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## Is Open Voir Dire a Good Thing - ABC, Inc. v. Martha Stewart: The Second Circuit's Interpretation of First Amendment Rights during Jury Selection in High-Profile Celebrity Trials

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IS OPEN VOIR DIRE "A GOOD THING"? ABC, INC. V. MARTHA STEWART<sup>1</sup>: THE SECOND CIRCUIT'S INTERPRETATION OF FIRST AMENDMENT RIGHTS DURING JURY SELECTION IN HIGH-PROFILE CELEBRITY TRIALS

I. INTRODUCTION

The year 2004 has been labeled the "Year of the Celebrity Trial."<sup>2</sup> Without a doubt, high-profile celebrity cases receive a great deal of media attention.<sup>3</sup> The media coverage present in television, newspaper, and Internet sources inundates the public with the latest stories from the Michael Jackson child molestation trial and the Kobe Bryant rape trial, to the Scott Peterson murder trial.<sup>4</sup> This constant attention may prejudice potential jurors and have an adverse impact on celebrity defendants.<sup>5</sup> On the other hand, courts respond to the potential harm to celebrity defendants by imposing gag orders, changing venue, and sequestering juries, thus manipu-

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1. 360 F.3d 90 (2d Cir. 2004).

2. Kevin Brass, *Trial and Error?*, AM. JOURNALISM REV., Apr./May 2004 (re-marking 2004 turning into "Year of Celebrity Trial" with assortment of celebrity trials creating "perfect storm" of media events), available at <http://www.ajr.org/Article.asp?id=3632>; Barbara Cochran, *Doors Closed to Media in Celebrity Trials*, RTNDA COMMUNICATOR, Mar. 2004 (observing six celebrity trials have occurred recently: actor Robert Blake, professional basketball player Kobe Bryant, singer Michael Jackson, high-profile defendant Scott Peterson, entrepreneur/home-décor mogul Martha Stewart, and former professional basketball player Jayson Williams), available at [http://www.rtnf.org/about/pres\\_mar04.shtml](http://www.rtnf.org/about/pres_mar04.shtml). The numerous star-powered trials have made this not only the year of the celebrity trial, but also the year of the secret trial as well. See Cochran, *supra*.

3. See Jaime N. Morris, Note, *The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases*, 44 B.C. L. REV. 901, 902 (2003) (noting heavy television and print coverage of three categories of high-profile cases). High-profile cases include cases containing sexual or sordid facts that "appeal to people's voyeuristic tendencies," where the crime is exceptionally horrific, and cases in which the defendants are celebrities. See *id.*

4. See Gene Policinski, *Why the rash of restraints against the news?*, FIRST AMENDMENT CENTER.ORG, at <http://www.fac.org/analysis.aspx?id=13897> (Aug. 20, 2004) (observing media's pursuit of information in Bryant, Jackson, and Stewart cases); see also Julie Hinds, *2004's pop-culture puzzlers*, DETROIT FREE PRESS.COM, at [http://www.freep.com/features/living/question28e\\_20041228.htm](http://www.freep.com/features/living/question28e_20041228.htm) (Dec. 28, 2004) (suggesting exhaustive media coverage of celebrity trials keeps society's mind off more pressing concerns like war and economic troubles).

5. See Laurie Nicole Robinson, Comment, *Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1313 (1998) (noting celebrity defendants receive increased media coverage and that "triers of fact may be influenced as to the guilt or innocence of the high-profile defendant").

lating the justice system in order to keep the media away and to protect celebrities.<sup>6</sup>

In *ABC, Inc. v. Stewart*,<sup>7</sup> the Second Circuit considered whether an order banning media agencies from *voir dire* examinations in the high-profile Martha Stewart case infringed upon the media's right of access.<sup>8</sup> Consequently, the Second Circuit had to decide whether the public's First Amendment right of access to criminal trials gives way to a defendant's Sixth Amendment right to a fair trial.<sup>9</sup>

This Note examines the Second Circuit's holding and rationale in *Stewart* as well as the implications this decision carries for future celebrity litigants. Section II details the facts and procedural history of *Stewart*.<sup>10</sup> Section III provides an overview of problems that occur in high-profile celebrity trials.<sup>11</sup> Section III also demonstrates how the First and Sixth Amendments conflict when the balancing test for *voir dire* is applied in intense media coverage cases.<sup>12</sup> Sec-

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6. See Cochran, *supra* note 2 (describing actions by judges to keep trial events secret). In Bryant's rape trial, the judge barred reporters from using tape recorders and from photographing witnesses. See *id.* In Jackson's child molestation trial, the judge denied a request by news organizations for live broadcast coverage. See *id.* In the high-profile murder trial of Scott Peterson, the trial judge ordered the witness list and potential juror list to be kept secret and banned cameras in the courtroom. See *id.*; see also Policinski, *supra* note 4 (illustrating methods used by judges to minimize possible effects from intense media coverage); Linda Deutsch, *Experts on the media warn of different justice system for celebrities*, SAN DIEGO UNION-TRIB., July 24, 2004, at A5 (discussing gag orders in Jackson and Bryant criminal trials and closed jury selection in Stewart trial). "[E]xtraordinary secrecy imposed by judges" may create a "two-tiered justice system – one for celebrities and one for everyone else." Deutsch, *supra*, at A5; see also Dahlia Lithwick, *Of Fame and Fairness*, AM. LAW., Mar. 2004, at 114 (doubting usefulness of techniques used by courts to keep publicity at bay). The article suggests:

[T]ools afforded judges to control the effects of pretrial publicity (*voir dire*, sequestration, postponement, and absurd instructions to ignore that which you know to be true) are the legal equivalents of a stone and flint. If we are going to ensure that the rich and famous receive unbiased juries, we need to make some drastic changes to the legal system.

*Id.*

7. 360 F.3d 90 (2d Cir. 2004).

8. See *id.* at 93 (setting out issues involved on appeal).

9. See *id.* (recognizing case requires balance of "two weighty constitutional rights: the First Amendment right of the press and of the public to access criminal proceedings and the Sixth Amendment right of criminal defendants to a fair trial").

10. For a discussion of the facts and procedural background of *Stewart*, see *infra* notes 16-31 and accompanying text.

11. For a discussion of problems that arise in criminal trials with intense media coverage, see *infra* notes 32-52 and accompanying text.

12. For a background of prior cases dealing with the First and Sixth Amendments and intense media coverage cases, see *infra* notes 53-112 and accompanying text.

tion IV explains the Second Circuit's foundation for its holding in *Stewart*.<sup>13</sup> Section V analyzes the court's reasoning based on its prior holdings and additional authority.<sup>14</sup> Finally, Section VI of this Note examines the likely consequences of the court's holding in *Stewart* on future *voir dire* cases and on the public's perception of fairness in the judicial process.<sup>15</sup>

## II. FACTS

An alliance of news organizations and publications ("Media Coalition")<sup>16</sup> moved to vacate a district court order closing *voir dire* proceedings in the high-profile case involving Martha Stewart.<sup>17</sup> The Media Coalition alleged the order violated the public's First Amendment right to access criminal trials.<sup>18</sup>

Martha Stewart's popularity has steadily increased over the past few decades. Stewart's notoriety made the Media Coalition's battle over access one worth fighting for. Since 1982, Martha Stewart has been involved in the home-lifestyle industry, building Martha Stewart Omnimedia, Inc. into a successful multi-billion dollar company

13. For an examination of the Second Circuit's reasoning in *Stewart*, see *infra* notes 113-52 and accompanying text.

14. For a critical analysis of the court's holding and rationale in *Stewart*, see *infra* notes 153-66 and accompanying text.

15. For a discussion of the potential effect of this decision, see *infra* notes 166-79 and accompanying text.

16. See *ABC, Inc. v. Stewart*, 360 F.3d 90, 96 n.2 (2d Cir. 2004) (listing sixteen members of Media Coalition: ABC, Inc.; American Lawyer Media; The Associated Press; Bloomberg, L.P.; CBS Broadcasting, Inc.; Cable News Network, L.P., L.L.L.P.; Daily News, L.P.; Dow Jones & Co., Inc.; Fox News Network, L.L.C., Fox Television Stations, Inc.; Gannett Co., Inc.; NBC, Inc.; Newsday, Inc.; NYP Holdings, Inc.; The New York Times Co.; Reuters; and The Washington Post Co.).

17. See *United States v. Stewart*, No. 03 Cr. 717 (MGC), 2004 WL 65159, at \*1 (S.D.N.Y. Jan. 15, 2004) (setting forth reasoning leading to closure of *voir dire*). The opinion states:

WHEREAS, there is a substantial risk that such publication [of juror responses to *voir dire* questions] or the possibility of such publication would prevent prospective jurors from giving full and frank answers to questions posed to them during *voir dire* . . . ; IT IS HEREBY ORDERED that no member of the press may be present for any *voir dire* proceedings that are conducted in the robing room; IT IS FURTHER ORDERED that a transcript of each day's *voir dire* proceedings will be made public . . . with the names of prospective or selected jurors redacted . . . ; IT IS FURTHER ORDERED that no member of the press may sketch or photograph or divulge the name of any prospective or selected juror . . . .

*Id.*

18. See *Stewart*, 360 F.3d at 96 (indicating aspects of motion to vacate district court order). Specifically, the Media Coalition challenged three parts of the district court's order: the closure of the *voir dire* proceedings, the provision for jury anonymity, and the restraint on publication of jurors' names. See *id.*

that sells “how-to” products for home decorating.<sup>19</sup> This success has made Martha Stewart “America’s most trusted guide to stylish living.”<sup>20</sup> As a well-known public figure, when criminal charges against Stewart were announced, the media swarmed.<sup>21</sup>

In 2001, the federal government brought criminal charges against Stewart for violating securities laws and for making false statements to federal agents.<sup>22</sup> From the start, the *Stewart* case attracted an extraordinary amount of media focus.<sup>23</sup> In response to the pretrial publicity, Judge Miriam Goldman Cedarbaum of the United States District Court for the Southern District of New York

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19. See *About Martha: Martha’s Biography*, MARTHA STEWART.COM, at <http://www.marthastewart.com/page.jhtml?type=learn-cat&id=cat653&navLevel=4> (last visited Mar. 18, 2005) (recounting Stewart’s personal and professional background). Stewart is a best-selling author, Emmy award winner, television and radio host, and newspaper columnist. See *id.*

20. *Id.* (listing honors earned by Martha Stewart). Among Stewart’s honors and awards are: being named one of “America’s 25 Most Influential People” in Time Magazine (June 1996) and one of “New York’s 100 Most Influential Women in Business.” *Id.*; see also Allan Chernoff, *Martha’s lawyer rebuts charges*, at <http://money.cnn.com/2004/03/02/news/companies/martha/> (Mar. 2, 2004) (noting Martha Stewart’s well-known catchphrase is describing something as “a good thing”).

21. See *Stewart*, 360 F.3d at 94 (mentioning immediate intense media coverage given to case).

22. See *id.* at 93-94 (listing numerous criminal charges against Stewart stemming from December 27, 2001 stock sale). The charges alleged Stewart illegally sold 3,928 shares of ImClone Systems, Inc. stock. See *id.* The government charged Stewart and her stockbroker Peter Bacanovic with federal securities law and regulation violations alleging Bacanovic gave Stewart non-public information that she used in selling her stock. See *id.* The case states:

Specifically, Stewart stands accused of conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371 (2000); making false statements, in violation of 18 U.S.C. § 1001 (2000); obstruction of agency proceedings, in violation of 18 U.S.C. § 1505 (2000); and securities fraud, in violation of 15 U.S.C. § 78j (2000). Bacanovic is charged with conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371 (2000); making false statements and documents, in violation of 18 U.S.C. § 1001 (2000); perjury, in violation of 18 U.S.C. § 1621 (2000); and obstruction of agency proceedings, in violation of 18 U.S.C. § 1505 (2000).

*Id.* at 94; see also Daniel Kadlec, *Not a Good Thing For Martha*, TIME MAG., Mar. 15, 2004, at 60 (noting Stewart was found guilty of obstruction of justice on March 5, 2004).

23. See *Stewart*, 360 F.3d at 94 (referring to district court Judge Cedarbaum’s concerns regarding unusually high level of publicity surrounding trial). From the start, Judge Cedarbaum, the government and defendants, devised a two-part *voir dire* process to try to empanel an unbiased jury despite the intense media scrutiny. See *id.* First, the process required potential jurors be selected based on their answers to a lengthy questionnaire. See *id.* Second, the remaining jurors would then be questioned away from other jurors in the judge’s robing room. See *id.*

issued an order barring media contact with potential jurors.<sup>24</sup> Despite the order, certain portions of the jury questionnaire appeared on a website.<sup>25</sup> Judge Cedarbaum believed the press was identifying and singling out prospective jurors.<sup>26</sup> As a result, the government asked the district judge to exclude the media from attending the *voir dire* proceedings.<sup>27</sup> Noting the “widespread and intense media coverage” of the case, the district judge banned the media from the *voir dire* proceedings.<sup>28</sup> To appease the media, the district judge ordered the publication of the redacted transcript of each day’s potential juror questioning.<sup>29</sup> In response, the Media Coalition appealed the district court’s closure of the *voir dire* proceedings.<sup>30</sup> The Second Circuit reversed the district court’s decision and held that the *voir dire* proceedings should have been open to the public.<sup>31</sup>

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24. See *United States v. Stewart*, No. 03 Cr. 717 (MGC), 2004 WL 65159, at \*2 (S.D.N.Y. Jan. 15, 2004). The district court held the January 2, 2004 order “was necessary to ensure the integrity of [the] proceedings’ as well as ‘the public’s and the parties’ overriding interest in a fair trial.’” *Stewart*, 360 F.3d at 94.

25. See *Stewart*, 360 F.3d at 94 (discussing that district court became aware website [www.gawker.com](http://www.gawker.com) contained posting paraphrasing portion of jury questionnaire).

26. See *id.* (citing district court order considering speculation that prospective jurors and their responses to *voir dire* questions may be disclosed).

27. See *id.* (mentioning government memorandum to district court asking media be excluded from *voir dire* in robing room). The government was concerned with ensuring juror candor. See *id.* Although it was the government that initially requested closed proceedings, the defendants also agreed. See *id.*

28. See *id.* at 95 (quoting district court’s ruling requiring *voir dire* to take place in robing room). The district court allowed a transcript of the jury selection proceedings to be made public with the names of jurors removed, or any information any juror requested not be made public. See *id.*

29. See *id.* (noting district court order). District court Judge Cedarbaum stated that by allowing a redacted transcript of each day’s proceedings to be published, she had chosen a less restrictive alternative to completely closing *voir dire*. See *id.*

30. See *Stewart*, 360 F.3d at 96 (recounting Media Coalition’s motion to vacate or modify district court’s order closing *voir dire*). The district court denied the Media Coalition’s request for a stay of *voir dire* pending appeal, and therefore, closed *voir dire* examinations started on January 20, 2004. See *id.* at 97. Although the Media Coalition also challenged the district court’s requirement of juror anonymity and restraint on publication of jurors’ names, the Second Circuit only examined the district court’s closure of *voir dire* examinations on appeal. See *id.* at 96.

31. See *id.* at 93 (holding under particulars of case, district court erred in closing *voir dire* examinations to public). The Second Circuit also noted that since *voir dire* was already complete for the *Stewart* trial at the time of its decision, the “remedy has no practical implications with respect to this case.” See *id.* The Second Circuit chose, however, to decide the case because the issues presented were likely to be repeated in future cases. See *id.*

### III. BACKGROUND

#### A. Problems Created by High-Profile Celebrity Trials

Is the constant media attention given to high-profile trials in the best interest of the justice system?<sup>32</sup> It is becoming increasingly obvious that celebrity trials are not ordinary trials.<sup>33</sup> The media attention given to high-profile trials causes problems for courts, such as finding impartial jurors.<sup>34</sup> Celebrity trials also foster the debate about whether celebrities receive preferential or unusual treatment in the justice system compared to ordinary defendants.<sup>35</sup> These problems suggest that the media attention afforded to celebrity trials hinders, rather than helps, the justice system.<sup>36</sup>

##### 1. *Difficulty Finding Impartial Decision Makers*

The public's interest in high-profile criminal trials has recently grown, thereby increasing the amount of media attention afforded

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32. See Mike Hoeflich, *Can celebrities get justice?*, LAWRENCE J.-WORLD, Aug. 18, 2004 (asking whether celebrity trials are so newsworthy as to be in best interests of accused and accusers), available at <http://www.ljworld.com/section/citynews/story/178777>. Hoeflich suggests the media has a duty to cover only newsworthy events. See *id.* The media's focus on celebrity trials points to a problem in having a society that prioritizes the coverage of tragedies. See *id.*

33. See *id.* (recognizing motives of both prosecutors and defendants are different in high-profile cases). Book deals and mercenary agendas are aspects that arise out of, and are unique to, celebrity trials. See *id.*; see also Lithwick, *supra* note 6, at 114 ("Does it matter that celebrities may be able to buy themselves first-class justice . . . [o]r are juries too smart to fall for such manipulation?"). Lithwick also mentions jurors in high-profile cases may find instant fame for themselves through television appearances or book deals after the trial has ended. See Lithwick, *supra* note 6, at 114. But see Recent Legislation, *Criminal Procedure - Witnesses and Jurors - California Enacts Ban on Receipt of Money for Information*, 108 HARV. L. REV. 1214, 1214 (1994-95) (announcing in effort to promote fair trials, California legislature passed Brown-Kopp Bill, CAL. CIV. CODE § 1669.7 (1994)). California lawmakers grew concerned over pretrial publicity after O.J. Simpson double-murder trial in which tabloids offered jurors money for inside information. See *id.* The new law makes it a misdemeanor for jurors or witnesses to be given compensation for providing information relating to a criminal case within specified time periods. See *id.* Further, witnesses must wait one year from the crime's commission and jurors must wait ninety days after their discharge before they can sell their stories. See *id.* at 1215. In addition, anyone who tries to pay a juror or witness may be guilty of tampering with a jury. See *id.* Supporters of the new law argue it helps support the Sixth Amendment right to a fair trial and that the First Amendment does not guarantee jurors compensation for selling their stories. See *id.*

34. For a discussion on the difficulty in finding impartial jurors, see *infra* notes 37-46 and accompanying text.

35. For a discussion of the public's view that celebrity trials are different than ordinary trials, see *infra* notes 47-52 and accompanying text.

36. See Hoeflich, *supra* note 32 (proposing if media printed only news that is "fit to print," celebrity trial news would diminish and have beneficial impact on justice).

each case.<sup>37</sup> A side effect of this amplification in media focus is the trial court's increased difficulty in finding impartial jurors.<sup>38</sup> The comprehensive nature of the pretrial publicity reaches a larger population of potential jurors and supplies them with an in-depth view of the crime and the defendant. The information provided by the media creates a larger population of potential jurors with pre-set notions about the case.<sup>39</sup>

It is the trial court's duty to take certain measures to prevent pretrial publicity from having a prejudicial effect on the jury pool.<sup>40</sup> There are several methods to reduce the potential juror prejudice. First, the trial court must consider the extent and nature of the publicity in order to decide whether the media attention is prejudicial.<sup>41</sup> Second, if there is a high risk that heavy exposure to prejudicial publicity will bias potential jurors, it is the trial court's responsibility to utilize various techniques that lessen the publicity's effect and ensure a defendant receives a fair trial.<sup>42</sup>

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37. See Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 44 (1996) (defining high-profile case as "one in which there is pervasive and continuous national media treatment in newspapers, magazines, radio, and television for the duration of the investigatory and pretrial proceedings"); see also Robinson, *supra* note 5, at 1313 ("Within the last decade, interest in high-profile criminal cases has grown to phenomenal levels.")

38. See Robinson, *supra* note 5, at 1313 (suggesting potential jurors may be influenced by media coverage concerning guilt or innocence of celebrity defendant).

39. See Hardaway & Tumminello, *supra* note 37, at 45 (illustrating how publicity reaches and impacts potential jurors). Irrespective of origin, whether it was a particularly sordid case or involved a celebrity, once a trial becomes nationally notorious, the trial becomes more difficult. See *id.*

40. See *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (holding massive, pervasive, and prejudicial publicity disabled defendant from getting fair trial). In the *Sheppard* murder trial, a newspaper published the names and addresses of potential jurors causing them to receive letters and calls about the case. See *id.* at 342. The Court in *Sheppard* also took into account that because the courtroom was so packed with media representatives, witnesses and counsel could not be heard. See *id.* at 344. The Supreme Court held *Sheppard* did not receive a fair trial. See *id.* at 335. The trial court must take all necessary precautions to ensure a fair trial, including controlling the release of information to the press, limiting the number of media members in the courtroom, and protecting witnesses from the media. See *id.* at 359; see also *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979) (recognizing trial judge has affirmative constitutional duty to take measures that ensure defendant receives fair trial).

41. See Hardaway & Tumminello, *supra* note 37, at 45 (emphasizing trial judges look at scope (how widespread publicity is) and nature (how in-depth and detailed publicity is) in deciding prejudicial effect).

42. See *id.* (recognizing task of trial court to look for prejudicial effects); see also Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 646 (1991) (noting Supreme Court requires judges



Trial courts use the following techniques to find and maintain impartial jurors: change of venue, gag orders, trial continuance, *voir dire*, jury sequestration, and judicial instructions.<sup>43</sup> Each of these procedures attempt to ensure finding an impartial jury.<sup>44</sup> Each technique, however, has flaws or difficulties sometimes rendering it ineffective.<sup>45</sup> Further, each method must be utilized properly to avoid violating the First Amendment's guarantee of freedom of the press and the Sixth Amendment's guarantee to a speedy and public trial.<sup>46</sup>

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to use variety of methods to identify impartiality and to minimize impact of publicity in courtrooms).

43. See Minow & Cate, *supra* note 42, at 646-54 (listing common judicial remedies for pretrial publicity). Examples include: changing venue by moving the trial to another jurisdiction; a continuance delays the trial, allowing time for the media focus to settle down; jury instructions such as directions telling the jury to ignore outside information; and *voir dire* questioning of jurors to determine impartiality. See *id.*; see also Morris, *supra* note 3, at 906-07, 912-13 (discussing use of gag orders and jury sequestration). A gag order prohibits lawyers, witnesses, jurors, and court personnel from making any harmful extrajudicial statements outside of the courtroom. See Morris, *supra* note 3, at 906. Jury sequestration restricts jury access to extrajudicial information in order to ensure jurors reach a verdict based solely on evidence from the trial. See *id.* at 912.

44. See Darren Carroll et al., *Free Press and Fair Trial: The Role of Behavioral Research*, 10 LAW & HUM. BEHAV. 187, 192 (1986) (recognizing helpful practices for dealing with impartiality include *voir dire*, jury instructions, sequestration, continuance, and gag orders).

45. See Minow & Cate, *supra* note 42, at 646-50 (observing difficulties each technique encompasses even when used properly to empanel impartial jury). Change of venue sometimes upsets members of the local community who have the primary interest in resolving the case. See *id.* at 647. Moreover, when the publicity is not just concentrated in one locality, but rather all over the country, change of venue itself is ineffective. See *id.* Continuance puts an unnecessarily heavy burden on the court system and may violate a defendant's constitutional right to a speedy trial. See *id.* at 647-48. Judicial instructions may be ineffective because few people can correct their thoughts just because they were instructed to do so. See *id.* at 648; see also Morris, *supra* note 3, at 924-33 (explaining ineffectiveness of current devices courts use to remedy pretrial publicity effects). A gag order by itself does not help because gag orders cannot constitutionally prevent the media from reporting anything it learns. See Morris, *supra* note 3, at 24. Further, a gag order only restricts trial participants' ability to give information and does not restrict the underlying information to which the media has easy access, such as the identity of the accused in rape trials. See *id.* Jury sequestration is not a perfect solution to protect a defendant's right to a fair trial because of the "high social and financial costs" of sequestration. *Id.* at 928. Further, jury sequestration may be ineffective at minimizing the effects of pretrial publicity because it comes into play late in the trial process. See *id.* By the time jurors are empanelled, most have already been in contact with some form of media influence. See *id.*

46. See Hardaway & Tumminello, *supra* note 37, at 46 (asserting it is essential for judicial remedies to ensure impartiality and must not interfere with constitutional requirements). The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy

## 2. *Inequities Within the Criminal Justice System*

In addition to the hardships associated with finding impartial jurors, celebrity trials may frustrate public policy. In particular, if celebrity trial judges need to go out of their way to use various judicial techniques to protect the rights of celebrities, then justice is not shaped by laws, but rather, manipulated according to whom the laws are being applied.<sup>47</sup> Some argue that judges differentiate between celebrity and ordinary non-celebrity trials for selfish reasons.<sup>48</sup> Regardless of why celebrity defendants receive extra protection, inequities are created between celebrity and non-celebrity defendants. There are both advantages and disadvantages to being a high-profile or celebrity defendant.<sup>49</sup> Celebrity defendants

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the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

47. See Tony Mauro, *Judges wrongly close court to protect jurors*, USA TODAY, Jan. 21, 2004, at 15A (opining defendants' constitutional guarantee to fair trial has morphed into trial by invisible jury in celebrity cases). By isolating potential jurors from the public and the media, judges are putting up barriers to the public's right to know how justice is being carried out. See *id.*; see also Paul K. McMasters, *Inside the First Amendment: Celebrity privacy claims trump public justice*, NAPLES DAILY NEWS, Aug. 2, 2004 (commenting that providing celebrities greater privacy in trials causes "great danger that our justice will be shaped less by laws and scrutiny by the public than by the fame or notoriety of the defendants"), available at <http://www.firstamendmentcenter.org/commentary.aspx?id=13803>. See generally Cochran, *supra* note 2 (proposing celebrity trials should be more transparent than regular trials). Trials that are especially open help give the public "confidence that those on trial are not getting special treatment—or unfair treatment—just because they are rich or famous." *Id.*

48. See Jennifer Barrett, *The First Amendment on Trial*, MSNBC.COM, at <http://www.msnbc.com/id/4497726/site/newsweek> (Mar. 10, 2004) (opining important issue in high-profile cases is fact that celebrity cases are highlight of judge's career); see also Ken Paulson, *Inside the First Amendment: Locking out the public*, NAPLES DAILY NEWS, Mar. 1, 2004 (commenting on factors that influence judges' decisions to limit press), available at <http://www.firstamendmentcenter.org/commentary.aspx?id=12771>. These factors include genuine resentment on the part of judges toward members of the media. See Paulson, *supra*. The job of judges is to administer justice efficiently, and therefore, media intrusion can feel unsettling and cause the judge to hastily keep information quiet rather than give out information. See *id.*

49. See Julie Hilden, *Celebrity Justice: Famous, Wealthy Criminal Defendants Can Hire High-Priced Lawyers, But Do They Also Face Disadvantages?*, at <http://writ.news.findlaw.com/hilden/20040827.html> (Aug. 27, 2004) (comparing differences between ordinary person and celebrity defendant); see also Robinson, *supra* note 5, at 1327-30 (recognizing defendants who are professional athletes may sometimes be held to higher standard). Defendants with celebrity status are faced with the heavy burden of living up to society's expectation that they are "flawless human beings." See Robinson, *supra* note 5, at 1328.

An example is the 1983 criminal case involving Kansas City Royals baseball players Willie Wilson, Jerry Martin, and Willie Aiken. See *id.* The players were charged with a federal misdemeanor for attempted cocaine possession. See *id.* The typical first-time offender charged with this drug offense would be required to pay a fine. See *id.* The magistrate judge in this case, however, sentenced each player to

have access to the best lawyers and a greater ability to use the press to their advantage than do ordinary defendants.<sup>50</sup> Alternatively, high-profile defendants are subject to prosecution by the press and risk having a severely damaged reputation after trial, even if they are acquitted or prosecuted for only a minor offense.<sup>51</sup> Whether or not the media's involvement in high-profile and celebrity trials is positive or negative, it results in decisions that impact how the law is defined.<sup>52</sup>

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three months in jail. *See id.* The magistrate judge stated "because [the defendants] were professional baseball players and something of role models for children, they should be held to a higher standard." *Id.*

On the contrary, athletes are sometimes held above the law and may receive smaller punishment or preferential treatment from police. *See id.* at 1331. An example is professional baseball player Barry Bonds, who went to court to get his child-support payment reduced. *See id.* Judge George Taylor reduced the family support payment and then asked Bonds for an autograph. *See id.* The public objection to the judge's request caused Judge Taylor to reverse his decision and recuse himself from the case. *See id.*

50. *See* Robinson, *supra* note 5, at 1331 (observing benefits given to celebrity defendants). Talented attorneys jump at the chance to work for celebrity or high-profile defendants because the media exposure causes the lawyers themselves to become celebrity figures. *See id.* Celebrity defendants can use the press to do interviews to get their side out early, something a non-newsworthy, ordinary person cannot do. *See id.*

51. *See* Hilden, *supra* note 49 (recognizing personal risks celebrity defendants face). The article states:

Interestingly, the phenomenon of 'prosecution by the press' can go further than simply an assault on character that tends to poison the jury pool or hurt the celebrity's career. It can also lead to the scoop-hungry press - in particular, the courtroom press - unearthing additional evidence in the case and, in effect, adding private resources to the prosecution's already well-funded investigation.

*Id.*; *see also* *World News Tonight With Peter Jennings: A Closer Look Kobe Inc.* (ABC television broadcast, Aug. 4, 2003) ("Until sexual assault charges made headlines this summer, Bryant was one of the most marketable players in sports. He has a multi-million-dollar deal with Nike and big contracts with Sprite, Spalding and McDonald's."). Another Bryant sponsor, Nutella, a chocolate spread manufacturer, dropped Bryant from a \$500,000 a year advertising contract after the publication of sexual assault charges against him. *See World News Tonight With Peter Jennings: A Closer Look Kobe Inc.* (ABC television broadcast, Aug. 4, 2003). "For Kobe Bryant, whether he is guilty or not, the price of a tarnished reputation could total \$15 million." *Id.*

52. *See* Deutsch, *supra* note 6, at A5 (observing impact high-profile cases have on non-celebrity trials). The article quoted Loyola University Law Professor Laurie Levinson stating, "the actions taken in high-visibility cases end up defining the law for everybody else." *Id.* "The judicial obsession with treating celebrities in a manner different than all other defendants has turned the courts in an unprecedented direction." Associated Press, *Jackson Pretrial Hearing Focuses on Keeping Documents Secret*, MARIN INDEP. J., June 25, 2004.

## B. The Sixth Amendment: The Litigant's Argument for Closure of *Voir Dire*

*Voir dire* is the primary and preferred remedy for pretrial publicity.<sup>53</sup> It is an opportunity for the judge or attorneys in the case to question potential jurors to determine whether they can be impartial.<sup>54</sup> To ensure that a proper jury is empanelled, it is imperative that the jurors answer the questions during *voir dire* truthfully.<sup>55</sup> Supporters of closed *voir dire* argue that jurors in high publicity cases may be hesitant to give truthful answers fearing that their answers will be made public.<sup>56</sup> By withholding their true opinions, or by formulating pre-conceived notions about the trial based on media reports, biased jurors may be empanelled.<sup>57</sup> This would result in a violation of the defendant's Sixth Amendment right to a fair trial.

The Supreme Court recognizes that portions of pretrial proceedings should be closed to the public in order to control pretrial publicity.<sup>58</sup> The theory is that closing these proceedings will stop

53. See Minow & Cate, *supra* note 42, at 649-50 (stating most judges favor *voir dire* as way to determine which citizens are impartial enough to sit on jury).

54. See Patton v. Yount, 467 U.S. 1025, 1031 (1984) (quoting Yount v. Patton, 710 F.2d 956, 979 (3d Cir. 1983)) (noting that "[a] thorough and skillfully conducted *voir dire* should be adequate to identify juror bias, even in a community saturated with adverse publicity adverse to the defendant.'").

55. See Glenn J. Waldman & Craig J. Trigoboff, *Voir Dire Necessities: The Florida Supreme Court Clarifies when Trial Counsel's Investigation of the Venire Must be Undertaken*, 76 FLA. B. J. 48, 48 (Oct. 2002). The article states:

*Voir dire* examination serves to protect that right [to an impartial trier of fact] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant a challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

*Id.*

56. See *In re* S.C. Press Ass'n, 946 F.2d 1037, 1039 (4th Cir. 1991) ("[F]rank and forthright responses from potential jurors, which are essential to *voir dire*, would be chilled if they felt that their remarks would be published in the press . . . ."); see also United States v. King, No. 94 Cr. 455 (LMM), 1998 U.S. Dist. LEXIS 1233, at \*5 (S.D.N.Y. Feb. 5, 1998) ("Prospective jurors, if made aware that their views will be publicly disseminated in the next day's newspapers or radio or television broadcasts, will be under pressure not to express unpopular opinions relevant to their choice as trial jurors.").

57. See U.S. CONST. amend. VI. Specifically, the Sixth Amendment allows for a criminal defendant to enjoy the right to a speedy and public trial by an impartial jury. See *id.*

58. See *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979) (discussing danger of pretrial publicity on fairness of pretrial hearings). In *Gannett*, the trial court barred petitioner newspaper company from a pretrial hearing on a motion to suppress confessions allegedly given involuntarily. See *id.* at 374-75. Attorneys for the defendant requested that the media be excluded because of possible prejudi-

the press from gaining access to information that may subsequently be published and possibly prejudice potential jurors.<sup>59</sup> In *Gannett Co., Inc. v. DePasquale*,<sup>60</sup> the Court held the Sixth Amendment does not guarantee the public the right to attend criminal pretrial hearings.<sup>61</sup> *Gannett*, however, has been read narrowly to apply solely to pretrial proceedings.<sup>62</sup> Further, *voir dire* is not officially considered a trial or a pretrial proceeding, and therefore, it is not protected under *Gannett*.<sup>63</sup>

Advocates of closing *voir dire* proceedings argue that the media is only barred from being present in the courtroom. The media is not being denied total access because a court may allow printed transcripts of the questioning to be released.<sup>64</sup> This method enables potential jurors to be questioned in private, promoting truthful responses and satisfying the public's right of access to the

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cial consequences from the adverse publicity. *See id.* at 375. The district attorney did not oppose the motion and the trial judge granted the motion. *See id.* The Supreme Court affirmed the decision to close *voir dire*, holding members of the public had no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials. *See id.* at 392.

59. *See* Hardaway & Tumminello, *supra* note 37, at 81 (discussing times where courts have had to close pretrial proceedings); *see also* Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (ruling news media caused petitioner to be deprived of that judicial serenity and calm to which he was entitled); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (holding presence of press must be limited at judicial proceedings when it is evident that defendant might otherwise be disadvantaged). In *Sheppard*, there was no doubt that the abundance of pretrial publicity reached at least some of the jury. *See Sheppard*, 384 U.S. at 358.

60. 443 U.S. 368 (1979).

61. *See id.* at 391 (remarking that Sixth Amendment constitutional guarantee is for benefit of defendant). It does not create a similar right for the public to witness the trial. *See id.* The Court, however, went on to note that the Sixth Amendment also does not provide the right for a defendant to demand a private trial. *See id.* at 382.

62. *See* Hardaway & Tumminello, *supra* note 36, at 83 (noting limited interpretation of *Gannett*).

63. *See* Michael P. Malak, Note, *First Amendment – Guarantee of Public Access to Voir Dire*, 75 J. CRIM. L. & CRIMINOLOGY 583, 588 (1984) (explaining loophole in *Gannett*'s protection). The Supreme Court limited its holding in *Gannett* in the later case *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Richmond Newspapers*, the Court restricted the holding in *Gannett* to involve only the question of public access to a pretrial motion under the Sixth Amendment. *See* 448 U.S. at 587. The trial court in *Richmond Newspapers* granted the defendant's motion to close his fourth retrial for murder to the public out of fear of jury contamination. *See id.* at 561. The Supreme Court reversed the decision to close the trial. *See id.* at 564. The plurality opinion in *Richmond Newspapers* implies that although the public does not have a right to attend criminal trials under the Sixth Amendment, it does have a right to attend criminal trials under the First Amendment. *See id.*

64. *See Gannett*, 443 U.S. at 393 (noting media's denial of access to proceeding was not absolute, but rather only temporary). The media still had an opportunity to examine the hearing information and "inform the public of the details of the pretrial hearing accurately and completely." *Id.*

proceedings.<sup>65</sup> Access to the *voir dire* transcript only temporarily denies the public access to information.<sup>66</sup> For this reason, the Supreme Court has held that the media's constitutional right to be present at a criminal trial is not violated by closed proceedings if a transcript is released.<sup>67</sup>

### C. The First Amendment: The Media's Argument for Open *Voir Dire*

In most cases, jury selection is performed in open court where members of the press and the public can see the actual jurors being questioned.<sup>68</sup> In previous Supreme Court cases analyzing First Amendment right of access claims, the Court has primarily focused on the historical development of the trial by jury and the role the public plays in the judicial proceeding in question.<sup>69</sup>

#### 1. *Historical Tradition of Openness*

The Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*<sup>70</sup> was the first case to give the media and the public a constitutional right of access to criminal trials.<sup>71</sup> In *Richmond Newspapers*, Chief Justice Berger included a summary of the evolution of open trials to show that "the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively

65. See *id.* (promoting benefit to both public and defendant by making transcript readily available).

66. See Malak, *supra* note 63, at 586 (addressing temporary nature of media's access denial if press is given transcript of suppressed hearing once danger of prejudice has gone away); see also *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 512 (1984) ("*Press-Enterprise I*") (suggesting methods to avoid unnecessary closure). "[T]he constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time . . . ." *Id.* For a discussion of the reasoning in *Press-Enterprise I*, see *infra* notes 89-95 and accompanying text.

67. See *Gannett*, 443 U.S. at 393 (stating petitioner newspaper's First and Fourteenth Amendment rights to attend criminal trial were not violated).

68. See Paulson, *supra* note 48 (suggesting jury selection is as important as all other trial proceedings involving fate of defendant).

69. See *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*") (noting previous First Amendment right of access to criminal proceeding cases have traditionally considered both history and societal role of public access).

70. 448 U.S. 555 (1980).

71. See *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 603 (1982) (referring to *Richmond Newspapers* decision as first case to recognize right of access to criminal trials is embodied in First Amendment). For a discussion of the facts and holding of *Richmond Newspapers*, see *supra* note 63 and accompanying text.

open.”<sup>72</sup> Justice Berger noted that prior to the Norman Conquest, criminal cases in England were brought before “moots” and the freemen of the town had to attend all trials.<sup>73</sup> After the Norman Conquest, the freemen no longer had to attend, however, there was no statute preventing their attendance.<sup>74</sup> Chief Justice Berger reasoned, “[f]rom these early times, although great changes in courts and procedures took place, one thing remained constant: the public character of the trial at which guilt or innocence was decided.”<sup>75</sup>

Later, in *Globe Newspaper Co. v. Superior Court*,<sup>76</sup> the Supreme Court again held that the First Amendment gives the press and public a right of access to criminal trials.<sup>77</sup> Like the plurality opinion in *Richmond Newspapers*, the Court in *Globe Newspaper* examined the historical aspects of open trials to reach its decision. The Court in *Globe Newspaper*, however, found that the right of access to criminal trials is not absolute.<sup>78</sup> The Court held that public access to a criminal trial could be restricted only if the public access would infringe on a compelling governmental interest.<sup>79</sup> Moreover, the restriction placed on public access would have to be narrowly tailored to protect that interest.<sup>80</sup> The Court’s opinion in *Globe Newspaper* estab-

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72. *Richmond Newspapers*, 448 U.S. at 569. The presumption of openness “has long been recognized as an indispensable attribute of an Anglo-American trial.” *Id.*

73. *See id.* at 565 (describing history of open proceedings). “Moots” were a type of town meeting where attendance was required. *See id.*

74. *See id.* at 566 (noting there are few records of history of early jury selection, however, there is one account, that if believed, shows that since the 16th century, jury selection has been performed in public). The case quotes Sir Thomas Smith:

All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositories and witnesses what is saide.

*Id.* (quoting T. SMITH, DE REPUBLICA ANGLORUM 101 (Alston ed. 1972)).

75. *Id.* (observing presumption of openness surrounding jury selection carried from England to Colonial America and has become common practice in America today).

76. 457 U.S. 596 (1982).

77. *See id.* at 605 (holding Massachusetts statute providing for exclusion of general public from trials of specified sexual offenses involving victims under age of 18 violates First Amendment).

78. *See id.* at 605-06 (noting majority of Justices in *Richmond Newspapers* acknowledged closure might be permitted under certain circumstances).

79. *See id.* at 606-07; *see also* *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976) (discussing tension between enforcing First Amendment and Sixth Amendment rights equally); Malak, *supra* note 63, at 588 (discussing *Globe Newspaper* established “strong presumption in favor of public access” in criminal trials).

80. *See Globe Newspaper*, 457 U.S. at 606-07 (commenting decision to restrict access is weighty one, thus decision must be narrowly tailored).

lished a case-by-case analysis of the public right of access interests and the government and defendants' interests in criminal trials.<sup>81</sup>

## 2. *Openness Has Positive Impact in Society*

In addition to considering the historical trend of openness, the Supreme Court has also customarily focused on whether public access has had a positive role in the proper functioning of the criminal justice system.<sup>82</sup> The Court emphasizes how public access can impair some court proceedings, such as grand jury deliberations.<sup>83</sup> Other procedures, however, such as the selection of jurors, improve both the actual and apparent fairness of the criminal trial, which is essential to maintaining public confidence in the judicial system.<sup>84</sup> The Court reasons that because it is impossible for every citizen to actually attend all criminal proceedings, allowing open proceedings gives the public confidence that the courts are conforming to customary procedures.<sup>85</sup>

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81. See *id.* at 607-08 (suggesting that compelling interest, such as protection of minor child, does not necessarily validate mandatory closure rule). “[I]t 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 . . . .” *Id.* at 608.

82. See *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1, 8-9 (1986) (“*Press-Enterprise II*”) (noting historical role and positive functioning role are two complementary considerations in cases dealing with claim of First Amendment access right to criminal proceedings).

83. See *id.* at 9 (showing there are some processes that would be totally frustrated if they were to be conducted openly). See generally *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958) (providing why grand jury investigations must not be open). Grand jury secrecy is necessary:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

*Id.* (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)).

84. See *Procter & Gamble*, 356 U.S. at 681-82 (finding *voir dire* to be governmental process that plainly requires public access to enhance basic and perceived fairness).

85. See *Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984) (“*Press-Enterprise I*”) (“The value of openness lies in the fact that people not actually attending 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.”); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (“People in an open society



D. Press-Enterprise Balancing Test for *Voir Dire*

*Gannett* decided one issue: pretrial proceedings may be closed.<sup>86</sup> *Globe Newspaper* and *Richmond Newspapers* settled another issue: criminal trials should presumptively be open.<sup>87</sup> What about *voir dire*? The Supreme Court has not decided specifically whether *voir dire* is a part of the pretrial proceedings or part of the actual criminal trial.<sup>88</sup> In *Press-Enterprise v. Superior Court of California* (“*Press-Enterprise I*”),<sup>89</sup> the Court did not decide which category *voir dire* falls into, but rather used the First Amendment as the basis of its decision to prevent closure of *voir dire*.<sup>90</sup>

In *Press-Enterprise I*, the Supreme Court unanimously held the presumption in favor of public access in criminal trials included the *voir dire* examination of potential jurors.<sup>91</sup> The Court, however, did

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do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”).

86. For a discussion of the holding and reasoning in *Gannett*, see *supra* notes 58, 60-64 and accompanying text.

87. For a discussion of the holding and reasoning in *Globe Newspaper*, see *supra* notes 69, 76-81 and accompanying text. For a discussion of the holding and reasoning in *Richmond Newspapers*, see *supra* notes 63, 73-75 and accompanying text.

88. See *Hardaway & Tumminello*, *supra* note 37, at 82 (observing vagueness surrounding decisions on whether *voir dire* is part of pretrial proceeding or part of actual trial). The Supreme Court in *Gannett* initially distinguished between pretrial proceedings and the actual trial, however, the holding in *Gannett* did not continue the distinction. See *id.*

89. 464 U.S. 501 (1984).

90. See *id.* at 516-17 (Stevens, J., concurring) (noting Court found First Amendment right of access only). If the defendant had claimed his Sixth Amendment right to a fair trial was compromised, the Court would have had to “determine whether the selection of the jury was a part of the ‘trial’ within the meaning of that Amendment.” *Id.* at 516. In *Press-Enterprise I*, petitioner, a newspaper company, asserted it had a fundamental right to attend the *voir dire* examinations in a trial concerning the rape and murder of a teenage girl. See *id.* at 503. The Supreme Court found the district court’s closure of *voir dire* was incorrect because there was a failure to articulate findings with the necessary specificity and also a “failure to consider alternatives to closure and to total suppression of the transcript.” *Id.* at 513.

91. See *id.* at 501-13 (noting 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 opinion concurring in judgment). The Burger majority based its decision on the historical evolution of openness and a desire to maintain public confidence. See *id.* at 501-13 (detailing different historical events for support). Justice Blackmun’s concurrence emphasized that the Court had not established any juror right to privacy. See *id.* at 513-16. Justice Steven’s concurrence emphasized that the Court did not decide whether *voir dire* is part of a “trial”, but rather used a First Amendment basis to reach its decision. See *id.* at 516-20. Justice Marshall concurred in the judgment, but disagreed with any suggestion in the majority decision that the privacy rights of jurors lessens the public right to access. See *id.* at 520-521 (“Only in the most extraordinary circumstances can the substance of a juror’s re-

not eliminate the option of closing *voir dire*.<sup>92</sup> Rather, it articulated a two-part test for deciding when the presumption of openness may be rebutted, resulting in closed *voir dire* proceedings.<sup>93</sup> Under this test, *voir dire* is open unless there is first a specific finding of an overriding interest that shows closure is necessary to uphold higher values.<sup>94</sup> Second, the closure must be narrowly tailored to serve that interest.<sup>95</sup>

The Court further defined the two-part test, set out in *Press-Enterprise I*, when it decided *Press-Enterprise Co. v. Superior Court of California* (“*Press-Enterprise II*”).<sup>96</sup> The Court determined the test applied when the overriding interest asserted is the Sixth Amendment right of the accused to a fair trial.<sup>97</sup> The balancing test of *Press-Enterprise I* and *Press-Enterprise II* poses two questions: first, is closure of *voir dire* essential to preserve higher values; and second, is closure narrowly tailored to serve that interest?

### 1. *Is Closure of Voir Dire Essential to Preserve Higher Values?*

In applying the balancing test, a court first considers whether the petitioning party has satisfactorily demonstrated an overriding interest that is likely to be prejudiced by open *voir dire*.<sup>98</sup> The petitioning party must demonstrate with specificity the interest to be

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sponse to questioning at *voir dire* be permanently excluded from the salutary scrutiny of the public and the press.”).

92. See Malak, *supra* note 63, at 594 (describing Court’s historical and public policy analysis leads to presumption in favor of open *voir dire*, but does not completely rule out possibility of closure).

93. See *Press-Enterprise I*, 464 U.S. at 510 (describing two part balancing test necessary to allow closure of jury selection). The case states:

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 is properly entered.

*Id.*

94. See *id.* at 510-11 (discussing first prong of balancing test).

95. See *id.* (presenting balancing test for closure of *voir dire*).

96. 478 U.S. 1 (1986).

97. See *id.* at 14-15 (holding “substantial probability” test is higher burden than normal “reasonable likelihood” standard). In *Press-Enterprise II*, petitioner, a press agency, was excluded from preliminary hearings in a murder trial. See *id.* at 3-4.

98. See *Waller v. Georgia*, 467 U.S. 39, 45-46 (1984) (applying *Press-Enterprise I* test). In *Waller*, the prosecutor wanted to close a suppression hearing. See *id.* at 41. The Supreme Court, in applying the balancing test of *Press-Enterprise I*, held that the State’s interest was not specific as to whose interests might be infringed. See *id.* at 46-47.

protected and how open *voir dire* would infringe that interest.<sup>99</sup> Two factors frequently encountered in this part of the test include juror privacy interests and the defendant's right to a fair trial.<sup>100</sup>

Previous cases have pinpointed juror privacy as the higher value that would justify limited media access.<sup>101</sup> Apart from standard privacy, juror privacy concerns may include contamination and safety issues.<sup>102</sup> Although juror privacy interests may be relevant concerns, it is the defendant's right to a fair trial that takes precedence over a juror's right to privacy.<sup>103</sup> Specifically, if the interest necessary to preserve higher values is the right of the accused to a fair trial, the court must look at whether "there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent."<sup>104</sup>

## 2. *Is Closure Narrowly Tailored to Serve that Interest?*

Once the court has established an overriding interest to justify closing *voir dire*, the court must narrowly tailor the closure to serve that particular interest.<sup>105</sup> Primarily, if the interest asserted is the Sixth Amendment right to a fair trial, the court must look at

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99. See Hardaway & Tumminello, *supra* note 37, at 83 (listing factors petitioning party must show to meet closure test of *Press-Enterprise*).

100. See Malak, *supra* note 63, at 603 (finding balancing test emphasis on privacy and safety concerns of potential jurors and on defendant's right to fair trial).

101. See *id.* at 604 (noting Supreme Court has recognized possible juror privacy interest that would compel limiting public access to criminal trials); see also *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (assuming jurors may have interest in protecting their answers to *voir dire* questions). The Supreme Court in *Press-Enterprise I*, however, requires judges to specify how the answers are sensitive in nature. See *id.*

102. See Malak, *supra* note 63, at 603 (giving example of issues that impact juror privacy and safety). Public access to jury questioning may leave jurors open to attack from a defendant's comrades, or leave jurors open to mockery from strangers or from those who know them personally. See *id.*

103. See *Press-Enterprise I*, 464 U.S. at 515 (Blackmun, J., concurring) (emphasizing juror's privacy right should not be assumed without carefully considering complications that assumption would bring). "I agree that the privacy interest of a juror is a legitimate consideration to be weighed by a trial court . . . I put off to another day consideration of whether and under what conditions that interest rises to the level of a constitutional right." *Id.* at 516. Because a defendant has an interest in protecting juror privacy in order to protect the defendant's own fair trial interest, there is no need to create a separate juror privacy interest. See *id.* (discussing concerns of implications of majority's decision).

104. *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 14 (1986) ("*Press-Enterprise II*") (stating heightened inquiry to be applied when interest asserted is defendant's right to fair trial).

105. See *id.* (explaining finding of reasonable alternatives constitutes narrow tailoring); see also *Press-Enterprise I*, 464 U.S. at 511 ("Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.").

whether there are reasonable alternatives to closure available.<sup>106</sup> If there are reasonable alternatives, a petitioning party is unlikely to receive closure of the *voir dire*.<sup>107</sup>

The *Press-Enterprise* decisions clearly advocated a focused control of any limitations a district court may place on the media for trial access; the decisions were less clear on how to define “narrow.”<sup>108</sup> The majority decision seems to suggest that any narrowly tailored restriction on access would pass judicial scrutiny.<sup>109</sup> Justice Marshall’s concurring opinion, however, suggests “narrowly tailored” means the limitation on access must make use of the least restrictive means possible.<sup>110</sup> Using either definition, lower courts have interpreted an acceptable narrow limitation in many different ways.<sup>111</sup> Examples of closure limitations found acceptable by reviewing courts include complete juror anonymity, *in camera voir dire*,

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106. See *Press-Enterprise I*, 464 U.S. at 511 (discussing need to examine alternatives before ordering closure); see also *United States v. King*, 140 F.3d 76, 82 (2d Cir. 1998) (illustrating alternatives to total closure of *voir dire*). The Second Circuit in *King* found that the lower court correctly applied the *Press-Enterprise* test by taking steps to establish reasonable alternatives to avoid complete closure. See *id.* In *King*, newspaper publishing companies appealed from orders of the district court limiting press access to the jury *voir dire* proceedings in defendant Don King’s, a famous boxing promoter, impending second trial on wire fraud charges. See *id.* at 78-79. On appeal, the Second Circuit affirmed, finding that the district court’s order denying press access to questioning of prospective jurors in defendant’s impending second trial was supported by explicit findings. See *id.* at 84. The limitations were selected only after considering various alternatives, and the limitations were imposed only for the brief duration of time necessary to empanel the jury. See *id.* at 82-84.

107. See *Hardaway & Tumminello*, *supra* note 37, at 83 (noting without requisite showing of factors, test is not met); see also *Waller v. Georgia*, 467 U.S. 39, 48-50 (1984) (holding closure must not be broader than necessary). In *Waller*, the Court held the state’s privacy interest argument was not specific enough to establish the entire hearing should be closed. See *id.* Rather, there were alternatives available unless the state provided more detail showing total closure was necessary. See *id.*

108. See *Malak*, *supra* note 63, at 605 (mentioning difficulty to interpret “narrow tailoring” of access limitation).

109. See *id.* (noting majority decision left open possibility that any limitation would satisfy part two of balancing test).

110. See *Press-Enterprise I*, 464 U.S. at 520 (Marshall, J., concurring) (stressing trial court’s obligation to limit access by order that “constitutes the least restrictive means available for protecting compelling state interests”). Justice Marshall opines the constitutionally favored method for balancing First Amendment interests of the media and the Sixth Amendment interests of defendants is to issue redacted transcripts preserving the anonymity of the jurors while keeping the substance of their responses public. See *id.* at 520-21.

111. See *Malak*, *supra* note 61, at 606 (stating various ways courts have dealt with problem of choosing acceptable limitations). Examples include complete juror anonymity, restriction on the number of press representatives, and giving jurors the opportunity to discuss problems with judge *in camera*. See *id.*

and restricting the number of media representations present during *voir dire*.<sup>112</sup>

#### IV. NARRATIVE ANALYSIS

In *Stewart*, the Second Circuit addressed whether the district court's order barring the press from attending *voir dire* infringed upon the media's First Amendment right of access to criminal proceedings.<sup>113</sup> The court had to balance the First Amendment right of the press and of the public with the Sixth Amendment right of the defendants to a fair trial.<sup>114</sup> In doing so, the court first had to decide whether the district court's motion required application of the *Press-Enterprise* test.<sup>115</sup> Finding the *Press-Enterprise* test did apply, the court next explored the two prongs of the balancing test and held the district court should not have closed the *voir dire* examinations from the media.<sup>116</sup>

##### A. Is the Press-Enterprise Test Necessary?

The government argued in support of the district court's closure of *voir dire* by asserting that the order did not totally impair the right of access, but merely deprived the Media Coalition of the op-

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112. See *id.* at 606 n.199 (mentioning cases where trial court decisions to limit media access were upheld by reviewing court). The Second Circuit has allowed for complete juror anonymity because of extensive pretrial publicity and the "sordid history" of multi-defendant drug case trials. See *id.*; see also *United States v. Barnes*, 604 F.2d 121, 135 (2d Cir. 1979) (upholding limitation of number of press representatives in courtroom during *voir dire*). The *Press-Enterprise II* majority decision suggested it is the right and duty of jurors to answer questions *in camera* when they realize the sensitive nature of the questions and the possible privacy concerns involved. See 478 U.S. at 1.

113. See *ABC, Inc. v. Stewart*, 360 F.3d 90, 93 (2d Cir. 2004) (addressing legal issues in case). The court first felt compelled to demonstrate there was proper jurisdiction over the case by finding the case fell within the "capable of repetition, yet evading review" exception to the mootness doctrine. See *id.* at 97 (quoting *Press-Enterprise II*, 478 U.S. at 6). Under this rule, the court may still hear a case where the challenged action is finished before it can be fully litigated and there is a "reasonable expectation" that the same party will face the same action again. See *id.* (quoting *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647-48 (2d Cir. 1998)). Noting *voir dire* proceedings last only a short time and the media would continue to seek access to such proceedings in high-profile cases, the court found that it had jurisdiction to hear the appeal. See *id.* at 97-98.

114. See *id.* at 98 (setting forth balancing test of two constitutional rights). For a discussion of the First and Sixth Amendment issues in *voir dire*, see *supra* notes 53-84 and accompanying text.

115. See *id.* at 99 (reasoning *Press-Enterprise I* and *Press-Enterprise II* test needs to be applied only when First Amendment right of access has been infringed upon).

116. See *id.* at 106 (stating holding of case).

portunity to witness *voir dire* firsthand.<sup>117</sup> Thus, application of the balancing test set forth in *Press-Enterprise I* and *Press-Enterprise II* is not necessary.<sup>118</sup> The Second Circuit did not agree with this argument; rather, it found a substantial difference between a reported transcript and a chance to see and hear testimony as it unfolds.<sup>119</sup> The Second Circuit reasoned, solely because a transcript will be released does not allow for the application of a more lenient balancing test.<sup>120</sup> The court moved to the issue of whether there was an adequate factual foundation for disallowing access at all, and thus applied the *Press-Enterprise* test to the district court's findings.<sup>121</sup>

### B. Closure Was Not Essential to Preserve Higher Values

The Second Circuit found closure of *voir dire* in *Stewart* was not necessary because the district court failed to make detailed findings demonstrating the need to preserve higher values.<sup>122</sup> The higher value interest asserted in the case was the defendants' Sixth Amendment right to a fair trial. The district court had to establish there was a considerable likelihood that the defendants' right to an impartial jury would be prejudiced by the media exposure, which could be prevented by closure.<sup>123</sup> In determining that the district court did not meet this burden, the Second Circuit recounted the

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117. See *id.* at 99 (emphasizing that since transcripts were released after *voir dire* proceedings, limited denial of access is not substantial constitutional consideration that overshadows interest of public and defendants for fair trial).

118. See *Stewart*, 360 F.3d at 99-100 (arguing firsthand witness of *voir dire* is not protected, rather access to *voir dire* information via transcripts suffices to pass judicial review).

119. See *id.* (citing opinions that state differences between documentary access and concurrent access); see also *United States v. Antar*, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994) (holding "documentary access is not a substitute for concurrent access, and vice versa"); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1072 (3d Cir. 1984) (stating "the availability of a trial transcript is no substitute for a public presence at the trial itself"); *Soc'y of Prof'l Journalists v. United States Sec'y of Labor*, 616 F. Supp. 569, 578 (D. Utah 1985) ("[T]he full flavor of the hearing cannot be sensed from the sterile sheets of a transcript.").

120. See *Stewart*, 360 F.3d at 100 (referring to *United States v. Simone*, 14 F.3d 833, 842 (3d Cir. 1994)). *Simone* held "we cannot conclude that the release of the transcript afforded adequate access in this case. To do so would relax the standard for closure and would undermine one of the essential aspects of access by permitting public scrutiny of the proceedings only at this later time . . ." *Id.*

121. See *id.* (applying factual findings in order to overcome presumption of openness). For a discussion of the *Press-Enterprise I* and *Press-Enterprise II* balancing test, see *supra* notes 86-112 and accompanying text.

122. See *Stewart*, 360 F.3d at 100-01 (noting prior judicial decisions require closure be supported by need to preserve other higher values). For a discussion of necessity of specific findings, see *supra* notes 94, 98-104 and accompanying text.

123. See *Stewart*, 360 F.3d at 100 (referring to increased finding district court must acquire established in *Press-Enterprise II*).

findings of the lower court.<sup>124</sup> The Second Circuit noted that the lower court relied on three findings to try to establish a substantial probability that open proceedings would prejudice the defendants' rights: the portion of the jury questionnaire that was disclosed to the public, the likelihood of jurors prejudging the defendants, and the risk that the jurors would lack candor in their responses to questioning.<sup>125</sup>

First, the district court found the public's interest in the *Stewart* case surpassed that exhibited in other high-profile cases in the district court's experience.<sup>126</sup> The Second Circuit, however, found nothing in the record that pointed to the media's engagement in improper behavior while covering the case.<sup>127</sup> The Second Circuit did not view disclosure of a portion of the jury questionnaire as problematic because there was no indication that a media source posted the information on a website.<sup>128</sup> It was purportedly posted by a prospective juror.<sup>129</sup> The Second Circuit reasoned that the lower court did not find a substantial probability that the *voir dire* proceedings had to be closed because the media would disrupt the procedure by disclosing information the lower court had previously forbidden them from revealing.<sup>130</sup>

Next, the Second Circuit scrutinized the district court's finding that prospective jurors would have prejudged *Stewart* in light of the extensive media coverage.<sup>131</sup> The court explained the case was not

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124. See *id.* at 100 (recounting entire text of district court order by Second Circuit).

125. See *id.* at 100-01 (listing findings lower court used in order to establish closure of *voir dire* necessary).

126. See *id.* at 96 (quoting district court January 15 order, "[t]his is a case in which the press is interested in all sorts of things in which I have never seen as much press interest in a case and, as I say, I had many high-profile cases . . .").

127. See *id.* at 101 (confirming district court's lack of finding of improper behavior on part of media). The court found nothing in the record to indicate there were any instances of media wrongdoings that would distinguish the case from others. See *id.* at 105.

128. See *Stewart*, 360 F.3d at 101 (noting lack of indication of misconduct by media in district court record). See generally Mauro, *supra* note 47, at 15A (describing Judge Cedarbaum's reaction to juror questionnaire publication). One of the questions revealed on the website: "Have you ever made a project or cooked a recipe from Martha Stewart?" *Id.*

129. See *Stewart*, 360 F.3d at 101 (mentioning possible juror misconduct); see also Mauro, *supra* note 47, at 15A (observing court order will not thwart ill-behaved prospective juror from "gossiping online").

130. See *Stewart*, 360 F.3d at 100 (distinguishing Judge Cedarbaum's reasoning that closure of *voir dire* was necessary because Internet posting showed breach of her previous order that journalists not talk to jurors).

131. See *id.* (noting lower court's concern about media coverage containing editorial statements of opinion about essential merits of charges against *Stewart*).

out of the ordinary and most prospective jurors probably have preconceptions in almost every high-profile criminal case.<sup>132</sup> As the court suggested, if this element alone is enough to allow closure, then most cases followed by the public would be closed “and the exception to openness would swallow the rule.”<sup>133</sup>

Finally, the court disagreed with the lower court’s determination that the media attention would prohibit prospective jurors from speaking candidly during questioning.<sup>134</sup> To illustrate this, the court found it odd to argue that a potential juror would not want to be candid in front of a reporter, but would be willing to reveal a bias against the defendant in front of the defendant in the courtroom.<sup>135</sup> The court distinguished the *Stewart* case from *United States v. King*,<sup>136</sup> an earlier Second Circuit decision.<sup>137</sup> The district court relied upon *King* in issuing its order.<sup>138</sup> In *King*, the *voir dire* questioning required jurors to express their feelings on racism and

132. *See id.* (refusing district court’s stance that *Stewart* case was out of ordinary); *see also* Mauro, *supra* note 47, at 15A (opining jury with no prejudgments is not desirable). The best jury would be composed of individuals who are intelligent enough to have been exposed to pretrial publicity about the defendant, but are able to detach any preconceptions from the facts presented to them in court. *See* Mauro, *supra* note 47, at 15A. If trial judges can “bang their gavels” and instruct jurors to “disregard what [they] have just heard”, it follows that we should allow them to disregard what they have learned from the media before the trial as well. *See id.*

133. *Stewart*, 360 F.3d at 101.

134. *See id.* (detailing district court’s belief that if media is present at *voir dire* session or if media will disclose names of prospective jurors, it is possible that venire persons would not want to give “full and frank” answers); *see also* Julie Rawe, *Martha Jockeys For A Jury*, TIME MAG., Jan. 19, 2004, at 18 (noting outcome of trial turns on how jury personally views defendant Stewart). “The fate of the domestic diva . . . hinges on whether the jury sees her as a cover-up artist or as a victim of overzealous prosecutors.” *Id.*

135. *See Stewart*, 360 F.3d at 101 (highlighting problems in lower court’s treatment of possible effects of reports on juror’s will to speak openly). The court lightly commented on defendant Stewart’s pleasant profession as a home-decorator:

It is, for example, difficult to imagine a person losing his or her job because he or she acknowledged admiration for or animosity toward Stewart. Nor would it have required the theologian’s heroic virtue for a person to express for publication a distrust in corporate leadership or a distaste of the niceties of home decorating.

*Id.* at 101-02.

136. 140 F.3d 76, 82 (2d Cir. 1998).

137. *See Stewart*, 360 F.3d at 101 (distinguishing *King*).

138. *See id.* at 102 (distinguishing case at hand by noting lack of findings in record or district court’s opinion suggesting reporters would have “chilled” juror conduct). For a discussion of the facts and holding of *King*, *see supra* note 106 and accompanying text.



explain their personal racial views.<sup>139</sup> This examination of particularly sensitive issues caused the district court to recognize potential jurors were not likely to be candid if they harbored racist views.<sup>140</sup> The court in *Stewart* found no similar controversial issues in its case and found once again the lower court did not establish a substantial probability that open *voir dire* would prejudice the defendants' Sixth Amendment right to a fair trial.<sup>141</sup>

To strengthen its decision, the *Stewart* court considered many similar decisions in cases decided by other circuits.<sup>142</sup> The Third, Sixth, and Seventh Circuit Courts have each reversed orders of district courts denying members of the press access to *voir dire* proceedings.<sup>143</sup> Moreover, the *Stewart* court noted there are only two circuit court cases that have upheld the closure of *voir dire* and each case could be differentiated from the issues in *Stewart*.<sup>144</sup>

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139. See *King*, 140 F.3d at 83 (noting jurors were asked to set forth personal views on racism). The *Stewart* court mentions the government asserted the possibility of sexist attitudes prejudicing jurors' impartiality, however, the court refused to decide whether the possible sexism would be enough to justify closure because the government did not raise the issue at the district court level. See 360 F.3d at 102. Nonetheless, the court reviewed the *voir dire* transcripts and found no questions that required the potential jurors to talk about gender bias. See *id.* Therefore, even if the government had raised the sexism issue more timely, there is nothing in the proceedings that would have affected juror candor. See *id.*

140. See *Stewart*, 360 F.3d at 102 (distinguishing *King* and noting that no similar issues were present in case at hand).

141. See *id.* (claiming it is hard to believe jurors would fear repercussions for acknowledging their high regard for or hatred toward defendant *Stewart*). "Where, as here, the *voir dire* proceedings do not explore particularly sensitive or controversial issues, knowledge that reporters are present probably discourages fabrication and ensures honesty on the part of venirepersons." *Id.*

142. See *id.* at 102-03 (remarking sister circuits have also reversed orders that closed *voir dire* proceedings in high-profile cases).

143. See *id.* at 103 (citing *United States v. Simone*, 14 F.3d 833, 841 (3d Cir. 1994), *In re Memphis Publ'g Co.*, 887 F.2d 646, 647-48 (6th Cir. 1989), and *United States v. Peters*, 754 F.2d 753, 755, 761 (7th Cir. 1985)). In *In re Memphis*, the Sixth Circuit reversed an order of closure, mandating *voir dire* cannot be closed without any specific finding of fact to support that conclusion. See *Stewart*, 360 F.3d at 103. A "naked assertion" that the Sixth Amendment right of the defendant might be harmed is insufficient. See *id.* Similarly, in *Peters*, the Seventh Circuit found the district court did not make specific enough findings regarding any threat the media coverage posed to finding an impartial jury. See *id.* In *Simone*, the Third Circuit stated they did not believe the concern about juror candor constituted sufficient reason to close *voir dire*. See *id.* "[T]he trial court needs to provide specific reasons in support of a conclusion that any effects that the presence of the press and public would have on candor are sufficiently greater than in the run of cases." *Id.* (quoting *Simone*, 14 F.3d at 841).

144. See *id.* at 103-04 (citing *In re South Carolina Press Ass'n*, 946 F.2d 1037, 1042 (4th Cir. 1991), and *In re Greensboro News Co.*, 727 F.2d 1320, 1321 (4th Cir. 1984)). In *In re Greensboro*, a case involving Nazi and Klansmen defendants, the Fourth Circuit found the case evoked strong opinions and that some potential jurors may be reluctant to express their opinions knowing their answers could be

### C. Closure Was Not Narrowly Tailored

After establishing the first part of the *Press-Enterprise I* and *Press-Enterprise II* test was not met, the Second Circuit addressed the second prong of the balancing test which required closure orders to be no broader than necessary to protect the interest advanced in the first part of the balancing test.<sup>145</sup> The court found the district court's order did not utilize a narrowly-tailored method of closure and, as a result, did not meet the second part of the balancing test.<sup>146</sup> The Second Circuit observed two available alternatives the district court could have used to address its concerns about media exposure while keeping *voir dire* proceedings open.<sup>147</sup>

The Second Circuit first suggested concealing the identities of the prospective jurors to ensure juror candor.<sup>148</sup> The court commented that other courts have been able to conceal juror identity without closing *voir dire* proceedings.<sup>149</sup> Second, the court suggested a split proceeding where the media could be present when potential jurors are asked routine background questions or are sub-

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reported in the press. See 727 F.2d at 1325 (noting holding of case). The Fourth Circuit applied the same reasoning to *In re South Carolina*, a case requiring jurors to discuss racial biases and criminal records of their family members. See 946 F.2d at 1042.

145. See *Stewart*, 360 F.3d at 104 (applying "narrow tailoring" standard to closure orders in question). The court could have stopped after finding that the first part of the test was not met, but elaborated to show that there were alternatives available had the district court met part one by demonstrating a substantial probability that defendants' rights would be prejudiced by an open *voir dire* proceeding. See *id.*

146. See *id.* (furthering notion that closure orders may not be considered narrowly tailored if reasonable alternatives exist). For a discussion of part two of the *Press-Enterprise I* and *Press-Enterprise II* balancing test, see *supra* notes 105-12 and accompanying text.

147. See *Stewart*, 360 F.3d at 104 (remarking, however, that alternatives proposed are not strict directions to be applied formulaically in future *voir dire* closure cases). The court stressed that "different circumstances call for different cures." *Id.*

148. See *id.* (explaining that this alternative differs from district court's order that also conceals juror names, but has *voir dire* take place in robing room). The Second Circuit suggests concealing names while allowing media members in courtroom. See *id.* In oral argument, the government rejected the Second Circuit's alternative because in the robing room potential jurors do not know transcripts will be available, thus, there is perceived anonymity. See *id.* Whereas in an open courtroom, even though their names will be redacted, potential jurors will be aware of the media's presence and will be hesitant to speak freely. See *id.* at 105. The Second Circuit refused the government's argument because of the inference that the district court would have intended to mislead venire members into a perceived anonymity. See *id.*

149. See *id.* at 104-05 (indicating it is possible to hide juror identity without total closure of *voir dire* to public).

mitting hardship requests.<sup>150</sup> With the presence of two easily attainable alternatives, the Second Circuit held that the district court did not narrowly tailor the closure, did not pass the second part of the test, and therefore, did not overcome the presumption of openness.<sup>151</sup> The court vacated the portion of the district court's order excluding the media from being present at the *voir dire* proceedings.<sup>152</sup>

## V. CRITICAL ANALYSIS

The Second Circuit correctly identified the test set forth in *Press-Enterprise I* and *Press-Enterprise II* as the proper test for analyzing competing First and Sixth Amendment issues in *voir dire*.<sup>153</sup> The court then meticulously applied the test and gave supporting reasons for why it disagreed with the lower court's use of the test.<sup>154</sup> The court reasonably found that the district court did not satisfy part one of the balancing test because of a lack of specific findings.<sup>155</sup> Given earlier Supreme Court opinions that suggest releasing transcripts of the proceedings to the public does not violate the First Amendment, the *Stewart* court may have incorrectly decided the district court did not narrowly tailor the *voir dire* closure.<sup>156</sup>

In consideration of the lower court's decision to close *voir dire*, the Second Circuit reviewed and critiqued the district court's rea-

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150. See *id.* at 105 (mentioning split examination as possible alternative to barring media from entire *voir dire* proceeding). There is no harm done in allowing the press to be present while potential jurors are providing "trivial details". See *id.* The *Stewart* court points out that in *United States v. King*, 140 F.3d 76 (2d Cir. 1998), the split *voir dire* examination alternative was not used simply because it was not requested, however, the method was an available option to ensure truthfulness from prospective jurors. See *id.* at 105.

151. See *id.* at 106 (emphasizing how burden is on those who wish to restrict media access to show why closure would be essential to preserve right to fair trial).

152. See *Stewart*, 360 F.3d at 106 (noting Media Coalition's requested relief for court to vacate portion of order that barred media from attending *voir dire* proceedings).

153. See *id.* at 98 ("Where the competing interest asserted is the right of the accused to a fair trial, the Supreme Court in *Press-Enterprise II* fashioned the . . . balancing test for determining whether closure is appropriate . . .").

154. For a discussion of the Second Circuit's application of the *Press-Enterprise I* and *Press-Enterprise II* test as applied in *Stewart*, see *supra* notes 116-52 and accompanying text.

155. For a discussion of the district court's lack of findings of a "substantial probability" the defendants' rights would be violated, see *supra* notes 112-44 and accompanying text.

156. For a discussion of the Supreme Court's opinion that providing transcripts when *voir dire* is closed does not violate the media's First Amendment right to attend a trial, see *supra* notes 63-67 and accompanying text.

soning and methodically gave reasons for why it was flawed.<sup>157</sup> In support of its decision, the *Stewart* court relied heavily on Supreme Court cases that have addressed the issue of conflicting First and Sixth Amendment rights.<sup>158</sup> The court also relied upon other circuit court decisions in reaching its own decision to open *voir dire*.<sup>159</sup> Importantly, the court distinguished the *King* case, a case the district court relied heavily upon in its decision to close *voir dire* in *Stewart*. This distinction was justified because of the obvious lack of possible threats to the defendants' rights in the *Stewart* case compared to the *King* case.<sup>160</sup>

Second, the *Stewart* court left open the possibility that in the future there would be a need for *voir dire* to be closed.<sup>161</sup> This calls for a case-by-case investigation of the facts of every case involving the closure of *voir dire* as previously determined by the Supreme Court in *Gannett*.<sup>162</sup> The Second Circuit gave examples of alternatives to complete closure that would satisfy the narrowly tailored portion of the *Press-Enterprise I* and *Press-Enterprise II* test. The Second Circuit, however, inexplicably does not place any weight on the district court's express attempt not to hinder the media's First Amendment rights by printing and releasing a redacted transcript.<sup>163</sup> On the contrary, the *Stewart* court uses a unique argument that implicates that closing *voir dire* denies the press the "color

157. See *Stewart*, 360 F.3d at 101 (finding district court made insufficient findings to establish open *voir dire* proceedings would prejudice defendant's right to impartial jury). The district court had no basis for its conclusion that prospective jurors would be unwilling to express any preconceptions. See *id.* The district court did not point to any controversial issue to be brought up in *voir dire* questioning that would impair the candor of the prospective jurors. See *id.*

158. See *id.* at 98 (citing *Waller v. Georgia*, 467 U.S. 39, 45 (1984), and *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980)). The *Stewart* court relied on the *Waller* opinion to show the First Amendment may be overridden by the Sixth Amendment right of a defendant to a fair trial. See *id.* at 98. Further, the *Stewart* court relied on the *Richmond Newspapers* plurality opinion to show the importance of the First Amendment guarantee to attend criminal trials; it prevents the press' freedom of speech from being eliminated. See *id.*

159. For a discussion of the other United States Court of Appeals cases dealing with closure of *voir dire*, see *supra* notes 142-44 and accompanying text.

160. For a discussion of the *Stewart* court's treatment of the *King* case, see *supra* notes 136-41 and accompanying text.

161. See *Stewart*, 360 F.3d at 105 (emphasizing right of accused to fair trial is most sacred constitutional right). There is a heavy burden on those who want to restrict access to the media, however, the district court could have overcome this burden if it had provided a sufficient factual basis and compelling justification for closure to ensure it was narrowly tailored. See *id.* at 106.

162. For a discussion of the case-by-case analysis rule set out in *Gannett*, see *supra* notes 58-63 and accompanying text.

163. See *Stewart*, 360 F.3d at 99 (rejecting government's argument that district court's order did not entirely impair public's First Amendment right of access).

and texture” of the proceeding.<sup>164</sup> Applying the Supreme Court’s opinions provided in *Gannett* and *Press Enterprise I*, it is debatable whether the Second Circuit correctly ruled the district court did not sufficiently tailor the order closing *voir dire*.<sup>165</sup> The court found part one of the balancing test was not met, thus, it is not essential to the outcome of the *Stewart* case as to whether part two was correctly decided. The Second Circuit’s disregard of the Supreme Court’s precedent in allowing transcripts to substitute for open *voir dire* may cause confusion in future cases.<sup>166</sup>

## VI. IMPACT

In *Stewart*, the Second Circuit decided the “mere fact of intense media coverage of a celebrity defendant . . . is simply not enough to justify closure” of *voir dire*.<sup>167</sup> The decision, reached by a prominent circuit court, to keep *voir dire* open will likely receive attention from other judges confronted with similar cases.<sup>168</sup> One commentator notes, “[j]udges in high-profile cases hate bad press, but more importantly they hate being scolded by appellate courts.”<sup>169</sup> Therefore, lower courts which have to make important decisions about

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164. See *id.* (“The ability to see and to hear a proceeding as is [sic] unfolds is a vital component of the First Amendment right of access—not, as the government describes, an incremental benefit.”); see also Barrett, *supra* note 48 (commenting on differences between open *voir dire* and reading transcript). “You don’t get a good sense of a ballgame if you’re just handed a scorecard and a transcript of the play-by-play. The American public deserves to know how justice is being carried out from the beginning to the end of the process.” Barrett, *supra* note 48.

165. See Gary Young, *The closed voir dire for Martha Stewart*, NAT’L L.J., Jan. 26, 2004, at 1 (noting case law supports argument that transcript availability allows for closed *voir dire*). Courts in recent cases, such as the trials of the Oklahoma City bombers, Timothy McVeigh and Terry Nichols, have become increasingly aware that jurors will not be candid if they feel a large audience is listening to their answers. See *id.*

166. See Barrett, *supra* note 48 (expressing concern over language of *Stewart* decision). Ken Paulson, executive director of the First Amendment Center, points out the Second Circuit “explored the possibility of allowing the public to see the jury but keeping the jury members anonymous.” *Id.* As an advocate of First Amendment rights for both the press and the public, Paulson found the “wiggle room” left by the court troubling. See *id.*

167. *Stewart*, 360 F.3d at 106. The court further noted, “[t]o hold otherwise would render the First Amendment right of access meaningless; the very demand for openness would paradoxically defeat its availability.” *Id.* at 102.

168. See Barbara Wartelle Wall, *Legal Watch: Closure of Juror Questioning Overturned in Martha Stewart Trial*, NEWS WATCH, at <http://www.gannett.com/go/newswatch/2004/march/nw0305-6.htm> (Mar. 5, 2004) (remarking *Stewart* decision is expected to significantly impact future right of access cases).

169. Barrett, *supra* note 48 (suggesting judges will “step more gingerly” in cases that involve restricting public’s First Amendment right of access to criminal proceedings).

how to control high-profile trials may be more careful when deciding whether or not to close *voir dire* proceedings in the future.<sup>170</sup>

It should also be considered that even though the *Stewart* trial court closed *voir dire*, there were still problems inside the jury room.<sup>171</sup> After the jury found defendants Stewart and Bacanovic guilty, there were numerous media reports of juror misconduct ranging from jurors purposefully lying in their answers to questions on the *voir dire* questionnaire to jurors reading newspaper articles about the Stewart case while in the jury room.<sup>172</sup> One juror even wanted to change her decision and find Bacanovic not guilty.<sup>173</sup> Despite these discrepancies, some jurors announced they deliberately worked hard to forget about Stewart's high-profile status and only concentrated on the evidence presented.<sup>174</sup> Perhaps the efforts the trial court took to select ideal jurors paid off.

The *Stewart* decision may address the two problems traditionally involved in high-profile cases: media bias affecting juries and inequalities in the courtroom.<sup>175</sup> First, the decision was a major victory for First Amendment and freedom of the press advocates.<sup>176</sup> The Second Circuit's decision in *Stewart* was also a step in the direc-

170. See *id.* (observing impact of *Stewart* decision). Although the decision vacating the closure of *voir dire* was too late to be applicable to the *Stewart* trial, the decision will have a long-term effect on all future trials. See *id.*

171. See Alison Gendar & Greg B. Smith, *Martha juror's regret*, N.Y. DAILY NEWS, Apr. 14, 2004, at 4 (announcing problems inside Stewart jury room).

172. See *id.* (listing various instances of juror misconduct). Juror Michelle Wisner told the media the jury discussed certain media reports that included the hourly rate of Stewart's attorney and the price of Stewart's handbag. See *id.*

173. See *id.* (stating that Juror Michelle Wisner contacted Bacanovic's attorney to reveal questionable juror behavior as well as to state she believed Bacanovic deserved another trial). "Martha Stewart, her persona, her bad behavior, it pulled him down with her. The government was gunning for Martha Stewart and Peter Bacanovic got sucked in." *Id.*

174. See Soni Sangha & Corky Siemaszko, *Jury Bites Back*, N.Y. DAILY NEWS, Mar. 6, 2004, at 5 (noting jurors did not focus on Stewart's celebrity status). One juror commented, "I had no problem separating her from her TV persona . . . . We weighed all the testimony. I think everybody came to the table with their understanding of the facts." *Id.*

175. For a discussion of the problems created by high-profile celebrity trials, see *supra* notes 32-52 and accompanying text.

176. See Mark Hamblett, Panel Rejects Barring Media From Stewart Trial Voir Dire, LAW.COM, at <http://www.law.com/jsp/article.jsp?id=1076428347792#> (Feb. 19, 2004) (noting benefit that decision has on media's First Amendment rights). Quoting First Amendment attorney Floyd Abrams:

What struck me most was the court's insistence that open judicial processes benefit justice, benefit defendants and benefit the public at large . . . . We hear so much about the potential, and sometimes real bad side of the press' presence at trial that it's refreshing to read a clearly focused opinion that emphasizes the public benefit.

*Id.*

tion toward keeping trials for celebrities on an equal playing field with trials for the general public.<sup>177</sup>

Besides furthering the media and public's First Amendment right to access to trials, the decision will also protect future defendants' abilities to receive fair trials.<sup>178</sup> The court's decision will demonstrate to the public that there is not a separate court system for celebrities, and ensure that celebrity defendants are also afforded the opportunity for a fair trial.<sup>179</sup> Open *voir dire*, when analyzed through the application of a detailed balancing test, will turn out to be a "good thing" for everybody involved.

Catherine Stehlin

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177. See *ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (3d Cir. 2004) ("[I]n general, openness acts to protect, rather than to threaten the right to a fair trial."); see also Hamblett, *supra* note 176 (quoting First Amendment attorney Floyd Abrams). The *Stewart* opinion is "a ringing affirmation of the notion that courts are not only presumptively open to the public but that is so even during high-publicity cases absent the most persuasive evidence that they must be closed." Hamblett, *supra* note 176; see also Paulson, *supra* note 48 (remarking best way to keep public confidence in judicial system is to administer justice evenly without regard to celebrity status).

178. See *Hardaway & Tumminello*, *supra* note 37, at 88 (opining court solution involving application of precise standard to constitutional clash of First and Sixth Amendments is appropriate). Applying standard tests to constitutional issues acknowledges:

[T]he realities of a modern society in which there is instantaneous dissemination of information by the mass media. When the First Amendment was established, the notice that inculpatory evidence against an accused in a local judicial proceeding might be transmitted instantaneously across the county in a way that might create mass hysteria and passion was beyond any comprehension. The standard [test] also recognizes that the law cannot permit pre-trial publicity protected by the First Amendment to immunize a defendant from all criminal liability.

*Id.* at 88-89.

179. See *Mauro*, *supra* note 47, at 15A (observing defendants can still obtain fair trial if judges keep in mind paradigm of fair-minded jurors); see also Patricia Hurtado, *Martha Judge Sticks to Press Ban of Jury Picks*, *NEWSDAY*, Jan. 17, 2004, at A08 (arguing treating celebrity trials differently from trials of ordinary citizens is not fair). It cannot be "the cases that the public is the most interested in are the ones where they have the least right of access." *Id.*