose much substance if access to observe the criminal trial could be foreclosed arbitrarily. 448 U.S. at 577, n.12.

64. *Id.* at 564-69.

65. *Id.* at 581.

66. *Id.* at 578.

67. *Id.*

68. 448 U.S. at 578 (citing Hague v. CIO, 307 U.S. 496, 519 (1939)).

69. *Id., see also* Bridges v. California, 314 U.S. 252, 263-65 (1941).

70. 488 U.S. at 576 ("An expansion of the freedom to assembly includes access for the public, and the media acting as agents of the public . . . [Without some] protection for seeking out the news freedom of the press . . . could be eviscerated.").

71. The sixth amendment guarantees that "the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI. *See, e.g.,* Gannett Co. v. DePasquale, 443 U.S.

the first amendment.[72]

B. Media Access to Non-Trial Proceedings

> It has of course, long been the law . . . that all judicial proceedings, both civil and criminal, are presumptively open to the public[73] and that a proceeding at which a criminal defendant enters a plea of guilty is indisputedly a substitute for a trial.[74]

There was no right to attend pre-trial proceedings at common law.[75] After the abolition of the Star Chamber[76] in 1641, defendants acquired rights akin to those embodied in the sixth amendment.[77] However, pre-trial proceedings were not granted the same degree of openness for fear of prejudice and bias resulting in an unfair trial.[78] Allowing the press

368 (1979) (only the criminal defendant, not the public or the press, may use the sixth amendment to challenge courtroom closure).

72. In re Washington Post, 807 F.2d at 388 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558-81 (1980); and In re Knight Publishing Co., 743 F.2d 231, 233 (4th Cir. 1984)).

73. Lee v. Brooklyn Union Pub. Co., 209 N.Y. 245, 103 N.E. 155 (1913).

74. People ex rel. Carr v. Martin, 286 N.Y. 27, 35 N.E.2d 636 (1941).

75. *Gannett,* 443 U.S. at 387, 389. *See, e.g.,* E. Jenks, THE BOOK OF ENGLISH LAW 75 (6th ed. 1967) ("It must, of course, be remembered, that the principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefatory stages of the proceeding . . . .").

76. The Star Chamber was a court which originally had jurisdiction in cases where the ordinary course of justice was so obstructed by one party, through writs, combination of maintenance, or overawing influence that no inferior court would find its process obeyed. The court consisted of the privy council, the common-law judges and all peers of Parliament. In the reign of Henry VIII and his successors, the jurisdiction of the court was illegally extended to such a degree (especially in punishing disobedience to the king's arbitrary proclamations) that it became odious to the nation and it was abolished. BLACK'S LAW DICTIONARY 1261 (5th ed. 1979).

77. 443 U.S. at 387, n.18.

78. *Id.* at 388. In the original New York Field Code of Criminal Procedure published in 1850, it was provided that pre-trial hearings should be closed to the public upon the request of the defendant to protect the defendants from prejudicial pre-trial publicity. 443 U.S. at 390. *See* COMMISSIONERS ON PRACTICE AND PLEADINGS, CODE OF CRIMINAL PROCEDURE, § 202 (Final Report 1850). The belief in the danger of open pre-trial proceedings was soon obliterated prior to the trial of Aaron Burr for treason in 1807 where a probable cause hearing was held. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10 (1986). *See* United States v. Burr, 25 F. Cas. 1 (CC Va. 1807) (No. 14,692). The fact that the courtroom was too small to accommodate the crush of interested citizens in the Burr hearing supports the evolution of the belief that pretrial proceedings should not be closed.

Although the drafters of the Constitution could not envision the modern day exclusionary rules and pretrial proceedings, the sixth amendment was drafted when written interrogatories of pretrial litigation were in existence. 443 U.S. at 395-96. Thus, the drafters were aware that some testimony may be recorded prior to the actual trial. However, that did not suggest that the public had a right to be present at pre-trial proceedings. *Id.* at 396.

access to criminal pre-trial proceedings is a relatively new and limited phenomenon.

In *Press-Enterprise Co. v. Superior Court,*[79] *("Press-Enterprise I")* the United States Supreme Court indicated that the first amendment right of access also extends to some pre-trial proceedings. In that case, the Court allowed the press access to voir dire proceedings,[80] treating voir dire as part of the trial. Consequently, subsequent courts were uncertain whether the first amendment right could be extended to pre-trial proceedings that were not a part of the trial.[81] The uncertainty was resolved two years later in *Press-Enterprise Co. v. Superior Court,*[82] *("Press-Enterprise II")* where the California Supreme Court held that the media has a first amendment right of access to the transcripts of a preliminary hearing.[83]

Subsequent decisions have found a first amendment right of access in a variety of pre-trial proceedings.[84] In *In re Washington Post Co.,*[85] the Fourth Circuit held that the press had a first amendment right of access to plea and sentencing proceedings and to documents filed in connection with the hearing.[86] The court reasoned that the taking of a plea served as a "substitute for trial"[87] and should be treated the same as a trial for first amendment purposes.[88] The court further held that even if plea proceedings could not be viewed as a part of the actual trial, "they are . . . as much an integral part of a criminal prosecution as are preliminary probable-cause hearings, suppression . . . or bail hearings, all of which have been held to be subject to the public's first amendment right of access."[89]

Other courts have held that a preliminary hearing is comparable to a trial since it provides the "sole occasion for public observation of the

79. 464 U.S. 501 (1984).

80. *Id.*

81. *See, e.g.,* In re Application of the Herald Co., 734 F.2d 93, 98 (2d Cir. 1984).

82. 478 U.S. 1 (1986).

83. In *Press-Enterprise II,* the state of California commenced prosecution of Robert Diaz, a nurse, who allegedly murdered twelve patients by administering massive doses of lidocaine. 478 U.S. 1, 3.

84. *See, e.g.,* In re Application of the Herald Co., 734 F.2d 93, 99 (2d Cir. 1984); United States v. Brooklier, 685 F.2d 1162, 1169-71 (9th Cir. 1982); United States v. Criden, 675 F.2d 550, 554-57 (3d Cir. 1982).

85. 807 F.2d 383 (4th Cir. 1986).

86. *Id.* The case involved a newspaper that moved to obtain release of the transcript of a plea hearing in connection with espionage charges against an alien and to obtain the right to participate in future hearings.

87. *Id.* at 389.

88. *Id.*

89. *Id.*

criminal justice system"[90] and is often the final determination of a criminal case.[91]

C. *The Role of Access in the Criminal Justice System*

Public access has played a significant role in the functioning of the criminal justice system.[92] Open criminal trials not only protect the defendant's sixth amendment right to a public trial by a fair and impartial jury,[93] but also protect the judiciary from extensive criticism because the public is allowed to supervise and participate in the prosecution.[94] The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence.[95] An adequately informed public can resort to extra-judicial reform measures through public discussion and political pressure.[96]

The first amendment embodies many values and several interpretations as to what is included within the protection of "free press."[97] Reporting on the criminal justice system is at the core of first amendment

90. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

91. *See* Waller v. Georgia, 467 U.S. 39, 46-47 (1984).

92. *See generally Richmond Newspapers,* 448 U.S. at 555; Globe Newspaper Co. v. Superior Court, etc., 457 U.S. 596, (1982); *Press-Enterprise I,* 464 U.S. at 501; *see also* Historical Overview *supra* at 220.

93. The defendant is guaranteed a fair trial by the due process clause of both the fifth and fourteenth amendments. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

94. Open trials help to maintain or increase public confidence in the criminal justice system. *See, e.g.,* Levine v. United States, 362 U.S. 610, 616 (1959) (right to a public trial reflects the common law concept that "justice must satisfy the appearance of justice").

95. *In re Washington Post Co.,* 807 F.2d at 389.

96. *See* Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings,* 91 HARV. L. REV. 1899, 1908 n.45 (1978) (public discussion of the Watergate affair resulted in legislative reforms of campaign practices).

97. The objective of constitutional protection for freedom of the press was explicitly announced as early as 1774 in a letter from the Continental Congress to the inhabitants of Quebec:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science and morality, and arts in general, in its diffusion of liberal sentiments on the administration of the government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs. 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774).

Our Founding Fathers were businessmen who wanted social order but wanted to minimize government intrusion into their business affairs. Their ideology is represented in the first amendment which provides a forum for the interchange of political and social ideas for promoting socially desirable changes. *See* Roth v. United States, 354 U.S. 476, 484 (1957). The first amendment assures the people freedom of communication regarding governmental functions.

values.[98] Secrecy diminishes the public's perception that justice is being done. As Justice Brennan stated in his concurring opinion in *Nebraska Press Association v. Stuart*:[99] "[The] [s]ecrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges . . . . [F]ree and robust reporting . . . [will] improve the quality of [the criminal justice] system by subjecting it to the cleansing effects of exposure and public accountability."[100]

Closed courtrooms are dangerous as public respect for the judicial process will erode if long awaited criminal prosecutions are concluded behind closed doors. Open courtrooms enhance the "community therapeutic value[101] of openness,"[102] because an outlet for public reactions and emotions resulting from criminal acts is provided.

V. THE CONFLICT

> Free Speech and fair trials are two of the most cherished policies of our civilization and it would be a trying task to choose between them.[103]

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[104] Although the public's right to attend criminal trials is not explicit in the Constitution,[105] courts have recognized that public access is necessary to the enjoyment of explicitly defined rights[106] and have further held that the right to an open public trial is a right shared by the public and the accused; the assurance of fairness is the common ground.[107]

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

99. *Id.*

100. *Id.* at 586. Other justifications for an open trial include the improved quality of testimony, unknown witnesses are possibly induced to come forward to testify and trial participants will perform their duties more conscientously. *See* Gannett Co. Inc. v. DePasquale, 443 U.S. 368 (1979); Waller v. Georgia, 467 U.S. 39 (1984) (public trial ensures duties performed responsibly, discourages perjury due to fear of embarrassment).

101. An open process of justice serves a prophylactic purpose, providing an outlet for community concern, hostility and emotion. It is important that society's criminal process satisfy the appearance of justice and the appearance of justice can best be provided by allowing people to observe it. Early history of open trials reflects that people sensed from experience and observation that the means used to achieve justice must have the support derived from public acceptance of both the process and its results. *Richmond Newspapers,* 448 U.S. at 571-72.

102. *Press-Enterprise II,* 478 U.S. at 13.

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

104. U.S. CONST. amend. I. The first amendment is made applicable to the states by the fourteenth amendment. U.S. CONST. amend. XIV.

105. Although the sixth amendment grants an accused the right to a speedy and public trial it does not grant such a right to the public. U.S. CONST. amend. VI.

106. *See generally* Historical Overview, *supra,* at 220.

107. *Press-Enterprise II,* 478 U.S. 1.

The sixth amendment grants criminal defendants the right to a public trial.[108] This guarantees that the government will conduct the trial in a fair manner. However, where the open trial interferes with a defendant's ability to obtain a fair trial, a tension between the two constitutional provisions results.[109] In *Nebraska Press*,[110] the Supreme Court held that "the Bill of Rights did not . . . assign priorities between First Amendment and Sixth Amendment rights, ranking one as superior to the other."[111] Thus, the Court was forced to reconcile the competing interests. The Court created a framework for balancing the rights of the accused and the rights of the media.

In *Nebraska Press,* several press and broadcast associations, publishers, and reporters challenged the validity of a judicial order which restrained the media from publicizing any of the defendant's admissions to law enforcement officials.[112] The Court held that the order was an unconstitutional prior restraint on the freedom of the press[113] and would not be tolerated by the Court. The Court found that prior to issuing a restrictive order a judge must consider "(a) [the] nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[114] The Court noted that "prior restraint[s] [have] an immediate and irreversible sanction [which] freezes [speech] at least for a time."[115] However, the Court limited its discussion to public disclosure of admissions and did not consider the issue of closed trials or pretrial hearings. The Court's failure to address the issue prompted lower courts to substi-

108. "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State . . . ." U.S. CONST. amend. VI. The sixth amendment public trial guarantee has been interpreted on various occasions. *See, e.g.,* Gannett v. DePasquale, 443 U.S. 368 (1979) (only the criminal defendant, not the public or the press, may use the sixth amendment to challenge courtroom closure); Estes v. Texas, 381 U.S. 532, 538 (1965) (the sixth amendment is a guarantee of the accused).

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

110. *Id.* at 561.

111. The case arose at a time when the courts encountered the media's increasing presence in the courtrooms which subjected the defendant to be convicted by a partial jury. The influence and the reach of the media biased jurors and convictions were overturned when the defense demonstrated that publicity had prejudiced the defense. *See* Estes v. Texas, 381 U.S. 532, 541-42 (1965) (the presence of television cameras and reporters, over defendant's objections, deprived the defendant of due process. Reporters could be present in the courtroom only in a nonobtrusive manner. The court held that a showing of inherent prejudice would merit reversal.).

112. *Nebraska Press Ass'n,* 427 U.S. 539, 543.

113. *Id.* at 570.

114. *Id.* at 562.

115. *Id.* at 559.

tute closure orders for gag orders.[116] Consequently, sixth amendment guarantees infringed upon first amendment privileges because defendants were granted their requests for closure. This proved detrimental to the public because the media was kept out of the proceedings and was unable to provide accurate reports to the public.

VI. ANALYSIS

The right of media access to criminal trials encompasses plea hearings because a plea serves as a substitute[117] for and is the legal and practical equivalent of the trial.[118] While it is possible that an open pre-trial hearing may disclose evidence to potential jurors, the possibility of a defendant's rights being impaired by the press and the public's access is almost minimal.[119] However, there are instances where pretrial publicity may effectively destroy the accused's right to a fair trial.[120] In *Demakos,* Judge Demakos was concerned with the remaining defendants' rights to fair and impartial trials. It is possible that a pleading defendant may implicate the remaining defendants, and thus influence their right to an impartial trial. However, courts have held that the mere fact that the pleading defendant may implicate his co-defendants is insufficient to warrant closure.[121] It is true that statements implicating the co-defendants are prejudicial; however, all evidence which suggests guilt is highly prejudicial. This does not mean that all inculpatory evidence[122] must be enjoined from pre-trial disclosure.[123] There is no basis for the rationale that closure is necessary because the damaging evidence may prove to be inadmissible at trial. It is unlikely that the evidence uncovered at a plea hearing would be inadmissible at the later trial of a co-defendant because more often than not, the defendant who pled guilty will testify at the co-defendant's trial.[124] In *Demakos,* the court recognized that open plea proceedings could not prejudice the remaining defendants and that categorical denial of access could not be justified.[125]

Additionally, the public's presence hinders temptation by the prose-

116. *Id.* at 564 n.8, 576 n.3 (Brennan, J., concurring).

117. In re Washington Post, 807 F.2d 383, 389 (4th Cir. 1986).

118. Hearst Corp. v. Clyne, 50 N.Y.2d 707, 725, 409 N.E.2d 876, 885, 431 N.Y.S.2d 400, 409 (1980) (dissenting opinion).

119. 50 N.Y.2d at 727, 431 N.Y.S.2d at 410.

120. *See, e.g.,* Sheppard v. Maxwell, 384 U.S. 333 (1966).

121. *Hearst Corp.,* 50 N.Y.2d at 727, 431 N.Y.S.2d at 411.

122. Evidence tending to show a person's involvement in a crime; incriminating evidence. BLACK'S LAW DICTIONARY 499 (5th ed. 1979).

123. 50 N.Y.2d at 727, 431 N.Y.S.2d at 411.

124. *Id.* 431 N.Y.S. 2d at 411.

125. *Demakos,* 529 N.Y.S.2d at 101.

cution or the court to coerce a plea or to impose a disproportionate sentence.[126] Furthermore, access to plea proceedings substantially enhances public discussion and knowledge of the criminal justice system.[127] The *Demakos* court accurately held that open criminal proceedings have a community therapeutic value because "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account."[128]

A. Judicial Requirements for Closure

> The court in *Press-Enterprise I* articulated the standard for closure: The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[129]

The closure standard has the practical effect of allowing press access to pre-trial or trial criminal proceedings in all but rare circumstances. The burden of sustaining a closure order is difficult, since "the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend . . . ."[130] The interest that may override the presumption in favor of open trials is a compelling state interest,[131] such as the government's interest in avoiding the disclosure of sensitive information,[132] which can be preserved by the most narrowly tailored means of closure.

The *Demakos* court properly applied this standard and held that the presumption of openness of trials had not been overcome by a factual showing of a compelling state interest sufficient to outweigh the constitutional right of public and press access.[133] Further, the court found it significant that Judge Demakos refused to provide an opportunity for the interested parties to be heard on the issue of closure[134] and did not make

126. *Washington Post,* 807 F.2d at 389.

127. In re Application of the Herald Co., 734 F.2d 93 (1984).

128. 529 N.Y.S.2d at 100.

129. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

130. *Id.* at 508.

131. *See* Brown v. Hartlage, 456 U.S. 45, 53-54 (1982) (compelling state interest required for state circumscription of first amendment rights); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-03 (1979) (highest form of state interest required for prior restraints).

132. *Demakos,* 529 N.Y.S.2d at 100.

133. *Id.* at 101.

134. *Id.*

any specific findings to support his conclusion that closure was necessary.[135] Furthermore, even if Judge Demakos' articulated purpose was justifiable, closure was not the means most narrowly tailored to serve that purpose since other less intrusive alternatives were only summarily determined to be not viable. The Judge's determination of nonviable alternatives consisted of conclusory statements lacking any factual basis.[136]

B. Pre-Trial/Trial Distinction

The Supreme Court in *Press-Enterprise I* seemed to move the analysis of closure away from the pre-trial/trial distinction.[137] Instead, the Court focused on first amendment values and the historical backdrop against which the first amendment was enacted.[138] The Court found the distinction between pre-trial and trial proceedings not dispositive in evaluating first amendment issues.[139] Hence, the public's right to access proceedings is no longer dependent upon the proceeding's similarity to a trial. Although the *Demakos* court did not address this issue, even if the distinction between pre-trial/trial proceedings was considered relevant by the court, the similarity of a plea hearing to a trial would be indicative of it being presumptively open.[140]

C. The Press as an Additional Check on the Three Branches of Government

The press acts as an additional check on the three official branches of government. In *Myers v. United States*,[141] Justice Brandeis wrote: "[In setting up the three branches of government the Founders'] purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[142] The purpose of a constitutional guarantee of a free press was to create a fourth institution to function as an additional check on the three official branches.[143]

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recor-

135. *Id.*
136. *Id.* at 99.
137. 464 U.S. at 821-24.
138. *Id.* at 517.
139. *Id.* at 516.
140. Richmond Newspapers v. Virginia, 448 U.S. 555, 572; In re Washington Post Co., 807 F.2d 383, 389.
141. Myers v. United States, 272 U.S. 52, 293 (1926) (dissenting opinion).
142. *Id.*
143. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

> dation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.[144]

The *Demakos* court recognized that open court proceedings serve several purposes, the most important of which is the perception that justice is being done.[145] Access to criminal proceedings further serves to protect the accused from "secret inquisitional techniques and unjust persecution by public officials."[146] Hence, the *Demakos* court correctly afforded the press its first amendment right of access and harshly reprimanded Judge Demakos for abridging the freedom of the press.[147] However, the result of the *Demakos* opinion is still troublesome because even with the release of defendant Buonocore's plea transcript, questions will linger as to whether the "whole story" has in fact been revealed. Perhaps some aspect of the plea proceedings was kept off the record for purposes of evading review and criticism or perhaps the plea was coerced by the court. Although subsequent media coverage will pacify the public's curiosity as to what occurred behind closed courtroom doors, secrecy at the outset will tarnish the public's perception that justice is being done.

D. The Elimination of an Independent Press

Although the press has at times been abusive and untruthful,[148] the elimination of an independent press is not the way to eliminate abusiveness and untruthfulness.[149] Alternatives have been suggested, however, on ways to keep the press in check. One alternative, suggested by a commentator, is to subject the press to regulations within the limits of a constitutional guarantee of free speech and require it to promote government policy or current notions of social justice.[150] Another alternative is to eliminate an autonomous press altogether and to rely on the traditional competition between the three branches of government, supplemented by vigorous political activity for an adequate flow of information between

144. *Richmond Newspapers*, 448 U.S. at 569. *See* 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827). Bentham also emphasized that open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public. *Id.* at 525.

145. *Demakos*, 529 N.Y.S.2d at 100.

146. *Id.* at 99-100.

147. *Id.* at 101.

148. Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975).

149. *Id.*

150. *Id.*

the people and their representatives and for a sufficient check on autocracy and despotism.[151] However, it is clear that the Founders did not intend to subject the press to such regulations because they doubted that personal liberties would survive without an independent press.[152]

In *Demakos,* the court recognized that the presence of the press is guaranteed by both the United States and state Constitutions[153] and held that press access assures the innocent that justice is being done, and imposes the power of the law on the guilty.[154]

Limiting media access to pre-trial proceedings has had very little practical effect. The barriers to closed proceedings are often penetrated by reporters through second-hand sources or informers.[155] Much of what the court seeks to keep from public discussion is already in the public domain either through reports of prior proceedings or through witness' accounts of the events. For example, in *Demakos,* Judge Demakos was unable to articulate how any current news reports would detrimentally increase the extensive public knowledge about the case.[156] The *Demakos* trial was preceded by the initial Howard Beach trial which, after three and one half months of front page coverage, resulted in the conviction of three defendants for manslaughter.[157] Hence, no matter how stringently closure is applied, dissemination of the information to the public will still result.

E. Conclusive Presumption of Openness

Although *Demakos* is a state decision, it is one of the first cases to explicitly adhere to a conclusive presumption of openness in press access cases.[158] Compelling circumstances that may warrant closure are difficult to articulate. The *Demakos* court increased the stringency of the standard for closure by stating that closure may be granted only in rare circumstances which clearly and compellingly outweigh the value of openness.[159] In conjunction with other decisions, the *Demakos* court

151. *Id.*

152. *Id.* at 637.

153. *Demakos,* 529 N.Y.S.2d at 99.

154. *Id.* at 100.

155. In *Demakos* the court discusses at length the extensive coverage of the prior trials which included the witness' accounts and observations. *Id.* at 101. One defense attorney also objected to closed sessions for fear of speculative media reports. *See also* Fried, *Howard Beach Judge Negotiating Plea Deals,* N.Y. Times, May 19, 1988, at B7 (the news of the plea bargain was news prior to its finality).

156. 529 N.Y.S.2d at 101.

157. *See supra,* Facts at 216.

158. *See also* Capital Newspapers v. Lee, 15 Med. L. Rptr. 1669 (N.Y. App. Div. 1988).

159. *Demakos,* 529 N.Y.S.2d at 100.

tipped the scale in favor of the press and provided the press with an additional cushion to fall upon in the case of a defendant who requests closure.

F. Alternatives to Closure

Protective measures are available to protect the defendant without closing the proceeding. The purpose of such protective measures is to ensure that the trial outcome is based solely on evidence produced at trial, and not on inadmissible information communicated to the jury through the media.[160]

In *Sheppard v. Maxwell*,[161] the country's highest court suggested many ways the judiciary could protect the rights of the accused. Some of the suggested protections include limiting the number of newsmen allowed in the courtroom, closely supervising courtroom conduct, insulating witnesses, and controlling the release of leads, information and gossip to the press by police officers, witnesses and counsel.[162] To prevent prejudice, a closure order should not be entered until all possible alternatives, including but not limited to a change of venue, continuance, sequestration of the jury and an adequate number of pre-emptory challenges, are explored.[163]

In *Demakos,* Judge Demakos found that a proper voir dire would not cure the prejudicial effect of pre-trial publicity because the case had received such extensive publicity. He further determined that questioning each juror about the events surrounding the Howard Beach tragedy would produce no protection for the remaining defendants because each juror who resided in New York City had presumably heard something about the highly publicized Howard Beach case and thus had formed an opinion.[164] Similarly, the trial could not be adjourned because some defendants had made motions to dismiss on speedy trial grounds; and a change of venue was not viable because there was no place in the State of New York where residents had not heard of, or would not hear of, the case.[165] The appellate court held that these findings did not support closure because Judge Demakos conceded that he was able to impanel an

160. *See, e.g.*, Singer v. United States, 380 U.S. 24, 36 (1965); Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, 360 U.S. 310 (1959).

161. *Sheppard,* 384 U.S. 333, 358-62.

162. *Id.*

163. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64.

164. 529 N.Y.S.2d at 101.

165. *See* Respondent Justice Demakos' Memorandum of Law in Support of Respondent's Cross Motion to Dismiss the Petition, New York Times Co. v. Demakos, 529 N.Y.S.2d 97 (A.D. 2d Dept. 1988).

impartial jury even after the extensive publicity of the first Howard Beach trial.[166]

The opinion of the appellate court was correct since the standard for closure requires that the means chosen to serve a compelling interest must be narrowly tailored. Since other alternatives would similarly serve the compelling interest of obtaining a fair trial, Judge Demakos failed to satisfy the means prong of the standard.

G. Chaos in the Courtrooms

Newspapers and journalists have been regarded as the handmaidens of effective judicial administration in the criminal field.[167] In cases where the press' access is challenged, appellate courts often admonish the trial court judge for not taking proper measures to avoid the carnival atmosphere that pervaded at trial.[168] As long as the press does not provide pure entertainment for its readers by engaging in abusive, untruthful or inflated news coverage, but rather provides accurate, thorough and responsible news reporting, the defendant will benefit. Truthful reporting may generate sympathy from the public for the defendant and ease the concerns of defense attorneys about prejudice to their clients because of partial reports.[169] Incomplete news accounts of criminal proceedings do not serve any interests and do not help to impanel an impartial jury. Furthermore, courts have found that open trials produce evidence which might otherwise not have been discovered in a closed proceeding.[170]

Yet, despite the clear benefits of open trials, press access to pretrial proceedings and to the actual trial has generated extensive criticism. Although Justice Stewart's concept of "press autonomy" indicates that the government can neither "intrude on the newsgathering, publishing or disseminating functions of the press nor grant special privileges to the press which might ultimately undermine its independence,"[171] the press has been permitted a free hand within the broadest scope possible without threatening the integrity of the trial.[172] In *Nebraska Press,* Justice Brennan stated: [T]here can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or

166. 529 N.Y.S.2d at 101.

167. *See Sheppard,* 384 U.S. at 350. *See also* J. BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (1825) (publicity is "the soul of justice").

168. 384 U.S. at 358; *Demakos,* 529 N.Y.S.2d at 101-02.

169. 529 N.Y.S.2d at 101. Impliedly, partial or speculative coverage is not desired. The defense would rather have thorough coverage so as to avoid unfavorable publicity.

170. *See, e.g.,* In re Oliver, 333 U.S. 257, 270 n.24 (1948).

171. Stewart, *Or of the Press,* 26 HASTINGS L.J. 631-37 (1975).

172. *Sheppard,* 384 U.S. at 350 (citing Bridges v. California, 314 U.S. 252 (1941)).

the operation of the criminal justice system, no matter how shabby the means by which the information is obtained."[173] However, the boundaries of a free hand give rise to those instances where courtroom access impedes a defendant's right to get a fair trial.

For example, *Sheppard*[174] was a murder case which received extensive national publicity. The press exploited the gruesome details of the murder of Dr. Sheppard's pregnant wife. Essentially, the accused was convicted and sentenced by the newspapers.[175] Although the trial judge was aware of the excessive pre-trial publicity, he failed to take effective steps to curtail the massive publicity or to eliminate the circus atmosphere of the trial.[176] A majority of the Supreme Court ordered the release of Dr. Sheppard from custody because the trial court failed to invoke procedures to guarantee him a fair trial.[177] The message in *Sheppard* was unmistakable: trial judges have a duty to take all steps necessary to guarantee a defendant a fair trial.[178]

VII. CONCLUSION

Closure in the *Demakos* case would not have been effective for two reasons. Though details were not known, news reports had already revealed the existence of the plea agreements.[179] Further, no showing was made that the public reporting of one defendant's plea agreement would irreparably harm the ability of the other defendants to obtain a fair trial.[180]

The *Demakos* court did not deviate from the general rule expressed by Justice Holmes over half a century ago: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence,

173. *Nebraska Press,* 427 U.S. at 588. However, he asserted that such publication "does not imply . . . any subordination of Sixth Amendment rights, for an accused's right to a fair trial may be adequately assured through methods that do not infringe First Amendment values."

174. 384 U.S. 333.

175. *Id.* at 335-42.

176. The jurors were subjected to newspaper, television and radio coverage of the trial while not taking part in the proceedings. The jurors also received anonymous letters and phone calls. Bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom hounding most of the participants in the trial. *Id.* at 352-55.

177. *Id.* at 358-62.

178. *Id.* at 362-63.

179. *See* Fried, *Howard Beach Judge Negotiating Plea Deals,* N.Y. Times, May 19, 1988, at B7.

180. Affidavit of Petitioner at 9-10, New York Times Co. v. Demakos, 529 N.Y.S.2d 97 (A.D. 2d Dept. 1988).

whether of private talk or public print."[181] Open plea proceedings in *Demakos* would not have induced undue outside influence; the sixth amendment rights of the remaining defendants would not have been infringed upon because the details of the Howard Beach murders had already received extensive coverage, from the date of the incident to the date of the plea proceedings. The guilt or innocence of those defendants would be established by whatever evidence was produced at their respective trials and not by public print.

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.[182] The press should not be curtailed but should be warned of the impropriety of publishing material not introduced in the proceedings,[183] and of the danger of publishing distorted material.

The *Demakos* court's analysis of press rights presents the trend of the law today towards a conclusive presumption of openness in pre-trial, trial and plea proceedings. Although compelling circumstances can overcome the constitutional right of press and public access, the court has indicated that protective measures other than closure are sufficient to protect a defendant's sixth amendment right to an impartial trial. Despite a conclusive presumption of openness, closure orders will still be issued and defendants will attempt to establish compelling interests sufficient enough to overcome the presumption. However, it is clear that the scale has been heavily tipped in favor of the press.

*Eileen F. Tanielian**

181. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

182. *Richmond Newspapers*, 448 U.S. at 572.

183. *Sheppard*, 384 U.S. at 362.

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