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FIRST AMENDMENT—GUARANTEE OF PUBLIC ACCESS TO *VOIR DIRE*

Press-Enterprise Company v. Superior Court, 104 S. Ct. 819 (1984)

I. INTRODUCTION

In *Press-Enterprise Company v. Superior Court*,[1] the United States Supreme Court held that the first amendment erects a presumption in favor of public access to the *voir dire* examination of potential jurors in criminal trials.[2] The State, through its courts, may limit or deny this right of access but only if such a restriction is necessitated by a compelling interest in the preservation of "higher values."[3] The Court also held that any restriction on public access must be narrowly tailored to preserve that compelling interest.[4]

The Court's decision to establish a presumption in favor of an open *voir dire* logically extends its previous decisions concerning such a first amendment guarantee during the actual trial[5] in order to enhance public scrutiny of governmental functions.[6] The Court recognized, however, that this guarantee of an open public proceeding potentially can intrude upon the legitimate privacy interests of jurors and other compelling state interests.[7] From a practical standpoint, therefore, the decision raises questions concerning how trial judges should apply the *Press-Enterprise* standard to pretrial proceedings other than the *voir dire*. The "higher values" standard promulgated here by the Court establishes the open *voir dire* presumption as a balance between first amendment and sixth amendment consid-

1 104 S. Ct. 819 (1984).

2 The first amendment provides the basis for the presumption of access herein established. *Id.* at 824 n.8; *see also infra* notes 98, 99, 103-06, and accompanying text. The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3 *See infra* notes 107-14 and accompanying text.

4 *See infra* note 115 and accompanying text.

5 *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-71 (1980); *see infra* notes 34-50 and accompanying text.

6 *See infra* notes 99-101 and accompanying text.

7 *Press-Enterprise*, 104 S. Ct. at 825.

erations, reflecting the public's need for scrutiny as it bears on the defendant's right to a fair trial. Although somewhat ambiguous on its face, the "higher values" standard should provide a workable guideline for resolving this potential conflict between public access considerations and other potentially compelling interests as they affect the defendant's right to a fair trial.[8]

Initially, this Note will explore more fully the interests at stake in the *Press-Enterprise* standard and examine the role of those interests in that standard. Then, it will discuss the standard itself and the major questions that confront a trial judge attempting to implement it. Finally, it will briefly examine some of the possible alternative methods of closure once closure is deemed necessary.

II. HISTORY

The Supreme Court, when first presented with the question of the public's right of access to a criminal trial, found that no such right existed in the sixth amendment;[9] it did suggest, however, that the public might have a right of access to a trial grounded in the first amendment.[10] In *Gannett Co. v. DePasquale*,[11] the Supreme Court held that the sixth amendment does not guarantee to the public the right to attend criminal trials.[12] The sixth amendment's guarantee of a public trial exists solely for the defendant's benefit;[13] no correlative sixth amendment right attaches to the general public to demand a public trial.[14] *Gannett* involved the denial of public access to a pretrial suppression hearing.[15] The trial court, with the agree-

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8 *See infra* notes 107-15 and accompanying text.

9 The sixth amendment states, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

10 *See infra* notes 12-15, 23-28 and accompanying text.

11 443 U.S. 368 (1979).

12 *Id.* at 391. In *Gannett*, the trial court excluded petitioner newspaper company from a pretrial hearing on a motion to suppress confessions allegedly given involuntarily and physical evidence seized as a result of these confessions. *Id.* at 374-75. Defense attorneys had requested that the public and press be excluded because of the possible prejudicial consequences of the adverse publicity; the District Attorney did not oppose the motion. *Id.* at 375. The trial judge granted the motion without any objection from petitioner's reporter at that time. *Id.*

13 *Id.* at 380-81 (citing Estes v. Texas, 381 U.S. 532 (1965); *In re* Oliver, 333 U.S. 257 (1948)). The Court wrote that " 'The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned.' " *Gannett*, 443 U.S. at 381 (quoting *Estes*, 381 U.S. at 538-39).

14 *Gannett*, 443 U.S. at 381. Because the Court found that the right to a public trial reposes solely in the defendant, defendants can waive that right much as they can waive their right to a trial by jury, at least in the context of the pretrial suppression hearing. *Id.* at 383-84.

15 *Id.* at 391-93. The Court distinguished considerations applicable to pretrial sup-

ment of both parties, "temporarily"[16] closed the hearing to the public and the press.[17] Despite the broad language of the Supreme Court's holding and the Court's analysis, both of which could apply to all facets of the trial, the majority's decision chiefly rests on considerations related to pretrial hearings,[18] suggesting a more restrictive reading of the holding.

In denying the public a right of access based on the sixth amendment, the Court focused on the effect that a public proceeding would have on the defendant's guarantee of a fair trial.[19] The Court declared that the "special risks of unfairness," both in a suppression hearing and in pretrial proceedings in general, dictated that the defendant's right to a fair trial was of paramount importance when compared to the right to a public trial, especially when someone other than the defendant is attempting to assert this right of a public trial.[20] In a more historical vein,[21] the Court pointed out that "pretrial proceedings, precisely because of this same concern for a fair trial, were never characterized by the same degree of openness as were actual trials."[22]

The Court, however, did not restrict its analysis in *Gannett* to the sixth amendment. It also explored the possibility of a public right of access grounded in the first amendment.[23] The Court denied petitioner newspaper's claim of first amendment infringement for two reasons. First, although none of the courtroom observers

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pression hearings from those involved in the actual trial. *See infra* notes 21-22 and accompanying text.

16 In *Gannett*, the trial court's "temporary" closure consisted of a closed hearing; the transcript was later released to the press and to the public. *Gannett*, 443 U.S. at 393.

17 *See supra* note 12 and accompanying text.

18 *See infra* notes 20-33 and accompanying text.

19 *Gannett*, 443 U.S. at 387-91.

20 *Id.* at 378. The Court's justification was that "[t]he whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury." *Id.*

21 The Court explained that even if the sixth and fourteenth amendments did bestow a right of access to criminal trials to the public, "it would not necessarily follow that the petitioner would have a right of access under the circumstances of this case. For there exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary." *Id.* at 387.

22 *Id.* at 387-88. The Court relied on historical precedent from English common law, *id.* at 387-89, and the American "judicial landscape," *id.* at 390-91, to support this statement.

23 *Id.* at 391-93. The Court has long held that the first amendment applies to the states through the fourteenth amendment; thus, the states and state employees, including state judges, may not abridge free speech. *See, e.g.*, Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976).

objected to the defendant's closure motion,[24] petitioner's objections were voiced at a subsequent hearing.[25] The trial court acknowledged that the press representatives had a constitutional right of access, but found that the defendant's right to a fair trial outweighed the right of access.[26] The Court examined the trial judge's determination that an open proceeding would have posed a "reasonable probability of prejudice to these defendants."[27] The Court sanctioned the closure decision because it was based "on an assessment of the competing societal interests involved . . . rather than on any determination that First Amendment freedoms were not implicated."[28] The Court later explicitly endorsed this assessment of competing interests in *Press-Enterprise*.[29]

The Court also relied upon the temporary nature of the denial of access in upholding the lower court's closure order in *Gannett*.[30] The press, and consequently the public, had access to a transcript of the suppression hearing once the danger of prejudice had dissipated, thus preserving both public access[31] and the defendant's interest in a fair trial.[32] The Court then concluded that "[u]nder these circumstances, any first and fourteenth amendment right of the petitioner to attend a criminal trial was not violated."[33]

The Court expanded upon this first and fourteenth amendment analysis in *Richmond Newspapers, Inc. v. Virginia*.[34] In *Richmond Newspapers*, the trial court granted a motion by the defendant to close his fourth retrial for murder to the public, fearing the possibility of juror contamination and juror distractions.[35] The Virginia Supreme

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24 Petitioner's reporter was among the courtroom observers that did not object to the closure motion. *Gannett*, 443 U.S. at 392.

25 *Id.*

26 *Id.* at 393.

27 *Id.*

28 *Id.* (quoting Saxbe v. Washington Post Co., 417 U.S. 843 (1974)).

29 *See, e.g., infra* note 109 and accompanying text.

30 *Gannett*, 443 U.S. at 393.

31 *See infra* notes 91-107 and accompanying text.

32 *Id.*

33 *Id.* The Court explained this conclusion as follows: "The press and the public then had a full opportunity to scrutinize the suppression hearing. Unlike the case of an absolute ban on access, therefore, the press here had the opportunity to inform the public of the details of the pretrial hearing accurately and completely." *Id.*

34 448 U.S. 555 (1980). After three mistrials of a criminal defendant charged with murder, the Virginia trial court granted defense counsel's motion to close the trial to the public. *Id.* at 559-60. The prosecution had no objection, and none was made by others present in the courtroom, including two of petitioner's reporters. *Id.* at 560. The trial court denied the motion to vacate the closure order at a later hearing, and the Virginia Supreme Court upheld this decision. *Id.* at 558-62.

35 *Id.* at 561.

Court denied plenary review of this determination.[36] In a plurality opinion,[37] the United States Supreme Court reversed the Virginia court's decision to close the trial. After distinguishing *Gannett* on the grounds that *Gannett* involved only the question of public access to a pretrial motion under the sixth amendment,[38] the Court held that the public has a right to attend criminal trials implied in the first amendment.[39] This first amendment right exists apart from any sixth amendment right previously foreclosed in *Gannett*.[40] Considerations regarding the fairness of criminal trials played a key role in the Court's judgment protecting this right of access.[41] The Court held, however, that this right of access was not absolute; it could be denied, but only by an "overriding interest" that was articulated in findings by the trial court.[42] The plurality opinion in *Richmond Newspapers*, then, appears to mark the beginning of the Court's trend toward limiting the scope of *Gannett*, presumably restricting it to sixth amendment claims of public access to pretrial proceedings.[43]

In *Globe Newspaper Co. v. Superior Court*,[44] the Court[45] held that the first amendment reposes in the public a right of access to criminal trials; like the plurality in *Richmond Newspapers*, however, the Court in *Globe Newspaper* did not find this right of access to be abso-

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36 *Id.* at 559-63.

37 Chief Justice Burger authored the plurality opinion and was joined by Justices White and Stevens; Justices Brennan, Stewart, and Blackmun concurred in the judgment, with Justice Marshall joining in Justice Brennan's opinion.

38 *Richmond Newspapers*, 448 U.S. at 564. The plurality also stated that the issue in *Richmond Newspapers* regarding first and fourteenth amendment access to trials had not previously been before the Court. *Id.*

39 *Id.* at 580. Chief Justice Burger's plurality opinion was based on virtually the same historical and public confidence rationale later employed in *Press-Enterprise*. *See generally id.* at 564-73; *see also Gannett*, 443 U.S. at 419-33 (Blackmun, J., joined by Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

40 *See supra* notes 13-14 and accompanying text.

41 *Richmond Newspapers*, 448 U.S. at 568-71; *see also id.* at 593-97 (Brennan, J., concurring in the judgment).

42 448 U.S. at 581. The interpretation of the earlier *Gannett* decision ranged from Justice Stewart's citation that although the sixth amendment does not confer on the public or the press any right of access to a trial, this broad holding leaves open the possibility of a right of access being guaranteed by other provisions of the Constitution, *id.* at 598-99, to Justice Blackmun's continued belief that the decision in *Gannett* was in error, *id.* at 603. In a separate opinion, Justice Brennan, joined by Justice Marshall, agreed with the majority view that the holding was limited to denial of a sixth amendment public right of access to pretrial proceedings. *Id.* at 584; *see supra* note 38 and accompanying text.

43 448 U.S. at 580-81.

44 457 U.S. 596 (1982).

45 Justice Brennan authored the majority opinion, and was joined by Justices White, Marshall, Blackmun, and Powell; Justice O'Connor concurred in the judgment; Chief Justice Burger dissented, with Justice Rehnquist joining him; Justice Stevens also dissented.

lute.[46] Public access to a criminal trial could be restricted, but only if public attendance at the trial would infringe on a compelling governmental interest, such as the interest of the public and the defendant in a fair criminal justice system,[47] and if the restriction imposed on public access was narrowly tailored to protect that interest.[48] Thus, the Court has advocated a case-by-case evaluation of the interests that compete with the public right of access to criminal trials.[49]

Although the Court enunciated in *Globe Newspaper* a strong presumption in favor of public access to a criminal trial, *Gannett* continued to raise questions concerning the Court's stance on public access to pretrial proceedings[50] because a sixth amendment right of public access to pretrial proceedings remained foreclosed.[51] Additionally, the Court's position regarding a first amendment right of access to pretrial proceedings remained unresolved, a situation that may have resulted simply from the plaintiff making the incorrect constitutional claim.[52] *Press-Enterprise*, however, presented the Court with an opportunity to explore the first amendment right of public access and its impact on the other potentially conflicting interests in the setting of a *voir dire* proceeding.

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46 *Globe Newspaper*, 457 U.S. at 606-07.

47 *Id.* at 606.

48 *Id.*

49 In *Globe Newspaper*, the Court applied this standard to its examination of the exclusion by the trial court of the press and the public from the trial of a defendant charged with the rape of three minor girls, pursuant to a Massachusetts statute requiring such closure. *Id.* at 598. The Massachusetts Supreme Court construed the statute, MASS. GEN. LAWS ANN. ch. 278, § 16A (1981), to require such exclusion during the victim's testimony pertaining to specified sexual offenses involving victims under age 18. *Globe Newspaper*, 457 U.S. at 599-600. The Court found that safeguarding the psychological welfare of a minor victim, as well as encouraging such victims to testify, amounted to a compelling interest. *Id.* at 607; *see also supra* note 48 and accompanying text. The Court, however, proceeded to invalidate the Massachusetts statute because it set forth a *mandatory* closure rule. 457 U.S. at 607-08.

Emphasizing that "the circumstances of the particular case may affect the significance of the interest," the Court concluded that, in the trial setting, "a trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Id.* The Court also listed several factors to be used in weighing the significance of the minor's interest, including: "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.*

Chief Justice Burger, joined by Justice Rehnquist, dissented, finding the exclusion of the press and the public only during the minor victim's actual testimony a rational limitation that furthered the State interest in protecting the welfare of the minor victim. *Id.* at 616-17.

50 The plurality opinion in *Richmond Newspapers* limited the application of *Gannett* to pretrial proceedings. *See supra* note 38 and accompanying text.

51 *Gannett*, 443 U.S. at 391.

52 *See supra* notes 23-33 and accompanying text.

III. FACTS OF *PRESS-ENTERPRISE*

Albert Greenwood Brown, Jr., was convicted in the Superior Court of California, Riverside County, for the rape and murder of a teenage girl.[53] He was sentenced to death.[54] Prior to the commencement of the *voir dire* examination of the prospective jurors, Press-Enterprise Co. petitioned the court to open the *voir dire* to the public and the press.[55] Petitioner contended that the public has an absolute right of access to the trial proceedings and that the *voir dire* is an essential component of those proceedings.[56] In opposing petitioner's motion, the State argued that if the press were present at the *voir dire*, the individual responses of the potential jurors would lack the candor necessary to assure the defendant a fair trial.[57]

The trial judge agreed with the State and denied Press-Enterprise Co.'s motion. The court limited the petitioner's presence in the courtroom to the "general *voir dire*,"[58] and denied petitioner and the public access to the individual *voir dire* of the prospective jurors.[59] During the "individual *voir dire*," the State and the defense questioned each potential juror about his or her opinion concerning the death penalty,[60] as well as other sensitive issues.[61] As a result of

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53 *Press-Enterprise*, 104 S. Ct. at 821. The relevant portion of California's murder statute, under which Brown was prosecuted, provides:

> All murder which is perpetrated by means of a bomb, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempting to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree . . . .

CAL. CRIM. CODE ch. 1, § 189 (West 1981).

54 104 S. Ct. at 821. Brown was sentenced pursuant to California's murder punishment statute, which states: "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1 . . . ." CAL. CRIM. CODE ch. 1, § 190 (West 1981).

55 104 S. Ct. at 821.

56 *Id.*

57 *Id.*

58 *Id.* The general *voir dire* primarily involves asking questions regarding the prospective jurors' backgrounds and past orientation to the case at hand; the individual *voir dire* involves asking more particularized questions designed to elicit the prospective jurors' orientation toward or knowledge of some of the more specific issues in the case. *See generally* MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 36 (6th ed. 1980).

59 *Press-Enterprise*, 104 S. Ct. at 821; *see also infra* notes 60-61 and accompanying text.

60 This process is known as "death qualification." It encompasses that portion of the *voir dire* in a capital trial wherein counsel question the veniremen regarding their views on the imposition of the death penalty, should the trial reach the sentencing stage.

In Hovey v. Superior Court, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1981), the California Supreme Court held that potential jurors must be sequestered from other jurors during the death qualification process. The United States Supreme Court has held that counsel may question the veniremen regarding their views on the imposition of the death penalty, but that jurors may not be excluded from the panel for cause because

the trial court's closure order, the public and the press could attend only about three days of the approximately six-week *voir dire*.[62]

Once the jury was empaneled, Press-Enterprise Co. moved the trial court to release a complete transcript of the *voir dire* proceedings.[63] The defendant opposed this motion, arguing that releasing the transcript would violate the jurors' right of privacy.[64] The State also opposed release of the transcript on the same grounds, adding that the veniremen had answered questions during the *voir dire* under an "implied promise of confidentiality."[65] The court denied petitioner's motion to release the transcript.[66] It concluded that the jurors' right of privacy[67] and the defendant's right to a fair trial justified the limitation on the public's right of access to the *voir dire*, even though the *voir dire* represents an exercise of governmental power by the judiciary.[68] The trial court did recognize that people generally have a right to know and observe governmental exercises of power.[69]

The jury found Brown guilty of the rape and murder of the teenage girl and, pursuant to California's death penalty statute,[70]

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of these views. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968) (excluding anti-death jurors for cause does not permit an adequate cross-section on the panel). It is constitutionally permissible to exclude jurors who refuse to impose the death penalty peremptorily. *See* Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *mod. on reh.*, 671 F.2d 858 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982); Spenkelink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) (excluding anti-death veniremen from the jury is not unconstitutional).

61 *Press-Enterprise*, 104 S. Ct. at 821.

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.* The motion was denied without prejudice. *Id.*

67 At oral argument on the motion to release the transcript, the trial judge supported his closure order based on the "implied confidentiality" of *voir dire*, and described the prospective jurors' *voir dire* responses as follows: "Most of them are of little moment. There are a few, however, in which some personal problems were discussed which could be somewhat sensitive as far as publication of those particular individual's [sic] situations are concerned." *Id.* (quoting Appendix at 103).

68 *Id.* At oral argument, the trial judge also stated:

> I agree with much of what defense counsel and People's counsel have said and I also, regardless of the public's right to know, I also [sic] feel that's rather difficult that by a person performing their civic duty as a prospective juror putting their private information as open to the public which I just think there is certain areas [sic] that the right of privacy should prevail and a right to a fair trial should prevail and the right of the people to know, I think, should have some limitations, so at this stage, the motion to open up the individual sequestered *voir dire* proceedings is denied without prejudice.

Id. (quoting Appendix at 121).

69 *Id.*

70 *See supra* note 54.

sentenced him to death.[71] After sentencing, Press-Enterprise Co. once again applied for release of the *voir dire* transcript and this motion again was denied.[72] The trial judge justified this decision by emphasizing the possible infringement on some jurors' privacy rights:

> The jurors were questioned in private relating to past experiences, and while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion.[73]

Petitioner then sought a writ of mandate from the California Court of Appeals to compel the Superior Court to release the *voir dire* transcript and to vacate the order closing the *voir dire* proceedings.[74] The petition was denied.[75] The California Supreme Court subsequently denied Press-Enterprise Co.'s request for a hearing.[76] On January 24, 1983, the United States Supreme Court granted certiorari.[77]

IV. THE SUPREME COURT OPINIONS

The Supreme Court unanimously[78] reversed the result reached by the California courts[79] and held that the guarantees of open public proceedings in criminal trials encompassed the *voir dire* examination of potential jurors.[80] Although unanimous in the result, several opinions were filed because the Justices disagreed on the rationale behind this result. The Burger majority based its decision on the historical evolution of the *voir dire* [81] and a desire to preserve public confidence in judicial proceedings.[82] The majority also left open the possibility that potential jurors might possess an independent privacy right that could warrant the limitation or even closure of the

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71 *Press-Enterprise*, 104 S. Ct. at 821.

72 *Id.*

73 *Id.* (quoting Appendix at 39).

74 *Id.*

75 *Id.*

76 *Id.*

77 459 U.S. 1145 (1983).

78 Chief Justice Burger's majority opinion was joined by Justices Brennan, White, Blackmun, Powell, Rehnquist, Stevens, and O'Connor. Justices Stevens and Blackmun filed concurring opinions, and Justice Marshall filed an opinion concurring in the judgment.

79 The California Court of Appeals denied petitioner's petition for a writ of mandate to compel the release of the *voir dire* transcript and vacate the trial court's order closing the *voir dire* proceedings. *Press-Enterprise*, 104 S. Ct. at 821.

80 *Id.* at 824-26.

81 *Id.* at 822-23. For a discussion of the majority opinion, see *infra* notes 87-116 and accompanying text.

82 *Id.* at 823-24.

voir dire.[83] Justice Blackmun concurred in the decision, but emphasized that the Court had not established any juror right to privacy.[84] Justice Stevens also concurred in the decision, stressing that because the first amendment basis for the decision did not require the Court to decide whether the *voir dire* is part of the "trial" for sixth amendment purposes, the Court had not decided that issue.[85] Finally, Justice Marshall concurred in the result reached by the majority but disagreed with its suggestion that the potential privacy interests of the prospective jurors lessens the public right to access.[86]

A. THE BURGER MAJORITY

Chief Justice Burger, writing for the Court, found that the presumption in favor of public access to court proceedings extends to the *voir dire*, and that this presumption can be overcome only by demonstrating, through articulated findings, that an overriding interest[87] was *in fact* threatened by an open proceeding.[88] Also, any closure order must be narrowly tailored to serve the interest at stake and the articulated findings must be specific enough to enable a reviewing court to evaluate the propriety of any closure order.[89] The Court held that the California court's closure order did not satisfy these criteria; the California court insufficiently supported its closure order with findings showing that an open proceeding in fact would have threatened an overriding interest.[90] In addition, even if the findings had been adequate to support some form of closure, the Court concluded that the trial court failed to consider alternatives to its virtually complete closure of the *voir dire*, thereby rendering its closure order unconstitutional.[91]

The Court found a presumption in favor of public access to the *voir dire* in both history and public policy. After an historical analysis of the development of the role of public access in the criminal

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83 *Id.* at 825.

84 *Id.* at 826-27 (Blackman, J., concurring); *see infra* notes 117-25 and accompanying text.

85 *Id.* at 827-29 (Stevens, J., concurring); *see infra* notes 126-35 and accompanying text.

86 *Id.* at 829-31 (Marshall, J., concurring in the result); *see infra* notes 136-40 and accompanying text.

87 The Court stated that the defendant's right to a fair trial was a compelling interest, and that the right to privacy of prospective jurors was potentially a compelling interest. *Id.* at 824-25.

88 *Id.* at 824.

89 *Id.*

90 *Id.* at 824-25.

91 *Id.* at 825.

trial itself,[92] the Chief Justice concluded that since before the signing of the Constitution, criminal trials were open to the public in both the United States and in England.[93] In addition, the "historical evidence"[94] suggested that "since the development of trial by jury, the process of selection of jurors has been a public process with exceptions only for good cause shown."[95] Thus, the Court concluded that history supports a presumption in favor of public access to the *voir dire*.[96]

The Court also justified this presumption favoring an open *voir dire* on several policy grounds. First, the Court found that public access to the *voir dire* would enhance public confidence in the "fair" operation of government, a confidence necessary to the survival of our republican system.[97] The Court reasoned that even though every individual cannot actually attend the proceedings, the public at large can be confident that the courts are following established procedures and that any deviations will become public knowledge

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92 *Id.* at 822.

93 *Id.*

94 *Id.* Chief Justice Burger first examined the period before the Norman Conquest in England, when cases were brought before "moots," which were essentially town meetings "such as the local court of the hundred or the county court." *Id.* (citing Pollock, *English Law Before the Norman Conquest*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 88, 89 (1907)). Attendance at "moots" was virtually mandatory for the community's freemen, who represented the "patria," or "country," in rendering judgment. *Id.* The Court's opinion then touched on the years after the Norman Conquest up through the 16th century, covering the evolution of the jury system into a small segment representing the community, and its emergence as an impartial trier of facts, largely due to the development of the system of challenging the jurors. *Id.* (citing 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 332, 335 (7th ed. 1956)). The Court suggested that jurors were selected in public beginning in the 16th century. *Id.* at 822-23.

The authority relied upon by the Chief Justice suggests that the public was not merely allowed but encouraged to attend the trial proceedings. Formerly, nothing concerning the trial was written down except the "enditement"; all other facets of the trial were " 'doone openlie in the presence of the Judges, the Justices, the enquest, *and so many as will or can come so neare as to heare it*.' " *Id.* (citing T. SMITH, DE REPUBLICA ANGLORUM 96, 101 (Alston ed. 1906) (emphasis added)). Colonial America then adopted the presumptive openness of jury selection from England, and this public jury selection was "the common practice in America when the Constitution was adopted." *Id.* at 823.

95 *Id.* at 822.

96 *Id.* at 823. In addition, the presence of others at the trial enabled "either party to pray a *tales*," 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349 (13th ed. 1800), if the number of jurors was insufficient due to challenges. In footnote 6, the Chief Justice states:

> By the statute 35 Hen. 8, ch. 6 (1543), the judge was empowered to award a "*tales de circumstantibus* of persons present in the court, to be joined to the other jurors to try the cause." 3 W. BLACKSTONE, *supra*, at 365. If the judge issued such a writ, the sheriff brought forward "talesmen" from among the bystanders in the courtroom. These talesmen were then subject to the same challenges as the others.

104 S. Ct. at 823 n.6.

97 104 S. Ct. at 823-24.

because *anyone* is free to attend trials.[98]

Second, the Court found that public access to the *voir dire* provides the accused with a benefit correlative to the benefit of enhanced public confidence.[99] Because openness provides for scrutiny of court procedures as well as decisions, courts adhere more closely to those procedures created to guarantee the accused a fair trial.[100] The selection of an impartial jury is a procedure that is essential to a fair trial.[101] Hence, the open *voir dire* proceedings enhance both the appearance of fairness upon which public confidence in the system rests and the fundamental fairness of the criminal process.[102]

Finally, the Court justified a presumption in favor of public access to trials because open trials have a "community therapeutic value."[103] The Court found that criminal acts, particularly violent crimes, "generate a community urge to retaliate and desire to have justice done."[104] Public awareness that the law is being enforced and that the criminal justice system is functioning provides a therapeutic outlet for these community urges.[105] Chief Justice Burger thus concluded that the concerns of both the victims in particular and the community as a whole are vindicated with the knowledge that "offenders are being brought to account for their criminal conduct by jurors fairly and openly selected."[106] Although each of these policy considerations had been offered in the past to support public access to trials, the Court found these policies equally applicable to the pretrial *voir dire*.[107]

The Court, however, did not completely rule out the possibility of closure. Although it did state that such a limitation must be "rare and only for cause shown that outweighs the value of openness,"[108]

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98 *Id.* at 823. According to the majority, "The value of openness lies in the fact that people not actually attending the trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Id.* (emphasis in original).

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.* (citing *Richmond Newspapers*, 448 U.S. at 569-71).

103 *Id.* (citing *Richmond Newspapers*, 448 U.S. at 578).

104 *Id.*; *see* T. REIK, THE COMPULSION TO CONFESS 288-95, 408 (1959).

105 *Press-Enterprise*, 104 S. Ct. at 823-24. "Proceedings held in secret would deny this outlet and frustrate the broad public interest." *Id.* at 824.

106 *Id.* "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 572).

107 *Id.*

108 *Id.* Chief Justice Burger distinguished the first amendment question of the open-

the Court found that some situations might require the closure of the *voir dire*.[109] Consequently, the Court articulated a two-part test for determining when this presumption is rebutted:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[110]

The Court judged the California court's closure order against this test and concluded that the closure order was unconstitutional.[111] It also noted with displeasure that a *voir dire* of six weeks "in and of itself undermines public confidence in the courts and the legal profession."[112] Although the superior court had stated that the sixth amendment right of the accused to an impartial jury and the privacy interests of the prospective jurors could justify closing the *voir dire* to public access,[113] the Supreme Court held that the superior court failed to support its decision by showing "that an open proceeding in fact threatened those interests."[114] Thus, the Court determined that it was impossible to conclude that closure was warranted.[115] Furthermore, even had the trial judge's findings been adequate to support closure, the Court reasoned that the failure to consider alternatives to combining closure of the *voir dire* with total suppression of the *voir dire* transcript rendered the trial judge's actions unconstitutional.[116]

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ness of *voir dire* from other questions, such as those regarding the fifth amendment prohibition against double jeopardy, where the determination of the start of the "trial" becomes important. *Id.*; *see also* Downum v. United States, 372 U.S. 734 (1963) ("trial" begins when the jurors are sworn in); Wade v. Hunter, 366 U.S. 684, 688 (1949) ("trial" begins when the first witness is sworn in).

109 *Press-Enterprise*, 104 S. Ct. at 824.

110 *Id.*

111 *Id.* at 826.

112 *Id.* at 824 n.9.

113 The Court recognized the sixth amendment right of a defendant to fundamental fairness in jury selection as a compelling interest and added that the process of jury selection may also create a compelling interest on the part of a prospective juror "when the interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain." *Id.* at 825.

114 *Id.* at 824-25.

115 *Id.* Although the trial court judge had found that " 'some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion,' " *id.* at 821 (quoting Appendix at 39), the Supreme Court found such statements to be insufficiently specific and concluded that the parts of the transcript that reasonably entitled the jurors to privacy could have been sealed without such a sweeping order; in any event, the "trial judge should explain why the material is entitled to privacy." *Id.* at 826.

116 *Id.* at 825. Two of the alternatives mentioned by the Chief Justice include (1)

B. JUSTICE BLACKMUN'S CONCURRENCE

Justice Blackmun concurred in the Court's decision because he agreed that the trial court failed to articulate specific findings that a compelling governmental interest[117] necessitated nondisclosure, and also failed to demonstrate that the closure was narrowly tailored to preserve that interest.[118] He wrote separately, however, to emphasize his understanding that the Court did not decide whether jurors have a privacy right that can compel the closure of the *voir dire* and the suppression of the *voir dire* transcript.[119] Although agreeing that jurors may have a privacy right that could be threatened by an open *voir dire* proceeding,[120] Justice Blackmun cautioned the Court against assuming the existence of such a strong privacy right without considering its possible consequences; he noted that the recognition of such a right could unnecessarily complicate *voir dire* proceedings.[121] In addition, according to Justice Blackmun, both the defendant[122] and the State[123] have a strong incentive to protect fully the privacy interests of the veniremen to en-

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requiring a prospective juror affirmatively to request an opportunity to present the problem to the judge *in camera*, with counsel present and on the record, once the general nature of the sensitive questions is made known to them; and (2) disclosing the substance of the private material while preserving the anonymity of the individuals sought to be protected. *Id.* at 825-26; *see also supra* note 60.

117 Justice Blackmun used the language from *Globe Newspaper* that was quoted earlier in the majority opinion, 104 S. Ct. at 824 (quoting *Globe Newspaper*, 457 U.S. at 606-07). *Press-Enterprise*, 104 S. Ct. at 826 (Blackmun, J., concurring).

118 *Id.* (Blackmun, J., concurring).

119 *Id.* (Blackmun, J., concurring). Justice Blackmun deemed the question of a privacy right as unnecessary to the determination of the case because (1) no juror was seeking to vindicate such a right, and (2) the trial court's error alone justified the decision. *Id.* at 826-27 (Blackmun, J., concurring); *see also supra* notes 64-65, 74-76 and accompanying text.

120 104 S. Ct. at 826 (Blackmun, J., concurring). Justice Blackmun also suggested that simply summoning the potential juror to his public duty cannot forfeit this privacy right. *Id.* (Blackmun, J., concurring).

121 *Id.* at 827 (Blackmun, J., concurring). Justice Blackmun asked:

> Could a juror who disagreed with a trial judge's determination that he had no legitimate expectation of privacy in certain information refuse to answer without a promise of confidentiality until some superior tribunal declared his expectation unreasonable? Could a juror ever refuse to answer a highly personal, but relevant, question, on the ground that his privacy right outweighed the defendant's need to know? I pose these questions only to emphasize that we should not assume the existence of a juror's privacy right without considering carefully the implications of that assumption.

Id.

122 "[T]he defendant has an interest in protecting juror privacy in order to encourage honest answers to the *voir dire* questions." *Id.* (Blackmun, J., concurring).

123 "The State has a similar interest in protecting juror privacy, even after the trial—to encourage juror honesty in the future—that almost always will be coextensive with the juror's own privacy interest." *Id.* (Blackmun, J., concurring).

courage their full cooperation.[124] Thus, Justice Blackmun felt that the Court should avoid the determination of such a right until the issue is squarely before it, and the Court can fully consider the ramifications of the issue.[125]

C. JUSTICE STEVENS' CONCURRENCE

Justice Stevens, also concurring in the decision, emphasized the first amendment dimensions of the public right of access to the *voir dire*.[126] The first amendment is concerned with the general right of public scrutiny of official proceedings.[127] The *voir dire*, like an actual trial, is just such an official proceeding.[128] Thus, in Justice Stevens' view, the presumption of public access encompasses more than the mere enhancement of public confidence in the functioning of the judiciary;[129] it encompasses the broader first amendment " 'common core purpose of assuring freedom of communication on matters relating to the functioning of government.' "[130] Justice Stevens established the relationship between the first amendment's access rights and their impact upon the judicial process.[131] He then reasoned that "a claim to access cannot succeed unless access makes a positive contribution to this process of self-governance."[132] Basing his conclusion on the enhanced public understanding of the *voir dire* process that will result from public access to these proceedings, Justice Stevens concluded that the public interest in avoiding lengthy *voir dire* proceedings[133] justified such access.[134] Finally, Jus-

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124 *Id.* (Blackmun, J., concurring).

125 *Id.* (Blackmun, J., concurring).

126 *Id.* at 827-28 (Stevens, J., concurring).

127 *Id.* at 828 (Stevens, J., concurring).

128 *Id.* at 827-28 (Stevens, J., concurring). Justice Stevens also pointed out the well-established principle that the fourteenth amendment extends the application of the first amendment to the abridgment of speech or the press by the states, including, as in the present controversy, state judges. *Id.* at 827 n.1 (Stevens, J., concurring); *see also* Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

129 *Press-Enterprise*, 104 S. Ct. at 827-28 (Stevens, J., concurring).

130 *Id.* at 828 (Stevens, J., concurring) (quoting *Richmond Newspapers*, 448 U.S. at 575).

131 *Id.* (Stevens, J., concurring); *see also supra* notes 97-98 and accompanying text.

132 104 S. Ct. at 828 (Stevens, J., concurring). Justice Stevens relied on the Court's opinion in *Globe Newspaper*, 457 U.S. 596, wherein the Court stated:

> Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs." Mills v. Alabama, 384 U.S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican form of self-government.

Press-Enterprise, 104 S. Ct. at 828 (Stevens, J., concurring) (quoting *Globe Newspaper*, 457 U.S. at 606).

133 *Id.* at 829 n.5 (Stevens, J., concurring).

134 *Id.* at 828-29 (Stevens, J., concurring).

tice Stevens agreed with the Court that jurors' privacy interests could potentially provide a basis for some limitation of the public's access to *voir dire*.[135]

D. JUSTICE MARSHALL'S CONCURRENCE

Justice Marshall concurred in the result reached by the majority, but disagreed with the suggestion that the public's right of access to the *voir dire* is diminished by the veniremen's right of privacy when "deeply personal matters are likely to be elicited in the *voir dire* proceedings."[136] On the contrary, according to Justice Marshall, "the policies underlying the public's right of access need protection most when courts attempt to conceal sensitive information from the public that has a bearing upon the ability of jurors to impartially weigh the evidence presented to them."[137] Consequently, not only should any access limitation be "narrowly tailored" to serve a conflicting, though compelling interest,[138] but also "a trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests" before issuing a closure order.[139] Finally, Justice Marshall objected to the majority's comments concerning the length of the *voir dire* proceedings, suggesting that the defendant's right to a

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135 *Id.* at 829 (Stevens, J., concurring). Justice Stevens stated that this context is among those in which " 'a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication.' " *Id.* (Stevens, J., concurring) (quoting Young v. American Mini Theaters, Inc., 427 U.S. 50, 70 (1976) (plurality opinion)). Justice Stevens observed that some of the access restrictions necessarily would pertain to the subject matter of questions that might probe into "areas of privacy that are worthy of protection." *Id.* (Stevens, J., concurring). He concluded that such restrictions would be permissible "[s]ince that function can safely be performed without compromising the First Amendment's mission of securing meaningful public control over the process of governance, [hence] this form of regulation is not an abridgment of any First Amendment right." *Id.* (Stevens, J., concurring).

136 *Id.* (Marshall, J., concurring in the judgment).

137 *Id.* (Marshall, J., concurring in the judgment) (referring to *Globe Newspaper*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process . . . .")).

138 *See supra* note 42 and accompanying text.

139 104 S. Ct. at 830 (Marshall, J., concurring in the judgment) (emphasis in original). Justice Marshall stated that

> the constitutionally preferable method for reconciling the First Amendment interests of the public and press with the legitimate privacy interests of jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses.

Id. (Marshall, J., concurring in the judgment); *see also supra* notes 60-61 and accompanying text. He then added that the substance of a juror's response to questions at *voir dire* can be excluded only "in the most extraordinary circumstances." 104 S. Ct. at 830 (Marshall, J., concurring in the judgment).

fair trial should not be subject to arbitrary time constraints.[140]

IV. ANALYSIS

The Supreme Court's affirmation in *Press-Enterprise* of a public right of access to *voir dire* proceedings grounded in the first amendment logically extends to the pretrial context previous Court decisions concerning access to the actual trial of a criminal defendant.[141] The decision appears to raise several questions concerning which pretrial proceedings will be open for public scrutiny[142] in light of the Court's previous decision in *Gannett*.[143] The *Gannett* result, however, can be reconciled with *Press-Enterprise*. The more important question remaining after *Press-Enterprise* concerns when courts will decide to limit the public's access to pretrial proceedings.

The standard set forth by the Supreme Court appears clear.[144] In practical application, however, the standard leaves trial judges with fairly wide discretion in deciding when to issue a closure order. The extent of the trial judges' discretion becomes evident when one considers the cumulative effect of the three decisions prerequisite to the issuance of any closure order. First, the trial judge must decide

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140 *Id.* (Marshall, J., concurring in the judgment). Justice Marshall objected to footnote 9 of the Burger opinion, which stated:

> We cannot fail to observe that a *voir dire* process of such length [six weeks], in and of itself undermines public confidence in the courts and the legal profession. The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused. Properly conducted it is inconceivable that the process could extend over such a period. We note, however, that in response to questions counsel stated that it is not unknown in California courts for jury selection to extend six months.

Id. at 824 n.9 (Marshall, J., concurring in the judgment). Noting that Albert Greenwood Brown, Jr., was accused of an interracial sexual attack and murder, Justice Marshall suggested that "a greater than usual amount of inquiry may have been needed in order to obtain a fair and impartial jury," and that six weeks is "not at all 'inconceivable' " in the given context. *Id.* at 830 (Marshall, J., concurring in the judgment). His objection focused on the fact that the Court possessed few of the facts that would enable it to decide on how long such a proceeding should be, and that the question was not presented to the Court. *Id.* For the same reasons, Justice Marshall stated that the majority's assumption that a six-week *voir dire*, as in the situation before the Court, " 'in and of itself undermines public confidence in the courts and the legal profession' " is unwarranted. *Id.* (Marshall, J., concurring in the judgment) (quoting the majority opinion, *id.* at 824 n.9). He then stated that the Court strayed beyond its proper role in lecturing the state court on how to best structure its *voir dire* proceedings in the absence of a claim that the length of such proceedings violates federal law. *Id.* at 831 (Marshall, J., concurring in the judgment).

141 *See Globe Newspaper*, 457 U.S. 596 (1982); *Richmond Newspapers*, 448 U.S. 555 (1980); *see also supra* notes 104-24 and accompanying text.

142 This assumes, of course, that these pretrial proceedings are not considered part of the "trial." *See supra* note 108.

143 *See supra* notes 12-33 and accompanying text.

144 *See supra* notes 108-18 and accompanying text.

if the particular situation warrants a limitation on public access.[145] Next, the permissible scope of any limitation must be divined from the opinion in *Press-Enterprise*.[146] Finally, having decided that access must be limited, the trial judge must determine the least restrictive means of limiting public access, a decision implicit in the Court's enumeration of several possible access-limitation alternatives.[147]

Prior to *Press-Enterprise*, the Supreme Court had not enunciated a clear threshold test for limiting public access to criminal proceedings,[148] although lower courts had addressed the issue. For instance, in *United States v. Brooklier*, the Ninth Circuit employed a standard based on substantial probability:

> Since the purpose of the findings is to enable the appellate court to determine whether the closure order was properly entered, the findings must be sufficiently specific to show that the three substantive prerequisites to closure have been satisfied—that there is a substantial probability (1) that public proceedings would result in irreparable damage to defendant's right to a fair trial, (2) that no alternative to closure would adequately protect this right, and (3) that closure would effectively protect it.[149]

The Supreme Court, in cases such as *Press-Enterprise*, has since tightened the threshold for closure, further emphasizing the importance of the public right to access during criminal proceedings.[150] Now, a trial judge must demonstrate that an open proceeding *in fact* threatens conflicting compelling interests, which will most often involve the defendant's right to a fair trial.[151]

The Supreme Court has determined that in order to limit the first amendment right of public access to a criminal proceeding, a trial court must balance the public access interests against other compelling interests.[152] In determining what amounts to a compelling interest militating for closure in the face of the public right of access to criminal proceedings, the Court has placed not merely its finger, but its entire weight on the scales to tip the balance in the direction that will best preserve the defendant's right to a fair trial. This bias in favor of the defendant's sixth amendment right is firmly

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145 *Press-Enterprise*, 104 S. Ct. at 824-25.

146 *Id.* at 824.

147 *Id.; see also supra* notes 16-17.

148 *See, e.g.*, United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982).

149 *Id.* at 1168-69. The test promulgated by the court in *Brooklier* is very close to that of the Supreme Court, with the exception of the "in fact" language. *See infra* note 151 and accompanying text.

150 *See, e.g., Press-Enterprise*, 104 S. Ct. at 824.

151 *Id.* at 824-25.

152 *Id.* at 824; *see also supra* note 141 and accompanying text.

established by the Court's language[153] in the line of decisions culminating in *Press Enterprise*[154] and by the policy underpinnings[155] for protection of the public right of access to criminal proceedings.

Although the Court's language in *Press-Enterprise* suggests that the right to privacy of prospective jurors might amount to a compelling interest in itself,[156] Justice Marshall's analysis in particular suggests that the Court's main concern with the privacy issue should revolve around how this interest bears on the defendant's right to a fair trial.[157] After all, as the majority states, "[n]o right ranks higher than the right of the accused to a fair trial."[158] Faced with a choice, the Court implies that any privacy interest will be subordinated in deference to the defendant's right to a fair trial.[159]

The interplay between the right to a fair trial and the public access interests serves to make the line-drawing task of the trial judge more difficult because the two interests involve many of the same considerations.[160] In establishing a balance, the crux of the public access issue lies in public scrutiny of all formal judicial proceedings because this scrutiny will lead to a public that is both confident and informed about its judiciary.[161] One of the underlying assumptions of the public access argument is that the public interest may not be protected fully by the parties in a criminal trial.[162] The public interest in a properly functioning judiciary is advanced precisely because of public access, which in turn enhances public confidence in that system.[163] If access were denied, this confidence

153 *See, e.g., supra* notes 99-102 and accompanying text.

154 *See also supra* notes 15-23 *(Gannett)*, 41-42 *(Richmond Newspapers)*, 47-48 *(Globe Newspaper)*, and accompanying text.

155 *See, e.g., supra* notes 86-90 and accompanying text.

156 *Press-Enterprise Co.*, 104 S. Ct. at 825. According to the majority, "[t]he jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain." *Id.*

157 *Id.* at 830 (Marshall, J., concurring in the judgment); *see also supra* note 121 and accompanying text.

158 *Id.* at 823.

159 *Id.* at 825. "The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process." *Id.*

160 *Id.* at 823. "[T]he primacy of the accused's right [to a fair trial] is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness." *Id.*; *see supra* notes 97-102 and accompanying text.

161 104 S. Ct. at 823; *see also* Great Falls Tribune v. District Court, 608 P.2d 116, 119 (Mont. 1980).

162 *In re* United States *ex rel.* Pulitzer Publishing Co., 635 F.2d 676, 681 (8th Cir. 1980).

163 *See supra* notes 98-99 and accompanying text.

presumably would fade.[164]

Another facet of the public interest in open trials involves the perceived substantive fairness of the system as it derives from the nature of crime and the criminal justice system. A crime is a wrong against the people of the community as a whole; its effects are not limited to the direct victim of the crime.[165] Lay people are prone to criticize the courts because of the perception that "the courts scrupulously observe every right of a defendant, but sometimes seem to overlook that the public is also directly affected by criminal acts and has a direct interest in the outcome of the proceedings."[166] Thus, the public confidence concern rests on substantive grounds as well as procedural integrity.

The public also maintains a pecuniary interest in criminal proceedings.[167] The public interest in openness here is akin to that of investors keeping track of their portfolios. This "public investment" rationale gives the public "every right to ascertain by personal observation whether its officials are carrying out their duties in responsibly and capably administering justice, and it would require unusual circumstances for this right to be held subordinate to the contention of a defendant that he is prejudiced by a public trial (or any part thereof)."[168] Extending the analogy to the procedural and substantive interests, the "public investors" have "votes" in the substance and procedure that they can delegate to their "proxy," the State. The "public investors" presumably have the choice to vote, for example by running for political office, or to delegate, which is by far the more frequent choice, depending on how they perceive their interests will be best served. Consequently, this public access enhances public confidence, which, in turn, helps the public remain comfortable with the delegation; because public representatives need not attend every proceeding, the system retains its efficiency.

Public access also generally protects the public interest in assuring the defendant a fair trial, a protection that the Court has repeatedly declared to be inviolable.[169] Assurance to the public of procedural and substantive integrity, both during and before the trial, augments the fairness of the defendant's trial for virtually the

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164 *Id.*

165 Commercial Printing Co. v. Lee, 553 S.W.2d 270, 273 (Ark. 1977).

166 *Id.* at 274.

167 *Id.* "[T]he courthouses are paid for with public funds; the judges, jurors, state's attorney (and defense attorneys who have been appointed by the court because of the indigency of their clients) are paid with public funds." *Id.*

168 *Id.*

169 *See supra* notes 99-102 and accompanying text.

same reasons.[170] Thus, by providing the possibility, no matter how small, that someone will be present at any criminal proceeding to reveal falsehoods or errors in the proceeding and call them to the attention of the interested parties, public scrutiny[171] accrues to the benefit of the defendant.[172]

The interests to be balanced by a trial judge before limiting public access—the right to a fair trial and the public right of access to the trial—are not always in harmony.[173] The evaluation of the defendant's right to a fair trial includes the possible prejudicial effects from adverse publicity and juror contamination,[174] juror privacy,[175] and juror safety[176] as they bear on the jurors' ability to fairly weigh the evidence at trial. Public access may have an adverse impact on these considerations.

Courts have encountered all three of these concerns— contamination, privacy, and safety—and examined the potential impact of publicity on the defendant's right to a fair trial.[177] The main emphasis, however, remains on the defendant's right to a fair trial above all else. For example, publicizing the names of the veniremen and their responses to *voir dire* questions could leave them open to ridicule at the hands of those who know them, or even those who do not.[178] The knowledge that their responses will be broadcast to all may also inhibit or destroy the integrity of their responses to questions.[179] Finally, this openness may leave the jurors open to attack at the hands of the defendant's comrades.[180] If potential jurors are concerned about any of these factors, they may choose, consciously or

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170 *See Press-Enterprise*, 104 S. Ct. at 823; *supra* note 169 and accompanying text.

171 Public scrutiny may also work against the defendant; for example, the defendant might have had the opportunity to make a favorable deal with the prosecutor but for the public eye. It is not necessarily a fair trial by custom, but the public might demand that something be done.

172 *Commercial Printing*, 553 S.W.2d at 273.

> [Public access] may well have a salutary effect. Cases have been reversed in this court because of answers given by prospective jurors on *voir dire* which subsequent investigation established were false, or at least incorrect, and which might have well disqualified the prospective juror. Particular spectators in a courtroom may know of such facts and call them to the attention of interested parties.

Id.

173 *See supra* notes 23-28 and accompanying text.

174 United States v. Layton, 519 F. Supp. 959 (N.D. Cal. 1981).

175 *Press-Enterprise*, 104 S. Ct. at 825.

176 United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

177 *See Press-Enterprise*, 104 S. Ct. at 825; *Barnes*, 604 F.2d at 134-35; *Layton*, 519 F. Supp. at 961-62.

178 *See Press-Enterprise*, 104 S. Ct. at 825.

179 *See Layton*, 519 F. Supp. at 961-62.

180 *See Barnes*, 602 F.2d at 134-35.

otherwise, to compensate in the interest of self-preservation by giving misleading responses or by concealing information. Consequently, the *voir dire* may not successfully elicit the information necessary to effectively screen the jurors, information that may later adversely affect the fairness of a trial.

In addition to the defendant's right to a fair trial, the Supreme Court also has acknowledged the possible existence of a juror privacy right that might become sufficiently compelling to require limiting public access to a criminal proceeding.[181] Because of the overwhelming policy reasons supporting the primacy of a defendant's right to a fair trial,[182] however, it is inconceivable that a juror's right to privacy could take precedence over the defendant's right. Although the Court did not specifically explore the ramifications of such a privacy right,[183] the most reasonable approach would have the trial judge, guided by the polestar of the defendant's right to a fair trial, consider juror privacy only as it pertains to the defendant's right to a fair trial.[184]

In most cases, any privacy interests of the veniremen will be protected during the *voir dire* proceedings through the discretion of the trial judge.[185] This discretion previously has been exercised to prevent unnecessarily intrusive *voir dire* questions.[186] More recently, however, trial judges have exercised their discretion to limit *voir dire* to protect juror safety[187] or to prevent irrelevant question-

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181 *Press-Enterprise*, 104 S. Ct. at 825.

182 *See supra* note 158 and accompanying text.

183 *See supra* notes 119-24 and accompanying text. The Court's failure to explore the privacy implications may have been due to a conviction that reasonable juror privacy expectations are *de minimis* or nonexistent. *Press-Enterprise*, 104 S. Ct. at 826 n.1. The Court stated:

> As to most of the information sought during *voir dire*, it is difficult to believe that when a prospective juror receives notice that he is called to serve, he has an expectation, either actual or reasonable, that what he says in court will be kept private. Despite the fact that a juror does not put himself voluntarily into the public eye, a trial is a public event. . . . And, as the Court makes clear today, *voir dire*, like the trial itself, is presumptively a public proceeding. The historical evidence indicates that *voir dire* has been conducted in public and most prospective jurors are aware that they will be asked questions during *voir dire* to determine whether they can judge impartially.

Id. (Blackmun, J., concurring) (citations omitted); *see also infra* notes 185-88 and accompanying text.

184 *See supra* notes 137-41 and accompanying text.

185 *See Press-Enterprise*, 104 S. Ct. at 826 n.1.

186 *See* Sprouce v. Commonwealth, 2 Va. Cas. 375 (1823); Ryder v. State, 100 Ga. 528, 534-35, 28 S.E. 246, 248 (1897) ("Neither the court nor counsel should ask questions tending to incriminate or disgrace the veniremen").

187 *See, e.g.*, United States v. Barnes, 604 F.2d at 140.

ing[188] in order to provide the necessary privacy protection indirectly. To the extent that a potential juror's individual right of privacy is threatened by relevant questioning despite these safeguards, that juror's privacy can be protected adequately by releasing a transcript of responses while concealing the juror's identity.[189] In some situations, the privacy interest may be so compelling as to lead the trial judge to exclude a potential juror from jury service.[190] Despite these privacy considerations, the *Press-Enterprise* Court's recognition of the defendant's right to a fair trial as a paramount compelling interest[191] seems to limit the consideration of any potential juror's privacy interest as a competing factor; privacy can be considered only as it affects an accused's right to a fair trial.[192] Treating potential jurors' privacy interests in this way respects the primary consideration of ensuring a fair trial and vastly simplifies the trial court's balancing process, thus greatly enhancing the workability of the *Press-Enterprise* standard.

The *Press-Enterprise* decision also espouses a narrow tailoring of any limitation on access,[193] but is less than clear on the interpretation of "narrow." In attempting to apply the *Press-Enterprise* standard, a trial judge must wonder whether *any* narrowly tailored limitation would suffice, an option seemingly left open by the language of the majority,[194] or whether such limitation must be "the least restrictive means available," as recommended by Justice Marshall.[195] Although the majority position conceivably could endorse Justice Marshall's position regarding "the least restrictive means,"[196] the more probable interpretation would appear to support *any* sufficiently narrow limitation. In any event, it would behoove the trial judge to employ the most narrowly tailored restriction on access because the least restrictive means best serves the vital interests involved and, more pragmatically, because costly

188 *See, e.g.*, United States v. Taylor, 562 F.2d 1345, 1355 (2d Cir.), *cert. denied sub nom.* Salley v. United States, 432 U.S. 909 (1977).

189 *Press-Enterprise*, 104 S. Ct. at 830 (Marshall, J., concurring in the judgment). "Only in the most extraordinary circumstances can the substance of a juror's response to questioning at *voir dire* be permanently excluded from the salutary scrutiny of the public and the press." *Id.* (Marshall, J., concurring in the judgment). Burger's majority opinion endorses a very similar form of limited closure. *See id.* at 825.

190 *Id.*

191 *Id.* at 823.

192 *See supra* notes 136-40 and accompanying text.

193 *Press-Enterprise*, 104 S. Ct. at 824.

194 *Id.*

195 *Id.* at 830 (Marshall, J., concurring in the judgment).

196 *Id.* at 825. The Court suggested that one of the main considerations would be to minimize the risk of unnecessary closure. *Id.* at 825. Logically, anything other than the least restrictive means must almost certainly involve a degree of unnecessary closure.

reversals can be avoided more easily.[197]

Finally, courts have dealt with the problem of choosing the "acceptable" limitation in myriad ways.[198] Where the circumstances of a particular trial endanger juror safety, courts have sought to protect the prospective jurors through "complete anonymity, namely, no disclosure of name or address."[199] Another example of a compromise closure found acceptable by a reviewing court involved a restriction on the number of press representatives present during *voir dire*, along with restrictions on the dissemination of the potential jurors' names.[200]

The *Press-Enterprise* majority also suggested imposing an affirmative duty upon prospective jurors to "request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record,"[201] once they realize the sensitive nature of the questions involved.[202] Whether the Court posited this procedure as a requirement or, more likely, as another alternative available to trial courts, trial judges at least should consider this procedure because it "can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy."[203] By requiring a prospective juror to come forward with his or her privacy concerns, this procedure will weed out the more frivolous claims of privacy infringement, which will be on the record in any event; it also enables the court to protect legitimate privacy concerns by withholding that portion of the record, or by otherwise protecting the juror's privacy through less restrictive means.

As a result of the *Press-Enterprise* decision, the public right of access to criminal proceedings appears to extend to *all* facets of judicial involvement in a formally initiated criminal proceeding. The Supreme Court considered the determination of whether the *voir*

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197 Appellate review tends to be *ex post* analysis while the trial judge must necessarily make his limitation determination *ex ante*. This emphasis by the court could be determinative because any risk or threat already will have materialized with a retrospective examination of the circumstances; consequently, the reviewing court may overturn many of the closure decisions because it does not face the urgency and time limitations placed upon a trial judge. *See, e.g., Richmond Newspapers*, 448 U.S. 555 (1980); Rapid City Journal v. Circuit Court, 283 N.W.2d 563 (S.D. 1979). *But see Gannett*, 443 U.S. 368 (1979).

198 *See, e.g., supra* notes 16-17.

199 *See, e.g., Barnes*, 604 F.2d at 135. The Second Circuit sustained this limitation on access because of the extensive pretrial publicity and because of the " 'sordid history' of multi-defendant narcotics cases tried in the Southern District." *Id.* at 134.

200 *See Layton*, 519 F. Supp. at 961-62.

201 *Press-Enterprise*, 104 S. Ct. at 825.

202 *Id.*

203 *Id.*

dire is part of the "trial" as superfluous to its decision.[204] Hence, the existence of a public right of access does not hinge on the particular stage of the trial; the access decision should be made regardless of the status of the trial. Different facets of a trial, however, will necessarily affect whether particular interests militate for or against public access, as the *Gannett* decision suggests.[205]

Has the Supreme Court changed its mind since deciding *Gannett*? Recall that *Gannett* involved the closure of a pretrial suppression hearing in which no objections were voiced at the time of closure.[206] Although the trial court later held a hearing on Gannett Company's objections to the closure order, the trial court sustained its previous closure order because an open proceeding posed a "reasonable probability of prejudice" to the defendant.[207] Although the findings presented in the *Gannett* opinion are hardly specific, the fact that the trial court released a transcript once the danger of prejudice had dissipated militated heavily for affirmance of the order in the eyes of the Court. Additionally, the trial judge's recognition of a right of public access in his determination to temporarily close the hearing served to further convince the Court.[208] If the fact situation in *Gannett* were presented to the Court today, the decision would be the same, although the record would most likely present the trial judge's grounds for closure more fully.

V. CONCLUSION

The *Press-Enterprise* decision enabled the Supreme Court to extend the previously established first amendment public right of access to criminal trials to potentially encompass the entire criminal proceeding. The Court appears to have acknowledged this right of access to all proceedings in the context of an impermissibly closed *voir dire* review. Additionally, the Court has clarified its standard of closure by implying that, given a choice of alternatives, trial judges should choose the least restrictive access limitation if they feel that an open trial would, in fact, threaten a competing, compelling interest, the most important of which is a defendant's right to a fair trial. Any narrow limitation on access would appear to be acceptable, but given the Court's apparent bias against unnecessary closure, trial

204 *See supra* notes 97, 126-34 and accompanying text.

205 *See supra* notes 18-33 and accompanying text.

206 443 U.S. at 392.

207 *Id.* at 392-93.

208 *Id.* at 393.

judges should attempt to select the narrowest alternative, which would logically minimize any unnecessary closure.

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