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THE PUBLIC'S RIGHT TO ATTEND CRIMINAL PROCEEDINGS IN NORTH CAROLINA

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The recent United States Supreme Court decision of Gannett v. DePasquale[1] concerning the public's right to attend criminal proceedings has been controversial--largely because of the numerous closings of court that occurred after the decision and uncertainty about its meaning. Because the Gannett decision questioned whether there was a federal constitutional basis for a public right of access, discussion has now focused on whether state constitutional, statutory, or common law provisions provide such a right.

This memorandum will discuss the Gannett case and North Carolina constitutional, statutory, and common law provisions that may provide a public right of access. Unless the discussion indicates otherwise, the right of the "public" includes the news media.

I. THE UNITED STATES CONSTITUTION: *Gannett v. DePasquale*

The ruling. In Gannett, the United States Supreme Court ruled that the public has no constitutional right under the Sixth Amendment (". . . the accused shall enjoy the right to a speedy and public trial. . .") to attend a pretrial suppression hearing in a criminal case. The Court did not decide whether there was a First Amendment right ("Congress shall make no law. . . abridging the freedom of speech or of

1. 99 S. Ct. 2898 (July 2, 1979).

the press. . .") to attend the hearing, but it ruled that even if such a right exists, the trial judge had appropriately considered it before he decided to exclude the public from the hearing.

Background. Two youths were accused of murdering a man in upstate New York. The newspaper coverage of the murder and the arrests was factual and unsensational. Those reports extended from July 20, 1976, to August 6, 1976; there were no newspaper stories from August 6 to November 4, 1976, the day a pretrial hearing was held on the defendant's motion to suppress confessions that they made to the police. The defense lawyers requested that the suppression hearing be closed to the public, asserting that adverse publicity had jeopardized the defendants' right to a fair trial. Neither the prosecutor nor the newspaper reporter nor anyone else who was present in the courtroom objected to the request. The judge granted the motion and the closed hearing was held.

The reporter's newspaper soon challenged the order closing the hearing. The judge ruled, however, that an open suppression hearing would have posed a "reasonable possibility of prejudice" to the defendants and that their right to a fair trial outweighed the public interest in an open hearing. An intermediate New York appellate court[2] reversed the trial judge's ruling, but New York's highest court[3] and the U.S. Supreme Court affirmed it.

The precise meaning of the Supreme Court's ruling is unclear because there are ambiguities[4] in the majority opinion and because three of the five justices who formed the majority wrote separate concurring opinions that disagree on the meaning of the majority opinion. In addition, at least five justices[5] have spoken publicly about the case since it was decided, each giving a somewhat different interpretation of it.

The Court has tentatively decided to hear a Virginia case[6] that may decide the constitutionality of closing an entire trial to the public. Thus by summer 1980 we may have some clarification (or more confusion) about the meaning of Gannett.

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2. 55 A.D. 107, 389 N.Y.S. 2d 719 (1976) (Sup. Ct. App. Div., Fourth Dept. 1976).

3. 43 N.Y.2d 370, 372 N.E.2d 544 (Ct. App. 1977).

4. For an effective criticism of the case, see Schmidt, "The Gannett Decision: A Contradiction Wrapped in an Obfuscation Inside an Enigma," 18 The Judge's Journal 12 (Fall 1979).

5. Burger, Powell, Blackmun, Stevens, and Brennan. See "Justices Speak out on Press," 3 The News Media and the Law 5 (November-December, 1979).

6. Richmond Newspapers v. Virginia (No. 79-243). The Supreme Court could possibly dismiss the case for lack of jurisdiction without deciding the merits of the case.

The Gannett opinions. Since there was no clear majority position on all the issues in the case, for a better understanding of Gannett we must discuss the various opinions.

Justice Stewart wrote the majority opinion, joined by Justices Burger, Powell, Rehnquist, and Stevens. He pointed out that (a) a judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity, and (b) a confession that may be ruled inadmissible as trial evidence may prejudice a defendant's constitutional right to a fair trial in many ways, particularly in jury selection. Stewart then reviewed the history of the Sixth Amendment, concluding that the right to a public trial belonged solely to the defendant and not also to the public. His conclusion appeared to apply to both pretrial hearings and trials, even though his opinion did not consistently say so.

Stewart avoided deciding whether the public and/or the news media have a First Amendment right to attend pretrial hearings but found that even if such a right exists, the trial judge in Gannett had adequately considered it before he closed the hearing. Stewart outlined the factors that supported the judge's ruling:

1. The newspaper was given a hearing later to argue that the hearing should have been open. Stewart's opinion hints at what Powell's concurring opinion[7] makes clear: A judge need not give the news media or the general public a hearing unless an objection is made when a motion to close is made. Although doing so may be awkward, a member of the news media or the general public must get the judge's attention at that time and object if he wants to preserve his right to be heard. A judge should therefore make an effort to see whether anyone in the courtroom wants to object.

2. The judge balanced the defendant's right to a fair trial and the public's interest in an open hearing and found that an open proceeding would pose a "reasonable possibility of prejudice" to the defendants.

3. Denial of access to the hearing was temporary because a transcript was provided after the danger of prejudice to the defendants had dissipated--in this case, when the defendants pled guilty.

Burger's concurring opinion emphasized that this case concerned only the closing of a pretrial hearing, implying that he might react differently to the closing of a trial.

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7. Even Blackmun's dissenting opinion indicates that there must be a contemporaneous objection in order for the public or news media to have a right to a hearing. See 99 S. Ct. at 2939.

Rehnquist's concurring opinion stated that neither the Sixth nor the First Amendment guarantees the public a right of access to a trial or pretrial hearing, and a trial judge need give no reason why he closed a hearing or trial if the litigants agreed to the closing. It is doubtful that any other justice agrees with this extreme position.

Powell's concurring opinion decided the First Amendment issue left open by the majority and outlined the procedures that a trial judge should follow. Since his fifth vote was essential to the majority decision, his opinion is especially important. Powell stated that the newspaper reporter[8] had a First Amendment interest in attending the suppression hearing. He would allow the news media and the general public an opportunity to be heard if the defendant moved to close a hearing, but only if they were present and objected at the time. The defendant would have to make "some showing"[9] that the fairness of his trial likely would be prejudiced by the presence of the public. The prosecutor would be given an opportunity to be heard. The news media and the general public would have to show to the court's satisfaction that alternatives to closing the hearing were available that would "eliminate"[10] the dangers shown by the defendant and/or prosecutor. Although Powell did not specify the alternatives, they probably include: changing the site of the trial, continuing the trial, bringing the jury pool from another area, or delaying the suppression hearing until the jury has been chosen and sequestered.[11] After considering all the evidence, the judge must decide whether the defendant's right to a fair trial would likely be jeopardized by news reports concerning inadmissible evidence.

Powell concluded that the judge in Gannett had complied with his criteria. Although the judge had not considered alternatives to closing the hearing, the newspaper's lawyer had failed to bring this issue adequately to his attention.

Blackmun--joined by Brennan, White, and Marshall--wrote a dissenting opinion that found that the public had a Sixth

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8. Although Powell referred to the newspaper reporter's First Amendment interest, presumably he would also allow members of the general public to object.

9. It is unclear whether "some showing" refers to a burden of production or a burden of proof as well.

10. Powell's use of the word "eliminate" places a heavy burden of proof on proponents of open hearings.

11. See generally, Commentary to Standard 8-8.3, ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press (Approved Draft, 1978). A North Carolina trial judge has no statutory authority to increase the number of peremptory jury challenges set by G.S. 15A-1217 [State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979)]; such an increase is an alternative mentioned in the ABA standards. However, he does have the inherent power to move a trial anywhere in the state despite the restrictions of G.S. 15A-957; State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979). Delaying the suppression hearing until trial eliminates the prosecutor's right to appeal an adverse ruling under G.S. 15A-979.

Amendment right to attend pretrial and trial proceedings. He outlined the criteria[12] that must be met to "demonstrate a strict and inescapable necessity for closure." He concluded that the defense lawyers had not met that burden in this case, and therefore the order closing the hearing was unconstitutional.

A trial judge's duty under Gannett. Until the Supreme Court clarifies the Gannett decision, trial judges should at least follow the procedures set out in Powell's concurring opinion, discussed above, since his fifth vote was essential to the majority decision. This course of action is particularly appropriate because Powell indicated[13] that he might join the four dissenting justices in a future case to strike down a closure order, even though his reasoning may differ from theirs.

Considering the fragile nature of the majority and particularly Burger's concurring opinion, a trial judge should not close an entire trial on the basis of the Gannett decision. Whether an entire trial may be closed must await a future decision--perhaps the pending Virginia case.

II. NORTH CAROLINA LAW

Even if the United States Constitution does not give the public a right to attend criminal proceedings, individual states may provide such a right if it does not interfere with the defendant's constitutional right to a fair trial. Therefore, North Carolina law must be examined to determine whether it guarantees the public a right to attend criminal proceedings.

A. The North Carolina Constitution: "Open Courts" Provision[14]

Recent attention has focused on Article I, Section 18, of the North Carolina Constitution:

> Sec. 18. Courts shall be open. All courts shall be open; every person for an injury done him in his lands,

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12. The criteria include: (1) a substantial probability that an open hearing will irreparably damage the defendant's right to a fair trial; (2) a substantial probability that alternatives to closure will not adequately protect his right to a fair trial; (3) a substantial probability that closure will effectively protect against the perceived harm.

13. See n. 2 of Powell's opinion, 99 S. Ct. at 2915.

14. Unlike most states, North Carolina has no explicit constitutional provision guaranteeing a public trial to a defendant. Article I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . ."), merely requires that a jury verdict be received in open court. Davis v. State, 273 N.C. 533, 160 S.E.2d 697 (1968).

> goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

This provision, in substantially identical form,[15] was added to the North Carolina Constitution when it was rewritten in 1868. The records of the convention that drafted the 1868 Constitution reveal nothing about this provision's origin or meaning.[16] However, it was probably borrowed from either the Ohio or the Pennsylvania constitution, since many provisions of the 1868 Constitution came from them[17] and this identical provision was contained in both.[18]

The "open courts" provision is found today in substantially identical form in twenty-nine other state constitutions.[19] Cases[20] in other states that have interpreted this provision trace its origin to Chapter 40 of the Magna Carta:[21]

> *Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam.* To no one will we sell, to none will we deny or delay, right or justice.

In the early thirteenth century, it was common to sell judicial writs, which varied in price. Plaintiffs paid to

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15. Article I, § 35, of the 1868 Constitution provided: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." The changes made to this provision by the Constitution of 1971 were stylistic and were not intended to be substantive. Conversation with John L. Sanders, Director of the Institute of Government, The University of North Carolina at Chapel Hill, who served on the staff of the North Carolina State Constitution Study Commission. Cf. Report of the North Carolina State Constitution Study Commission 30 (Raleigh, 1968).

16. See Ferrell, "Debates of the North Carolina Constitutional Convention of 1868" (unpublished manuscript in the possession of J. S. Ferrell at the Institute of Government, The University of North Carolina at Chapel Hill).

17. See Lefler & Newsome, The History of a Southern State: North Carolina 490 (3d ed. 1973).

18. Penn. Const. of 1838, Art. 9, § 11; Ohio Const. of 1851, Art. I, § 16.

19. Alabama: Art. I, § 13; Colorado: Art. II, § 6; Connecticut: Art. First, § 10; Delaware: Art. I, § 9; Florida: Art. I, § 21; Idaho: Art. I, § 18; Indiana: Art. I, § 12; Kansas: Bill of Rights, § 18; Kentucky: Art. I, § 14; Louisiana: Art. I, § 22; Maine: Art. I, § 19; Mississippi: Art. 3, § 24; Missouri: Art. 1, § 14; Montana: Art. II, § 16; Nebraska: Art. 1, § 13; New Hampshire: Part First, Art. 14th; North Dakota: Art. I, § 22; Ohio: Art. I, § 16; Oklahoma: Art. II, § 6; Oregon: Art. I, § 10; Pennsylvania: Art. I, § 11; Rhode Island: Art. I, § 5; South Dakota: Art. VI, § 20; Tennessee: Art. I, § 17; Texas: Art. I, § 13; Utah: Art. I, § 11; Vermont: Ch. II, § 28; West Virginia, Art. 3, § 17, Wyoming: Art. 1, § 8. The provisions in the Arizona (Art. 2, § 11), South Carolina (Art. V, § 9), and Washington (Art. I, § 10) constitutions are not included because they differ substantially in wording.

20. Townsend v. Townsend et al., Peck 1 (Tenn. 1821); Harrison, Pepper, & Co. v. Willis, 7 Heisk. 35 (Tenn. 1871); Perce v. Hallett, 13 R.I. 363 (1883); Swann v. Kidd, 79 Ala. 431 (1885); C. v. C., 320 A.2d 717 (Del. 1974); Malin v. La Moure County, 27 N.D. 140, 145 N.W. 582 (1914); In re Lee, 64 Okla. 310, 168 P.53 (1917).

21. Chapter 40 of King John's version. It is the last sentence in Chapter 29 of King Henry III's version.

have their lawsuits heard quickly, and defendants paid counterfines to delay them. Payments were also made to ensure a fair hearing for one's case. Chapter 40 was designed to check certain abuses such as excessive fees (though it did not abolish such fees or the sale of writs).[22]

State courts that have decided cases[23] under their respective "open courts" provisions have been concerned with such issues as the constitutionality of required payment of court costs or filing fees, litigants' access to courts when they have a recognized legal remedy, and other related matters. Very few cases[24] have interpreted this provision in relation to the public's right to attend court proceedings. In fact, one state supreme court[25] has specifically rejected a public right of access to court records under this provision.

In sum, most state court decisions have been concerned with litigants' right of access to courts, which conforms with the historical origin of the "open courts" provision.

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22. W. McKechnie, Magna Carta 395-98 (2d ed. 1914); F. Thompson, Magna Carta 97-99 (1948).

23. Harrison, Pepper, & Co. v. Willis, 7 Heisk, 35 (Tenn. 1871); In re Lee, 64 Okla. 310, 168 P. 53 (1917); Perce v. Hallett, 13 R.I. 363 (1883); Swann v. Kidd, 79 Ala. 431 (1885); State v. Laramore, 175 Ind. 478, 94 N.E. 761 (1911); Square D. Co. v. O'Neal, 225 Ind. 49, 72 N.E.2d 654 (1947); Campbell v. Hulett, 243 S.W.2d 608 (Ky. 1951); Miles v. Board of Sup'rs of Scott County, 33 So.2d 810 (Miss. 1948); Shea v. North-Butte Mining Co., 55 Mont. 522, 179 P. 499 (1919); Rehn v. Bingaman, 151 Neb. 196, 36 N.W.2d 856 (1949); Malin v. La Moure County, 27 N.D. 140, 145 N.W. 582 (1914); Baltimore & O. R. Co. v. Stankard, 56 Ohio St. 224, 46 N.E. 577 (1897); Commonwealth v. Keenan, 347 Pa. 574, 33 A.2d 244 (1943); Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978). See generally, 16A C.J.S. Constitutional Law §§ 708-20 (1956); 16 Am. Jur. 2d Constitutional Law §§ 613-17 (1979).

24. The best known case is E. W. Scripps Company v. Fulton, 100 Ohio App. 157, 125 N.E.2d 896, appeal dismissed, 164 Ohio St. 261, 130 N.E.2d 701 (1955). The court of appeals' majority opinion--and particularly the concurring opinion--found a public right in the Ohio constitution's "open courts" provision. Both opinions are unpersuasive because: (1) they do not discuss the Magna Carta origins of the provision; (2) the Ohio Supreme Court dismissed the case as moot, therefore diminishing the decision's precedential value; and (3) the Ohio Supreme Court in a later case based a public right of access solely on the First Amendment, and Ohio's "freedom of press" provision (Art. I, § 11) without mentioning Ohio's "open courts" provision. State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).

See also Commonwealth v. Klinger, 75 Pa. D. & C. 2d 664 (1976), a trial court decision that implies that the "open courts" provision of the Pennsylvania constitution mandates an open preliminary hearing. But the Pennsylvania Supreme Court has not explicitly recognized a public right under this provision. See Philadelphia Newspapers, Inc. v. Jerome, 478 Pa. 484, 387 A.2d 425 (1978), appeal dismissed, 99 S. Ct. 3104 (1979). Thus the statements of Justices Stewart and Blackmun in Gannett that early state constitutions with "open courts" provisions like Pennsylvania's guaranteed a public right to open trials are not supported by state court interpretations of those provisions. And the cases cited by Justice Blackmun in n. 10 of his opinion, 99 S. Ct. at 2931, do not support his statement that several states have recognized a public right under "open courts" provisions, except possibly the Scripps and In re Edens (discussed in text) cases.

25. C. v. C., 320 A.2d 717 (Del. 1974).

North Carolina cases. Early North Carolina Supreme Court cases interpreted the "open courts" provision in the same manner as other state courts. In Hewlett v. Nutt,[26] the Court ruled that assessing court costs against a losing party in a lawsuit did not violate this provision. In Hardware Co. v. Cotton Co.,[27] a case that decided whether a civil complaint stated a cause of action, the Court commented on the provision in this manner:

> This is a wise provision. The courts shall be open for an injury done plaintiff. The vice of plaintiff's contention is that the plaintiff does not allege an injury done it. . . .[28]

In Veazy v. Durham,[29] the Court appeared to recognize that the "open courts" provision originated from the Magna Carta and means that litigants may have access to courts without sale, denial, or delay.

In a 1957 case, Raper v. Berrier,[30] a somewhat different interpretation of the "open courts" provision began to appear. In a child-custody dispute, the trial judge questioned the child privately without the consent of the parties and the lawyers. The Supreme Court ruled that the trial judge erred,[31] citing the "open courts" provision and stating that it required that the questioning be conducted openly:

> The public, and especially the parties, are entitled to see and hear what goes on in the courts [citations omitted]. That courts are open is one of the sources of their greatest strength.[32]

Since the case concerned the right of the parties and lawyers to hear the questioning of the child, the Court's discussion of the public's right was not necessary to its decision, but its language became the basis of support for two recent decisions involving disciplinary actions against district court judges. In re Edens[33] involved a district court judge who decided a criminal case outside the courtroom without the prosecutor's knowledge. In its conclusions of law, the Court stated:

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26. 79 N.C. 263 (1878).
27. 188 N.C. 442, 124 S.E. 756 (1924).
28. 188 N.C. at 444, 124 S.E. at 758.
29. 231 N.C. 357, 57 S.E.2d 377 (1956).
30. 246 N.C. 193, 97 S.E.2d 782 (1957).
31. In a similar case, Cook v. Cook, 5 N.C. App. 652, 169 S.E.2d 29 (1969), the Court of Appeals ruled that the trial judge erred by privately questioning a child in a custody dispute despite the plaintiff's specific request that the parties be present.
32. 246 N.C. at 195, 97 S.E.2d at 784.
33. 290 N.C. 299, 226 S.E.2d 5 (1976).

> The trial and disposition of criminal cases is the public's business and ought to be conducted in open court. See N.C. Const., Art. I, § 18. Raper v. Berrier [citation omitted]. [The judge's] disposition of [the criminal case] outside the courtroom when court was not in session improperly removed the proceeding from the public domain where it belonged and made it instead a private matter between him and counsel for the defendant.[34]

In re Nowell,[35] another judicial discipline case, quoted approvingly from the Raper and Edens cases.

Summary. It is unclear whether North Carolina's "open courts" provision provides a public right of access that a judge must consider in deciding whether to close a hearing or trial. The provision's historical origins, most cases from other states, and early North Carolina cases do not support such a right. But the recent child-custody and judicial discipline cases provide a more expansive reading of the provision and a possible recognition of a public right of access. We must await an appropriate case for the Court to decide the issue of a public right of access.

B. North Carolina Statutes

Unlike some other states,[36] North Carolina has no specific statute giving the public a right to attend criminal proceedings. The only "open courts" statute is G.S. 7A-191, which requires that all district court trials "on the merits" be conducted in open court but allows all other proceedings to be held in chambers. There is no comparable statute applicable to superior court.

Three statutes specifically allow in camera (nonpublic) proceedings[37] in criminal cases. G.S. 15-166 allows a superior court judge to exclude the public from a rape or sex offense trial while the victim is testifying. G.S. 8-58.6 requires a judge to hold an in camera hearing to determine the admissibility of questions directed at the rape/sex

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34. 290 N.C. at 306, 226 S.E.2d at 9-10.

35. 293 N.C. 235, 237 S.E.2d 246 (1977).

36. New York (Judiciary Law § 4: See Westchester Rockland v. Leggett, 5 Med. L. Rptr. 2009 (Ct. App. 1979); Arkansas [Ark. Stat. Ann. § 22-109 (Repl. 1962)]: see Shiras v.. Britt, 5 Med. L. Rptr. 2020 (Sup. Ct. 1979); Wisconsin (W.S.A. § 757.14: see State ex rel. Newspapers, Inc. v. Circuit Court for Milwaukee County, 65 Wis. 2d 66, 221 N.W.2d 894 (1974); Missouri (Mo. R.S. § 476.170: see Missouri v. Lohmar, 5 Med. L. Rptr. 2156 (Mo. Cir. Ct., St. Charles County 1979).

37. The Gannett case did not decide the constitutionality of closing parts of a trial on request of a prosecutor when some important governmental interests are asserted, such as rape victims' and children's privacy, military secrets, skyjacker profiles, undercover police officers' identities, etc. See generally Annot., "Exclusion of Public During Criminal Trial," 48 A.L.R.2d 1436 (1956).

offense victim about his or her prior sexual behavior. Questions and answers at a probable cause hearing in a district court may not be repeated in open court. G.S. 7A-629 allows a district court judge to exclude the public from a juvenile hearing unless the juvenile requests that the hearing be open.

C. The Common Law

The Gannett majority and dissenting opinions agreed on one aspect of their analysis of the Sixth Amendment: Historically, trials in English and American courts have been open to the public. They also indicated that there is a common law public right to attend trials, although not--according to the majority--pretrial proceedings. A California intermediate appellate court[38] has recognized a common law public right to attend trials. North Carolina appellate courts have not decided this question.

III. CONCLUSION

The Gannett decision, which failed to recognize explicitly a public right of access to court proceedings under the federal Constitution, has caused a re-examination of state law provisions to determine whether such a right exists. Whether it exists under North Carolina law remains an open question. Even if it does, it is not absolute; it must be balanced against the defendant's constitutional right to a fair trial. In balancing these rights, North Carolina appellate courts will have to establish procedures and standards of proof (as the Gannett opinions did) for the parties to follow when they seek to close or keep open a hearing or trial.

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38. Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163 (Dist. Ct. App. 1956). See generally, Note, Courts: The Right of the Public to a Public Trial 4 U.C.L.A. L. Rev. 475 (1957); Note, The Right to a Public Trial in Criminal Cases, 41 N.Y.U. L. Rev. 1138, 1150-51 (1966); Note, The Right to Attend Criminal Hearings, 78 Colum. L. Rev. 1308 (1978).