SOME THOUGHTS ABOUT A GENERAL RULE*

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Ever since I started practicing law in the 1940's—indeed, ever since I became a Perry Mason fan in the 1930's—I have noted that from time to time trial judges ask lawyers to step up to the bench—or perhaps into chambers—to discuss privately something that is about to happen in a trial. As a participant in some of those conferences, I never questioned the legitimacy of the judge's interest in preventing inadmissible matter from coming to the attention of the jury. As a mere bystander who witnessed other such conferences, I was often curious about what was happening, but it never occurred to me that I might have a constitutional right of access to those secret proceedings. For just as the ordinary citizen is presumed to be innocent of any wrongdoing as he goes about his daily business, I blithely assumed that if the trial judge, the prosecutor, and the defendant's lawyer all thought it appropriate to conduct a part of the trial privately, they were doing nothing wrong.

That assumption has been vigorously questioned in the debate that preceded and followed the Court's decision in *Gannett Co. v. DePasquale*.[1] As you will recall, that case involved a trial judge's decision to grant the request by defense counsel, which the prosecutor did not oppose, that the hearing to determine the voluntariness of a confession be conducted in camera in order to avoid the risk that publicity about the confession might prejudice potential jurors against the defendant and thereby compromise his right to a fair trial.[2] The trial judge assumed that the public generally has a right of access to suppression hearings, but concluded that in this case, in order to protect the rights of the

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1. 99 S. Ct. 2898 (1979).

2. *Id.* at 2903.

accused, the public interest could be adequately vindicated by access to the written transcript at some time after the hearing was over.[3]

New York's intermediate appellate court disagreed with this assessment and held that the suppression hearing should have been open to the public.[4] The New York Court of Appeals, however, agreed with the trial judge.[5] That court held, as a matter of state law, that criminal trials are presumptively open to the public, including the press, but that the presumption was overcome in this case because of the danger posed to the defendant's right to a fair trial.[6]

In a sense, therefore, the highest court of the state concluded that the trial judge—the man on the scene—was in a better position to evaluate the risks of prejudice than appellate judges who must act on the basis of a cold written record. Even though elected trial judges, like other human beings, may have an interest in enlarging the news coverage of events in which they participate, they are surely conscious of their duty to make a disinterested assessment of the potential impact on local juries of local news stories. Notwithstanding the widespread cynicism engendered by Watergate, I believe it is still appropriate to presume that normally they will discharge this responsibility faithfully.

The United States Supreme Court affirmed the judgment of the New York Court of Appeals.[7] Both Mr. Justice Stewart's opinion for the Court and Mr. Justice Blackmun's opinion for the four dissenting Justices recognize that the claimed constitutional right of access was arguably bottomed on either the Sixth or the First Amendment to the United States Constitution.

With respect to the former, the majority held, in essence, that the Sixth Amendment means just what it says.[8] It provides that in all criminal prosecutions, the accused shall enjoy certain basic rights—the right to a speedy and public trial, the right to an impartial jury, the right to be confronted with the witnesses against him, to have compulsory process, and to have the assistance of counsel. The Court held that this language in the Constitution described rights that the accused could assert.[9] Without questioning the strong societal interest in public trials

3. *Id.*
4. *Id.* at 2904.
5. *Id.*
6. *Id.*
7. *Id.* at 2913.
8. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

9. 99 S. Ct. at 2905-06.

and without denying that other legal rules apart from the Constitution might require that proceedings be conducted publicly, the Court held that members of the general public, including the press, could not assert the rights guaranteed to the accused by the Sixth Amendment.[10] The Court did not hold that the Sixth Amendment gave the accused any right to a secret trial. And most assuredly the Court did not invite the States to revive the Star Chamber—a form of proceeding that denied the accused the rights expressly guaranteed by the language of the Sixth Amendment.

The dissenters, without suggesting that any other rights protected by the Sixth Amendment could be asserted by anyone except the accused, adopted the novel position that any spectator who happened to be in the courtroom could enforce the defendant's Sixth Amendment right to a public trial notwithstanding the defendant's objection.[11] They did not question the proposition that the risk of prejudice could justify a closure order in some cases, but concluded that this was not such a case.[12]

The position of the dissenters has been widely acclaimed by representatives of the news media who seem to fear that the majority's decision has removed the cornerstone of our constitutional edifice. It is remarkable, however, how little attention has been devoted to the treatment of the First Amendment in the two principal opinions. It is that Amendment on which lawyers for the press have primarily relied in their several unsuccessful attempts to persuade the Court to recognize a constitutional right of access to information the press would like to publish.[13] Those are the cases in which reporters have argued either that future access to confidential information would be impaired if they were compelled to identify their anonymous sources or that their immediate access to certain information, such as conditions within a prison, is guaranteed by the First Amendment. The comments in the *Gannett* opinions concerning the First Amendment claim are therefore worthy of note.

Mr. Justice Stewart, speaking for the Court, noted that some of his colleagues had expressed the opinion that the First Amendment does provide some protection for a right of access for the public in general, or the press in particular.[14] After assuming *arguendo* that such a con-

10. *Id.*
11. *Id.* at 2939 (Blackmun, J., dissenting).
12. *Id.* at 2919-21 (Blackmun, J., dissenting).
13. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 7-8 (1978); Saxbe v. Washington Post Co., 417 U.S. 843, 844-45 (1974); Pell v. Procunier, 417 U.S. 817, 821 (1974); Branzburg v. Hayes, 408 U.S. 665, 679-81 (1972).
14. 99 S. Ct. at 2911. *See* Houchins v. KQED, Inc., 438 U.S. 1, 19 (1978) (Stevens, J., dissent-

stitutional right of access exists,[15] he explained why that assumed right had not been impaired by the trial judge. Public access was not totally denied because a written transcript would be available after the hearing was over;[16] the delay in obtaining such access was justified by the public interest in avoiding an unfair trial and minimizing the risk of a reversal and a second trial if the defendant should be convicted.[17] Whether one agrees or disagrees with the trial judge's appraisal of the risk of prejudice in this particular case, no one could seriously argue that the right to gather news should be given absolute priority over the defendant's interest in a fair trial in *every* case.

Because the dissenters relied entirely on their novel reading of the Sixth Amendment as conferring rights on members of the general public, they did not address the question whether the First Amendment protects any right of access. The dissenters simply noted—quite accurately—that "this Court heretofore has not found and does not today find, any First Amendment right of access to judicial or other governmental proceedings."[18]

That statement fairly identifies what one might characterize as a "general rule" that is now on the firing line. The rule draws a sharp distinction between the dissemination of information or ideas, on the one hand, and the acquisition of newsworthy matter on the other. Whereas the Court has accorded virtually absolute protection to the former, it has never squarely held that the latter is entitled to any constitutional protection whatsoever. There are at least three reasons why thinking Americans should remember this rather obvious distinction.

First, as a learned spokesman for the press noted at a session of the American Bar Association in Dallas a few weeks ago,[19] our courts have unequivocally and continuously vindicated the core principle of First Amendment press law. The consistent results in cases involving the right of the press to publish,[20] or to decide what not to publish,[21] are significant because they most distinguish America from other nations around the world—not only from countries like the Soviet Union and Iran as presently governed, but also from more friendly nations like England—that impose significant restraints upon what the news media

ing); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, J., dissenting). *See also* Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (Stewart, J., concurring).

15. 99 S. Ct. at 2912.

16. *Id.*

17. *Id.*

18. *Id.* at 2922 (Blackmun, J., dissenting).

19. See Remarks of Floyd Abrams, "The Citizens and the Courts," American Bar Association's Annual Meeting at Dallas, Texas, August 13, 1979.

20. *See, e.g.*, Smith v. Daily Mail Publishing Co., 99 S. Ct. 2667 (1979); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

21. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

may publish. There is no valid basis for questioning the present Supreme Court's faithful adherence to recognized First Amendment doctrine in the area in which its protection is of the greatest importance.

Second, the Court's repeated refusals to extend First Amendment protection to a right of access to newsworthy matter—whether directly as in the prison cases[22]—or indirectly by creating a constitutional privilege to refuse to disclose anonymous sources[23]—cannot fairly be described as a withdrawal of protections previously available to the press. Quite the contrary, they are more fairly characterized as a refusal to develop or to recognize new rules of law. I have heard the prophets of doom argue that the Watergate scandal would never have been exposed if *Gannett* and other cases had been decided a few years ago. That argument has no merit. The rules concerning access to judicial proceedings, as well as the rules concerning the reporter's duty to answer relevant questions during grand jury or pretrial discovery proceedings, are exactly the same today as they were in 1973 and 1974. There is no reason to believe that any trial judge or any prosecutor would have acted any differently had he foreseen *Gannett* or any of the other opinions that have been so severely criticized in the recent past. Reporters may say that they would have been more cautious if they had had a better understanding of the risks associated with investigative news reporting, but their's is a profession that has always been characterized by courage and independence. If the risks of gun play had no serious chilling effect on Arizona's early press,[24] it seems unlikely that the risk of litigation will actually intimidate very many conscientious reporters or editors.

Third, the debate about the general rule that I have described is healthy. In a way it is what the First Amendment is all about. Some of the criticism of the Court's work has the flavor that is often found in petitions for rehearing—the traditional outlet for the emotions of the disappointed litigant. Much of the debate seems unrelated to what actually happens in the thousands of criminal proceedings that are constantly being processed throughout the country. It has been suggested, for example, that occasional nonpublic suppression hearings may foster corrupt bargains among prosecutors, judges, and defendants. But short of an absolute ban on private proceedings—which no one has yet advocated—no procedure can entirely foreclose that possibility. For in

22. *See* cases cited at note 13 *supra*.

23. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

24. Arizona, in the nineteenth century, was a place where a newspaper "editor had to be as handy with the gun as with his pen, for he was as likely to be called upon to shoot it out with those who did not agree with his editorial views." I WORLD BOOK ENCYCLOPEDIA 407 (1959 ed.).

those relatively few cases that are covered by the press—and certainly in those involving prominent public figures—it would be no more difficult to contrive a false justification for a closure order than a false justification for a suppression order. More fundamentally, this sort of suggestion calls into question the integrity of the entire plea bargaining process—if not the entire judicial process—which seldom, if ever, is conducted entirely in public. Rules of procedure governing countless routine trials should not be distorted because they leave room for mistakes by an incompetent or unfaithful judge. These rules can limit the judge's options, but their workability depends on the assumption that competent honest persons will occupy judicial office.

The fear that trial judges will now routinely conduct entire trials in secret has also been expressed. But the usual reason for an in camera proceeding is to prevent the jury from having access to inadmissible matter; that reason could not possibly motivate an order excluding the public from the proceedings that take place in the presence of the jury. It is possible, of course, that some judges may occasionally enter maverick orders. That possibility may justify the adoption of new court rules, or even new legislation, but occasional aberrations are not normally regarded as an acceptable reason for rewriting the Constitution of the United States.

Although much of the debate is unpersuasive, it is all constructive. It highlights the importance of our great tradition of public trials; it minimizes the risk that trial judges will unnecessarily exclude the public from judicial proceedings; and it maximizes the likelihood that legislators and other lawmakers will make constructive changes in the rules relating to access to governmental proceedings. Moreover, the discussion can only generate interest and thought about the status and future of what I have described as the general rule.

Is there indeed an unequivocal general rule that will require rejection of every attempt to find constitutional protection for a right of access to information? Or is this the kind of general rule that, as Dean Green[25] might have suggested, may not mean exactly what it seems to imply in every conceivable situation? Are there situations in which a

25. In the address from which these paragraphs are excerpted, I spoke at some length about Leon Green, a great law teacher who had special influence on my understanding of the law. Leon Green was the Dean of Northwestern School of Law for some 18 years in a teaching career that began in 1915 and continued through 1978. Literally thousands of former law students know that Leon Green was a kind, gentle, and unselfish man. In class, he was at once a ruthless and an inspiring teacher.

Dean Green rejected the dichotomy implied by the statement that ours is a government of laws, not of men. That rejection did not reflect any disrespect for the function of general rules as placing firm limits on the choices men and women may make—either as citizens or as judges—but rather expressed his belief that any workable system of law depends as heavily on the quality of the persons who administer it as on the form that particular rules may take.

rule denying access to information about how the Government is serving its master is so plainly unsupported by any legitimate interests that it may be fairly characterized as an abridgment of free speech?[26] Even if there is no constitutional protection for access to news, are there arguments of policy that should motivate legislative protection, or the adoption of new rules of state law? After all, the fact that the framers of the United States Constitution did not foresee the need for a particular rule—or the fact that the Supreme Court of the United States may have failed to discern the framers' actual intent—does not foreclose action by other lawmaking institutions.

26. *See* Houchins v. KQED, Inc., 438 U.S. 1, 19 (1978) (Stevens, J., dissenting).