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Randolph N. Jonakait

*New York Law School*, [farrah.nagrampa@nyls.edu](mailto:farrah.nagrampa@nyls.edu)

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# SECRET TESTIMONY AND PUBLIC TRIALS IN NEW YORK

RANDOLPH N. JONAKAIT\*

## I. INTRODUCTION

New York leads the country in denying public trials.<sup>1</sup> Unlike courts in other jurisdictions,<sup>2</sup> New York courts close their doors and hear secret

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\* Professor of Law, New York Law School.

1. See Thomas M. Fleming, Annotation, *Exclusion of Public From State Criminal Trial in Order to Avoid Intimidation of Witness*, 55 A.L.R.4th 1196, 1200-11 (1988) (citing 14 New York cases in which courtrooms were closed); Thomas M. Fleming, Annotation, *Exclusion of Public From State Criminal Trial in Order to Preserve Confidentiality of Undercover Witness*, 54 A.L.R.4th 1156, 1160-75 (1988) (citing 133 New York cases in which courtrooms were closed compared to only three decisions closing courtrooms in other states); Thomas M. Fleming, Annotation, *Exclusion of Public From State Criminal Trial in Order to Prevent Disturbance by Spectators or Defendant*, 55 A.L.R.4th 1170, 1178, 1181 (1988) (citing three New York cases in which courtrooms were closed).

2. See Robin Zeidel, Note, *Closing the Courtroom for Undercover Police Witnesses: New York Must Adopt a Consistent Standard*, 4 J.L. & POL'Y 659, 662-63 (1996). "The closure of courtrooms during the testimony of undercover police officers is strictly a New York phenomenon. In other jurisdictions, where undercover officers face the same dangers as those in New York, the pattern of closing the courtroom has not developed." *Id.* at 663; see also James J. Fagan, *Close the Door! Closure of Courtroom During Testimony of an Undercover Police Officer*, 26 SUFFOLK U. L. REV. 619, 632 n.98 (1992) (labeling such cases outside New York as "rare"). Westlaw searches provide additional statistical support: 266 of 336 post 1990 cases reflecting courtroom closures during undercover officer testimony were from New York. Search of WESTLAW, ALLCASES and NY-CS Databases (Mar. 3, 1998) "courtroom /s clos! & undercover and da(aft 1990)"; see also *Ayala v. Speckard*, 131 F.3d 62, 75 (2d Cir. 1997) (in banc) (Parker, J., dissenting):

In other jurisdictions where undercover officers may face the same dangers as those in New York, the reliance on courtroom closure has not developed on this scale. This is evidenced, in part, by the fact that very few other courts have addressed courtroom closure on a regular, on-going basis like New York.

*Id.* at 82. Judge Parker went on to state:

A thorough search of every United States jurisdiction, including the District of Columbia, with no time restriction, reveals that no state requests courtroom closure for its undercover officers in narcotics cases as often as New York. Narcotics cases from other jurisdictions reveal that courtrooms are closed very rarely and on a case-by-case basis.

*Id.* at 82 n.7.

testimony almost routinely in undercover drug cases.<sup>3</sup> On July 1, 1997, the New York Court of Appeals decided a trilogy of courtroom closure cases.<sup>4</sup> These cases reaffirmed that special care must be taken before an accused's family can be excluded from a courtroom and that a careful, on-the-record inquiry must be taken before closure can be ordered. While keeping the existing procedural requirements for closure, however, the third case loosened the substantive standard many lower courts had imposed for courtroom closures.<sup>5</sup> If courtroom closings were routine before, they will become even more frequent.

On December 3, 1997, an in banc Court of Appeals for the Second Circuit also decided a closure case.<sup>6</sup> Before that decision, some Second Circuit panels granted habeas corpus relief to New York prisoners and set out standards conflicting with the closure standards of the New York courts. The in banc Second Circuit swept away those restrictive standards and adopted closure criteria that are at least as broad as those of the New York courts. Routine courtroom closings in undercover cases have, in effect, been sanctioned by both the New York state and federal courts.

With a focus on these 1997 cases, this article will discuss the constitutional and statutory provisions that protect the right to a public trial in New York and examine the procedures that are required to justify a closure in spite of the protections. The article continues by examining the kinds of societal and prosecutorial interests that can justify a closure. Finally, the article will analyze the unarticulated assumptions that the New York courts are using to justify their frequent closures. If those premises are as faulty as they appear, the courts have not been correctly balancing the proper interests in determining whether closures are appropriate.

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3. See Gary Spencer, *Court of Appeals Limits Closing of Courtrooms*, N.Y.L.J., Sept. 20, 1995, at 1 (stating that "[t]he closing of courtrooms during testimony by undercover police officers has become a routine practice in New York drug cases"); Zeidel, *supra* note 2, at 662 (stating that "the closing of courtrooms during such testimony has become a 'routine practice' in New York State narcotics cases, primarily in New York City."); see also *Ayala*, 131 F.3d at 80-81 (stating that "[i]n New York, however, courtroom closure during the testimony of an undercover officer in buy-and-bust cases is so common that trial closure has been the basis of appeal in numerous cases. Presumably, countless more were not appealed.").

4. See *People v. Nieves*, 683 N.E.2d 764 (N.Y. 1997); *People v. Ramos*, 685 N.E.2d 492 (N.Y. 1997); *People v. Tolentino*, 684 N.E.2d 23 (N.Y. 1997).

5. See *Tolentino*, 684 N.E.2d at 25.

6. See *Ayala*, 131 F.3d at 62. In this article, "Court of Appeals" will refer to the New York Court of Appeals; "Second Circuit" will be used for the federal court.

## II. CONSTITUTIONAL AND STATUTORY PROTECTIONS OF A PUBLIC TRIAL

Four provisions protect the right to a public trial in New York criminal cases. Although New York is one of the few states without a state constitutional guarantee of a public trial, two statutes protect that right,<sup>7</sup> as do two federal constitutional guarantees. The First Amendment grants the public and the press the right of access to criminal trials,<sup>8</sup> and the Sixth Amendment guarantees criminal defendants open trials.<sup>9</sup>

These diverse provisions, however, have not led to diverse protections.<sup>10</sup> All the guarantees utilize the same test.<sup>11</sup> The standard recognizes that public trials have a number of benefits: open criminal proceedings help assure the community that trials are being conducted fairly;<sup>12</sup> they offer a "community therapeutic value" for the hostility and

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7. See N.Y. CIV. RIGHTS LAW § 12 (McKinney 1983) (providing that "[i]n all criminal prosecutions, the accused has a right to a speedy and public trial"); see also N.Y. JUD. LAW § 4 (McKinney 1983) stating:

The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all person who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

*Id.*

8. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (holding that because the public and press have this right of access, trials cannot be closed simply because both parties agree to nonpublic proceedings).

9. See U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.").

10. Compare *People v. Ramos*, 685 N.E.2d 492 (N.Y. 1997) (holding that the trial court does not have to consider unrequested alternatives to closure when a defendant asserts the right to a public trial), with *Associated Press v. Bell*, 510 N.E.2d 313, 317 (N.Y. 1987) (holding that a defendant asserting his right to a fair trial must demonstrate that first, there is a "substantial" probability that the defendant's right to a fair trial will be prejudiced in a way that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights).

11. Cf. *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (stating that "the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public").

12. See *Press-Enterprise Co. v. Superior Court* [I], 464 U.S. 501, 508 (1984) (stating that "the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known"); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (stating that "public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process").

outrage criminal acts often provoke by providing "an outlet . . . for these understandable reactions and emotions;"<sup>13</sup> they "permit[] the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government;"<sup>14</sup> and, they discourage "perjury, the misconduct of participants, and decisions based on secret bias or partiality."<sup>15</sup> Such proceedings can also help assure that key witnesses become known.<sup>16</sup> In sum, "[P]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."<sup>17</sup>

The standard governing public trials, however, also recognizes that the right to a public trial, "though fundamental, is not absolute."<sup>18</sup> Criminal trials are presumptively open,<sup>19</sup> but in "rare circumstances" the public can be excluded.<sup>20</sup> Circumstances which warrant exclusion must demonstrate

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13. *Press-Enterprise [II]*, 464 U.S. at 508-09.

14. *Globe Newspaper Co.*, 457 U.S. at 606; see also *In re Oliver*, 333 U.S. 257, 270 (1948) (stating that "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power").

15. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

16. See *In re Oliver*, 333 U.S. at 270. "Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony." *Id.* at 270 n.24.

17. *Globe Newspaper Co.*, 457 U.S. at 606.

18. *People v. Ramos*, 685 N.E.2d 492, 495 (N.Y. 1997).

19. In addition to the taking of testimony, the Supreme Court has held that this presumption of openness applies to jury *voir dire*, at least some preliminary hearings, and suppression hearings. See *Press-Enterprise Co. v. Superior Court [II]*, 478 U.S. 1 (1986) (applying the presumption to some preliminary hearings); *Press-Enterprise Co. v. Superior Court [I]*, 464 U.S. 501 (1984) (applying the presumption to *voir dire*); *Associated Press v. Bell*, 510 N.E.2d 313 (N.Y. 1987) (applying the presumption to suppression hearings); see also *Waller v. Georgia*, 467 U.S. 39 (1984); *Westchester Rockland Newspapers, Inc. v. Leggett*, 399 N.E.2d 518 (N.Y. 1979) (applying public trial guarantee to a preliminary hearing); *New York Times Co. v. Demakos*, 529 N.Y.S.2d 97 (App. Div. 1988) (applying public trial guarantee to plea proceedings). But see *Troy Publishing Co. v. Dwyer*, 494 N.Y.S.2d 537 (App. Div. 1985) (holding that the public trial right does not extend to a hearing seeking to compel blood and hair samples because this proceeding, new to the law, is similar to a warrant application, which is not public).

20. See *Ramos*, 685 N.E.2d at 495-96; see also *Richmond Newspapers, Inc.*, 448 U.S. at 573 (stating that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice") (plurality opinion).

a cause that outweighs the benefits of openness,<sup>21</sup> and proceedings can become secret only when there is a "substantial probability" that values protected by confidentiality will outweigh the benefits of a public trial.<sup>22</sup> This determination must be made on a case-by-case basis.<sup>23</sup>

Such balancing, the Supreme Court has held, uses a four-part test. In *Waller v. Georgia*,<sup>24</sup> the Court stated that "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."<sup>25</sup> Forgoing any stricter requirements, the New York Court of Appeals has concluded that this standard also governs closures in New York.<sup>26</sup>

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21. See *Press-Enterprise [II]*, 464 U.S. at 509 (stating that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness").

22. See *Ramos*, 685 N.E.2d at 496 ("The essential first step is a sufficient trial record to establish a substantial probability of prejudice to an overriding interest in the event of open-court testimony."); see also *Press-Enterprise [III]*, 478 U.S. at 14; *People v. Nieves*, 683 N.E.2d 764, 767 (N.Y. 1997); cf. *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir. 1997) (stating that "the Supreme Court has used various formulations to describe the gravity of the interest that will justify courtroom closure, as well as the degree of certainty that the asserted interest will be harmed"). Judge Newman, writing for the Second Circuit, went on to state:

It may be doubted whether trial judges can make meaningful distinctions between "compelling" and "overriding" interests or can distinguish between whether such interests are "likely to be prejudiced" or whether there is a "substantial probability of" prejudice. We believe the sensible course is for the trial judge to recognize that open trials are strongly favored, to require persuasive evidence of serious risk to an important interest in ordering any closure, and to realize that the more extensive is the closure requested, the greater must be the gravity of the required interest and the likelihood of risk to that interest.

*Id.* at 70.

23. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982) (stating that while protecting the well-being of a minor is a compelling interest, "it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary").

24. 467 U.S. 39 (1984).

25. *Id.* at 48.

26. See *Ramos*, 685 N.E.2d at 497 (N.Y. 1997). The prosecutor contended "that a less demanding standard applies when the courtroom is partially closed and that, therefore, they needed to show only a 'substantial reason' for the partial closure ordered during the testimony" of one officer where the trial court allowed the presence of anyone connected with the court's calendar unless the prosecutor established that the calendared

As a result, four major issues have emerged in New York which are essential to deciding whether a courtroom can be closed: What circumstances or interests justify a closure? What kind of factual showing is necessary to justify a closure? How broad can the closure be? And what, if any, alternatives to closure must a trial court consider? The issue that has caused the most recent controversy is the consideration of possible alternatives to closure.

### III. REASONABLE ALTERNATIVES

The Court of Appeals has concluded that a trial court need not consider alternatives to closure if a party has not suggested them.<sup>27</sup> This position was first stated in *People v. Martinez*.<sup>28</sup> On appeal, the defendant suggested that the trial court could have posted a court officer at the door to admit those who did not pose a threat to the undercover's identity; that the court could have asked the defendant to name family members or others who could have been admitted; or that the court could have had the

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cases involved that undercover officer. *Id.* at 497 n.1. The Court of Appeals concluded that it did not have to address the prosecutor's contention because it determined that the more stringent *Waller* standard was satisfied. *See id.*

*Cf. Ayala*, 131 F.3d at 70 ("Our Court has endeavored to reconcile the various formulations in the Supreme court decisions by relating the gravity of the interest asserted to the degree of closure requested."); *see Woods v. Kuhlman*, 977 F.2d 74 (2d Cir. 1992), where the prosecutor in a state robbery case indicated that members of a defendant's family had threatened a witness, who was now fearful of testifying in front of the family. The trial court, relying on the prosecutor's representation and a brief inquiry of the witness, excluded defendant's family for the testimony of that witness. The Second Circuit, citing decisions in other circuits, concluded that the "substantial probability" and four-prong *Waller* test does not apply to partial closures. *See id.* at 76. Partial closures are constitutional if a "substantial reason" for the closure exists. *See id.* at 77. Such a reason existed here, and the defendant was not entitled to relief. *See id.*

*Compare Okonkwo v. Lacy*, 104 F.3d 21 (2d Cir. 1997), *rev'd on other grounds*, with *Ayala*, 131 F.3d at 71-72. The Second Circuit stated that while *Woods* only requires a substantial reason for a partial closure, a partial closure means the exclusion of specified people. However, there may be special circumstances where the public is barred that do not constitute partial closure. Partial closure is not the exclusion of the general public for one witness. Furthermore, a closure is not partial if some family or friends are admitted, but the public is generally barred. The general exclusion of the public for one witness requires a substantial probability that an overriding interest will be prejudiced as well as the satisfaction of the other *Waller* prongs. *See Okonkwo*, 104 F.3d at 25.

*See People v. Chan*, 656 N.Y.S.2d 22, 28 (App. Div. 1997) (applying the "substantial reason" standard to the exclusion of a group of spectators during the remainder of a witness' testimony during a suppression hearing).

27. *See People v. Martinez*, 624 N.E.2d 1027, 1031 (N.Y. 1993).

28. *Id.*

officer testify behind a screen. The Court of Appeals held that the failure to consider these options was not an error because the defendant had not offered these possibilities to the trial court:

While it is surely the better practice, and indeed may be the required practice, for a trial court explicitly to consider whether closure is broader than necessary, to explore reasonable alternatives to closure, and to make findings adequate to support closure . . . , on the present record the court's failure to consider the alternatives defendant now suggests was not error. Defendant's sole objection and the entire argument before the trial court was concentrated on the sufficiency of the People's showing for closure. . . . Such measures as stationing a guard at the door, taking names and using a screen might well be investigated in future cases, but on this record the trial court did not err in failing to consider them.<sup>29</sup>

This conclusion was reaffirmed in *People v. Ramos*,<sup>30</sup> one of a trio of cases concerning courtroom closure that the Court of Appeals decided on July 1, 1997.<sup>31</sup> *Ayala* held that while a trial court must consider alternatives to complete closure,<sup>32</sup> neither the trial court nor the closure's proponent has the responsibility of enumerating alternatives to closure. Instead, "the party opposed to closing the proceeding must alert the court to any alternative procedures that allegedly would equally preserve the interest . . . ."<sup>33</sup>

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29. *Id.* at 1031-32 (citations omitted).

30. 685 N.E.2d 492 (N.Y. 1997). *Ramos* stated that its holding "comports with our holding in [*Martinez*], where we rejected the defendant's argument that the trial court erred in failing to consider, on its own, certain alternatives to closing the courtroom." *Id.* at 500.

31. See *People v. Nieves*, 683 N.E.2d 764 (N.Y. 1997); *Ramos*, 685 N.E.2d at 492; *People v. Tolentino*, 684 N.E.2d 23 (N.Y. 1997).

32. The *Waller* "principles require trial courts, before excluding the public, to consider whether something short of complete closure would protect the 'overriding interest' at stake. . . . *Waller*, however, does not hold that the trial court must explicitly consider alternatives on the record. Nor does it address who has the burden of suggesting possible alternatives." *Ramos*, 685 N.E.2d at 499.

33. *Id.* at 500. The Court reasoned:

Any other rule would place an impractical—if not impossible—burden on trial courts, particularly in buy-and-bust cases. Even if the court were to hold a separate hearing on the issue, or itself consider and reject some alternatives to closing the proceeding, a defendant on appeal could likely always conjure up yet another method of concealing the witness's identity that the court overlooked. Under these circumstances, placing the onus wholly on trial courts



While the reaffirmation of a precedent is normally routine, this one was noteworthy. Shortly before the *Ramos* court had denied Luis Ramos and Robert Ayala relief, holding that trial courts do not have to consider unproffered alternatives, the Second Circuit granted habeas corpus relief to Stephen Ayala holding the opposite.<sup>34</sup>

In *Ayala v. Speckard*,<sup>35</sup> the courtroom in a Bronx buy-and-bust case was closed for the undercover officer.<sup>36</sup> The Second Circuit panel first concluded that a substantial probability had not been shown that an overriding interest would have been prejudiced by open testimony.<sup>37</sup> The court went on to conclude that the closure was also improper because the trial court had not considered reasonable alternatives to closure.<sup>38</sup>

The state sought, and gained, a rehearing.<sup>39</sup> The court then concluded that whether or not open testimony would have presented the necessary substantial probability of prejudice, relief still had to be granted because the trial court had failed to consider reasonable alternatives before closing the courtroom. The panel specifically rejected the New York Court of Appeals position in *People v. Martinez*<sup>40</sup> that the trial court does not have to consider alternatives unless put forth by the defendant.<sup>41</sup> Instead, the Second Circuit panel concluded that Supreme Court precedents required trial courts to consider reasonable alternatives to closure even if not proffered by the defense.<sup>42</sup> The court concluded:

[T]he Supreme Court has unmistakably held that courtrooms are presumed to be open. . . . For that presumption to mean anything, the party seeking to close the court must have the burden of insuring that the court adequately addresses constitutional concerns. If those concerns are not properly addressed it is appropriate for the party seeking to deviate from

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would provide an incentive for defendants to remain silent.

*Id.*

34. See *Ayala v. Speckard*, 102 F.3d 649, 652-54 (2d Cir. 1996).

35. 89 F.3d 91 (2d Cir. 1996).

36. See *id.* at 92.

37. See *id.* at 95.

38. See *id.* at 96.

39. See *Ayala*, 102 F.3d 649 (2d Cir. 1996).

40. 624 N.E.2d 1027 (N.Y. 1993).

41. "[T]he State argues that the Sixth Amendment does not burden the court to consider alternatives to complete closure unless the party objecting to closure suggests reasonable alternatives. We reject the State's argument, which has been adopted by the New York Court of Appeals [in *People v. Martinez*] . . . ." *Ayala*, 102 F.3d at 652-53.

42. See *id.* at 653.

the constitutional norm, here the State, to bear the risk of reversal on appeal. If the party seeking to close the courtroom does not assist the court in considering alternatives, then . . . the court must sua sponte consider such alternatives.<sup>43</sup>

The differing interpretations of the Constitution and Supreme Court precedents created an important conflict between the courts of New York and the Second Circuit. New York courts concluded that the standards for courtroom closure only required the trial court to consider reasonable alternatives if they were offered by the parties, while the Second Circuit required trial courts on their own to undertake such a consideration.

Prisoners whose convictions were and would be affirmed by the state courts seemed guaranteed a new trial if they could get into federal court. And since courtroom closings are common occurrences in New York, many convictions were at stake.<sup>44</sup> Shortly after the Second Circuit's *Ayala* decision however, some Second Circuit judges pronounced disagreement with it.<sup>45</sup> It was not surprising, then, that the Second Circuit granted a rehearing in banc in *Ayala v. Speckard* and two other cases.<sup>46</sup>

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43. *Id.* at 654. The Second Circuit noted that the trial court did not consider some obvious alternatives including a strategically placed chalkboard shielding the witness from the spectators. The defendant could also have been asked who he wanted in the courtroom with the state then having the burden of showing why that person should have been excluded. The undercover officer also might have concealed his identity in some other fashion, such as through a disguise. The court did not conclude that these were good alternatives, but merely that the trial court should have considered such possibilities. *See id.* at 653-54.

44. *See Ayala v. Speckard*, 131 F.3d 62, 81 (2d Cir. 1997) (in banc) (Parker, J., dissenting). "[T]he government during oral argument in this in banc appeal stated that hundreds or thousands of convictions would be overturned should this Court uphold the rule announced in [*Ramos*]." *Id.*

45. Just six weeks after *Ayala*, another Second Circuit panel in *Pearson v. James*, 105 F.3d 828 (2d Cir. 1997), granted habeas corpus relief because the trial court had not considered reasonable alternatives before closing a courtroom. In a concurring opinion, two judges stated that while they disagreed with *Ayala* that reasonable alternatives must be considered even if not put forth by the defendant, they felt bound by the earlier decision and therefore agreed that a new trial had to be granted. "We subscribe to the opinion of the Court, and agree in particular that we are required to reverse because of *Ayala's* holding . . . . We write separately to record disagreement with the *Ayala* holding." *Id.* at 831. (Jacobs, J. and Cabranes, J., concurring).

46. En banc rehearing was also granted in *Pearson*, 105 F.3d at 828, and *Okonkwo v. Lacy*, 104 F.3d 21 (2d Cir. 1997). In each of those cases, Second Circuit panels relying on *Ayala* granted New York state prisoners habeas corpus relief because trial courts had not on their own considered reasonable alternatives before closing the courtroom.

The in banc court concluded that the New York Court of Appeals had it right after all.<sup>47</sup> When the courtroom is closed for an undercover officer, the trial court on its own does not have to consider alternatives to the closure.

Whether or not a *sua sponte* obligation exists to consider alternatives to complete closure, we see nothing in the First Amendment cases or in *Waller* to indicate that once a trial judge had determined that limited closure is warranted as an alternative to complete closure, the judge must *sua sponte* consider further alternatives to the alternative deemed appropriate. At that point, it becomes the obligation of the party objecting to the trial court's proposal to urge consideration of any further alternatives that might avoid the need for even a limited disclosure. This . . . is the conclusion reached by the New York Court of Appeals.<sup>48</sup>

By the end of 1997, the New York Court of Appeals and the Second Circuit were in agreement on the trial court's responsibility for the consideration of reasonable alternatives to closure.

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47. See *Ayala*, 131 F.3d at 73. Judge Walker's concurring opinion, joined by Judge Jacobs, did not reach the merits, but instead found that *Teague v. Lane*, 489 U.S. 288 (1988), a case forbidding, with limited exceptions, the application of a new constitutional rule on habeas corpus, applied. Judge Parker, joined by Judges Cardamone and Altamari, dissented.

48. *Ayala*, 131 F.3d at 71. The majority had earlier stated:  
Some, but not all, members of the majority are of the view that *Waller* appears to indicate that alternatives to complete closure are what the [Supreme] Court required trial judges to consider *sua sponte* when First Amendment closure standards are applied in the Sixth Amendment context . . . . [I]t is arguable that the Court expects trial courts to consider lesser alternatives *sua sponte* only before taking the extreme step of closing an entire proceeding.

*Id.* at 70-71. The dissent concluded:

[T]he Supreme Court's four-prong test set forth in *Waller v. Georgia* . . . requires a trial judge to consider *sua sponte* alternatives to courtroom closure in a case where alternatives are not suggested by a party otherwise objecting to closure. This interpretation obeys the mandatory language of the Supreme Court's third *Waller* factor that "the trial court *must* consider reasonable alternatives to closing the proceeding," [467 U.S. at 48] (emphasis added), and fulfills the requirement of the second *Waller* factor that "the closure *must* be no broader than necessary to protect [the] interest [of the party seeking closure] . . . ."

*Id.* at 75-76 (emphasis added) (Parker, J., dissenting).

## IV. EXCLUSION OF FAMILY MEMBERS

While the Court of Appeals—now confirmed by the Second Circuit—has concluded that a trial court has no duty to consider unrequested alternatives to a courtroom closure for a witness, it has been ambiguous about the trial court's duty to the defendant's family. In *People v. Nieves*,<sup>49</sup> decided the same day as *People v. Ramos*,<sup>50</sup> the court found a courtroom closure for an undercover officer's testimony improper because the defendant's wife and children were specifically excluded.<sup>51</sup>

In reaching this conclusion, the court first repeated its holding from *People v. Martinez*<sup>52</sup> that the trial court had no obligation to inquire whether the defendant wished family members present. The court further noted that in *Martinez* the defendant had made no such request and that there had been no unidentified spectators in the courtroom.<sup>53</sup> *Nieves* continued: "Where, by contrast, the trial court is aware that the defendant's relatives have been attending the proceedings or that the defendant would like to have certain family members present, exclusion of those individuals must be necessary to protect the interest advanced by the People in support of closure . . . ."<sup>54</sup>

If a defendant asks to have family members attend, *Nieves* indicates that there must be a specific showing that they should be excluded before the courtroom can be closed to them.<sup>55</sup> Furthermore, this

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49. 683 N.E.2d 764 (N.Y. 1997).

50. 685 N.E.2d 492 (N.Y. 1997).

51. See *Nieves*, 683 N.E.2d at 767.

52. 624 N.E.2d 1027 (N.Y. 1993).

53. See *Nieves*, 683 N.E.2d at 766.

54. *Id.*

55. See *id.* at 766-67. The Court of Appeals had indicated this well before *Nieves*. See *People v. Kin Kan*, 574 N.E.2d 1042 (N.Y. 1991) (involving a prosecution for large-scale, gang-related drug dealing). A cooperating accomplice expressed fear of retaliation if he testified in open court. The Court of Appeals, however, held that exclusion of the defendant's family during the accomplice's testimony was erroneous. The closure, the court held, was broader than necessary because the record did not justify the exclusion of the family. The court stressed that the witness had been held in jail with a co-defendant and had not asked for protective custody; the defendant knew the accomplice; and the accomplice had appeared in court when the defendant's family had been present. Furthermore, there were compelling reasons to have the family present because the defendant did not speak English and had to rely on interpreters. See *id.* at 1044-45.

Similarly, *People v. Gutierrez*, 657 N.E.2d 491 (N.Y. 1995), held that exclusion of family members was "broader than constitutionally tolerable . . . ." The court stated, "[a]lthough the undercover officer indicated that he feared for his life and ongoing drug investigations would be jeopardized, he never claimed to hold those fears with respect to

language—although dictum because Nieves objected to the exclusion of his family—indicates that even if the defendant does not request family members' continued presence, but they have been attending, the trial court must determine whether there are specific reasons to exclude the relatives.<sup>56</sup> At least in this one circumstance, reasonable alternatives must apparently be considered even though not raised by the parties.

This presents a host of problems. Does the duty extend to all relatives no matter the remoteness of consanguinity? Is it limited to relatives, or are lovers and friends included? The trial court may be mistaken or unaware of who has been attending. Do trial courts have some sort of duty to ascertain the identity of spectators? Spectatorship identity is not normally part of the trial record. How is an appellate court to resolve this issue?

Because of these circumstances, the wise trial judge contemplating closure should raise the issue of family members even if the defense does not. Not only does it make sense legally,<sup>57</sup> it is simply the right thing to do. Crucial testimony given behind sealed doors with family and friends excluded is a reminder of too many repressive societies. It should truly

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defendant's wife and children and did not otherwise advance any valid ground for excluding defendant's family during the officer's testimony." *Id.* at 491.

Before *Nieves*, the First and Second Departments had held that when the courtroom is to be closed, but the defendant seeks inclusion of family members or other particular people, the prosecution has the burden of showing that the exclusion of those people will serve an overriding purpose. *See, e.g.,* *People v. Tejada*, 636 N.Y.S.2d 25, 26 (App. Div. 1995) (stating it was an error to exclude family members when undercover officer had no particularized fear of them); *People v. Ramos*, 636 N.Y.S.2d 81, 82 (App. Div. 1995) (stating it was an error to exclude defendant's sister and her boyfriend). *But see* *People v. Vredenburg*, 606 N.Y.S.2d 453, 454 (App. Div. 1994) (holding that defendant's wife, and witness' mother, were properly excluded during testimony of rape and sodomy victim).

56. The public trial guarantee is not satisfied merely because the defendant's friends and relatives are permitted to be present when the rest of the public is excluded from the courtroom. *See* *People v. Jelke*, 123 N.E.2d 769 (N.Y. 1954); *cf.* *People v. Glover*, 457 N.E.2d 783, 785 (N.Y. 1983) (affirming closure and stressing that the trial court had told the defendant that anyone he desired could be present in the courtroom during a rape complainant's testimony). *See generally* Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 391 (1932) (defining a "public trial" as a trial "in which any member of the public may be present if he wishes").

57. Even if the defense and the court do not raise the family and friends issue, the prosecutor, who is concerned about preserving any resulting conviction, should raise the issue.

take special justifications for that to happen.<sup>58</sup> Indeed, the wise trial judge should go even further and ask the general question whether the defense wants any specific people admitted, not just family members, when closing the courtroom.<sup>59</sup>

When the issue is raised, family members can be excluded only if their presence presents a substantial probability that the interest sought to be protected by closure would be harmed by their presence.<sup>60</sup> *Nieves*, however, made no definitive ruling as to what would justify such an exclusion. The court merely concluded that the record did not support the family's removal.<sup>61</sup> Chief Judge Kaye's unanimous opinion stressed that the undercover officer expressed no trepidation about testifying before the relatives. In fact, the officer never even mentioned them.<sup>62</sup> The trial court concluded that there was no indication that the family was involved with drugs and that it was a "large leap" to conclude that the wife would broadcast the undercover officer's identity.<sup>63</sup>

The trial court instead justified the spouse's exclusion on the prosecutor's report that a court reporter claimed to have seen the wife speaking to a prospective juror. The defense replied that that juror had already been excused and that the wife merely responded to a request for time. The children were banished, the trial court stated, simply because they were children and did not understand the concept of confidentiality.

This, the Court of Appeals concluded, did not justify the exclusions. Whether such grounds might have been sufficient was moot because the trial court conducted no inquiry of the wife, the juror, or the court

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58. See *People v. Spence*, 657 N.Y.S.2d 645, 646 (App. Div. 1997). The trial court barred defendant's wife, who testified for defendant, from the courtroom during summations. The first department reversed, stating that "[a]s the testimony of the witness had been concluded, we discern no valid basis to exclude a family member from the courtroom . . . ." *Id.*

59. Cf. *People v. Morales*, 658 N.Y.S.2d 450 (App. Div. 1997) (holding error to exclude Legal Aid supervisor during undercover officer's testimony because prosecution did not establish that the supervisor jeopardized an overriding interest of the officer); *People v. Hines*, 640 N.Y.S.2d 133, 134 (App. Div. 1996) (holding error to exclude a Legal Aid attorney who had been observing the trial).

60. See *People v. Nieves*, 683 N.E.2d 764, 766-67 (N.Y. 1997). "[T]he record here was insufficient to establish a 'substantial probability' that the officer's safety would be jeopardized by the presence of defendant's wife and children." *Id.* at 767.

61. *Nieves* stressed that the showing must be on the record. See *id.* at 767. "[T]he trial court's reasons for excluding the defendant's family must be 'demonstrated and documented' in the record." *Id.* at 766 (quoting *People v. Kin Kan*, 574 N.E.2d 1042, 1044 (N.Y. 1991)).

62. See *Nieves*, 683 N.E.2d at 767.

63. See *id.* at 766.

reporter. Furthermore, nothing was asked of the children, and the record did not even reveal whether they were toddlers or teenagers.

The Appellate Division affirmed on different grounds, relying on the conclusion that the defendant's residence was twelve blocks from the crime scene. The Court of Appeals once again held that the record was insufficient for this ruling.<sup>64</sup> The court stressed that the defendant's residence was not established at the closure hearing and, therefore, was not part of the trial court's decision to close.<sup>65</sup> The Appellate Division could not retroactively consider the residence in affirming the closure.<sup>66</sup>

Thus, while *Nieves* made clear that when exclusion of the family is at issue a special showing of the necessity for their banishment is required, its holding does not explain what circumstances would justify such an exclusion.<sup>67</sup> *Nieves*, however, does indicate the importance of a proper record. The third case of the July 1, 1997, trilogy indicates even more strongly that a proper record is essential in justifying any closure.<sup>68</sup>

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64. *See id.*

65. *See id.* at 767.

66. *See id.*

67. *But see* *People v. Joseph*, 452 N.E.2d 1243, 1245 (N.Y. 1983) (upholding closure including exclusion of defendant's family and friends during sodomy complainant's testimony); *see also* *People v. Feliciano*, 644 N.Y.S.2d 307 (App. Div. 1996) (holding that exclusion of defendant's mother and sister was justified because they lived within the area of undercover operations and the officer reasonably feared that they would be able to identify him during his operations); *People v. Green*, 627 N.Y.S.2d 21, 21-22 (App. Div. 1995) (holding that exclusion of undercover officer's mother, girlfriend, and two infant children was unjustified merely because the defendant felt "uncomfortable" by their presence); Zeidel, *supra* note 2, at 709.

[L]ower state courts have generally ruled that in order to exclude a defendant's family members, the prosecutor must establish that the family members live in or frequent an area in very close proximity to the undercover officer's current area of operations, and the officer must have specific concerns regarding the family members.

*Id.* at 709-10.

*But see* *Ayala v. Speckard*, 131 F.3d 62, 72 (2d Cir. 1997) (in banc) ("We note that none of the defendants requested that family members be permitted to remain in the courtroom, a request that would have required careful consideration by the trial judge."); *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994) (holding that exclusion of defendant's parents during an undercover officer's testimony because the undercover worked in the Bronx and his parents lived in the Bronx, violated the Constitution.)

68. *See* *People v. Tolentino*, 684 N.E.2d 23 (N.Y. 1997).

## V. THE NECESSARY FACTUAL SHOWING

In *People v. Tolentino*,<sup>69</sup> the trial court, in an undercover drug case, closed the courtroom based on the prosecutor's assertions that the officer might still be working in the same area. The defendant objected.<sup>70</sup> The trial judge made no further inquiry and no factual findings.<sup>71</sup> The defendant then asked that his girlfriend be allowed to attend, and the prosecutor consented to her presence.<sup>72</sup>

The Court of Appeals first held that the defendant's request for his girlfriend's attendance did not indicate his consent to the general public's exclusion.<sup>73</sup> The court then reversed because the record did not justify the closure.<sup>74</sup> The memorandum decision stated that a closure hearing is not required in every case, but stressed that the inquiry on the record must be careful enough to show that defendant's right to a public trial is being sacrificed for a compelling reason.<sup>75</sup> For three reasons, that inquiry was deficient in *Tolentino*. First, the geographical assertions and claims of fear were too general.<sup>76</sup> Second, the "trial court . . . failed to question the undercover officer personally or to make any further inquiry of the prosecutor."<sup>77</sup> And third, the trial court failed to make "any factual findings to support its closure order."<sup>78</sup>

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69. *Id.*

70. *See id.* at 24.

71. *See id.* at 24-25.

72. *See id.* at 25.

73. *See id.*

[D]efendant's request to have his girlfriend attend the proceedings was insufficient, by itself, to establish his consent to exclusion of the general public. Indeed, defendant was obligated to alert the trial court to any particular friends or family members that he wished to remain in the courtroom during the closed testimony. . . .

*Id.*

74. *See id.*

75. *See id.*; *see also* *People v. Jones*, 391 N.E.2d 1335 (N.Y. 1979) (stating that the trial court must make a "careful inquiry" before a courtroom can be closed). A particular form of inquiry is not required in all cases, but sometimes a hearing is required. *See id.* at 1339.

76. *See Tolentino*, 684 N.E.2d at 25. "The prosecutor's generalized representation that the undercover officer continued to work in the vicinity of the arrest and feared for his safety was insufficient, without greater specificity, to establish a substantial probability of prejudice to an overriding interest . . . ." *Id.*

77. *Id.*

78. *Id.*



*Tolentino* makes clear what the Court of Appeals had stated before. In all cases denying a public trial, the trial court must make factual findings justifying the decision.<sup>79</sup> While *Tolentino* did not state that a hearing was always required or specify the form of a hearing when one is held, the decision indicates that the better practice for trial courts is to hold a hearing whenever practicable.<sup>80</sup> The decision certainly demonstrates that trial courts should not merely rely on a prosecutor's assertions. Instead, an inquiry should include direct questioning of witnesses with the requisite knowledge about the asserted grounds for closure.<sup>81</sup> The

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79. See *Westchester Rockland Newspapers v. Leggett*, 399 N.E.2d 518, 525 (N.Y. 1979) (holding that inquiry justifying closure as well as factual findings must be on the record).

80. See *Tolentino*, 684 N.E.2d at 25; *People v. Joseph*, 452 N.E.2d 1243, 1244 (N.Y. 1983) (holding inquiry without a formal hearing sufficient when the court conferred on the record in the robing room with a sodomy victim); *People v. Glover*, 457 N.E.2d 783, 784 (N.Y. 1983) (holding inquiry sufficient when the court had presided over a previous trial of the same charges and observed the embarrassing nature of the testimony); see also *People v. Graham*, 606 N.Y.S.2d 780, 780 (App. Div. 1994) (stating that "[a] formal hearing is not always required, and careful inquiry directed at counsel, the witness, or the spectators . . . may be sufficient"); *People v. Cosentino*, 603 N.Y.S.2d 560, 561 (App. Div. 1993) (holding inquiry sufficient to exclude defendant's wife and son at second trial because court had observed their disruption at first trial). *Id.*

81. See *People v. Clemons*, 574 N.E.2d 1039, 1040-42 (N.Y. 1991) (holding inquiry insufficient when courtroom closed after prosecutor merely stated that rape complainant wanted closure); *People v. Mateo*, 536 N.E.2d 1146, 1146-47 (N.Y. 1989) (holding closure during cross-examination based upon the prosecutor's assertions that the witness would suffer public humiliation if she had to testify publicly to her use of cocaine during sexual practices improper because the trial court should have made inquiry of the witness herself); *People v. Cuevas*, 409 N.E.2d 1360, 1361 (N.Y. 1980) (holding inquiry based solely on the prosecutor's representations about an undercover officer insufficient); see also *People v. Doty*, 423 N.Y.S.2d 797, 798 (App. Div. 1979) (holding closure improper when no evidentiary hearing nor independent inquiry beyond reliance on prosecution's assertion that confidential informant, by the nature of his work, could be in danger). But see *People v. Homan*, 654 N.Y.S.2d 925, 926 (App. Div. 1997). Although the opinion is not clear on this point, closure apparently was proper in this sodomy case based upon the prosecutor's characterization of the child witness' feelings.

The Second Circuit has also indicated that inquiry must be made of witnesses with knowledge of the asserted grounds for closure. See *Guzman v. Scully*, 80 F.3d 772, 773 (2d Cir. 1996). The trial court in a state murder trial excluded four women during the cross-examination of a prosecution witness. The prosecutor said that that witness, Ceden, had observed four women and said that they were friends or relatives of another witness, Blanco, and that there were antagonisms between Blanco and him. Defense counsel said that two of the women were connected with Blanco, but that the other two were defendant's friends or relatives. Without further inquiry, the trial court excluded the four. The Second Circuit held that this exclusion was constitutional error because the trial court could not have found a substantial reason for the exclusion without conducting

defendant should normally be present at such a hearing or inquiry and have the opportunity for cross-examination.<sup>82</sup> Indeed, if a court is going to deny a defendant cross-examination or the right to be present at a closure hearing, a careful court would explain on the record its reasons for doing so.

In some kinds of cases, New York locks courtroom doors in an almost methodical fashion even though denials of public trials are supposed to be rare. This raises a fundamental question: Are New York courts too easily concluding that a public trial jeopardizes an overriding interest? The 1997 cases have reaffirmed procedures to be used in determining whether courtrooms should be closed. While it is now clear that a trial court only has to consider reasonable alternatives proffered by the parties, trial courts must make careful inquiries on the record before ordering a closure, and those courts should be sensitive to exclusion of a defendant's family. These rulings, since they repeat existing New York doctrines, should not have a significant effect on the rate at which the doors are blocked.

Of course, with the burden on the defense to raise alternatives, we can expect an educated defense bar increasingly to present options to the court. At a minimum, defense attorneys should be regularly asking for friends and family to remain in the courtroom. Such alternatives, however, will not affect the rate of closure; their goal is only to ameliorate the effects of closure.

Furthermore, while the Court of Appeals has again reaffirmed the necessity for a careful inquiry and record before closure can be ordered, this requirement should not cause much change in the New York practice

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an inquiry of the prosecution witness, especially in light of counsel's statement that two of the women were not related to Blanco. *See id.* at 776.

82. *But see* *People v. Chan*, 656 N.Y.S.2d 22, 24 (App. Div. 1997). A witness had become fearful of spectators during a break in testimony. The first department, over dissent, upheld a closure even though the trial court did not hold a hearing, but based its decisions on the witness' demeanor and reactions to seeing the men outside. Although the defendants were absent from this inquiry, the appellate division stated that their rights to be present were not violated. Their presence would have been totally superfluous, the court concluded, because they had not seen the encounter between the witness and the spectators and, therefore, had nothing to contribute to the inquiry. *See id.* at 27. The dissent said that the defendants' exclusion from this inquiry was error because they had "peculiar knowledge" of the spectators' identities. *Id.* at 29. *See also* *People v. Turaine*, 577 N.E.2d 55, 56 (N.Y. 1991) (holding where at a hearing to determine whether a witness could testify that the defendant had threatened or intimidated him, "[d]efendant was entitled to confront the witness against him at that hearing and also to be present so that he could advise counsel of any errors or falsities in the witness' testimony which could have an impact on guilt or innocence"); *cf.* *People v. Torres*, 607 N.Y.S.2d 669, 670 (App. Div. 1994) (holding that it was error to deny a defendant the opportunity to cross-examine at a hearing to determine whether closure is proper for an undercover officer's testimony).

of denying public trials. Presumably most courts were already doing this, and diligent trial courts can relatively easily satisfy these requirements. Occasionally a reversal may result because of an inadequate hearing, but certainly prosecutors should be alert to this possibility and demand that a better record be built. The reaffirmation of the careful inquiry requirement will little change the rate at which closures are ordered in New York.

If closures do occur extraordinarily frequently in New York, it is not because of the procedures used to make the determinations. Instead, it must be because of the standards employed to determine whether a public trial will harm an overriding interest. All closure cases, however, are not the same, and the standard used to measure whether a denial of a public trial varies by the category of the closure case. As the examination in the next section indicates, while closures because of pretrial publicity, witness embarrassment, witness intimidation and fear, and unruly and disruptive spectators raise some concerns about what justifies a closure, it is the cases concerning undercover police work that present the most problems.

## VI. INTERESTS JUSTIFYING CLOSURE

### A. Pretrial Publicity

Pretrial publicity seldom justifies closing a courtroom.<sup>83</sup> While the Court of Appeals in *Gannett Co. v. DePasquale*<sup>84</sup> upheld a closed suppression hearing upon the defendant's motion, eight years later, *Associated Press v. Bell*<sup>85</sup> announced strict rules for the closure of suppression hearings.

In a highly publicized murder case, the defendant claimed that disclosure of any suppressed material would threaten the later impaneling of an impartial jury. Defendant proposed that, after a jury was sworn, the media be furnished with the hearing transcripts, redacted to exclude suppressed evidence. The trial court agreed that there was a "possibility"

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83. See *Gannett Co. v. DePasquale*, 372 N.E.2d 544, 553-54 (Cooke, J., dissenting), *aff'd*, 443 U.S. 368 (1979).

84. *Id.*; cf. *Westchester Rockland Newspapers, Inc. v. Leggett*, 399 N.E.2d 518, 526 (N.Y. 1979). This case held that concerns over pretrial publicity did not justify the closure at defendant's request of a mental competency hearing. The court first concluded that the public trial right extends to pretrial hearings and that hearings can be closed only if there is a "strong likelihood" that evidence at a pretrial hearing would prejudice the defendant's trial if disclosed to potential jurors. That showing was not made because the defendant had openly moved for a competency exam and that fact was already reported in the press.

85. 510 N.E.2d 313 (N.Y. 1987).

that the pretrial publicity from the hearing could threaten a fair trial and ordered the suppression hearing closed.<sup>86</sup>

The Court of Appeals recognized that suppression hearings posed a peculiar risk of prejudicial pretrial publicity,<sup>87</sup> but concluded that since such hearings frequently challenge the conduct of police and prosecutors, the public has a particular interest in them.<sup>88</sup> Consequently, while the guarantee is not absolute, the public and press have a right to attend suppression hearings.<sup>89</sup> The closure cannot be justified by a hypothetical risk of prejudice.<sup>90</sup> The party seeking to deny public access bears the burden of establishing that a fair trial would be harmed by that access. Furthermore, "there must be 'specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.'"<sup>91</sup> This burden will seldom be met, the court

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86. *See id.* at 317.

87. *See id.* "[S]uppression hearings pose a peculiar risk in that adverse pretrial publicity could inflame public opinion and taint potential jurors by exposing them to inadmissible but highly prejudicial evidence . . . ." *Id.* at 316.

88. "[S]uppression hearings frequently challenge[ ] acts of the police and prosecutor . . . giving particular value and significance to conducting such hearings in the public eye . . . ." *Id.*

89. "[T]he public and the press may have a First Amendment right of access to pretrial suppression hearings. This right of access is not, however, absolute." *Id.*; *see also* *New York Times Co. v. Demakos*, 529 N.Y.S.2d 97, 101-02 (App. Div. 1988) (holding that the public trial guarantee applies to plea proceedings and that the trial court improperly closed plea proceedings because there was an insufficient showing that the closure was necessary to protect the remaining defendants' right to a fair trial). Furthermore, the Second Department stated that the trial court must give interested parties notice and an adequate opportunity to be heard about the closure. Thus, it was error to deny the *New York Times* the opportunity to be heard. Moreover, the record did not support the closure to protect future fair trials, especially since neither the prosecution nor defense asked for the closure, and at least one defendant opposed it. *See id.*; *cf.* *Troy Publishing Co. v. Dwyer*, 494 N.Y.S.2d 537, 539 (App. Div. 1985) (holding that public trial right did not extend to a hearing seeking to compel blood and hair samples). This kind of proceeding, new to the law, is similar to a warrant application, which is not public.

90. *See Associated Press*, 510 N.E.2d at 316 ("[A] hypothetical risk of prejudice or taint cannot justify categorical denial of public access to suppression hearings . . . ."). *Id.*

91. *Id.* at 317 (quoting *Press-Enterprise Co. v. Superior Court* [II], 478 U.S. 1, 14 (1986)). In this First Amendment case, the New York Court of Appeals indicated that the trial court must make specific findings about alternatives. If a party has a duty to raise them, it is the party seeking closure. *See id.* at 317. The court's language seems

indicated, because a "careful voir dire" will almost always insure an impartial jury and obviate the need for a closed proceeding.<sup>92</sup> It takes an extraordinary situation to close the proceedings because of fears that the pretrial publicity will prevent a fair trial since ordinarily the jury selection process will insure an impartial body.<sup>93</sup> Consequently, closures of New York courtrooms because of pretrial publicity have been truly rare.

### B. *Witness Embarrassment and Public Morals*

While courtrooms cannot be closed merely to protect good morals and public decency,<sup>94</sup> witness discomfort or embarrassment expected from public testimony during sexual assault trials can justify courtroom closure. Thus, *People v. Joseph*<sup>95</sup> found a closure proper during the testimony of the complainant in a robbery and sodomy trial because the acts were "demeaning," and the witness said that she was tense and would be more comfortable testifying if all persons were excluded.<sup>96</sup>

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to indicate that even if a party does not raise them, the court must still consider alternatives. The recent *Ramos* case, however, holds that the party opposing closure has the burden of presenting alternatives and that the trial court does not have to consider them if they are not raised. *See People v. Ramos*, 685 N.E.2d 492, 500 (N.Y. 1997). *Ramos* did not address this apparent conflict. *See id.*

92. *See Press-Enterprise [III]*, 478 U.S. at 15. "Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Id.*

93. *See id.* at 14. The court stated that the requirement of specific findings was not so strict that it would require disclosure of what was sought to be kept confidential, but that the findings requirement was not satisfied when there were no findings as to what, if any, tainted evidence might be presented and whether such evidence would threaten empaneling an impartial jury. It was not sufficient that there was the mere possibility that such evidence would be adduced or that it would produce the harm. The record supported neither the conclusion that there was a "substantial probability" that closure would prevent publicity that would harm a fair trial and that reasonable alternatives to closure would not adequately protect the defendant. *See id.*

94. *See People v. Jelke*, 123 N.E.2d 769, 773-74 (N.Y. 1954).

95. 452 N.E.2d 1243 (N.Y. 1983).

96. *See People v. Glover*, 457 N.E.2d 783 (N.Y. 1983) (holding closure proper during a rape complainant's testimony when the trial judge knew of the embarrassing nature of the charges because he presided over an earlier trial and was aware of traffic by curious courthouse employees in and out of the courtroom during her testimony); *see also People v. Mateo*, 536 N.E.2d 1146 (N.Y. 1989) (holding that witness' embarrassment may justify closure).

The reported appellate cases concerning embarrassing testimony in sexual crimes consistently uphold closure.<sup>97</sup> The nature of the testimony alone seems sufficient for closing. As long as the case concerns sordid, demeaning acts involving embarrassing testimony, public exclusion has been held appropriate.<sup>98</sup> While the Constitution requires a case by case consideration, the New York appellate cases seem to allow a per se closure in sexual assault cases, assuming all such cases involve demeaning acts and embarrassing testimony. The cases seldom even discuss such factors as the maturity of the witness,<sup>99</sup> the likelihood of truly avoiding the embarrassment if a transcript is made public, or any necessity that the witness indicate a firm reluctance to testify in public.

On the other hand, the reported cases of closure during sexual assault trials are few, at least compared to undercover cases, indicating perhaps that many or most such trials are public. The decisions, however, give no indication of why some might be open while others are not.

### C. Intimidation and Fear

Three decades ago, when the public trial jurisprudence was less developed, the Court of Appeals in *People v. Hagan*<sup>100</sup> permitted public exclusion based on the apparent fear of a witness. That witness' lawyer told the court that "the witness feared for his life and threats had been made against him and that he would not testify."<sup>101</sup> Although *Hagan* suggested good grounds for the public exclusion were presented, the court ultimately held, "Even if there were error in the exclusion, it should be held beyond a reasonable doubt that it was harmless."<sup>102</sup> This holding, however, would no longer stand. Later both the Supreme Court and the

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97. See, e.g., *Glover*, 457 N.E.2d at 784; *Mateo*, 536 N.E.2d at 1147; see also *People v. Vredenburg*, 606 N.Y.S.2d 453 (App. Div. 1994) (holding closure proper including the exclusion of the witness' mother, defendant's wife, in sodomy and rape prosecution involving sordid, demeaning acts which required embarrassing testimony); *People v. Pasko*, 495 N.Y.S.2d 100 (App. Div. 1985) (holding courtroom closure proper in rape case which involved sordid, demeaning acts and required embarrassing testimony).

98. See, e.g., *Pasko*, 495 N.Y.S.2d at 100; see also *People v. Vredenburg*, 606 N.Y.S.2d 453 (App. Div. 1994).

99. Cf. *People v. Homan*, 654 N.Y.S.2d 925, 926 (App. Div. 1997) (holding closure proper for nine-year-old witness who "the prosecutor said was nervous and embarrassed to testify about sexual acts committed upon her by defendant, her grandfather").

100. 248 N.E.2d 588 (N.Y. 1969).

101. *Id.* at 590.

102. *Id.* at 591 (citing *Chapman v. California*, 386 U.S. 18 (1967)).

Court of Appeals held that the denial of a public trial requires a new trial without a showing of prejudice.<sup>103</sup>

Since *Hagan*, the Court of Appeals has not decided under what circumstances, if any, a courtroom can be closed because a witness fears or has been intimidated by spectators. While closure for fears without an objective basis is problematic,<sup>104</sup> lower courts have considered it clear that witness intimidation can justify public exclusion.<sup>105</sup> These cases, however, have left some unresolved issues.

First, courtrooms have been closed for witness intimidation apparently based upon the unsupported statements of witnesses that spectators have threatened them.<sup>106</sup> These cases now seem in conflict with *Nieves*<sup>107</sup> where

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103. See *Waller v. Georgia*, 467 U.S. 39 (1984) (holding that when a trial is unconstitutionally closed, the defendant is entitled to a new trial without a showing of prejudice); see also *People v. Jones*, 391 N.E.2d 1335, 1341 (N.Y. 1979) (holding violation of public trial right requires reversal without showing of prejudice).

104. Recently, a divided first department panel held that spectators could be barred because a witness feared them even though there was no proof or even allegations that these men had made any threats that the witness claimed to have received. The court, citing federal cases that permitted closure without objective proof of danger to the witness, concluded that "[n]either case law nor logic compels such a showing" of objective proof of threats or other danger. *People v. Chan*, 656 N.Y.S.2d 22, 27 (App. Div. 1997). The court held that the witness' mere belief of an association between the threats and the spectators was sufficient. "Irrespective of whether these perceived threats could be tied to the men outside the courtroom, Fang's belief that the connection existed and his acute emotional reaction upon seeing the group of Chinese men outside the courtroom justified closure." *Id.* The court further suggested that the witness' adamancy in refusing to testify publicly gave the necessary justification for closure. "By demonstrating that Fang would not testify unless these men were excluded, the People presented a 'substantial reason,' i.e., the need for a witness to testify, sufficient to demonstrate the defendants' right to a public trial has not been violated." *Id.* at 28 (footnote omitted).

105. Spectators have also been excluded by lower courts because they were unruly or disruptive. See, e.g., *People v. Cosentino*, 603 N.Y.S.2d 560 (App. Div. 1993) (exclusion of defendant's wives and son from a second trial proper when at first trial they created such a disturbance at the verdict stage that two jurors switched their votes causing a mistrial).

106. See, e.g., *People v. Parker*, 598 N.Y.S.2d 214 (App. Div. 1993) (exclusion proper of four of defendant's friends when witness "reported" their attempts to intimidate him); see also *People v. Graham*, 606 N.Y.S.2d 780, 781 (App. Div. 1994) (exclusion of defendant's "young male friends" during the testimony of prosecution witness was proper when the witness indicated that she was afraid to testify because the defendant's brother had threatened to kill her if she appeared in court, and defendant's friends had threatened the witness' brother and mother); *People v. Ortiz*, 569 N.Y.S.2d 81, 83 (App. Div. 1991) (exclusion proper of defendant's brother and other spectators when witness "represented" that the spectators had previously threatened him).

the Court of Appeals indicated that allegations that defendant's wife talked with a potential juror could not justify her exclusion without further inquiry into the nature of the conversation. The necessary careful inquest to justify closure seems to require not only hearing from the person claiming threats, but also from the supposed threatener.<sup>108</sup>

Second, a public trial can be denied only to prevent harm to an overriding interest, not merely as a consequence of past actions. If closure will not avert or ameliorate future prejudice, then the closure serves no purpose and should not be ordered. The courts that have closed courtrooms because witnesses report threats have not explored what future prejudice the order will affect.

If attempts have been made to intimidate a witness before a trial and the identity of that witness is known—whether the courtroom is open or closed—those seeking retribution or revenge will know or can easily discover how the witness testified. After all, whether a defendant is jailed or is at large during the trial, he is not held incommunicado and can communicate the content of any testimony. Moreover, if those seeking vengeance are banished when the witness is called, they will have a good idea of what the testimony is expected to be, and, if present during summations, they can learn more definitively what it was. Consequently, a closed courtroom does not seem to affect the likelihood of future harm as the result of the testimony. As one judge has said concerning the issue of intimidation:

If [the witness] were truly in fear, and the accuseds were convicted upon his testimony, protective measures after the verdict came down would be required, for whether he testified in Star Chamber or in open court it would be known that his testimony was necessary to convict. A private telling of his story

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107. 683 N.E.2d 764 (N.Y. 1997).

108. Compare *People v. Guzman*, 575 N.Y.S.2d 26, 29 (App. Div. 1991) (upholding the exclusion of four spectators with acknowledged ties to the defendant when the witness "reported" that the four intimidated him), with *Guzman v. Scully*, 80 F.3d 772, 773 (2d Cir. 1996) (granting Guzman habeas corpus relief). The prosecutor said that the witness, Cedeno, had observed four women and said that they were friends or relatives of another witness, Blanco, and that there were antagonisms between Blanco and him. Defense counsel said that two of the women were connected with Blanco, but that the other two were defendant's friends or relatives. Without further inquiry, the trial court excluded the four. The Second Circuit held that this exclusion was constitutional error. The trial court could not have found a substantial reason for the exclusion without conducting an inquiry of the prosecution witness, especially in light of counsel's statement that two of the women were not related to Blanco. See *id.* at 775-76.



would not protect him from revenge after the trial was finished. Clearing the courtroom accorded him no protection . . . <sup>109</sup>

Courts contemplating closure because of witness intimidation or fear concerning spectators who already know the witness' identity should be discussing how open testimony will produce an increased anxiety beyond that which will otherwise exist. So far the New York courts have not done that.<sup>110</sup>

#### D. Undercover Police Work

As the recent *People v. Ramos*<sup>111</sup> case reaffirms, undercover police work can produce circumstances justifying courtroom closure. The Court of Appeals previously concluded that the public may be excluded while an undercover officer testifies to protect the integrity of pending investigations, ensure the future usefulness of the officer, and ensure the officer's safety from reprisals.<sup>112</sup> Closure, however, is not justified merely because a witness is an active undercover officer at the time of the testimony and fears for his safety.<sup>113</sup> *Ramos* stated:

[T]he mere possibility that this safety interest might be compromised by open-court testimony does not justify abridgement of a defendant's constitutional right to a public trial. . . . [T]he proponent of closure must establish a "substantial probability" that the articulated interest will be prejudiced by an open courtroom. . . . Thus, a specific link must be made between

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109. *United States ex rel. Bruno v. Herold*, 408 F.2d 125, 134 n.3 (2d Cir. 1969) (Waterman, J., dissenting).

110. *Cf. Guzman*, 80 F.3d 772 (2d Cir. 1996) (granting a habeas corpus petition and concluding that when intimidation is claimed by the presence of spectators who already know the witness' identity, the witness must persuade the trial judge that having observers see and hear him will produce substantial additional anxiety beyond that which already exists from them already knowing his identity and that he is a prosecution witness).

111. 685 N.E.2d 492 (N.Y. 1997).

112. *See People v. Cuevas*, 409 N.E.2d 1360, 1361 (N.Y. 1980).

113. *See Ramos*, 685 N.E.2d at 496 (closure "requires more than conclusory assertions that the officer remains an active undercover and fears for his or her safety"); *cf. People v. Jones*, 391 N.E.2d 1335, 1340 (N.Y. 1979) (closure was improper when trial court based its decision on judicial notice of the dangers of undercover work, but at the time of trial the officer was on patrol duty in a part of New York City distant from scene of drug transaction).

the officer's safety concerns and open-court testimony in the particular buy-and-bust case . . . .<sup>114</sup>

The issue, then, in New York undercover cases is whether the facts of a particular case indicate a substantial probability that public testimony will prejudice the officer's safety or effectiveness. While *Ramos* stated that analysis of this issue begins with *People v. Martinez*,<sup>115</sup> the earlier decision in *People v. Hinton*<sup>116</sup> should be the starting point.

The *Hinton* prosecutor sought public exclusion because the officer was still an active undercover agent with other drug investigations pending and because other drug targets were in the courtroom. The Court of Appeals stressed this last factor in affirming the closure: "The very targets of the agent's other investigations were present in the courtroom, thereby constituting a peril to the agent's life."<sup>117</sup> *Hinton* then went on to conclude, "While we reaffirm today the inherent discretionary power of the trial court to close the courtroom, we need only point out that the discretion be sparingly exercised and then, only when unusual circumstances necessitate it."<sup>118</sup>

*Martinez*, however, indicated that the unusual circumstance of an active undercover officer's other targets being in the courtroom is not necessary for closure. There, the Court of Appeals considered two buy-and-bust cases, finding the closure justified in only one. Public exclusion was erroneous when the drug sale occurred in the Bronx, the undercover officer testified that he was still actively engaged in open Bronx cases which had not yet gone to trial, and the officer said that he feared for his safety if the courtroom were open. The cross-examination showed that the pending cases were street level buys in which arrests had already been made and that the officer's area of operations was the entire Bronx.

The Court of Appeals concluded that this "perfunctory showing . . . was insufficient. . . . [W]ere such a showing accepted, we would in effect sanction a rule of per se closure for undercover officers . . . ."<sup>119</sup> The court stressed that the Bronx was more than forty-one square miles with 1.2 million residents and pointed out that the testimony did not indicate

114. *Ramos*, 685 N.E.2d at 496.

115. 624 N.E.2d 1027 (N.Y. 1993); see *Ramos*, 685 N.E.2d at 496 (stating that "[a]nalysis begins with our decision in *People v. Martinez* [citation omitted], where we addressed the requisite factual showing to satisfy the first 'prong' of *Waller* in the context of undercover testimony in buy-and-bust cases").

116. 286 N.E.2d 265 (N.Y. 1972).

117. *Id.* at 267.

118. *Id.*

119. *Martinez*, 624 N.E.2d at 1031.

that other targets were likely to be in the courtroom, nor did it indicate actual threats to the officer's safety. Instead, the danger issue was supported only by the officer's assertion that he feared for his safety.<sup>120</sup>

*Martinez*, however, found closure justified because the crime occurred at 8th Avenue and 42nd Street in Manhattan, a location where the undercover had been on duty twenty-five of the previous thirty days and to which area she would be returning. The undercover continued that open testimony could reveal her identity and get her killed. To preserve her confidentiality, she routinely entered the courthouse through nonpublic entrances. The Court, in affirming the closure, stressed that the undercover was returning to the particular location that was the scene of the crime and that that location was readily accessible from the courthouse.<sup>121</sup>

After *Martinez*, courtrooms have been frequently closed for undercover testimony. With only a few exceptions, these closures have been upheld by the appellate courts.<sup>122</sup> In these cases, the officer has often testified that he has feared for his safety if his identity were to become

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120. *See id.*

[T]he testimony established no more than the officer's continuing activity as an undercover "in the Bronx area"—more than 41 square miles and 1.2 million residents . . . . No reference was made, for example, to associates of defendant or targets of investigation likely to be present in the courtroom, or to threats received. Indeed, no link was made, or even attempted, between the officer's fear for his safety throughout the Bronx area and open-court testimony in this buy-and-bust case . . . . [Concerns about the officer's safety] is supported only by the officer's own assertion that he feared for his safety if the courtroom was not closed.

*Id.*

121. "[T]he undercover officer identified a particular location—Port Authority in Manhattan, the site of defendant's arrest—readily accessible from the Manhattan courthouse, at which she had functioned daily for a month, and to which she would return as an undercover that very day to complete her work with drug dealers." *Id.*

122. *See People v. Duke*, 653 N.Y.S.2d 363, 364 (App. Div. 1997). "The [undercover] officer testified that he would soon be returning to work in the area where the defendant was arrested. This court has repeatedly held that when the officer so testifies and closure is necessary to protect his safety, the requirements for closure . . . have been met . . . ."; *see also Zeidel, supra* note 2, at 669. ("Generally, the New York State appellate courts are quite sympathetic to the concerns of undercover officers, and uphold closure by the trial court in the majority of cases."); *cf. Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997) (in banc) (Parker, J., dissenting). "From October 20, 1996 to October 8, 1997, more than fifty cases involved the appeal of a closure order at trial in New York state." *Id.* at 81 n.4. "At the state level, courtroom closure was upheld in all but five of these cases." *Id.* at 81.

known.<sup>123</sup> The courts have frequently mentioned threats to the undercover officer.<sup>124</sup> Decisions have also noted that the courthouse is readily accessible from the area of the undercover officer's area of operations.<sup>125</sup> Sometimes testimony includes detailed steps that the officer has taken to preserve his identity, such as arriving at the courthouse in unmarked cars and using nonpublic courthouse entrances.<sup>126</sup>

The crucial factor, however, in assessing closures in the pre-*Ramos* days was geographic specificity. If the officer was returning to undercover duties after the trial to the "same" or "exact" location as the crime on

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123. See, e.g., *People v. Nicot*, 655 N.Y.S.2d 376, 377 (App. Div. 1997); *People v. Ramos*, 653 N.Y.S.2d 606, 607 (App. Div. 1997).

124. See, e.g., *People v. Jones*, 654 N.Y.S.2d 303 (App. Div. 1997); *People v. Ramos*, 653 N.Y.S.2d 606 (App. Div. 1997). While often just general threats are mentioned, sometimes more specific threats are listed. See *People v. Diaz*, 655 N.Y.S.2d 544, 545 (App. Div. 1997) (officer was threatened by defendant that he "better not be a cop"); *People v. Ayala*, 608 N.Y.S.2d 642 (App. Div. 1994) (ex-defendant had attempted to warn others that the undercover was a police officer).

125. See, e.g., *People v. Glen*, 654 N.Y.S.2d 306 (App. Div. 1997); *People v. Bowden*, 651 N.Y.S.2d 453 (App. Div. 1996). This concern, too, has sometimes been given more detail. See *People v. Rivera*, 654 N.Y.S.2d 771, 772 (App. Div. 1997) (A backup officer stated that it is "well known" that undercover officers testify and that people from the area of the crime come to the courthouse, thus jeopardizing the safety of the undercover officers.); *Diaz*, 655 N.Y.S.2d at 544 (A co-defendant at large, and undercover officer had other cases pending on same floor of the courthouse and in grand jury.); *People v. Pepe*, 653 N.Y.S.2d 101, 101 (App. Div. 1997) (The trial court took into consideration its personal observations that defendants from pending cases, "including one particular individual," were highly likely to be in court.).

126. See, e.g., *Ramos*, 653 N.Y.S.2d at 607; *People v. Rosario*, 625 N.Y.S.2d 19 (App. Div. 1995).

trial, the public exclusion was upheld.<sup>127</sup> If, however, future duties were not at the scene of the crime, closures were often held improper.<sup>128</sup>

*Ramos*, however, indicates that even without such geographic precision, closure can be proper. That court had two cases before it, upholding the closure in both because a substantial probability had been demonstrated in each that open testimony would prejudice the undercover officer's safety and effectiveness.<sup>129</sup>

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127. See, e.g., *People v. Ayala*, 608 N.Y.S.2d 642 (App. Div. 1994); *People v. Aponte*, 655 N.Y.S.2d 951 (App. Div. 1997); *People v. Diaz*, 655 N.Y.S.2d 544 (App. Div. 1997); cf. Zeidel, *supra* note 2, at 705 ("The state can present strong evidence supporting closure where the undercover officer will return to the exact location of the arrest to continue undercover operations.").

But see *People v. Johnson*, 650 N.Y.S.2d 408 (App. Div. 1996). The *Johnson* court upheld courtroom closure during the testimony of a confidential informant who continued to serve as an undercover informant. See *id.* at 410. The court stated that although his name had been disclosed in the complaint, his role had not been revealed nor had his appearance. See *id.* Closure was necessary to prevent the public from putting his face and name together. The court did not indicate whether the closure standards for confidential informants should be different from those for undercover police officers, but the opinion did not indicate that the informant was working the same area as the crime. There was no indication that anyone who was the target of pending or future investigations would probably be in the courtroom. The court seemed to be saying that there should be a per se closure for confidential informants who continued in this capacity at the time of trial. See *id.*

128. See, e.g., *People v. Bobo*, 653 N.Y.S.2d 617 (App. Div. 1997) (holding that closure was improper). The court stressed that the undercover was not currently working in the area of the crime. See *id.* at 618. It was not sufficient for closure that he could be assigned to that area again and that he had lost and released subjects in that area. The court concluded that the mere risks of undercover work were not sufficient to close the courtroom. See *id.* Similarly, *People v. Davis*, 620 N.Y.S.2d 15 (App. Div. 1994) held a closure improper. The officer was still participating in undercover operations, had some 200 prior buys pending, and his safety had been imperiled during those buys. See *id.* at 16. The testimony apparently failed to justify closure because it did not reveal that the undercover was now working in the area of the crime; see also *People v. Pankey*, 631 N.Y.S.2d 766 (App. Div. 1995) (finding error in closing courtroom when undercover officer did not then work in the area where defendant was arrested and was not expected to return there). But see *People v. Pepe*, 653 N.Y.S.2d 101 (App. Div. 1997) (affirming closure despite the fact that the officer did not indicate he would be returning to the area). The court stated that the crime occurred in the Manhattan South police district and the officer had 40 to 50 unresolved cases in the Manhattan South area where he continued to participate in buy-and-bust operations. See *id.* at 101. The court did not mention the size and population of the Manhattan South area. *Pepe* did not discuss how this case was distinguished from *People v. Martinez*, 624 N.E.2d 1027 (N.Y. 1993), where continued undercover work in the Bronx was not specific enough to justify closure.

129. See *People v. Ramos*, 685 N.E.2d 492, 497 (N.Y. 1997).

In the proceeding involving the defendant Ramos, the two undercover officers had seen former buy subjects in and around the courthouse and had pending cases in the same courthouse, with one officer having such cases in the same courtroom. The Court of Appeals concluded, "Thus, in notable contrast to Martinez . . . the undercover officers specifically referred to the likelihood of encountering other investigative targets."<sup>130</sup> Furthermore, the officers had recently worked in the precinct of the buy and planned to return there within a day, and they took steps to preserve their identities in entering the courtroom.<sup>131</sup>

In the proceeding involving the defendant Ayala, the undercover officer stated that he was then working in three precincts, one of which included the courthouse and another which encompassed the crime scene. The Court of Appeals noted that this specification was less precise than the street corner designation accepted as the grounds for closure in *Martinez*,<sup>132</sup> but was narrower than "the Bronx area" deemed insufficiently specific in that case.<sup>133</sup> In addition, the officer in *Ayala* used a private courthouse entrance which "further confirmed his claim that he feared being identified."<sup>134</sup> On balance, the Court of Appeals concluded, in what it regarded as the closer of the two cases, that closure was not an abuse of discretion, stating:

Police officers cannot be expected always to have advance notice of the precise street corner to which they will be assigned, and here the officer's specification of certain precincts was akin to identifying the particular neighborhood in which he continued to be active. Since these included both the neighborhood of defendant's drug activity and the neighborhood of the courthouse, a sufficient link was made between testifying openly in defendant's case and being recognized by residents of those neighborhoods in which the officer worked undercover.<sup>135</sup>

While lower courts have interpreted *Martinez* as requiring continuing undercover duties in the exact or same location as the crime, *Ramos* adopts a looser standard. Arguably, closure will now be appropriate whenever the officer continues in an undercover capacity in the same

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130. *Id.*

131. These included "riding to court in an unmarked car and using a private entrance to the courthouse." *Id.* at 494.

132. 624 N.E.2d 1027 (N.Y. 1993).

133. *Ramos*, 685 N.E.2d at 497.

134. *Id.*

135. *Id.*

precinct as the drug sale. Surely the other factors mentioned by the court should be satisfied in almost all buy-and-bust cases where an active undercover officer will testify. Thus, Chief Judge Kaye's opinion referred to the undercover officers' efforts to preserve confidential identities by their use of private courthouse entries and arrivals in unmarked cars, but these steps are not hard to take, and we can expect them in all carefully prepared future cases.<sup>136</sup>

*Ramos* also mentioned that in one case the undercover officers had "observed former 'buy' subjects in . . . the courthouse and had several other cases pending in the court."<sup>137</sup> This, too, can be expected to be the normal situation for an officer engaged regularly in undercover work. Cases do not go to trial the day after the arrest. During the elapsed months, the officer, especially one working buy-and-bust operations, will have participated in other arrests. As a consequence, the officer will almost always have other cases pending when he testifies.

These two factors—steps to preserve identity and pending cases—will do little to limit closures in undercover cases.<sup>138</sup> Instead, the crucial issue in determining whether closure in undercover cases is proper still remains geographical. While lower courts, however, had interpreted *Martinez* to mean that the officer had to be operating in the same or exact location as the crime, *Ramos* expands the area justifying closure. A return to a street corner or a block is not necessary. Instead, closure is justified as long as the officer will work undercover in the precinct of the crime, and closure may also be justified simply because the officer operates in the precinct of the courthouse.

Even so, *Ramos* added this hortatory note:

Our holding . . . by no means constitutes a green light for closing courtrooms in all buy-and-bust cases, and we condemn the allegedly routine practice of closing the courtroom during the testimony of undercover officers. . . . This practice flies in the face of directives by the United States Supreme Court and this Court regarding courtroom closure.<sup>139</sup>

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136. A different identity preservation issue was not discussed. If drug dealers have the perspicacity to stake out courthouses in hopes of learning who are undercover officers, they might have the wisdom to observe their local precinct houses for the same purposes. Are the undercover officers entering and leaving neighborhood police houses? What steps are taken there to keep their identities confidential?

137. *Ramos*, 685 N.E.2d at 497.

138. Since *Ramos* affirmed a case without mentioning that the officer had other cases before the court, pending cases can not be seen as necessary for closure.

139. *Ramos*, 685 N.E.2d at 501.

*Ramos*, however, expands the possibilities for closure by loosening the strict geographical requirement that lower courts had thought *Martinez* imposed. If New York closures had been routine before, they should be close to habitual in the future.

And now the Second Circuit will not be restraining these New York practices although restraint seemed possible before the recent in banc decision. In the first panel decision in *Ayala v. Speckard*,<sup>140</sup> the court held that the prosecution failed to demonstrate a substantial probability that an overriding interest would be prejudiced by open testimony.<sup>141</sup> The court agreed that the safety of undercover officers is an overriding interest, but stated that the mere possibility of such danger was not enough to justify closing the courtroom.<sup>142</sup> The justification was insufficient when nothing in this case gave the undercover a particular reason to have concerns.<sup>143</sup> Instead, he testified to a general fear that public exposure of his identity could cause him danger in his continuing undercover work and testified to such fear in all cases where he was a witness.<sup>144</sup> To allow closure on such a showing, the panel continued, would mean that no undercover officer who intends to return to undercover work need testify in open court.<sup>145</sup>

On the panel rehearing,<sup>146</sup> the court explained that in its earlier decision it had not said that the undercover had to testify publicly in every case.<sup>147</sup> Instead, it had held that closure is allowable only if a "substantial probability" is demonstrated in each case that open testimony would endanger the undercover's safety.<sup>148</sup> The state, *Ayala* conceded, has an overriding interest in managing the risk to undercover officers. Whether there had been a sufficient showing of such harm did not matter, however, since relief had to be granted because the trial court failed to consider reasonable alternatives before the closure.

A similar result was reached by a Second Circuit panel in *Okonkwo v. Lacy*.<sup>149</sup> In *Pearson v. James*,<sup>150</sup> however, another Second Circuit panel

140. 89 F.3d 91 (2d Cir. 1996).

141. *See id.* at 92.

142. *See id.* at 95.

143. *See id.*

144. *See id.*

145. *See id.* at 96.

146. *See Ayala v. Speckard*, 102 F.3d 649 (2d Cir. 1996).

147. *See id.* at 652.

148. *Id.*

149. 104 F.3d 21 (2d Cir. 1997).

150. 105 F.3d 828 (2d Cir. 1997).



held that the overriding interest prong of *Waller v. Georgia*<sup>151</sup> was satisfied when an undercover officer said her undercover activity was continuing in the same neighborhood as the crime, but that habeas relief still had to be granted because the trial court failed to consider reasonable alternatives.<sup>152</sup>

It was for these three cases, *Ayala*, *Okonkwo*, and *Pearson*, that the Second Circuit granted the in banc rehearing. As previously discussed,<sup>153</sup> the in banc Second Circuit held that trial courts need not consider alternatives to closure not proffered by the closure's opponent.

It also held that the circumstances justified the courtroom closings in all three cases. The court noted that the officers were all returning to undercover work in the same areas where the defendants were arrested, and these areas were described with particularity. The court continued that the state has an extremely substantial interest in maintaining the effectiveness of an undercover officer, and the trial courts were justified in concluding that this interest would be seriously prejudiced by open testimony.<sup>154</sup> The court stated that closure was constitutional because

[t]here is no requirement that the prosecution must prove that particular individuals likely to attend the trial will disclose the officer's identity. . . . [T]he right to a public trial does not require the . . . risk that the officer's identity will become known through observation by members of the public who might enter the courtroom and see the officer testifying. The gravity of the state interest in protecting the secrecy of the officer's identity from casual observers and the likelihood that this interest will be prejudiced by the officer's testifying in open court are both sufficiently substantial to justify the limited closure of the courtroom during the officer's testimony.<sup>155</sup>

Of course, there is always a chance that a casual observer will learn an undercover's identity at a public trial. Consequently, by the Second Circuit's reasoning, closure should always be required for the testimony

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151. 467 U.S. 39 (1984).

152. See *Pearson*, 105 F.3d at 830.

153. See *supra* text accompanying notes 35-48.

154. See *Ayala v. Speckard*, 131 F.3d 62 (2d Cir. 1997) (in banc). The court also stated, "[s]ince the state interest in maintaining the secrecy of the undercover officer's identity warranted the limited closure, we need not consider the respondents' additional point that the closure was also justified by the risk to the officer's safety." *Id.* at 72.

155. *Id.* The court stressed that the closure was limited. "The closure is limited not only because it lasts only for the testimony of one witness, albeit an important witness, but also because there is no limitation at all on the right of the public or the press to examine the transcript of the officer's testimony." *Id.*

of an officer continuing in undercover work. Although the in banc court noted that the officers were returning to the area of the arrest, a location described with "particularity," the Second Circuit's reasoning does not support a requirement that closure is justified only when the officer is continuing to operate in a narrow area encompassing the arrest.

The court concluded that a state had an important interest in protecting the identity from "casual observers" and that there was sufficient likelihood that open testimony would prejudice that interest to mandate a closed courtroom. Whether the undercover officer is returning to the particular area of arrest or another, there always exists the likelihood in an open courtroom that a casual observer will learn the identity of the undercover officer. The in banc *Ayala* opinion indicates that as long as the testifying officer will return to undercover work, closure for his testimony is appropriate. Instead of being a restraint on the New York courts, the Second Circuit gives a broader mandate to close than does the state court.

#### VII. THE UNTESTED ASSUMPTION UNDERLYING CLOSURES IN UNDERCOVER DRUG CASES

While the New York Court of Appeals has concluded that closures for undercover testimony is justified to protect the safety and effectiveness of the officer, the court has little explored the assumptions underlying its conclusions. The court's major premise seems to be that in cases when the officer returns to the same precinct as the crime, open testimony leads to a substantial probability that spectators will learn that the officer operates as an undercover. That conclusion seems unassailable, but closure seems to require another assumption. Not only may observers learn the identity, there must be a substantial probability that at least some of these spectators will carry this knowledge back to the streets and personally endanger the officer's safety or damage his effectiveness or spread the knowledge to others who will consequently endanger or impair usefulness.

If this is the logic, the rationale behind the court's geographic requirement is not clear. Although *People v. Ramos*<sup>156</sup> seems to expand the geographic restriction from the narrow location of the crime or the arrest to the precinct of the crime or the precinct of the courthouse, it does not seem to displace *People v. Martinez*,<sup>157</sup> which indicates that closure is not justified simply because the officer will work undercover in the county of the crime.

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156. 685 N.E.2d 492 (N.Y. 1997).

157. 624 N.E.2d 1027 (N.Y. 1993).

The reason for the geographic restriction, however, is not clear. If the concern is only that "casual observers" will learn the identities of undercover officers, as was the focus of the Second Circuit's recent analysis in *Ayala v. Speckard*,<sup>158</sup> the geographic restriction is out of place. Casual observers can gain this knowledge no matter what the locus of the future undercover assignment.

The New York Court of Appeals must be concerned about something more than just casual observers. Its geographic distinctions seem to depend upon the unarticulated assumption that drug dealers or others who will inform drug dealers will observe trials from their precinct to learn identities of undercover officers, but they are unlikely to be spectators at proceedings from other parts of the county or region.

This is a dubious assumption. For example, since the New York County courthouse hears cases from all of Manhattan, spectators from every part of the county will be in attendance. If the lower east side spectator sees the testimony about the Harlem drug sale from an officer now assigned to the lower east side, the danger to the officer's safety and usefulness is as great as it was in *Ramos* where the officer was returning to his precinct for an undercover assignment. The geographic restriction only makes sense if the assumption is that drug dealers and their cohort will seek out trials concerning their area of operation, but will not spend the effort for trials concerning nearby locations. Drug dealers are shrewd, but, according to the court's apparent assumptions, sharply limited in their deviousness and industriousness.

This parsing of the court's premises might seem to support the abandonment of any geographic requirement for closure. On the other hand, nothing indicates that the court's present geographic restriction has affected undercover officer's safety and utility when their operations switch neighborhoods. If the limitations of *Martinez* were putting police in jeopardy, we could expect prosecutors to document that to the courts. Apparently officers are safe when their identities are revealed, but they are not working the same precinct. Perhaps drug dealers really are not shrewd. Perhaps they are provincial enough only to seek out trials from their own precinct. Or perhaps we should question what the Court of Appeals treats as self-evident—the connection between a revealed undercover officers' identity and the endangerment of the officer's safety and effectiveness.

What the court has ignored is that all undercover work is not the same. The relationship between a disclosed identity and danger will vary with the kind of undercover work being done.

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158. 131 F.3d 62 (2d Cir. 1997). See *infra* text accompanying notes 159-66.

*Ramos* and *Martinez* concerned street-level buy-and-bust undercover transactions. *People v. Hinton*,<sup>159</sup> the first Court of Appeals decision affirming closure in an undercover case, however, involved a different kind of operation. The sales did not occur on the street, but at the defendant's home. The defendant was not immediately arrested after the sale; instead, the undercover officer made another purchase from him twelve days later, and the arrest was apparently made even later.<sup>160</sup>

The goals of this kind of long-term operation are often not just mere street-level sales. The purpose may be to identify others in a drug network through conversations with the seller or surveillance. The hope may also be to gain the confidence of the seller to negotiate a large purchase. In this kind of operation, both the safety of the officer and his effectiveness may depend on his identity remaining confidential. Obviously, a dealer would stop his negotiations with someone he knew was a policeman. The officer in these long-term investigations must have a continuing relationship with the sellers, and this requires a continuing confidential identity. Furthermore, if the dealers learn that identity while the operation progresses, they have strong incentives to harm the officer before they are arrested. Since meetings may be in nonpublic, often secluded, spots, the dealers may have good opportunities to do such harm. As the prosecution said in *Hinton*, "[The undercover] was entering alone places where drugs were being sold. To ask him to do this after his identity was disclosed is beyond the limits an officer should be required to go. To abandon investigations already started is unfair to our community."<sup>161</sup>

The Court of Appeals in *Hinton* stressed that "the very targets of the agent's other investigations were present in the courtroom, thereby constituting a peril to the agent's life."<sup>162</sup> Since the investigations involving these targets were still pending,<sup>163</sup> further contact between those targets and the officer must have been contemplated. At a minimum, public testimony would have disrupted these investigations. Targets that the officer had cultivated in hopes that they would sell him drugs, but had not yet done so, certainly would not do so if they saw him testify. The investigatory efforts already invested in these targets would have been wasted. Those who had sold him drugs, but whom the officer planned to

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159. 286 N.E.2d 265 (N.Y. 1972).

160. These facts are drawn from Appellant's Brief at 7-8, *People v. Hinton*, 286 N.E.2d 265 (N.Y. 1972).

161. Brief for Appellant at 7-8, *People v. Hinton*, 286 N.E.2d 265 (N.Y. 1972).

162. *Hinton*, 286 N.E.2d at 267.

163. The prosecutor told the trial court "that other narcotic investigations were pending [and] that other targets in these narcotic investigations were present in the courtroom . . . ." *Id.* at 266.

have further contact with, either to buy more drugs or to get more information from, might now flee or even worse, set up a meeting in a secluded spot to kill the officer with the hopes of avoiding arrest for the past sales. Under these circumstances, there clearly was a substantial probability that public testimony would prejudice an overriding interest that closure could prevent.

Put more generally, if further long-term undercover work is planned at the time of trial, and there are good reasons to believe that targets of those investigations might learn of the undercover's identity from public testimony, then strong reasons exist for a closed courtroom. As long as there are targets of long-term investigations unconnected to the defendant,<sup>164</sup> and the probability is that some of these targets will learn the identity of the undercover officer from public testimony, a closed courtroom for the undercover officer's testimony is appropriate.

The connection between the undercover officer and the seller in the kind of long-term operation employed in *Hinton* is much different from that relationship in a street-level, buy-and-bust. Typically in the buy-and-bust an undercover officer approaches someone on the street who appears to be selling drugs. The officer indicates that he would like to buy a controlled substance. After a purchase, he communicates the seller's description to a backup team, who shortly after the transaction makes an arrest. This is usually followed by a confirmatory identification with the undercover officer often driving by in an unmarked vehicle.<sup>165</sup>

Infiltrations of drug networks are not the goal. The primary purpose is the removal of street peddlers who are indiscriminately selling to a wide

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164. If, of course, the defendant is part of the organization still being investigated, with or without a closed courtroom, the defendant can tell his compatriots about the undercover's identity. Closure, then, would not prevent prejudice to the overriding interests.

165. See Michael Z. Letwin, *Report From the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 823 n.152 (1990).

In theory, a "Buy and Bust" begins with the deployment of a team of plainclothes officers at a drug trafficking location (the "set"). The undercover member of the team purchases ("makes buys") from dealers, usually with marked currency ("pre-recorded buy money"). Occasionally the undercover wears a radio transmitter (a "wire") to record and/or transmit the transaction to the rest of the unit (the "backup team"), which waits just out of sight. Sometimes another officer (the "ghost") keeps the undercover in visual contact. After the buy, the undercover transmits a description of the seller to the backup team, which detains those who match the undercover's radio description. Some time later, the undercover views and makes a confirmatory identification of the suspect, either at the scene (a "drive-by") or in the precinct.

*Id.*; see also Zeidel, *supra* note 2, at 659 n.1 (describing buy-and-bust operations).

clientele. These sellers have no particular relationship with their buyers, and the drug sale is normally the only contact between the undercover and the seller before the trial. The goal in buy-and-bust operations is not to build a continuing association between the undercover and the dealer, but merely to purchase drugs and immediately arrest the seller. In the buy-and-bust, the seller's first contact with the undercover buyer is meant to be his last.

Under these circumstances, the undercover agent is in no more danger than police generally when he approaches a seller who knows or believes that he is an officer. Frequently in the course of their trade, dealers must spot officers on patrol. Street-level sellers, however, do not normally attack such officers. Indeed, with the prevalence of sales in New York City, if street dealers just occasionally assaulted known police officers, the crime reports would record numerous daily incidents. Instead of attacking the police, street dealers, hoping that their conduct has not been observed, temporarily cease their activities and perhaps flee.

The same holds true for the recognized undercover in the buy-and-bust operation. Since there has been no prior contact between the undercover agent and the seller, the seller has not sold before to this person. This dealer does not have the incentive to attack that the seller does in the long-term operation who has already sold drugs to a person now recognized as the police. Instead, the seller approached in the buy-and-bust by someone he believes is the police will hope that his behavior has not been observed and that as long as he does not sell to this potential buyer he will not be arrested. He will pretend that he is not a dealer and will perhaps leave the location. His best recourse for avoiding an arrest is to do nothing with or to the officer. Indeed, if he surmises that the person approaching him is an undercover agent, then he has surmised that backup officers are nearby. He knows that an attack on the officer is likely to lead to an arrest and probable physical harm.

Certainly many street sellers must be wary, and these dealers must frequently become suspicious, correctly or not, of the stranger approaching him. If there were a substantial probability that violence often results when such a dealer suspects that an approaching buyer is a cop, such violent episodes should be rampant. Evidence of such attacks, however, has not been presented in the closure cases.

Courts truly probing and not just accepting the conclusory assertions about danger should be asking undercover officers how often they have approached someone believed to be a dealer, but the dealer would not sell. If the officer has had such encounters, the frequency of resulting violence should be cataloged. If such violence is as rare as this analysis suggests, then courts ought to be more skeptical about their basis for closure.

Dangers, however, might increase after a sale for an agent whose identity then becomes compromised. The seller who, since the sale has discovered that the buyer was an officer, upon seeing that agent again

might wish to take actions to prevent an arrest that will seem imminent. This situation, however, should not be common because the goal of the buy-and-bust is to apprehend right after the sale. In an efficient operation, only a fraction of the buy-and-bust sellers should go unapprehended long enough for them to have any chance of learning the undercover's identity before they are arrested.<sup>166</sup> Furthermore, violence is a possibility in every arrest. The risks for the recognized undercover involved in an arrest seem no more than what all officers routinely face when making an arrest.

These surmises that the danger to the revealed undercover officer is minute from unapprehended sellers may, of course, be wrong. Discovery of the identity in buy-and-bust undercover operations may be both more likely and dangerous than suggested. These are, of course, empirical propositions. The police or the prosecutors ought to have useful statistics and other facts about the dangers, but interestingly and perhaps significantly, no case actually documents those risks with hard information.<sup>167</sup> Logic and common sense, however, do not support the claimed connection between safety and closure in buy-and-bust cases.<sup>168</sup>

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166. Closure also would not ordinarily seem to be justified because the undercover operation seeks to find "lost targets" in the crime area. If that process consists of the undercover agent cruising the area in a car and backup officers making arrests when a seller is spotted, public testimony will not increase the undercover officer's risks.

167. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). The Court held unconstitutional a Massachusetts statute requiring closure during the testimony of sexual assault victims who were minors. The Court concluded:

[that the provision could not be] justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure . . . will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense.

*Id.* at 609-10; cf. Zeidel, *supra* note 2, at 716. "Even though active undercover officers certainly face serious dangers, courts must not assume that the level of danger merits closure of the courtroom in every case. Risks from public testimony should not be assumed; rather, they should be substantiated by fact." *Id.* (footnote omitted).

168. Courts should also probe whether closure is justified because the undercover officer has been threatened. If the threats came from someone who already knows the undercover's identity or has already been arrested, an open trial will not increase the danger to the officer. If the threat is of the kind, "You better not be a cop," and that person has not yet been arrested, the likelihood should be assessed whether an open trial will lead to the threatener's learning the officer's identity, meeting the officer again, and carrying out the threat instead of fleeing or being immediately arrested. Indeed, such warnings seem comparable to the kind police often receive. Police work is dangerous, and many officers receive threats. Courtrooms are not usually closed as a result.

This analysis suggests, however, that an officer's effectiveness in buy-and-bust operations may diminish if his identity becomes known. If sellers, recognizing him as a police officer, refuse to deal with him, his usefulness as an undercover agent will decrease. Since the government has a stake in preserving the usefulness of its operatives, this interest may justify closure. Assertions of diminished effectiveness and prevention of them by closure, however, should not be uncritically accepted.

First, closure is only justified when it will prevent prejudice to the overriding interest. If the prejudice will occur even if there is private testimony, the public exclusion is not justified. A probability of diminished effectiveness occurs every time an undercover officer testifies even with spectators banned. The defendant can always see the undercover testify and thereby learn his identity. As a result, there is always a significant probability that this identity will circulate in the defendant's circle of relatives and acquaintances whether they are present or not. If a revealed identity diminishes effectiveness, then the police have to expect less utility in this group whether or not the testimony has been public.

Indeed, the identity could be expected to spread further. Conversations at the corner store or the basketball courts can be expected like this: "Ramon, what happened to your brother?" "He was convicted of selling crack. That guy we know as Bill (or the tall redhead with the scar) is a cop and said that my brother sold him drugs." Because anyone in the vicinity might hear such comments, the officer's identity could always be revealed in the neighborhood. Private testimony cannot prevent an undercover already known by some (false) identity in the neighborhood from having his status revealed. Even if Ramon has not attended the trial, the police could not be sure that Ramon's brother, the defendant, has not told him the identity of the undercover officer.

Even so, as *Ramos* and many other cases reveal, the officer does return to the same neighborhood. He can continue there because in buy-and-bust operations the buyer and seller have no special relationship. The sales are, in effect, anonymous transactions, and there is no danger in the word spreading, "That guy we know as Bill is a cop," because the sellers do not know the buyer before the sale.

Closure prevents little harm to buy-and-bust operations. Since an increased risk of harm is unlikely to occur if the undercover officer's identity becomes known, closure little affects the danger to the police. Since buy-and-bust operations do not require the seller knowing the buyer in advance, the effectiveness of the undercover officer will be little affected by public testimony. Instead, the harm closure prevents is the possibility that a courtroom spectator who is a drug seller will actually see the undercover testify, later recognize him again as he approaches to buy drugs, and refuse to deal with him when he otherwise would have. When a court gauges whether a substantial probability exists that an overriding



interest would be affected by public testimony, it is the probability of this seemingly rare event affecting effectiveness that should be weighed.

On the other hand, the anonymous nature of buy-and-bust transactions means that the effectiveness of such an operation does not require a particular undercover officer working a particular location. Since the buyer does not have a continuing relationship with the seller, many undercover officers could make a buy from a particular seller. Similarly, if an officer could not buy in one neighborhood because his identity became known, he could buy in another. Rotating those assigned to undercover operations and the locations of undercover agents would not affect the level of arrests from buy-and-bust operations.

The undercover's continuation of work in the same area, then, must be more a matter of administrative convenience for the police department than a matter of preserving effectiveness of buy-and-bust operations. If so and if it is correct that harm to the buy-and-bust undercover officer is unlikely to be caused by public testimony, then the closure calculus should be weighing the fundamental right to a public trial against administrative expediency. If this were done, New York would see fewer denials of public trials.<sup>169</sup>

### VIII. CONCLUSION

Recent cases by the New York Court of Appeals and the Second Circuit sanction New York's continuing routine closure of courtrooms for the testimony of undercover officers in buy-and-bust cases. These cases rest on faulty, unarticulated assumptions. If these flawed premises were recognized, the rate of courtroom closures in New York would decline.

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169. Cf. Zeidel, *supra* note 2, at 663 (discussing the way other jurisdictions have eliminated the need for closure by limiting officers' undercover work to short periods of time); *Ayala v. Speckard*, 131 F.3d 62, 82 (2d Cir. 1997) (in banc) (Parker, J., dissenting) ("New York's adoption of a law enforcement practice that continually conflicts with defendants' and the public's constitutional rights is highly suspect.").