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## NYLS Journal of Human Rights

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Volume 3

Issue 1 *Symposium: The Cutting Edge - Emerging  
Medical Issues and the Law*

Article 9

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1985

# Constitutional Law-First Amendment-Access to Government Proceedings-Voir Dire of Jurors-Press Enterprise Co. V, Superior Court of Cal.

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### Recommended Citation

Wait, Barbara Hricko (1985) "Constitutional Law-First Amendment-Access to Government Proceedings-Voir Dire of Jurors-Press Enterprise Co. V, Superior Court of Cal.," *NYLS Journal of Human Rights*: Vol. 3 : Iss. 1 , Article 9.  
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CONSTITUTIONAL LAW—FIRST AMENDMENT—ACCESS TO GOVERNMENT PROCEEDINGS—*Voir Dire* OF JURORS—*Press-Enterprise Co. v. Superior Court of Cal.*—The amendments to the Constitution provide a list of human rights. Among these guaranteed rights are freedom of speech and the press,<sup>1</sup> as well as the right to a public trial by an impartial jury.<sup>2</sup> The Constitution guarantees rights which, although not enumerated, are nonetheless considered to be fundamental.<sup>3</sup> Inherent in the first amendment, in conjunction with the fourteenth,<sup>4</sup> is the public's right of access to information concerning the government<sup>5</sup> and, in particular, the right to know how criminal trials and the system of justice function.<sup>6</sup> This interest may conflict with other constitutional rights, in particular an accused's right to a fair trial as guaranteed by the sixth amendment. When human rights, embodied in certain amendments, are protected without consideration for other ones, important interests are infringed. Therefore, when amendments appear to conflict, it is necessary to balance all involved interests. The Supreme Court, while refusing to establish a priority as between the first and sixth amendments, did extend

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1. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. U.S. CONST. amend. VI. The sixth amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." *Accord* U.S. CONST. ART. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .").

3. *See infra* notes 49-53 and accompanying text.

4. U.S. CONST. amends. I and XIV.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. § 1.

5. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980). Chief Justice Burger, announcing the judgment of the Court, pointed out in reference to the first and fourteenth amendments that the "expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at 575.

6. *Id.*

the right of public access to governmental information to include the voir dire of prospective jurors in *Press-Enterprise Co. v. Superior Court of Cal.*<sup>7</sup> Noting that the selection of the jury is presumptively a public process,<sup>8</sup> the Supreme Court held that this "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."<sup>9</sup>

## I. PRESUMPTIVE OPENNESS

### A. *Historical Background*

The historical evidence of the proceedings in criminal trials reveals that the "trial has been open to all who cared to observe."<sup>10</sup> Furthermore, the development of the jury system<sup>11</sup> il-

7. 464 U.S. 501 (1984).

8. *Id.* at 505.

9. *Id.* at 510.

10. *Richmond Newspapers*, 448 U.S. at 564.

11. Blackstone's opinion is evidenced by an excerpt from his COMMENTARIES:

[T]he trial by jury ever has been, and I trust will ever be, looked upon as the glory of the English law . . . [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.

3 W. BLACKSTONE, COMMENTARIES 379 (9th ed. 1978).

Early versions of the modern jury can be traced to England prior to the Norman Conquest. A public official would call groups of neighbors to answer questions under oath. 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I* 138 (2d ed. 1968). Gradually these questions came to center upon disputed facts, knowledge of which the jurors either already possessed or could easily attain. In this sense they served as witnesses, but their decisions were binding upon the parties involved. 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 317 (7th ed. 1956). *See also* 6 J. WIGMORE, *EVIDENCE* § 1800 (3d ed. 1940). As this system evolved after the Norman Conquest, the jurors began to serve more as impartial triers of fact, rather than as witnesses to the events at issue and as such, they could be challenged. 1 W. HOLDSWORTH at 332. While objections to prospective jurors could be made based on personal hostility, it was not until the fourteenth century that petit jurors could be challenged, according to statute, because of their participating as an indicator on the jury. *See id.* at 324-325. For a discussion of the historical development of the jury trial in the Anglo-American system, *see generally*, 3 W. BLACKSTONE, *supra*, at 349-85; 1 W. HOLDSWORTH, *supra*, at 312-50; E. JENKS, *A SHORT HISTORY OF ENGLISH LAW* 46-55 (3d ed. 1924); A.H. MANCHESTER, *A MODERN LEGAL HISTORY OF ENGLAND AND WALES 1750-1950* at 86-99 (1980); 1 F. POLLOCK & F. MAITLAND, *supra*, at 138- 53; RADCLIFFE & CROSS, *THE ENGLISH LEGAL SYSTEM* 66-91 (6th ed. 1977); 6 J. WIGMORE, *supra*, at § 1800.

The evolution of the procedure of trial by jury bears a close connection to the public

illustrates that it presumptively has also been a process to which the public has had access.<sup>12</sup> While there are not many written records concerning the public nature of the early trial, the Supreme Court in *Press-Enterprise*<sup>13</sup> discussed an account written by Sir Thomas Smith in 1565 in which he notes that trials were held in an open or common place, and that only the "enditement" was recorded.

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*.<sup>14</sup>

Relying on Sir Thomas Smith's version of the trial proceedings, the Court in *Press-Enterprise* notes, "[i]f we accept this account it appears that beginning in the sixteenth century, jurors were selected in public."<sup>15</sup>

While the tradition of public trials in the United States can be traced back to the common law system in England, there is evidence that the public nature of trials first became a part of our legal system during the colonial period.<sup>16</sup> Our Founding Fathers, as well as our English ancestors, had good reason to distrust trials and proceedings which were held in secret, for they had only to recall the abuse and excess of the Spanish Inquisition, the English Court of Star Chamber, and the French *lettre*

character of the trials themselves. As one observer has noted:

[A "public" trial] seems almost a necessary incident of jury trials, since the presence of a jury . . . already insured the presence of a large part of the public. We need scarcely be reminded that the jury was the *patria*, the "country" and that it was in that capacity and not as judges, that it was summoned.

Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 388 (1932) [hereinafter cited as Radin, *Public Trial*]. See, e.g., 3 W. BLACKSTONE, *supra*, at 349 ("the trial by *jury*; called also the trial *per pais*, or by the country").

12. *Press-Enterprise v. Superior Court of Cal.*, 464 U.S. 501 at 506.

13. *Id.* at 508.

14. *Id.* (emphasis in original) (quoting T. SMITH, *DE REPUBLICA ANGLORUM* 96 (Alston ed. 1906)). See also Radin, *Public Trial*, *supra* note 11, at 382.

15. 464 U.S. 501 at 507. See also E. JENKS, *supra* note 11, at 73-74. ("[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access . . . appears to have been the rule in England from time immemorial").

16. See *In Re Oliver*, 333 U.S. 257, 266-67 (1948); *Press-Enterprise*, 464 U.S. at 508.

*de cachet* of the *Ancien Regime*.<sup>17</sup> Drawing upon our common law heritage, the sixth amendment to the Constitution guarantees a person who is criminally charged the right to a public trial by an impartial jury.<sup>18</sup> At the time this amendment was adopted, the guarantee of a public trial pertained only to federal criminal prosecutions, but in 1948, in the case of *In Re Oliver*, it was deemed to be applicable to state criminal proceedings through the fourteenth amendment.<sup>19</sup> Likewise, another sixth amend-

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17. *Cf. Oliver*, 333 U.S. at 268-69 nn.21-23 (noting, in part, that different aspects of the proceedings conducted by these tribunals were done secretly); Radin, *Public Trial*, *supra* note 11 at 386-89. Radin points out that Parliamentary opponents to the Star Chamber did not focus on the secrecy aspect and, in fact, there are some grounds for belief that this court did not conduct proceedings secretly. What apparently caused Parliament concern was the fact that the Star Chamber possessed as much power as it did, rather than how it exercised that power. Radin questions not the evils of secret trials, but whether secret trials did exist in England. He places more weight upon the *lettre de cachet* in influencing the Framers of the Constitution:

[In] the eighteenth century the evil reputation of *lettres de cachet* and perhaps the horrendous picture of the "Spanish Inquisition," gave the "open and public trial" of the common law something of an odor of sanctity. It certainly was not a deliberately planned safeguard against the dangers incident upon secrecy. But, however it arose, it has found formulation as a constitutional right in almost every state, and in the Constitution. While the historical foundation created for it is purely mythical, the rationalization which the courts have attempted must be accepted and its implications examined.

Radin, *Public Trial* at 389.

18. U.S. CONST. amend. VI. *See supra* note 2.

19. *In re Oliver*, 333 U.S. 257, 273. In this case, the petitioner was subpoenaed to appear before a Michigan circuit judge, who was conducting a one-man grand jury investigation, pursuant to state law. After petitioner's testimony, the judge determined he was in contempt of court and consequently convicted and sentenced him to serve sixty days in jail. The Supreme Court held that the petitioner's trial and conviction, in grand jury secrecy, without affording him the rights to counsel, to prepare his defense, to call witnesses on his behalf, and to cross-examine the witness who testified against him, constituted a denial of due process of law under the fourteenth amendment. The Court noted:

In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

*Id.*

Radin wrote his article, *The Right to a Public Trial*, in 1932, which was sixteen years before the Supreme Court decided *In Re Oliver*. At that time, Radin observed that, while the sixth amendment did not pertain to state court proceedings, almost all state constitutions contained a provision similar to that of the federal Constitution. Radin, *Public Trial* at 386. Citing a passage from *Davis v. United States*, 247 F.2d 394, 395 (8th Cir. 1917), Radin emphasizes that some states viewed the right to a public trial almost as an unqualified right:

ment provision, that which entitles an accused to a trial by jury, was expanded to include within its scope state criminal proceedings. In *Duncan v. Louisiana*,<sup>20</sup> the Court held:

Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we held that the fourteenth amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the sixth amendment's guarantee.<sup>21</sup>

### B. *Jurisprudential Value*

Two important constitutional values have emerged: the right to a trial by jury and the public nature of such a trial.<sup>22</sup>

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The provision (sc. the sixth amendment) is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England. The corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed.

Radin, *Public Trial* at 386.

20. 391 U.S. 145 (1968).

21. *Id.* at 149. The decision in this case was rendered on May 20, 1968. At that time, the constitution of the State of Louisiana permitted a jury trial only in cases in which the sentencing could include imprisonment at hard labor or capital punishment. Since Duncan was convicted of simple battery, which is a misdemeanor in Louisiana, the trial judge refused to grant Duncan's request for a trial by jury. Following his conviction, Duncan was sentenced to 60 days in prison and, in addition, fined \$150. Duncan appealed, alleging that his constitutional rights had been violated because he had been denied a jury trial. The Louisiana Supreme Court did not agree with appellant and did not grant him a writ of certiorari. *Id.* at 146. Appellant then sought review in the Supreme Court, which granted certiorari. *Id.* at 147.

22. See *supra* notes 18-21 and accompanying text. The applicability of the Bill of Rights of the Constitution to the individual states, through the fourteenth amendment, has been a topic of much debate. The Supreme Court has viewed an infringement of many of the rights which are safeguarded by the first eight amendments, regardless of whether on the federal or state levels, as a denial of due process of law. In an extensive discussion concerning the meaning of the fourteenth amendment's "due process of law" in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897), Justice Harlan noted: "In determining what is due process of law regard must be had to substance, not to form." *Id.* at 235. In that case, the fourteenth amendment was held to protect the right to compensation for property taken by the State. *Id.* at 241. Other cases expanded the constitutional rights protected by the fourteenth amendment: *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (the sixth amendment guarantees an accused the right to counsel); *In Re Oliver*, 333 U.S. 257 (the sixth amendment protects the right to a public trial); *Mapp v. Ohio*, 367 U.S. 643 (1961) (the fourth amendment guarantees free-

Together they are viewed as two of the most important factors in the effective administration of the judicial process. In particular, the openness of trials serves to uphold the integrity of the judicial system and to help prevent courts from being used as "instruments of persecution."<sup>23</sup> As the Supreme Court noted in *In Re Oliver*,<sup>24</sup> "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."<sup>25</sup> Further, accessibility to these proceedings not only upholds the integrity of the judicial system, it also educates the public about that system,<sup>26</sup> and builds public confidence in the adversarial process and in judicial remedies.<sup>27</sup> Public proceedings help to assure the accused of a fair and accurate adjudication of the issues,<sup>28</sup> demonstrate the fairness of the law, and point out that procedural rights are protected.<sup>29</sup> The open nature of the proceedings brings the case to the attention of people who may have knowledge of the circumstances at issue and may volunteer to testify.<sup>30</sup> The fact that the public is in attendance at a trial helps to prevent accusations concerning possible dishonesty on the part of the judge,<sup>31</sup> dissuades perjury<sup>32</sup> and impropriety on the part of those who are involved in the proceedings,<sup>33</sup> and

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dom from unreasonable searches and seizures, and the exclusion from trial of any illegally obtained evidence); *Malloy v. Hogan*, 378 U.S. 1 (1964) (the fifth amendment privilege against self-incrimination).

23. *In re Oliver*, 333 U.S. 257, 270.

24. *Id.* at 257.

25. *Id.* at 270.

26. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572-73; WIGMORE, *supra* note 11, at § 1834; Radin, *Public Trial*, *supra* note 11 at 392.

27. *In re Oliver*, 333 U.S. 270; *Richmond Newspapers*, 448 U.S. at 594-95 (Brennan, J., concurring); WIGMORE, *supra* note 11 at § 1834; 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524-26 (1827).

28. *Richmond Newspapers*, 448 U.S. at 593 (Brennan, J., concurring).

29. *Id.* at 594-95 (Brennan, J., concurring).

30. WIGMORE, *supra* note 11, at § 1834.

31. BENTHAM, *supra* note 27 at 522. But see Radin, *Public Trial*, *supra* note 11, at 394 (noting that judges may act improperly even though people are present in the courtroom and their presence may even encourage such conduct rather than hinder it).

32. Perjury is discouraged in the sense that testifying publicly raises the possibility that any false statement may be exposed. WIGMORE, *supra* note 11, at § 1834. Blackstone also believed that perjury would be discouraged: "a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." BLACKSTONE, *supra* note 11, at 373.

33. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569.

helps prevent prejudicial or biased feelings from forming the basis of decisions.<sup>34</sup> As the Supreme Court emphasized in *Press-Enterprise*:

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. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>35</sup>

In addition to the importance attached to having criminal trials open to the public, there is also a "community therapeutic

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34. *Id.* While the ultimate outcome is not the only part to be considered, it is, nonetheless, a significant object of public concern. "A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted." *Id.* at 571.

Frequently quoted is a passage in which Bentham, over 150 years ago, recognized the value of openness and the need for safeguards through public access to judicial proceedings:

[S]uppose the proceedings to be completely secret, [and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

BENTHAM, *supra* note 27, at 524.

35. *Press-Enterprise v. Superior Court of Cal.*, 464 U.S. 501, 508; *see also Richmond Newspapers v. Virginia*, 448 U.S. 555, 569-71. It is important to note that the Supreme Court felt that "justice must satisfy the appearance of justice" in order for the system to work effectively. *Levin v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *accord*, *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring and dissenting). *See also Richmond*, 448 U.S. at 571-72; *id.* at 594-95 (Brennan, J., concurring); the Supreme Court notes that institutional integrity is enhanced by keeping the proceedings open to the public:

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.

448 U.S. at 572.



value"<sup>36</sup> to be considered. After a crime has been committed, especially a violent one, public reaction may be widespread and people must have an avenue through which to vent their emotions.<sup>37</sup> It is a natural tendency for society to want the guilty to be punished.<sup>38</sup> People want to see that justice, in fact, is done.<sup>39</sup> Public trials provide an outlet for community concern and assure people that the criminal justice system is working.<sup>40</sup> "Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected."<sup>41</sup>

The Constitutional guarantees under the sixth amendment are personal to the accused,<sup>42</sup> and do not confer upon the public a right of access to criminal trials.<sup>43</sup> Therefore the sixth amendment protections for the accused must be placed in perspective with the guarantees of the first amendment<sup>44</sup> which, in conjunc-

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36. 448 U.S. at 570.

37. *Press Enterprises* 464 U.S. at 508-09; *Richmond Newspapers*, 448 U.S. at 570-72.

38. 464 U.S. at 509.

39. *Id.* at 506-10. See also Radin, *Public Trial*, *supra* note 11, at 394.

40. Problems arise when people, caught up in the excitement and emotion of the situation, feel that adequate measures are not being taken to uphold the laws and that a miscarriage of justice must be prevented. As a result, they take matters into their own hands, employing "self-help" methods such as those used by vigilante committees. *Richmond*, 448 U.S. at 571.

41. *Press Enterprise v. Superior Court of Cal.* 464 U.S. 501, 509.

42. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-80; see *Faretta v. California*, 422 U.S. 806, 848 (1975) (Blackmun, J., dissenting) ("the specific guarantees of the sixth amendment are personal to the accused . . ."); *Estes v. Texas*, 381 U.S. 532, 538-39 (1965) ("the purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned."); *id.* at 588 (Harlan, J., concurring) ("Thus the right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered."); *id.* at 583 (Warren, C.J., concurring) ("[T]he public trial provision of the sixth amendment is a 'guarantee to an accused' designed to 'safeguard against any attempt to employ our courts as instruments of persecution.' . . . A public trial is a necessary component of an accused's right to a fair trial . . .") (quoting *In re Oliver*, 333 U.S. 257, 270).

43. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-81; *id.* at 381 n.9; see also *Estes v. Texas*, 381 U.S. 532, 538-39; *contra United States v. Cianfrani*, 573 F.2d 835, 847 (3d Cir. 1978) (the right of access to all adjudicative proceedings is conferred upon the public by the fifth and sixth amendments). See Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1321-22 (1978) [hereinafter cited as Note, *The Right to Attend*].

44. U.S. CONST. amend. I., see *supra* note 1 and accompanying text.

tion with the fourteenth amendment,<sup>45</sup> include the right of freedom of communication, especially with regard to governmental proceedings.<sup>46</sup> Obviously, one of the main functions of government is the administration of justice.<sup>47</sup> The first amendment not only protects speech and press, but also prohibits the government from limiting the source and availability of information.<sup>48</sup> As much as there is a constitutionally guaranteed freedom of speech, there is also a corresponding right to listen and to "receive information and ideas."<sup>49</sup> Over the years, courts have upheld many different rights which they deemed to be included under the umbrella of the first amendment, such as the right of peaceable assembly,<sup>50</sup> the right to distribute literature,<sup>51</sup> and the right of access to traditionally open places, like parks, streets, and sidewalks,<sup>52</sup> subject, of course, to traditional time, place, and manner restrictions.<sup>53</sup> "What this means in the context of trials is that the first amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."<sup>54</sup> Since people have the freedom of speech<sup>55</sup> and the right to assemble<sup>56</sup> and traditionally they have served a vital role in criminal proceedings,<sup>57</sup> it follows that they should be accorded the right to attend criminal trials.<sup>58</sup>

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45. See *supra* note 4 and accompanying text.

46. See *supra* note 5 and accompanying text.

47. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575; see also *Craig v. Harney*, 331 U.S. 367, 374 (1947) (Douglas, J.) ("A trial is a public event. What transpires in the courtroom is public property").

48. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978).

49. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas"); see also *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

50. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

51. *Lovell v. Griffin*, 303 U.S. 444 (1938).

52. See *Hague v. CIO*, 307 U.S. 496 (1939).

53. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

54. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576.

55. See *supra* note 1.

56. *Id.*

57. *Richmond Newspapers*, 448 U.S. at 578. See *supra* notes 23-35 and accompanying text.

58. *Richmond Newspapers*, 448 U.S. at 577. ("The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the

## II. PRESUMPTIVE OPENNESS OF PRETRIAL PROCEEDINGS

## A. Federal Circuit Court Decisions

While it is accepted, both by common law tradition and constitutional guarantees, that a criminal trial must be open to the public,<sup>59</sup> the question of whether access should be allowed to proceedings other than the trial itself, or exactly what proceedings are considered to be part of the trial for purposes of public access, has not always been as clear.

Lower courts, most notably the Third Circuit, have grappled with the issues of accessibility to pretrial hearings and voir dire examinations of prospective jurors. In *U.S. v. Sorrentino*,<sup>60</sup> the court held that the right to a public trial applies to the entire trial, including the selection of the jury.<sup>61</sup> This decision, however, rested upon the sixth amendment,<sup>62</sup> and the court noted that “[w]hile all of these rights are in a broad sense for the protection of the public generally they are in a very special sense privileges accorded to the individual member of the public who has been accused of crime.”<sup>63</sup> Accordingly, many of these “privileges,” such as the right to a public trial, may be waived by the defendant, as did happen in this case.<sup>64</sup>

This right to a public trial based upon the sixth amendment

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amalgam of the first amendment guarantees of speech and press, and their affinity to the right of assembly is not without relevance”).

59. See *supra* notes 11-21 and accompanying text; see also *Craig v. Harney*, 331 U.S. 367, 374 (“What transpires in the court room is public property”).

60. 175 F.2d 721 (3d Cir. 1949), *cert. denied*, 338 U.S. 868 (1949), *reh'g denied*, 338 U.S. 896 (1949).

61. *Id.* at 722. In this case, an order issued by the trial judge excluded all people from the courtroom except the jurors, attorneys, witnesses, and the press, beginning with the first day of trial, during which the jury was selected. This order was later relaxed for the remaining three days of trial. Sorrentino, who was convicted, along with others, of a conspiracy to violate the Mann Act, later contested the closure order, claiming that he was denied his right to a public trial. The Court stated that the right to a public trial “applies to the entire trial, including that portion devoted to the selection of the jury.” Sorrentino’s constitutional rights were not violated, however, because he, in fact, had waived his right to a public trial by not objecting to the closure order. *Id.* at 723.

62. *Id.* at 722.

63. *Id.* at 722-23.

64. *Id.* at 723. *Cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (“While the sixth amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial”). See *e.g., U.S. v. Cianfrani*, 573 F.2d 835, 852.

has also been held to encompass pretrial hearings.<sup>65</sup> Chief Judge Seitz of the Third Circuit began his analysis in *U.S. v. Cianfrani*<sup>66</sup> emphasizing that there is a strong presumption that the public has access to all judicial proceedings.<sup>67</sup> Concluding that the sixth amendment guarantee to a public trial extended to the pretrial suppression<sup>68</sup> and *Starks* hearings<sup>69</sup> in this case, Chief Judge Seitz went on to consider the appropriate limitations that should be placed upon this presumption and the importance of public access to adjudicative proceedings.<sup>70</sup> The court held that:

[A]ny motion that seeks to close any portion of a proceeding subject to the public trial requirement of the

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65. *Cianfrani*, 573 F.2d 835, disapproved on other grounds; *Gannett*, 443 U.S. at 382 n.9 (criticized for its departure from the plain meaning of the sixth amendment). See Note, *The Right to Attend*, *supra* note 43 at 1321-22.

66. 573 F.2d 835. This case concerned the trial of Henry J. Cianfrani ("defendant"), a well-known politician from Philadelphia, who was indicted by a federal grand jury for violations of federal law in connection with his alleged misconduct while in public office. The 110 count indictment included charges for mail fraud (18 U.S.C. § 1341); racketeering (18 U.S.C. §§ 1961, 1962(c)); income tax evasion (26 U.S.C. § 7201); and obstruction of justice (18 U.S.C. § 1503). The pretrial suppression and *Starks* hearings (*see infra* note 69) were of special significance because they involved the federal wiretapping statute (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*) and the public was excluded from them. At these in camera proceedings, the defendant stipulated that the tapes had been recorded with the permission of one of the parties involved and that the government had met all the requirements of *Starks*. The end result was that Cianfrani pleaded guilty to all counts, except he pleaded *nolo contendere* to income tax evasion, and thus the "trial" concluded with the plea hearing and sentencing of the defendant. 573 F.2d at 841-44.

67. *Cianfrani*, 573 F.2d at 847. Chief Judge Seitz relied upon the fifth amendment (due process clause) and, most importantly, the sixth amendment (public trial provision) for support for this presumption.

68. For other decisions which have held that pretrial suppression hearings are subject to the sixth amendment's guarantee to a public trial *see* *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969) (pretrial suppression hearing concerning the voluntariness of defendant's confession); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971) (pretrial hearing concerning the admissibility at trial of narcotics seized by police from defendant); *see also* *United States v. Clark*, 475 F.2d 240, 247 (2d Cir. 1973) (exclusion of defendant and public from hearing on motion to suppress drugs which were seized at an airport terminal security check (to prevent hijacking) violated defendant's sixth amendment rights).

69. A *Starks* hearing requires that in order to introduce tape recordings into evidence at trial, the party intending to so offer must prove, by clear and convincing evidence, that the tapes are accurate and authentic, and furthermore, the party should show that those conversations were voluntary, and made in good faith, without any inducement. *United States v. Starks*, 515 F.2d 112, 121 & n.11 (3d Cir. 1975).

70. *U.S. v. Cianfrani*, 573 F.2d 835, 851-61.

sixth amendment, or to seal any portion of the record thereof, may be granted only after full and fair consideration by the court of the important public policies that the sixth amendment protects. This is required even though it be the defendant who seeks to exclude the public.<sup>71</sup>

Thus, according to the Third Circuit, it is only under exceptional circumstances that even a part of a criminal trial may be subject to consideration for closure, and even then "only that portion of the public may be excluded for only that portion of the proceeding that the court finds to be strictly and inescapably necessary to protect the interests asserted by the defendant in support of his motion to close a hearing subject to the public trial requirement."<sup>72</sup>

In its discussion, the court pointed out that there are no "hard and fast" rules which could be used in determining which hearings should be closed, or the length of such closure.<sup>73</sup> This is a decision which district courts must make in each separate situation.<sup>74</sup> In particular, the court of appeals did not believe that limited access to a pretrial suppression hearing, as set out in this case, infringed the first amendment rights of the public or the press.<sup>75</sup>

Rather than relying on the sixth amendment, the District Court in *United States v. Dorfman*,<sup>76</sup> based its decision on the first amendment, holding that this amendment creates a presumptive right of access to the pretrial suppression hearing<sup>77</sup> for

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71. *Id.* at 854.

72. *Id.*

73. *Id.* at 858.

74. *Id.* In the *Cianfrani* case, the evidence which the defendant sought to suppress involved tapes of intercepted communications. The court of appeals, recognizing that the privacy of communications justifies some limitation on access, felt that some protection against disclosure of the content of these tapes, or any evidence derived therefrom, was permissible, but that the district court's closure of the hearing and sealing of the record was too broad. *Id.* at 857, 859. Once the trial court decided that these communications were lawfully intercepted (which was the only portion of the hearing which dealt with the actual contents of the tapes) the public could have been allowed to attend the hearing without any problem of the content of the communications being made public. *Id.* at 857-60.

75. *Id.* at 861.

76. 550 F. Supp. 877 (N.D. Ill., E.D. 1982). This case concerned a multi-count indictment which included charges of conspiracy to bribe a United States senator.

77. *Id.* at 884.

both the public and the press. In this case, the court denied a motion to close the evidentiary hearing, but received all the surveillance materials under seal as exhibits.<sup>78</sup> After determining that almost all of the electronic surveillance was lawful, the court entertained a motion to unseal these exhibits.<sup>79</sup> Acknowledging that "there is a common law right to inspect and copy judicial records,"<sup>80</sup> the district court found that the record of the case included exhibits which were introduced at an evidentiary hearing.<sup>81</sup> Judge Marshall of the district court gave a brief anal-

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78. *Id.* at 879.

79. *Id.* at 880.

80. *Id.* The record of a case has been held to include the exhibits which were introduced at an evidentiary hearing. See *U.S. v. Hubbard*, 650 F.2d 293, 299 (D.C. Cir. 1980). Of course, it must be remembered that:

[T]he right to inspect and copy judicial records is not absolute. . . .

[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

*Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978) (footnote omitted), quoted in *U.S. v. Hubbard*, 650 F.2d 293, 315-16.

81. *U.S. v. Dorfman*, 550 F. Supp. 877, 880. These sealed exhibits were central to the suppression hearing and, therefore, a vital component of the case, as well. As such, the district court deemed that they were subject to the common law right of access. The significance of pretrial hearings is more fully discussed herein. See *infra* notes 113-14 and accompanying text.

Citing *U.S. v. Hubbard*, 650 F.2d 293, the district court noted that an exception may be made to the common law right of access "where the documents sought are essentially irrelevant to the issues at the evidentiary hearing." 550 F. Supp. at 880. In *Hubbard* the exception centered around unique circumstances involving the defendants, who were officials or employees of the Church of Scientology. Certain documents were introduced, under seal, at a pretrial suppression hearing for the purposes of proving the defendants' contention that many of the documents were not relevant to the proceedings and that the search and seizure of the documents was unlawful in that it exceeded the scope of the warrant. 650 F.2d at 316. The court of appeals determined that the seal should not have been lifted since these materials were not found to be relevant to the charges in this case and they were not used in the trial. *Id.* at 321. Furthermore, the district court did not substantiate any reasons favoring public access, and the court of appeals, upon weighing only the generalized interests, found that the trial court abused its discretion by unsealing the documents. *Id.* at 317. In addition, the circuit court pointed out that the public did have access to various portions of the proceedings surrounding this case including, among others, the memoranda and hearing on the motion to suppress, the judge's memorandum decision in connection therewith, as well as the "stipulated record which was the basis for the defendants' convictions and to the actual 'trial' of the criminal charges of which the defendants were convicted." *Id.* at 317-18. *Contra* Judge MacKinnon's dissenting opinion in *Hubbard* in which he concluded that disclosure was warranted:

[T]he requirement for *public disclosure* of the evidentiary record in a court proceeding which results in a judicial ruling naturally flows from the constitu-

ysis of the Supreme Court's encounters with the issue of access to judicial proceedings under the first amendment<sup>82</sup> and concluded that the bulk of the sealed material did not bear upon the offenses contained in the indictment, and thus could be released immediately.<sup>83</sup> There were other sealed exhibits that were viewed as being directly related to the charges of the indictment which, if released, would probably be subject to pretrial publicity and might hamper the selection of an impartial jury.<sup>84</sup> These exhibits were to be kept under seal "only until the jury is impaneled and sworn."<sup>85</sup> The district court balanced all involved interests and determined that once the defendants' rights to a fair trial were adequately protected by a proper voir dire and instructions to the jury, the seal could be removed and the people of the community, as well as the press, would have access to this material without having to wait until the conclusion of the trial.<sup>86</sup>

In *In re United States ex rel. Pulitzer Pub. Co.*<sup>87</sup> the Eighth Circuit was faced with determining whether an in-chambers voir dire was constitutionally valid. The court decided that this type of voir dire was inappropriate in the absence of any inquiry as to alternate solutions, in the absence of a recognition of any right under the Constitution for the public or the press to attend the voir dire proceedings, and, most importantly, in the absence in the record of any articulated reasons for, and balancing of, inter-

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tional requirement that the trial be public. Even though a motion to suppress may not be a "trial" there is no difference in the ultimate requirement that the record be public. A judicial proceeding cannot be said to be public if the public be denied access to the evidence admitted as relevant to the issues before the court. *It is as important to public disclosure of judicial proceedings that the public be able to read written evidence in the record as it is that they be able to hear oral testimony.*

650 F.2d at 330 (MacKinnon, J., dissenting) (emphasis in original).

82. *U.S. v. Dorfman*, 550 F. Supp. 877, 883, reviewing *Gannett Co. v. DePasquale*, 443 U.S. 368; *Richmond Newspapers v. Virginia*, 448 U.S. 555; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

83. 550 F. Supp. at 886.

84. *Id.* at 886-87.

85. *Id.* at 887.

86. *Id.* at 887-88. The Court, holding that the exhibits could not be kept sealed for reasons of privacy, noted that it had already considered this aspect of the surveillance which was unduly intrusive into the privacy of those who were being monitored, for that portion of the material was suppressed at the hearing.

87. 635 F.2d 676 (8th Cir. 1980).

ests of the public in having access to criminal proceedings versus the right of the parties therein to a fair trial.<sup>88</sup> The circuit court granted the petition for a writ of mandamus to prevent the trial court from conducting the voir dire in camera solely because the district judge failed "to announce his reasons for the decision to close the voir dire proceedings and . . . to balance the right of the public to attend the trial against the right of the defendant to a fair trial in accordance with the principles announced in *Richmond Newspapers, Inc. v. Virginia*."<sup>89</sup> The court pointed out the need to balance the sixth amendment guarantee to a fair trial, which outweighed the right of the public to attend criminal proceedings in *Gannett Co. v. DePasquale*,<sup>90</sup> and the holding in *Richmond*,<sup>91</sup> which concluded that the public's right of access to a criminal trial is protected by the first amendment.<sup>92</sup>

### B. Supreme Court Decisions

One of the Supreme Court's first encounters with the issue of access to judicial proceedings was in *Gannett Co. v. DePasquale*.<sup>93</sup> This case concerned the validity of an order which closed to the public a pretrial hearing involving a motion to suppress specific physical evidence and alleged involuntary confessions.<sup>94</sup> In a 5-4 decision<sup>95</sup> the Court affirmed the order, holding that the sixth amendment guarantees no right of the public or the press to attend pretrial hearings.<sup>96</sup> Justice Stewart, speaking

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88. *Id.* at 677.

89. *Id.* at 678 (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555).

90. 443 U.S. 368.

91. *Richmond Newspapers*, 448 U.S. 555.

92. *See Pulitzer*, 635 F.2d at 677-79.

93. 443 U.S. 368. Prior to this case, the Supreme Court addressed, in a series of cases, access to prisons and concluded that the press did not have any rights superior to those afforded the public generally. *E.g.*, *Houchins v. KQED*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974). *But cf.* *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). The Court noted, in dictum: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."

94. 443 U.S. at 374-75, 377.

95. *Id.* at 370. Chief Justice Burger, Justices Powell, Rehnquist, and Stevens joined in Justice Stewart's opinion for the Court. Chief Justice Burger, Justices Powell and Rehnquist filed concurring opinions. Justice Blackmun, concurring in part and dissenting in part, filed an opinion in which he was joined by Justices Brennan, White, and Marshall.

96. *Id.* at 394. The trial judge had concluded that if the suppression hearing were



for the majority, stated that courts must take adequate measures to protect an accused's right to due process,<sup>97</sup> which often includes minimizing pretrial publicity by closing pretrial proceedings.<sup>98</sup>

Justice Stewart emphasized that the sixth amendment guarantees the defendant in a criminal proceeding, among other things, the right to a speedy and public trial,<sup>99</sup> but he also noted that the Constitution does not provide for a public right of access to a criminal trial.<sup>100</sup> This sixth amendment right to a public trial is "personal to the accused."<sup>101</sup> Nevertheless, the sixth amendment does not confer upon the defendant the right to a private trial.<sup>102</sup> The Court acknowledged the importance attributed to public trials, as well as the public's interest "in having a criminal case heard by a jury, an interest distinct from the defendant's interest in being tried by a jury of his peers."<sup>103</sup> However, once a defendant waives his right to a jury trial,<sup>104</sup> there is no right on the part of the public to insist that he have a trial by jury, regardless of the societal interest attached thereto.<sup>105</sup>

open, there would be a reasonable likelihood that the defendants would be prejudiced by the pretrial publicity and, therefore, the closure order was necessary to protect the defendants' right to a fair trial. *Id.* at 376.

97. *Id.* at 378-79. *E.g.*, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Irvin v. Dowd*, 366 U.S. 717 (1961). *Cf.* *Estes v. Texas*, 381 U.S. 532.

98. *Gannett Co. v. DePasquale*, 443 U.S. 368, 378-79.

99. *Id.* at 379, 386-87.

100. *Id.* at 379.

101. *Id.* at 379-81 (quoting *Faretta v. California*, 422 U.S. 806, 848 (Blackmun, J., dissenting), and at 381-82 n.9. *See also*, *In re Oliver*, 333 U.S. 257; Note, *The Right To Attend*, *supra* note 43 at 1326.

102. 443 U.S. at 382. Defendants cannot compel closure but, as in this case, they may move for closure. When defendants requested that the hearing be closed, neither the District Attorney nor Gannett's reporter objected to the motion, which the trial judge then granted. The judge also reserved his decision concerning release of the transcript, which prompted Gannett to move the court to vacate the exclusionary order. *Id.* at 375-76. Ruling that "the interest of the press and the public was outweighed in this case by the defendants' right to a fair trial," the trial judge refused to allow the suppression hearing to be open. *Id.* at 376.

103. *Id.* at 383.

104. *Cf.* FED. R. CRIM. P. 23(a) (defendant may waive a jury trial, provided that the court and prosecution consent).

105. 443 U.S. at 384. *See also id.* at 383:

Recognition of an independent public interest in the enforcement of sixth amendment guarantees is a far cry, however, from the creation of a constitutional right on the part of the public. In an adversary system of criminal justice, the public interest in the administration of justice is protected by the partici-

The Court placed great reliance upon the proposition that the public's interest in the efficient administration of justice is fully protected by the adversary system.<sup>106</sup> In considering the scope of public access to judicial proceedings, the Court found there is merely a common-law rule of proceedings being open to the public, which is hardly the same as a constitutional right.<sup>107</sup> The Supreme Court looked mainly to the sixth amendment for authority. "Our judicial duty in this case is to determine whether the common-law rule of open proceedings was incorporated, rejected, or left undisturbed by the sixth amendment. . . . There is no question that the sixth amendment permits and even presumes open trials as a norm."<sup>108</sup> At this point, however, the Court drew a distinction between a trial and a pretrial proceeding, and even assuming, *arguendo*, that there was a common-law right of the public to attend criminal trials embodied in the sixth and fourteenth amendments, there was still no evidence to support a public constitutional right to attend a pretrial proceeding.<sup>109</sup>

Justice Stewart briefly addressed the first and fourteenth amendment implications, but determined that this issue did not have to be decided by this Court in the abstract.<sup>110</sup> He felt that the state *nisi prius* court had considered the circumstances and properly balanced the first amendment right of access with the sixth amendment guarantee of a fair trial, which might have been endangered had the suppression hearing been made public.<sup>111</sup> Furthermore, Justice Stewart pointed out, the public had access to the suppression hearing transcript after the danger of pretrial prejudice was gone, so that the first and fourteenth amendments were not violated.<sup>112</sup>

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pants in the litigation. Thus, because of the great public interest in jury trials as the preferred mode of fact-finding in criminal cases, a defendant cannot waive a jury trial without the consent of the prosecutor and judge.

106. *Id.* at 383, 384.

107. *Id.* at 384.

108. *Id.* at 385.

109. *Id.* at 385, 387-91. In fact, Justice Stewart found evidence in early common law commentaries that the public did not have a right of access to pretrial proceedings. See *id.* at 387-91 and accompanying notes.

110. *Id.* at 391-93.

111. *Id.* at 392-93.

112. *Id.* at 393.

Agreeing with the majority opinion, Justice Powell presented his view in a concurring opinion, and concluded that the petitioner's reporter<sup>113</sup> had a right of access to the pretrial suppression hearing.<sup>114</sup> Justice Powell recalled his dissenting opinion in *Saxbe v. Washington Post Co.*<sup>115</sup> in which he discussed the role of the press in connection with the first amendment function of protecting public discussion of governmental proceedings.<sup>116</sup> While Justice Powell recognized that there is not an absolute right of access to judicial proceedings,<sup>117</sup> he also noted that it is usually the trial courts which must determine whether or not closure is justified.<sup>118</sup> According to Justice Powell, the Supreme Court should identify the constitutional standard by which the trial judges may be guided.<sup>119</sup> In his opinion, the best course would be a:

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113. Justice Powell emphasized the importance of suppression hearings in certain cases. Oftentimes, as did happen in this case, there was no trial due to the fact that the suppression hearing resulted in plea bargaining and guilty pleas being entered. "In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself." *Id.* at 397 n.1 (Powell, J., concurring).

114. *Id.* at 397 (Powell, J., concurring).

115. 417 U.S. 843, 850 (1974). In this case, the Court held in a 5-4 decision that the prohibition by the Federal Bureau of Prisons of interviews between the press and individual inmates of federal medium and maximum security prisons did not violate the first amendment.

116. Justice Powell believed that the press has a vital role to play:

An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. . . . In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the first amendment.

*Id.* at 863 (Powell, J., dissenting). For a further discussion concerning the role of the press see *infra* notes 198-201 and accompanying text.

117. *Gannett Co. v. DePasquale*, 443 U.S. 368, 398 (Powell J., concurring). This right is limited "both by the constitutional right of defendants to a fair trial . . . and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants." *Id.*

118. *Id.*

119. *Id.* *But see, id.* at 403-06 (Rehnquist, J., concurring). "[T]he lower courts are under no constitutional constraint either to accept or reject those procedures. They remain . . . free to determine for themselves the question whether to open or close the proceeding." *Id.* at 405. *See also id.* at 405-06 n.2.

[F]lexible accommodation between first and sixth amendment rights which are protected from state-law interference by the fourteenth amendment—an accommodation under which neither defendants' rights nor the rights of members of the press and public should be made subordinate. . . . The question for the trial court, therefore, in considering a motion to close a pretrial suppression hearing is whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury.<sup>120</sup>

While the Court had clearly affirmed the closure order in *Gannett* on sixth amendment grounds, first amendment implications of open judicial proceedings remained in a state of confusion.<sup>121</sup> One year later, the Justices again encountered the public access question in *Richmond Newspapers, Inc. v. Virginia*.<sup>122</sup> Although the Court was unable to render a majority opinion,<sup>123</sup> the Justices, nevertheless, clearly established that the Constitution guarantees the public and the press the right to attend criminal trials. Chief Justice Burger, speaking for the plurality, held that “[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”<sup>124</sup>

The *Richmond* case stemmed from a prior trial in which the defendant, Stevenson, had been charged with murder and convicted at his first trial, which was reversed on appeal.<sup>125</sup> The second and third retrials both resulted in mistrials, and at the fourth trial, the judge granted a motion by the defendant's coun-

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120. 443 U.S. at 400 (Powell, J., concurring). Justice Powell felt the trial court applied a standard similar to the one he expounded, and in doing so, correctly determined that closure was appropriate. See *id.* at 401-03 (Powell, J., concurring).

121. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 602, nn.1-2 (Blackmun, J., concurring).

122. 448 U.S. 555.

123. Chief Justice Burger delivered the plurality opinion, joined by Justices White and Stevens. Justices White and Stevens also entered concurring opinions. Justice Marshall joined Justice Brennan in his opinion concurring in judgment. Justices Stewart and Blackmun filed opinions concurring in judgment while Justice Rehnquist filed a dissenting opinion. Justice Powell did not take part in the consideration or decision of the case. *Id.* at 558.

124. *Id.* at 581.

125. *Id.* at 559.

sel that the trial be closed to the public.<sup>126</sup> Although no one objected at the time the motion was granted, appellants, Richmond Newspapers, Inc., *et al.*, moved that same day to have the closure order vacated.<sup>127</sup> The hearing on the motion, treated as part of the trial, was also closed and the court refused to grant appellants' motion to vacate.<sup>128</sup> At the conclusion of this trial, the defendant was found "not guilty" and released.<sup>129</sup> Appellants were allowed to intervene nunc pro tunc and, failing to find relief in the Virginia state courts, sought review by the Supreme Court, which granted certiorari.<sup>130</sup>

In the plurality decision, Chief Justice Burger traced the common-law tradition that criminal trials are presumptively open to the public,<sup>131</sup> which ensures the fairness of trials and increases the public's awareness and understanding of the judicial system.<sup>132</sup> He mentioned the role of the press in reporting judicial proceedings upon which the public has come to rely for information.<sup>133</sup> As the majority of the Court in *Gannett* held that the sixth amendment did not give the public or the press the right of access to a pretrial hearing,<sup>134</sup> so in *Richmond* the Court also refused to find that the first amendment explicitly protected the right of the public to attend criminal trials.<sup>135</sup> Chief Justice Burger did conclude that there is a presumption of openness in criminal trials.<sup>136</sup> However, he continued his analy-

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126. *Id.* at 559-60. Reporters for Richmond Newspapers, Inc. were present in the courtroom before the trial began. When the motion for closure was made, the trial judge checked to see whether the prosecution had any objections. Finding none, the judge granted the motion. The record does not reflect that anyone objected, including Richmond Newspapers' reporters. *Id.*

127. *Id.* at 560.

128. *Id.* at 560-61. The trial court did not consider whether there were any available alternatives to closure. "At the closed hearing, counsel for [Richmond Newspapers] observed that no evidentiary findings had been made by the court prior to the entry of its closure order and pointed out that the court had failed to consider any other, less drastic measures within its power to ensure a fair trial." *Id.* at 560.

129. *Id.* at 562.

130. *Id.* at 562-63.

131. *Id.* at 564-69.

132. *Id.* at 569-73.

133. *Id.* at 572-73. This passage, to a certain extent, echoes some of Justice Powell's views in his concurring opinion in *Gannett Co. v. DePasquale*, 443 U.S. 368, 397-403. See *supra* notes 113-16 and accompanying text.

134. 443 U.S. at 394.

135. *Id.* at 379-87.

136. *Richmond Newspapers*, 448 U.S. at 573.

sis with special attention devoted to first amendment implications, by focusing on whether the Constitution, without an explicit provision, provides a guarantee of public access to criminal trials.<sup>137</sup>

In expressing the view that the exclusion of the public from criminal trials is sharply limited by the first amendment, the Chief Justice noted that the public would be unable to discuss the criminal justice system unless it was allowed to attend and observe the proceedings.<sup>138</sup>

In guaranteeing freedoms such as those of speech and press, the first amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "[T]he first amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a first amendment right to 'receive information and ideas.'" What this means in the context of trials is that the first amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted.<sup>139</sup>

The first amendment encompasses more than just freedom of speech and freedom of the press within its constitutional umbrella. It includes the right of assembly and "the right of access to places traditionally open to the public," such as the courtroom.<sup>140</sup>

Although the Constitution does not contain a provision specifically addressing public access to judicial proceedings,<sup>141</sup> Chief Justice Burger noted that the Court had previously found other

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137. *Id.* at 575.

138. *Id.* at 575-80.

139. *Id.* at 575-76 (citations omitted) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) and *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

140. *Id.* at 577-78. *See generally id.* at 577-78 (the right of assembly in connection with the exercise of other first amendment guarantees).

141. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

rights implicit in the enumerated guarantees, and had accorded them constitutional protection, such as the right of association, the right to privacy, the right to travel, and the requirement in a criminal trial that proof must be beyond a reasonable doubt.<sup>142</sup> In conclusion, the Court held that "the right to attend criminal trials is implicit in the guarantees of the first amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated."<sup>143</sup>

Concurring in the judgment, Justice Brennan explained that in our constitutional system, the first amendment plays a "structural role" in protecting self-government through public debate and discussion, which, if it is to be at all effective, must be informed and uninhibited.<sup>144</sup> The Supreme Court has not taken the position that the first amendment always provides freedom of access to information; therefore, the Court has recognized that access to information concerning the government is limited by the context and subject matter of that material and its relation to governmental security or confidentiality interests.<sup>145</sup> Im-

142. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958) (right of association); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *In re Winship*, 397 U.S. 358 (1970) (standard of proof beyond a reasonable doubt). This is consistent with the view that the framers of the Constitution drafted it with broad principles in mind, and thus the amendments were not meant to be confined to a narrow, literal interpretation. 457 U.S. at 604.

143. *Richmond Newspapers*, 448 U.S. at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

144. 448 U.S. at 587 (Brennan, J., concurring in judgment). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (Powell, J., dissenting):

What is at stake here is the societal function of the first amendment in preserving free public discussion of governmental affairs. . . . [The first amendment] embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that first amendment concerns encompass the receipt of information and ideas as well as the right of free expression.

*Saxbe*, 417 U.S. at 862-63.

Justice Learned Hand once said that the interest of the media in disseminating the news, like the interest protected by the first amendment, "presupposes that right conclusions are more likely to be fathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 392, 372 (S.D.N.Y. 1943).

145. See *Richmond Newspapers*, 448 U.S. at 584-86, 588 (Brennan, J., concurring)

portant factors to be considered regarding the right of access are tradition and the value of that accessibility.<sup>146</sup> Justice Brennan traced our "legacy of open justice" from early English history and colonial state practices to constitutionally guaranteed rights, which have vigorously been protected by the Supreme Court.<sup>147</sup> In addition to recognizing that judicial proceedings have inherently been open to the public,<sup>148</sup> and that public proceedings are beneficial,<sup>149</sup> Justice Brennan also acknowledged the right of the public to receive information about these proceedings without necessarily being there in person. "While these decisions are impelled by the classic protections afforded by the first amendment to pure communication, they are also bottomed upon a keen appreciation of the structural interest served in opening the judicial system to public inspection."<sup>150</sup>

In Justice Brennan's view, however, trials and judges themselves play a more pivotal role in the administration of justice. It is within these proceedings that law is made and constitutional rights are upheld.<sup>151</sup> The courts are, after all, one of the branches of government and, as such, judicial proceedings are

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"An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded."

146. 448 U.S. at 589 (Brennan, J., concurring):

First the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

*Id.* at 589.

147. *Id.* at 589-93 (Brennan, J., concurring).

148. *Id.* at 592.

149. *Id.* at 593-97. *See, e.g., supra*, notes 26-41 and accompanying text.

150. 448 U.S. at 592 (footnote omitted). *See also* *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (discussion of governmental affairs); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976) (reporting of criminal proceedings); *Time, Inc. v. Firestone*, 424 U.S. 448, 478 (1976) (Brennan, J., dissenting) ("with the judiciary as with all other aspects of government, the first amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions that might in the alternative grow remote, insensitive, and finally acquisitive of those attributes of sovereignty not delegated by the Constitution"); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 492 (1975) (function of press in judicial proceedings).

151. *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring).



matters that are of interest to the community.<sup>152</sup> The fact that the public may attend the trial, or learn about the proceedings through the coverage of the press, serves not only as a check upon the system, but also as an aid in the fact finding process.<sup>153</sup> "Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding. In that sense, public access is an indispensable element of the trial process itself. Trial access, therefore, assumes structural importance in our 'government of laws.'"<sup>154</sup>

Two years later Justice Brennan spoke for the majority, which had adopted his structural approach to the public's right of access, in *Globe Newspaper Co. v. Superior Court*.<sup>155</sup> In construing first amendment protections, made applicable to the states through the fourteenth amendment, the Court held invalid a Massachusetts statute<sup>156</sup> which required a trial for a sex offense to be closed when victims under the age of 18 were testifying.<sup>157</sup>

The trial court had issued an order excluding the public and the press from the courtroom during the trial of the accused, who was charged with raping three minors.<sup>158</sup> A Boston area newspaper publisher, the appellant herein, challenged the closure order, eventually appealing to the Massachusetts Supreme Judicial Court en banc.<sup>159</sup> After the defendant was acquitted, the Massachusetts Supreme Judicial Court dismissed Globe's appeal<sup>160</sup> stating, however, that the statute in question required

152. *Id.* at 596.

153. *Id.*

154. *Id.* at 597 (citations omitted) (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803)).

155. 457 U.S. 596. In this case, the Supreme Court addressed the issue of access to a criminal trial which involved a sex-related offense.

156. MASS. GEN. LAWS ANN. ch. 278 § 16A (West 1981), provides in pertinent part:

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.

157. 457 U.S. at 610-11.

158. *Id.* at 598-99.

159. *Id.* at 600. Previously a justice of that Court had conducted a hearing and denied Globe's request for relief. *Id.* at 599-600.

160. *Id.* at 600 (since the trial had been completed, the Court considered the issue moot).

closure only when victims under the age of 18 were testifying at a sex-offense trial.<sup>161</sup>

The Supreme Court vacated the judgment of the Massachusetts court and remanded the case for further consideration following the decision in *Richmond Newspapers*.<sup>162</sup> On remand, the Massachusetts Supreme Judicial Court determined that its prior interpretation of the Massachusetts statute was still valid, even in light of the *Richmond* decision.<sup>163</sup> On appeal, the Supreme Court reversed.<sup>164</sup> Relying heavily upon the various opinions in *Richmond*,<sup>165</sup> Justice Brennan reiterated the two factors which explain why the first amendment protects the right of public access to criminal trials: there is first, the tradition that trials have been open to the public, and second, the important role which public access plays in the functioning of the administration of justice.<sup>166</sup> This right of access, however, is not absolute.<sup>167</sup>

But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.<sup>168</sup>

The Court discussed the State's interests in terms of two general categories. The first interest consisted of "safeguarding

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161. *Id.* (the matter of closure for the rest of the trial was within the discretion of the trial court).

162. 448 U.S. 555 (1980).

163. 383 Mass. 838, 423 N.E.2d 773 (1981).

164. 457 U.S. 596, 602.

165. 448 U.S. 555 (especially upon his own concurring opinion. *See supra* notes 144-54 and accompanying text).

166. 457 U.S. at 605-06.

167. *Cf. id.* at 613-20 (Burger, C.J., dissenting). The Chief Justice viewed the majority's decision as interpreting the *Richmond* decision to hold that there is a "First Amendment right of access to all aspects of all criminal trials under all circumstances." *Id.* at 613. Chief Justice Burger notes that the Court will allow states to enact statutes which are more narrowly tailored than the one in this case, but he still believes that the Court's decision is "nevertheless a gross invasion of state authority and a state's duty to protect its citizens. . . ." *Id.* at 612-13.

168. 457 U.S. at 606-07.

the physical and psychological well-being of a minor,"<sup>169</sup> which the Court believed is a compelling interest. It is not necessary, however, that a closure order be required under all circumstances.<sup>170</sup> A better approach, according to Justice Brennan, would be for the trial court to determine whether the factors<sup>171</sup> in each individual case mandate excluding the public in order to protect those victims who are minors from further embarrassment and trauma.<sup>172</sup>

The second interest asserted by the State is "the encouragement of minor victims of sex crimes to come forward and provide accurate testimony."<sup>173</sup> As before, the Supreme Court did not feel that the Massachusetts statute<sup>174</sup> was narrowly tailored enough to serve this interest.<sup>175</sup> Thus, Massachusetts had not demonstrated any interest which could justify a mandatory exclusion during a minor victim's testimony.<sup>176</sup>

Both *Richmond* and *Globe* reflect the Supreme Court's departure from its prior attitude in *Gannett*<sup>177</sup> that the right to a public trial is only personal to the accused and that the Constitution does not include a right of the public to attend a criminal trial. Furthermore, *Richmond* and *Globe* signify the formal recognition by the Supreme Court that the Constitution does guarantee the public the right of access to criminal trials.<sup>178</sup> It was against the background of these decisions involving the issue of public access to criminal trials and pretrial suppression hearings that the Supreme Court addressed the question of whether the

169. *Id.* at 607.

170. *Id.* at 607-08.

171. *See id.* at 608 for a list of suggested factors to be considered by the trial court in determining, on a case by case basis, whether closure is necessary.

172. *Id.* at 608.

173. *Id.* at 609.

174. *See supra* note 156.

175. 457 U.S. at 609-10. One important fact which the Court points out is that the statute closes that portion of the trial during which the minor sex victim is testifying; it does not prohibit access to the trial transcript or any other source of that testimony. *Id.* at 610.

176. *See, e.g., id.* at 611 n.27.

177. 443 U.S. 368, 379-80.

178. *See, e.g.,* 457 U.S. at 603 ("The first amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the amendment, are nonetheless necessary to the enjoyment of other first amendment rights").

public has the right to attend the voir dire<sup>179</sup> in *Press-Enterprise Co. v. Superior Court of Cal.*<sup>180</sup>

### III. PRESS-ENTERPRISE CO. V. SUPERIOR COURT OF CAL.

#### A. Background

The controversy in *Press-Enterprise* arose out of a trial in the Superior Court of California, Riverside County, in which Albert Greenwood Brown, Jr.<sup>181</sup> was convicted and sentenced to death for the rape and murder of a teenage girl.<sup>182</sup> Before the trial began, the voir dire examination of prospective jurors took six weeks to complete. During this period, approximately three days of "general voir dire" was open to the public and the press.<sup>183</sup> Press-Enterprise Co., the petitioner herein, moved before the examination of prospective jurors began, that the voir dire should not be closed to the public or the press, but the trial judge denied the motion.<sup>184</sup>

Petitioner submitted a motion, after the jury was selected, to have a transcript of the voir dire examination released. Although the trial judge acknowledged that there were only a few jurors who had personal matters which were discussed in response to questions on voir dire, he denied the motion, concluding that the privacy interests of the jurors must be protected.<sup>185</sup> Following the conviction and sentencing of Brown, petitioner sought a writ of mandate in the California Court of Appeal to require the trial court to release the transcript of the voir dire proceedings. Petitioner's application was denied and the California Supreme Court refused to grant Petitioner's request for a

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179. The definition of voir dire is "to speak the truth." BLACK'S LAW DICTIONARY 1412 (5th ed. 1979). It refers to a pretrial proceeding in which potential jurors are questioned, in an attempt to find those who are capable of deciding the issue(s) at trial without being biased or prejudiced. For more information regarding the voir dire procedure, see Note, *People v. Williams: Expansion of the Permissible Scope of Voir Dire in the California Courts*, 15 Loy. L.A.L. Rev. 381 (1981).

180. 464 U.S. 501.

181. The accused was a twenty-six year old black man. Young, *Supreme Court Report: Voir Dire Must Be Open to the Public*, 70 A.B.A.J. 108, 112 (April 1984).

182. The victim was a fifteen year old white girl. *Id.*

183. 464 U.S. at 503.

184. *Id.*

185. *Id.* at 504.

hearing.<sup>186</sup> The Supreme Court granted certiorari and reversed the lower court's decision.<sup>187</sup>

### B. *Majority Opinion*

Chief Justice Burger began the majority opinion by reviewing historical evidence of the origins of the jury system, and recalling the decision four years earlier in *Richmond*<sup>188</sup> which determined that criminal trials have long been presumptively open to the public.

In looking at the evolution of the trial by jury, the Chief Justice concluded that "the process of selection of jurors had presumptively been a public process with exceptions only for good cause shown."<sup>189</sup> This view is consistent with the Court's position regarding the basic presumption that, by nature, the criminal justice system is open to the public. One of the more important factors involved is the actual selection of the jury, for these people are the ultimate triers of fact. They are charged with the responsibility of weighing the evidence, deciding the facts, and determining the outcome of the trial. Realizing that it is difficult to separate the community's right to have access to a criminal trial from the accused's right to a fair trial,<sup>190</sup> Chief Justice Burger stressed that the value of openness of the proceedings assures the basic principles of fairness, as well as the appearance of fairness, both of which help maintain public confidence in the judicial system.<sup>191</sup>

Many of the same factors are analyzed in connection with access to the examination of the veniremen as were considered with regard to the openness of criminal trials and pretrial hearings. Such factors include the therapeutic value to the community and the corresponding outlet for reactions and emotions, the knowledge that offenders are being justly dealt with for their transgressions, and the limited circumstances under which access to criminal proceedings may be denied or restricted.<sup>192</sup> The

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186. *Id.*

187. 459 U.S. 1169 (1983).

188. 448 U.S. 555.

189. 464 U.S. at 505.

190. *Id.* at 508.

191. *Id.* See *supra* notes 26-35 and accompanying text.

192. 464 U.S. at 508-10. See *supra* notes 36-41 and accompanying text.

Supreme Court was quite specific in delineating the permissible limitations on access:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.<sup>193</sup>

While constitutional as well as policy considerations are quite similar to those addressed by the Court in previous cases concerning the question of accessibility, there is a distinguishing characteristic. In *Press-Enterprise*, the Supreme Court focused on the values of the first amendment and the historical context in which it was enacted,<sup>194</sup> as opposed to the fifth<sup>195</sup> or sixth amendments.<sup>196</sup>

It has long been recognized that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."<sup>197</sup> There is no necessity, however, for forcing a choice between the first and

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193. 464 U.S. at 510. *Cf.* *Globe Newspapers Co. v. Supreme Court*, 457 U.S. 596, 606-07 (a state's "justification in denying access must be a weighty one. . . . [I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

194. 464 U.S. at 509, n.8. ("[T]he question we address—whether the *voir dire* process must be open—focuses on first, rather than fifth, amendment [Due Process] values and the historical backdrop against which the First Amendment was enacted"). *See id.* at 516 (Stevens, J., concurring) ("The constitutional protection for the right of access that the Court upholds today is found in the first amendment, rather than the public trial provision of the sixth") (Footnotes omitted).

195. *U.S. v. Cianfrani*, 573 F.2d 835, 847 (Due Process). *See also supra*, notes 65-75 and accompanying text. The fifth amendment due process clause has served, along with the sixth amendment provision for a public trial, as the basis for the presumption "that all adjudicative proceedings are open to the public." *See also* 573 F.2d at 847 n.3, noting the Supreme Court's recognition that the due process clause of the fifth amendment "demands appropriate regard for the requirements of a public proceeding in . . . all adjudications through the exercise of the judicial power." (citing *Levine v. United States*, 362 U.S. 610, 616).

196. *U.S. v. Sorrentino*, 175 F.2d 721, 722 (Based upon examination of the sixth amendment, the constitutional right to a public trial was held to apply to the entire trial, including selection of the jury.) *See also Cianfrini*, 573 F.2d at 847 (discussion of the sixth amendment as part of the basis for the presumption of public proceedings).

197. *Bridges v. California*, 314 U.S. 252, 260 (1941).

sixth amendments. These two constitutional provisions, and all the rights which they encompass, are compatible, each yielding to the other when circumstances so dictate. As Justice Brennan noted, "I would reject the notion that a choice is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other."<sup>198</sup>

People have a right to know how the judicial branch of government is functioning, that criminal trials are conducted openly and fairly, that the ends of justice are being served. Secrecy is inimical to the inherent system of fairness which the trial process represents. Oftentimes the public is informed or made aware of criminal proceedings through the reporting efforts of the press. "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."<sup>199</sup> Through the media, the public learns of the strengths and weaknesses of the judicial system. While it is not the sole source of information, the press nonetheless remains one of the prime distributors of the "news," with an important role to serve.<sup>200</sup>

Commentary and reporting on the criminal justice system is at the core of first amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance

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198. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 598, 611-12 (Brennan, J., concurring).

199. *Sheppard v. Maxwell*, 384 U.S. 333, 350. *Accord*, *Estes v. Texas*, 381 U.S. 532, 538-42.

200. While this article briefly discusses the function of the press with regard to the right of access to criminal proceedings, a detailed analysis of either the role of the press in all situations or the question whether the media should be entitled to greater first amendment protection than ordinary citizens, is beyond the scope of this article. For additional information in this regard, see *Pell v. Procunier*, 417 U.S. 817, 839-41 (1974) (Douglas, J., dissenting); *Branzburg v. Hayes*, 408 U.S. 665, 727-28 (Stewart, J., dissenting); see generally Douglas, *The Public Trial and the Free Press*, 33 ROCKY MTN. L. REV. 1 (1960); Green, *The Press and the Judicial System: One Reporter's View*, 16 AM. CRIM.L. REV. 497 (1979); Comment, *Commonwealth v. Hayes*, 54 TEMP. L.Q. 417 (1981); Note, *The Right to Attend*, *supra* note 43, at 1313-20; Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 849-50 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1506 (1974).

and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.<sup>201</sup>

As important as the role of the press may be, it must be balanced with the sixth amendment guarantee to a fair trial. Prior restraints on speech, such as limiting the coverage of the press in all criminal proceedings, violate the Constitution.<sup>202</sup> The right of the accused, however, to a fair trial by an impartial jury must be protected, pursuant to the sixth amendment and the Due Process Clause.<sup>203</sup> The trial judge must take into consideration the public's interest in having access to the proceedings, as well as the somewhat speculative impact which that access might have on the accused's rights under the sixth amendment, when determining whether to grant a motion for closure.<sup>204</sup> Chief Justice Burger, citing the majority opinion in *Globe*,<sup>205</sup> emphasized that the State must be able to demonstrate a compelling governmental interest which necessitates closure and, in addition, that closure is narrowly tailored to serve that compelling interest.<sup>206</sup>

In *Press-Enterprise*, the Supreme Court held that closure was not warranted.<sup>207</sup> While fundamental fairness in the process of selecting a jury is a right to which the accused is entitled, and though the prospective jurors do have some right of privacy, these compelling interests were insufficient to support six weeks of closed voir dire.<sup>208</sup> The California court failed to consider al-

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201. *Nebraska Press*, 427 U.S. at 587 (Brennan, J., concurring).

202. *Id.* at 556-62.

203. *Id.* at 551-56. See, *Sheppard*, 384 U.S. at 362-63.

204. Cf. *Nebraska Press*, 427 U.S. at 607 (Brennan, J., concurring). Agreeing that these rights must be balanced, Justice Brennan stated that judges would be interjected into censorship roles if they had authority to place prior restraints on trial publicity, in view of the speculatively adverse effect it could have on the accused.

205. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07.

206. 464 U.S. at 509-10.

207. *Id.* at 510.

208. *Id.* at 508-09.



ternatives to closing the proceedings to the public and the press.

The Supreme Court recognized that in a case which involved an alleged rape of a teenage girl, some questions on voir dire might relate to sensitive areas<sup>209</sup> which potential jurors might not feel comfortable in answering honestly in the presence of people other than the judge and counsel for the respective parties.<sup>210</sup> There are alternative ways to protect these privacy interests other than the method chosen by the trial court. For example, an individual could ask to speak with the judge, in camera, on the record and with attorneys for both sides present, and thus have the opportunity to explain the nature of their "privacy interest."<sup>211</sup> In this way, the risk of unnecessary closure would be reduced, and, if necessary, that particular person could be excused from serving on the jury.<sup>212</sup> Another alternative is limited closure, which is achieved by initially closing the voir dire, thereby protecting the juror's privacy, and later "opening" the proceeding by making available, within a reasonable amount of time, a transcript of that proceeding, provided that the juror's privacy interest would not be infringed.<sup>213</sup> It might be necessary, however, to either seal part of the transcript or withhold the name of a juror in order to safeguard that individual's privacy.<sup>214</sup>

In this case, the trial court neither considered alternatives to closure, nor released a transcript of the voir dire examination. Furthermore, in his decision denying release of the transcript even after the defendant, Brown, had been convicted and sentenced to death, the trial judge mentioned, in reference to the voir dire, that "while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discus-

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209. Such questions might include whether the prospective juror has ever been involved in a situation similar to the one at trial, or if anyone of this juror's family has ever been so involved. These issues would bear upon any conscious or subconscious prejudicial feelings which the veniremen might be harboring towards persons, such as the defendant in that particular trial, as well as personal attitudes with regard to specific crimes in general.

210. 464 U.S. at 511-12.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 512. In addition, if part of the transcript is to be sealed, the trial judge must articulate the reason why the information is deserving of privacy protection.

sion."<sup>215</sup> The judge's statement did not justify either the initial closure or the suppression of the transcript.

Once a criminal proceeding has begun, the threat of pretrial publicity and the potential adverse effect it could have on the prospective jurors are very real concerns which the trial judge must take into consideration. When a jury has been selected, however, there are ways to guard against, or at least minimize, any possible influential impact on the jury, such as instructing the jurors about their responsibility, or sequestering them, if necessary. Likewise, the reasons for not making the voir dire procedure open to the public may decrease in importance as time goes on. Certainly after the trial is over and a verdict has been rendered, considerable thought must be given to whether closure is still necessary to protect the interests sought to be protected in the beginning. As previously discussed, there are alternatives to closure which must be carefully considered before a trial judge decides to prohibit the public or the press from attending the voir dire at the trial.

### C. *Concurring Opinions*

Justice Blackmun concurred with the majority of the Court, agreeing "that the privacy interest of a juror is a legitimate consideration to be weighed by a trial court in determining whether the public may be denied access to portions of a voir dire proceeding or to a transcript of that proceeding."<sup>216</sup> He emphasized, however, that the Court does not address whether there is a constitutional right of privacy on behalf of potential jurors.<sup>217</sup> While the issue was not raised in this case, Justice Blackmun pointed out that both the defendant and the state are interested in encouraging the full cooperation of the jury.<sup>218</sup> Thus, in most cases, a juror's privacy interests will be protected by virtue of the fact that the defense and the prosecution want to ensure that jurors will be candid in answering questions on voir dire.<sup>219</sup>

In his concurring opinion, Justice Stevens pointed out that the basis for the protection of the right of access in this case is

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215. *Id.* at 504.

216. *Id.* at 516 (Blackmun, J., concurring).

217. *Id.* at 513.

218. *Id.* at 515.

219. *Id.*

the first amendment.<sup>220</sup> Recalling the judgment of the Court in *Richmond*,<sup>221</sup> Justice Stevens emphasized the broad concerns covered by the first amendment, including the protection of the right of access to information concerning the functioning of government, which was endorsed by the Court in *Globe*.<sup>222</sup> Having such access enables citizens to effectively participate in our system of self-government.<sup>223</sup> “[A] claim to access cannot succeed unless access makes a positive contribution to this process of self-governance. Here, public access cannot help but improve public understanding of the voir dire process, thereby enabling critical examination of its workings to take place.”<sup>224</sup>

Justice Stevens acknowledged that the right of access is not unlimited and may be restrained, in certain circumstances, by the jurors’ privacy interests or the content of the information which has been sealed.<sup>225</sup> While Justice Stevens saw this as a possible limitation on access, Justice Marshall felt that this insight into the answers provided by veniremen was still important in light of the purpose underlying the right of public access.<sup>226</sup> In his view, the material which may be obtained from the voir dire examination, albeit possibly sensitive information, reflects upon the impartiality of the jurors, and their ability to consider the evidence from an unbiased viewpoint.<sup>227</sup> An ideal solution is to release the transcript of the voir dire examination, but not identify the jurors, thereby giving effect to the public’s right of access while simultaneously protecting the privacy interests of the jurors.<sup>228</sup>

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220. *Id.*

221. 448 U.S. at 558-81.

222. 457 U.S. 596.

223. *Id.* at 604.

224. 464 U.S. at 518 (Stevens, J., concurring).

225. *Id.* at 519. Justice Stevens noted that: “When the process of drawing lines between what must be open and what must be closed begins, it will be necessary to identify at least some of the limits by reference to the subject matter of certain questions that arguably may probe into areas of privacy that are worthy of protection.” *Id.*

226. *Id.* at 520 (Marshall, J., concurring).

227. *Id.*

228. *Id.* This approach would satisfy Justice Marshall’s standard so that “prior to issuing a closure order, a trial court should be obliged to show that the order in question constitutes *the least restrictive means available* for protecting compelling state interests.” (Emphasis in the original). This standard is more stringent than the majority’s view, which requires that a closure order, in order to pass constitutional muster, must be “narrowly tailored” to serve a compelling governmental interest. *Id.* at 510 (Opinion of

## IV CONCLUSION

*Press-Enterprise Co. v. Superior Court of Cal.* upholds the public's right of access to the voir dire examination of prospective jurors, and in accord with preceeding Court decisions derives this right from the first amendment. It confirms the Supreme Court's commitment to protecting the penumbra of rights which flow from the first amendment, while at the same time protecting the sixth amendment rights of an accused or the possible privacy interests of prospective jurors. The Court's message is clear. The public does have the right to know what the government is doing, so that people may intelligently discuss, effectively monitor, and actively participate in our republican system of government. Judicial proceedings are presumptively open, and therefore, "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness."<sup>229</sup> With the increased sensitivity of issues to come before the courts in the future, the need to balance all involved interests will be even more compelling.

*Barbara Hricko Wait*

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Burger, C.J.).

229. *Id.* at 509.

