

Florida State University Law Review

Volume 7 | Issue 4

Article 7

Fall 1979

Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979)

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Recommended Citation

Margot Pequignot, *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979), 7 Fla. St. U. L. Rev. 719 (1979).
<https://ir.law.fsu.edu/lr/vol7/iss4/7>

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Criminal Procedure—FAIR TRIAL—CONSTITUTION DOES NOT GRANT AN AFFIRMATIVE RIGHT OF ACCESS TO A PRETRIAL PROCEEDING WHEN ALL PARTICIPANTS AGREE IT SHOULD BE CLOSED TO PROTECT DEFENDANT'S FAIR TRIAL RIGHTS—*Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979).

The summer of 1979 saw the closing of twenty-two criminal trials in twelve states¹—an unprecedented exercise of judicial discretion. Yet those actions were arguably sanctioned by the United States Supreme Court in its July *Gannett Co. v. DePasquale* opinion.² Although Chief Justice Burger publicly has denied that the Court intended its decision to go beyond the closing of pretrial suppression hearings,³ lower courts have cited *DePasquale* as precedent for their closure rulings.

The genesis of this controversial decision was an upstate New York murder case in which the defense successfully moved to close a pretrial suppression hearing because of the “unabated buildup of adverse publicity.”⁴ Long-time Seneca County, New York, resident Wayne Clapp allegedly was shot and killed with his own gun by David Jones and Kyle Greathouse.⁵ Arrested in Michigan, the two fugitives confessed to the murder and turned over the weapon to Michigan police before being extradited to New York.⁶ Back in Seneca County, however, the defendants pleaded not guilty and requested that their prior statements, and the gun, be suppressed as evidence.⁷ The district attorney did not oppose the defense motion to close the suppression hearing to the press and public.⁸ But once the trial court granted the defense motion, *Gannett Co., Inc.*, the nation's largest newspaper chain and owner of two Rochester, New York, newspapers, moved to vacate the closure order.⁹ The trial

1. Epstein, *Closing of trials traced to Supreme Court Ruling*, Tallahassee Democrat, Aug. 19, 1979, at 8A, col. 2. In an explicit attempt to clarify *DePasquale*, the United States Supreme Court has agreed to review *Richmond Newspapers v. Virginia*, 5 MEDIA L. REP. 1545, cert. granted, No. 79-243 (Oct. 9, 1979), in which the Virginia Supreme Court upheld the right of a circuit court judge to close a criminal trial to both the press and the public.

2. 99 S. Ct. 2898 (1979).

3. TIME, Aug. 20, 1979, at 49. “Burger blamed the press for misleading lower court judges on the scope of the high court's decision.” *Id.*

4. *Gannett Co. v. DePasquale*, 372 N.E.2d 544, 546 (N.Y. 1977), *aff'd*, 99 S. Ct. 2898 (1979).

5. MacKenzie, *Closed Courtrooms?*, 65 A.B.A.J. 53 (1979). Clapp disappeared after local residents saw him in his fishing boat on Seneca Lake in the company of two young strangers. The victim's body has never been recovered. *Id.*

6. *Id.* at 54.

7. TIME, July 16, 1979, at 66.

8. 99 S. Ct. at 2903.

9. *Id.* at 2899. A reporter for the Rochester newspapers was present at the hearing but did not object to the closure order until after she had consulted with *Gannett's* counsel. Judge

court refused to grant Gannett's motion, reasoning that publicity of the pretrial suppression hearing would be prejudicial to the defendants.¹⁰

Upon a request for prohibition and mandamus, the New York Supreme Court, Appellate Division, held that Judge DePasquale's order was not supported by a sufficient showing of potential prejudice and that it thus violated petitioner's first amendment rights.¹¹ The New York Court of Appeals disagreed, however, asserting that "the Constitution should not be considered as a substitute for a sunshine law."¹²

On July 2, 1979, Justice Stewart, writing for the Court, affirmed the court of appeals' ruling.¹³ The Court held that "the constitutional guarantee of a public trial is for the benefit of the defendant" alone,¹⁴ and that the public has no "correlative right . . . to insist upon a public trial."¹⁵ Justice Stewart recognized that open proceedings were an important concept at common law, but he rejected the contention that a public right of access had been incorporated into the sixth amendment.¹⁶ While recognizing the existence of a "strong societal interest" in open criminal trials, Justice Stewart nevertheless found that the public had no "affirmative

DePasquale granted counsel's request for a hearing, even though the two-day suppression hearing had ended. *Id.*

10. *Gannett Co. v. DePasquale*, 389 N.Y.S.2d 719, 721 (N.Y. App. Div. 1976), *modified*, 372 N.E.2d 544 (N.Y. 1977), *aff'd.*, 99 S. Ct. 2898 (1979). *Contra*, Brief of the American Civil Liberties Union and the New York Civil Liberties Union as Amicus Curiae In Support of the Petition for a Writ of Certiorari at 16 (the ACLU concluded that a change of venue would have protected defendants' fair trial rights because, as far as it had been able to determine, neither Clapp's murder nor the arrest of Jones and Greathouse had been reported in the New York Times).

11. *Gannett Co. v. DePasquale*, 389 N.Y.S.2d 719, 723-24 (N.Y. App. Div. 1976), *modified*, 372 N.E.2d 544 (N.Y. 1977), *aff'd*, 99 S. Ct. 2898 (1979). The defendants' trials were pending at the time of the appellate division's ruling. 372 N.E.2d at 547.

12. 372 N.E.2d at 548. "[T]he inherent power to limit public access has become a common and integral aspect of due process in trials for *particularly sensitive crimes*. . . . Having imposed on the Trial Judge an affirmative obligation to ensure this [public access—fair trial] balance, it would be anomalous indeed to withhold the discretionary power necessary to achieve it." *Id.* (Emphasis added; citations omitted.) The New York Court of Appeals reviewed the case even though the questions presented had been rendered moot when the defendants pleaded guilty to lesser included offenses. *Id.* at 547.

13. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (U.S. 1979). Justice Stewart was joined by Chief Justice Burger and Justices Powell, Rehnquist and Stevens; Chief Justice Burger and Justices Powell and Rehnquist filed concurring opinions.

14. *Id.* at 2906. "The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused." *Id.* at 2905. Justice Stewart relied heavily on law review notes and articles to substantiate this conclusion. *Id.* at 2906 n.9. Ironically, Justice Stewart wrote in his dissent in *Estes v. Texas*, 381 U.S. 532, 614-15 (1965): "The suggestion that there are limits upon the public's right to know what goes on in courts causes me deep concern."

15. 99 S. Ct. at 2906.

16. *Id.* at 2907.

[constitutional] right of access” because “our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation.”¹⁷

The Court declined to decide whether a first amendment right of access exists.¹⁸ It pointed out that Judge DePasquale’s closure order was temporary, not absolute, and that petitioner eventually gained access to the transcript of the hearing at issue.¹⁹

Even though the Court was careful to make a distinction between pretrial proceedings and the criminal trial itself in the text of its opinion,²⁰ its actual holding reads: “[M]embers of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend *criminal trials*.”²¹

In a lengthy and well-documented dissent,²² Justice Blackmun chastised the Court for its “easy but wooden approach,”²³ and for its failure to recognize the modern-day significance of pretrial hearings.²⁴ He forcefully suggested that the Court’s failure to recognize a constitutional right of public access to criminal trials presents the possibility of summary closure of *all* judicial proceedings, so long as both judge and litigants agree.²⁵ Such a result, he asserted, would be contrary to the practices of Anglo-American common law²⁶ and

17. *Id.* at 2907-08, 2913.

18. “We need not decide in the abstract . . . whether there is any such constitutional right. For even assuming . . . that the First and Fourteenth Amendments may guarantee such access . . . this putative right was given all appropriate deference by the State *nisi prius* court in the present case.” *Id.* at 2912.

19. *Id.* The transcript was made available after the two defendants pleaded guilty to lesser offenses. *Id.* at 2904 n.4.

20. *Id.* at 2909-10.

21. *Id.* at 2911 (emphasis added).

22. 99 S. Ct. at 2919. Joined by Justices Brennan, White, and Marshall, Justice Blackmun concurred with the Court’s finding that the controversy was not moot, but dissented from the rest of the opinion. *Id.*

23. *Id.*

24. *Id.* Justice Blackmun compared criminal trials at early common law and at the time of the drafting of the Constitution with modern-day pretrial hearings by pointing out that in 1976, 100% of felony prosecutions in Seneca County, New York, terminated at the pretrial stage. *Id.* at 2934. New York City disposed of 89.7% of its 17,700 felony indictments that year at pretrial hearings. In New York State (excluding New York City and Seneca County), 93.4% of the 16,676 felonies prosecuted in 1976 were resolved before coming to full trial. Brief for Petitioner at 10 n.6 (quoting State of New York, *Twenty-Second Annual Report of the Judicial Conference* 52-55 (1977)).

Justice Stewart, on the other hand, equated present-day suppression hearings with formalized preliminary proceedings at common law, taking no note of the increased reliance on pretrial hearings for final adjudication. 99 S. Ct. at 2909 n.17. *But see id.* at 2913-14 (Burger, C.J., concurring); 2914 n.1 (Powell, J., concurring).

25. *Id.* at 2907. The Court rejected the notion that an accused can compel a private trial without the concurrence of the prosecutor and the trial court. *Id.* at n.11. *See Singer v. United States*, 380 U.S. 24, 34 (1965).

26. 99 S. Ct. at 2925-26; *see* 2 BISHOP, *NEW CRIMINAL PROCEDURE* § 957 (2d ed. 1913).

to the spirit in which the sixth amendment was drafted.²⁷ Justice Blackmun further pointed out that the Court's holding is inconsistent with the open court practices of many states.²⁸ That particular concern suggests that the *DePasquale* opinion may well endanger one of the most progressive state responses to the public's right of access—Florida's bold new "cameras in the courtroom" experiment.²⁹

The Florida Supreme Court allowed the temporary use of television cameras in the courtroom in 1975 when Post-Newsweek Stations, Florida, Inc., filed a petition to change the Florida Bar's judicial code of conduct.³⁰ The project failed initially, but on July 1, 1977, the Florida Supreme Court approved a one-year pilot program to permit electronic media coverage of court proceedings at all levels.³¹ By the end of that program, more than 2,750 judges, attorneys, jurors, witnesses, and court personnel had participated in televised proceedings.³²

Two surveys resulted from the pilot program. The first dealt with nonjudicial participants and was conducted by the Office of the State Courts Administrator (OSCA).³³ Sixty-two percent of those contacted responded to the questionnaires, and their favorable comments helped convince an already sympathetic court that the cameras had "absolutely no adverse effect upon the participants' performance or the decorum of the proceedings."³⁴

27. 99 S. Ct. at 2929-30. "The trial is always public; . . . [T]here seems to have been an undue solicitude to introduce into the constitution some of the general guards and proceedings of the common law in criminal trials . . ." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1785 (Boston 1833).

28. 99 S. Ct. at 2931 n.10.

29. See *In re Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764 (Fla. 1979). Ironically, the Florida Supreme Court determined, after several years of study, that the camera scheme was workable only if the consent of trial participants was not required. *Id.* at 766; cf. 99 S. Ct. at 2908 ("our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation").

30. FLORIDA CODE OF JUDICIAL CONDUCT, Canon 3A(7) specifically prohibited "broadcasting, televising, recording, or taking photographs" in and around courtrooms except for ceremonial, instructional and other limited purposes.

31. 370 So. 2d at 766; see petition of Post-Newsweek Stations, Fla., Inc., 347 So. 2d 402 (Fla. 1977); Whisenand, *Florida's Experience with Cameras in the Courtroom*, 64 A.B.A.J. 1860 (1978).

32. 370 So. 2d at 767.

33. *Id.* at 768.

34. *Id.* at 768-69. The percentages of each group which responded to the survey were as follows:

Witness	44%
Attorney	65%
Court Personnel	72%
Juror	65%

Id. at 768.

Survey respondents indicated that although the presence of cameras made participants slightly self-conscious and nervous, it also made them more attentive and responsible. Court personnel and attorneys surveyed felt that participating attorneys were slightly more flamboyant than usual, but that witnesses were affected "to a degree between not at all and slightly."³⁵

A second, separate study, conducted by the Conference of Circuit Judges, elicited a somewhat smaller response than did the OSCA poll.³⁶ However, ninety to ninety-five percent of the circuit judges who commented felt that trial participants "were not affected in the performance of their sworn duty by the presence of electronic media."³⁷

In finally acceding to petitioner's request to amend Canon 3A(7) of the Florida Code of Judicial Conduct, the court made it clear that it was doing so on the basis of its supervisory authority, "not upon any constitutional imperative."³⁸ Nevertheless, the opinion quite clearly recognized Florida's "commitment to open government" as a compelling impetus to opening the state's courtroom doors to the camera.³⁹ The court quoted *Nixon v. Warner Communications*⁴⁰ to reject the notion that the first and sixth amendments mandate electronic media access to judicial proceedings; yet, in the same decision the court saw a recognition by the United States Supreme Court that the public has a right to attend trials.⁴¹ The court further observed that: "It is essential that the populace have confidence in the [judicial] process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance."⁴²

Despite the Florida court's outward disavowal of predicating its decision "[on] any constitutional imperative,"⁴³ its *Post-Newsweek*

35. *Id.* at 769.

36. *Id.*

37. *Id.* at 770.

38. *Id.* at 774. Canon 3A(7) of the Florida Code of Judicial Conduct now reads:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

39. *Id.* at 780. The Florida Legislature opened its chambers to gavel-to-gavel television coverage in 1973, becoming the first legislative body in the country to take its full deliberations into constituents' homes. See also FLA. CONST. art. II, § 8(a), (b) (requiring full and public financial disclosure by public officials and candidates); FLA. STAT. ch. 119 (1977) (public records law); FLA. STAT. § 286.011 (1977) (open meetings law).

40. 435 U.S. 589 (1978).

41. 370 So. 2d at 774.

42. *Id.* at 780 (citation omitted).

43. *Id.* at 774.

opinion is anchored firmly in state judicial precedents which speak openly of safeguarding first and sixth amendment access rights.⁴⁴ Other states⁴⁵ and lower federal courts⁴⁶ appear to share Florida's concern for encouraging public awareness and observation of their respective judicial systems. The decisions which demonstrate that concern invariably refer to the roots of open judicial proceedings as imbedded deep in Anglo-Saxon common law.⁴⁷

The tradition of public participation unquestionably predates the formulation of fundamental rights for the accused as now embodied in the sixth amendment.⁴⁸ The writings of sixteenth and seventeenth century commentators suggest that England's courts were opened as a direct reaction to and distrust of the secret proceedings held on the Continent and by English ecclesiastical courts.⁴⁹

Early American colonists incorporated the tradition of public attendance at both civil and criminal trials into their charters and constitutions.⁵⁰ A strong desire to ensure and perpetuate public participation in judicial proceedings, even to the exclusion of a professional legal structure, manifested itself in forceful declarations.⁵¹

44. See *Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904 (Fla. 1977); *News-Press Publishing Co. v. State*, 345 So. 2d 865 (Fla. 2d Dist. Ct. App. 1977); *Miami Herald Publishing Co. v. Collazo*, 329 So. 2d 333 (Fla. 3rd Dist. Ct. App. 1976), *cert. denied*, 342 So. 2d 1100; *State ex rel Gore Newspapers Co. v. Tyson*, 313 So. 2d 777 (Fla. 4th Dist. Ct. App. 1975), *overruled on other grounds sub nom. English v. McCrary*, 348 So. 2d 293 (Fla. 1977).

45. *E.g.*, *Gannett Pacific Corp. v. Richardson*, 580 P.2d 49 (Hawaii 1978) (sufficient basis required for closure of pretrial hearing); *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn. 1977) (clear and substantial showing of prejudice required); *Keene Publishing Corp. v. Keene Dist. Court*, 380 A.2d 261 (N.H. 1977) (pretrial closure not justifiable on basis of protecting accused's rights); *State v. Allen*, 373 A.2d 377 (N.J. 1977) (public has right to expect public trials); *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d 425 (Pa. 1978) (public access should be limited only when compelling state obligation exists to protect accused's right to fair trial); *Williams v. Stafford*, 589 P.2d 322 (Wyo. 1979) (presumption of open proceedings absent exceptional circumstances); see 99 S. Ct. at 2931 n.10.

46. *E.g.*, *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978) (public has common law right to open proceedings); *Stamcarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974) (only limited portions of a trial may be closed, and then only under exceptional circumstances); *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973) (right to public access attaches at pretrial stage); *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965) (sixth amendment public trial guarantee protects the public's right to know as much as the accused's right to fair trial).

47. 99 S. Ct. at 2925-27 (Blackmun, J., dissenting).

48. *Id.* at 2927.

49. See 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 594-95, 603 (London 1827). See also, *In re Oliver*, 333 U.S. 257, 268 n.21 (1948).

50. See F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 18, 22 (1969); 1 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 49-53 (1909).

51. East Jersey and the Carolinas actually prohibited the payment of money for legal representation. F. HELLER, *supra* note 50, at 17-19.

[W]hen the continental Congress declared "that the respective colonies are enti-

In 1787 a debate arose among the framers of the Constitution over the necessity of enumerating fundamental rights to be retained by the people.⁵² The fierce exchanges and speeches, which led to the adoption of the Bill of Rights, clearly demonstrate the concern the founders of the new republic had that the people retain traditional common law rights.⁵³ That concern was manifested further by the inclusion of the ninth amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁵⁴

Prior to *DePasquale*, the United States Supreme Court cited this Anglo-American and colonial history in dictum to support Justice Blackmun's current dissenting conclusion: that the sixth and fourteenth amendments prohibit "the States from excluding the public from a proceeding . . . without affording full and fair consideration to the public's interests in maintaining an open proceeding."⁵⁵ In *In re Oliver* the Court denounced as unconstitutional the Michigan practice of allowing a judge to act as a one-person grand jury.⁵⁶ In so holding, the Court recognized that the purpose of public criminal trials is to act as a "restraint on possible abuse of judicial power."⁵⁷ The Supreme Court frequently has reiterated the concept of utilizing public awareness as a safeguard against unchecked judicial autonomy.⁵⁸

tled to the common law, . . . "the common law so appealed to must be understood to include not only trial by a jury . . . but also publicity of the proceedings. . . . The denial of these rights was among the grievances complained of in the Declaration of Independence.

Id. at 21 (quoting *Declaration of Rights of the Continental Congress* art. 5 (1774), reprinted in H.R. Doc. No. 398, 69th Cong. 1st Sess. 3 (C. Tansill ed. 1927)).

52. James Wilson expressed grave doubts about the necessity for enacting a Bill of Rights at the Pennsylvania Convention on Nov. 28, 1787:

[A] bill of rights is neither an essential nor a necessary instrument . . . for who will be bold enough to undertake to enumerate all the rights of the people? . . . [I]f the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted.

3 RECORDS OF FEDERAL CONVENTION OF 1787, at 143-44 (M. Farrand ed. 1966). See also 3 J. STORY, *supra* note 27, at § 1776.

53. See 2 RECORDS OF FEDERAL CONVENTION OF 1787, at 637 (M. Farrand ed. 1966).

54. U.S. CONST. amend. IX. See 3 J. STORY, *supra* note 27, at §§ 1898-1901.

55. 99 S. Ct. at 2932-33 (Blackmun, J., dissenting).

56. 333 U.S. 257 (1948).

57. *Id.* at 270. The Court also interpreted *Gaines v. Washington*, 277 U.S. 81 (1928) as standing for the proposition that a criminal trial conducted in secret is a violation of due process. *Id.* at 272.

58. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (prior restraint order unconstitutional when other alternatives available to trial court). "[D]iscussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors." *Id.* at 573 (Brennan, J., concurring).

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (publication of information regarding confidential commission investigating judge cannot be criminally punish-

The Court now appears to be reversing its prior, suggested position on the access question.⁵⁹ As the Florida Supreme Court suggested in *Post-Newsweek* the public access issue has no clearly defined constitutional basis; it, in effect, straddles the first and sixth amendments.⁶⁰ In his concurring opinion in *DePasquale*, Justice Powell apparently recognized this dual constitutional nature of the public's right to courtroom access.⁶¹ He pointedly rejected Justice Rehnquist's conclusion that the Court's opinion leaves trial courts "free to determine for themselves the question whether to open or close the proceeding."⁶² Yet Justice Powell turned away from the sixth amendment basis advocated by the dissent and predicated his defense of open proceedings on the first and fourteenth amendments.⁶³ He thereby reserved to himself the burden of being the probable decisive vote in the next public access case the Court decides to review—a role Justice Rehnquist viewed with some disdain.⁶⁴

Because Justice Powell chose a different constitutional basis for his defense of open courtrooms, Florida's "cameras in the courtroom" experiment arguably lacks the blessing of the country's highest court. Had its 5-4 vote followed Justice Blackmun's reasoning, *DePasquale* would be a clear affirmation of the Florida court's sentiment: "We have no need to hide our bench and bar under a bushel."⁶⁵

Although Justice Powell based his support of open trials on the first amendment, he failed to discuss the fact that the media's first amendment right of access has been tied increasingly to that of the public.⁶⁶ Justice Powell addressed the delicate press and public ac-

ble under first amendment), Chief Justice Burger wrote: "The operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Id.* at 839.

59. 99 S. Ct. at 2911.

60. Compare 99 S. Ct. at 2915-16 (Powell, J., concurring) with *id.* at 2932-33 (Blackmun, J., concurring). See also *Opinion & Comment*, 65 A.B.A.J. 1264 (1979).

61. 99 S. Ct. at 2918-19.

62. *Id.* at 2919 n.2. Justice Powell challenged that conclusion. *Id.* at 2915 n.2.

63. "I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing." *Id.* at 2914.

64. "I do not so lightly as my Brother Powell impute to the four dissenters in this case a willingness to ignore the doctrine of *stare decisis* and to join with him in some later decision to form what might fairly be called an 'odd quintuplet'. . . ." *Id.* at 2919 n.2 (Rehnquist, J., concurring).

65. 370 So. 2d at 781.

66. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568 (once a public hearing is held, nothing can keep the press from reporting what occurs there); *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) ("Newsmen have no constitutional right of access . . . when the general public is excluded."); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) ("there is nothing that proscribes the press from reporting events that transpire in the courtroom"); *Estes v.*

cess/fair trial balance required by past United States Supreme Court decisions by suggesting that the press and public have the burden of "showing to the [trial] court's satisfaction that alternative procedures [to closure] are available" ⁶⁷ In the past, that burden has lain with the parties and the court. Thus, even Justice Powell's maverick first amendment stance appears to meet only halfway the stringent standards imposed in the past ⁶⁸ to ensure the delicate press and public access/fair trial balance which has evolved through years of Supreme Court decisions. That very concept of carefully weighing constitutional rights may be hopelessly obsolete in the light of *DePasquale*: "[A] trial judge may surely take protective measures even when they are not strictly and inescapably necessary." ⁶⁹

DePasquale already has begun to impact heavily on the public and the press. At least some trial courts have interpreted it to allow the closure of trials to exclude everyone from the courtroom except trial participants. ⁷⁰ Thus, not only the public, but the press—and Florida's cameras—can be banned. It is sadly ironic, in this era of legislative sunshine laws and administrative hearing acts, that the nation's highest court has relegated a time-honored and cherished right of the people to the status of merely "a strong societal interest." ⁷¹

The *DePasquale* plurality overlooked the significant question of whether the accused's guarantee of a "public trial" can be meaningful without the "public." The promise of increased courtroom access, held out to the citizens of Florida by the state's highest court, rings hollow in the wake of *DePasquale*. ⁷²

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Texas, 381 U.S. 532, 540 (1965) (reporters entitled to same courtroom access rights as general public).

67. 99 S. Ct. at 2916. "The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights . . ." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976); see *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965).

68. See generally *Craig v. Harney*, 331 U.S. 367, 376 (1947) ("imminent, not merely a likely, threat to the administration of justice"); *United States v. CBS, Inc.*, 497 F.2d 102, 106 (5th Cir. 1974) ("limitation can be no broader than necessary to accomplish the desired goal"); *Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904, 908 (Fla. 1977) ("danger . . . must immediately imperil").

69. 99 S. Ct. at 2904.

70. See *TIME*, Aug. 20, 1979, at 49; Epstein, *Closing of trials traced to Supreme Court Ruling*, *Tallahassee Democrat*, Aug. 19, 1979, at 8A, col. 2. See also Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation?* 65 A.B.A.J. at 1179 (1979).

71. 99 S. Ct. at 2907.

72. "[T]his Court emphatically has rejected the proposition . . . that the First Amendment is some sort of Constitutional 'sunshine law' . . ." 99 S. Ct. at 2918 (Rehnquist, J., concurring). See *Opinion & Comment*, 65 A.B.A.J. 1264 (1979).

