University of Baltimore Law Review

Volume 14
Issue 2 *Winter 1985*

Article 7

1985

Casenotes: Constitutional Law — Constitutional Guarantees of Open Public Proceedings in Criminal Trials Extend to Voir Dire Examination of Potential Jurors. Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984)

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CONSTITUTIONAL LAW — CONSTITUTIONAL GUARANTEES OF OPEN PUBLIC PROCEEDINGS IN CRIMINAL TRIALS EXTEND TO VOIR DIRE EXAMINATION OF POTENTIAL JURORS. *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819 (1984).

Prior to the voir dire in a criminal trial for the rape and murder of a teenage girl, the petitioner, Press-Enterprise Company, moved that the voir dire be open to the public and the press.[1] The Superior Court of California, Riverside County, denied the motion, permitting the public and the petitioner to attend only the general voir dire.[2] The individual voir dire regarding questions dealing with the death penalty and other special areas was closed to the press and the public. After the jury was empaneled, the petitioner's motion for a release of a complete transcript of the voir dire proceedings was also denied.[3] The California Court of Appeal refused to grant a writ of mandate to compel the release of the transcript and vacate the order closing the voir dire proceedings.[4] After the California Supreme Court denied the petitioner's request for a hearing,[5] the United States Supreme Court granted certiorari.[6] The Court vacated the order of the California Court of Appeal and remanded the case for further proceedings.[7] The Court held that criminal trials and proceedings are presumptively open to the public and in this case the presumption of openness had not been rebutted by any findings that an open proceeding would threaten the defendant's right to a fair trial and the prospective jurors' interest in privacy.[8]

There is much evidence indicating that the notion of public trial was rooted deeply within English common law.[9] At common law, public trial was the generally accepted practice[10] and in America this tradition continued to flourish.[11] After the American Revolution, the sixth amendment to the United States Constitution embodied this concept of public trial.[12] To whom the right of public trial extends has been a ques-

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1. Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 821 (1984).
2. The state opposed the motion, arguing that if the press were present the juror responses would lack the candor necessary to assure a fair trial. *Id.* at 821. The entire voir dire lasted six weeks, of which all but three days was closed to the public. *Id.*
3. *Id.* Following the defendant's conviction the petitioner again applied for a release of the voir dire transcript. That request was also denied. *Id.*
4. Press-Enterprise Co. v. Superior Court, 4 Civil No. 27904 (Cal. Ct. App. May 13, 1982) (order denying writ of mandate), *vacated*, 104 S. Ct. 819 (1984).
5. Press-Enterprise Co. v. Superior Court, 4 Civil No. 27904 (Cal. June 30, 1982) (order denying petition for hearing), *vacated*, 104 S. Ct. 819 (1984).
6. Press-Enterprise Co. v. Superior Court, 103 S. Ct. 813 (1983).
7. Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984).
8. *Id.* at 824-26.
9. *Id.* at 822-23. *See generally* Radin, *The Right To A Public Trial*, 6 TEMP. L.Q. 381-84 (1932).
10. Radin, *The Right To A Public Trial*, 6 TEMP. L.Q. 381, 388 (1932).
11. *Id.* at 384. *See generally* Note, *The Right To Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1322-23 (1978).
12. The sixth amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI. Prior to the ratification of the United States Constitution, Pennsylvania

tion that has generated much discussion, and in recent years the Supreme Court's treatment of this issue has undergone notable change.

The sixth amendment speaks of the right to a public trial as a right of the accused.[13] In one early decision, the Supreme Court noted that the public trial guarantee is exclusively for the benefit and protection of persons accused of a crime.[14] Subsequent decisions and related commentary consistently limited the assertion of a right to public trial to the accused and rejected the notion that members of the public could also assert the right.[15]

In *Gannett Co. v. DePasquale*,[16] a pretrial hearing on a motion to suppress certain evidence was closed to the public and press upon the request of the defendant. In upholding the decision to exclude the public and the press, the Supreme Court held that the Constitution does not give the public an affirmative right of access to a pretrial proceeding, where all the participants in the litigation have agreed that it should be closed to protect the fair trial rights of the defendant.[17] The majority opinion reasoned that the sixth amendment guarantee is for the benefit of the accused.[18] In addition, although there is an independent public interest in the enforcement of the sixth amendment, this interest does not create a constitutional right on the part of the public.[19] Significantly, the majority declined to consider whether the first amendment[20] carries with it an independent "right of access" to criminal proceedings on the part of the public and the press.[21] In dissent, Justice Blackmun argued that the

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adopted the concept of public trial in its state constitution. 1 B. SCHWARTZ, THE BILL OF RIGHTS 265 (1971).

13. U.S. CONST. amend. VI.
14. *In re* Oliver, 333 U.S. 257, 270 n.25 (1948).
15. *E.g.*, Gannett Co. v. DePasquale, 443 U.S. 368, 379 (1979) (the public-trial guarantee is for the benefit of the defendant); Estes v. Texas, 381 U.S. 532, 588 (1965) (Harlan, J., concurring) ("Thus the right of 'public trial' is not one belonging to the public, but one belonging to the accused . . . ."); Note, *supra* note 11, at 1321; Annot., 61 L. ED. 2D 1018 (1978) (federal cases on the federal constitutional right to a public trial in a criminal case).
16. 443 U.S. 368 (1979).
17. *Id.* at 394.
18. *Id.* at 379-81.
19. *Id.* at 383. The Court noted that after the trial a transcript of the hearing was released. Thus, unlike the situation involving an absolute ban on access, the press in this case did have the opportunity to inform the public. *Id.* at 393. The Court also distinguished Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), on the ground that the Court there held that a prior restraint order was in violation of the first amendment guarantee of free press. In *Gannett*, by contrast, there was no prior restraint because the exclusion order did not prevent the petitioner from publishing any information already in its possession. *Gannett*, 443 U.S. at 393 n.25.
20. The first amendment provides, in pertinent part: "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 . . . ." U.S. CONST. amend. I.
21. *Gannett*, 443 U.S. at 392. In concurrence, Justice Powell argued that such a "right of access" based on the first amendment should be recognized. *Id.* at 397-403 (Powell, J., concurring). Also concurring, Justice Rehnquist specifically rejected any notion that the first amendment gives any such "right of access." *Id.* at 403-06

fourteenth amendment prohibits states from excluding the public from a criminal trial without first considering the public's interest in maintaining an open proceeding.[22] Justice Blackmun would require this conclusion even though it is the accused who seeks to close the trial.[23] The tendency on the part of the Court to recognize what Justice Powell referred to as a "right of access" reached its full potential in the landmark case of *Richmond Newspapers, Inc. v. Virginia*.[24]

In *Richmond Newspapers*, the Court held for the first time that the Constitution guarantees the right of the public[25] to attend criminal trials.[26] There, the defendant in a murder trial requested that the trial be closed to the public. The petitioner, a newspaper publishing company, argued that before ordering closing, the court should first decide that closure is the only way to protect the defendant's rights.[27] The Supreme Court agreed. The plurality opinion found what Chief Justice Burger referred to as a "presumption of openness" in the very nature of criminal trials in this country.[28] Although there is no express constitutional language guaranteeing the public a right to attend criminal trials, the Court nevertheless noted that there are certain fundamental rights that, although not expressly guaranteed, have been recognized as indispensible.[29] The Court went on to hold that the first amendment implicitly guarantees the public a right to attend criminal trials.[30] As they had suggested in *Gannett*,[31] Justices Brennan, Marshall, and Blackmun held closure to be constitutionally improper without a consideration of how to protect the vital interests of the public.[32] The Court in *Richmond News-*

(Rehnquist, J., concurring). In an opinion concurring in part and dissenting in part, in which Justices Brennan, White, and Marshall joined, Justice Blackmun also declined to review the first amendment question, arguing that "to the extent the Constitution protects a right of public access . . . the standards enunciated under the Sixth Amendment suffice to protect that right." *Id.* at 447 (Blackmun, J., concurring in part and dissenting in part).

22. 443 U.S. at 432-33 (Blackmun, J., concurring in part and dissenting in part).
23. *Id.*
24. 448 U.S. 555 (1980).
25. That the term "public" also includes the press is generally accepted. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980); Nixon v. Warner Communications, 435 U.S. 589, 609 (1978); Estes v. Texas, 381 U.S. 532, 589 (1965) (Harlan, J., concurring).
26. 448 U.S. 555, 580 (1980).
27. *Id.* at 560.
28. *Id.* at 573-75.
29. *Id.* at 579-80.
30. *Id.* at 580.
31. *See supra* notes 21-23 and accompanying text. Chief Justice Burger distinguished *Gannett* on the ground that the issue there of the public's "right of access" was based on the sixth amendment, while in *Richmond Newspapers* the right was found in the first amendment. *Richmond Newspapers*, 448 U.S. at 564; *see also id.* at 584 n.2 (Stevens, J., concurring) (*Gannett* unambiguous in holding sixth amendment right may be asserted only by the accused); *id.* at 585 n.1 (Brennan, Marshall, JJ., concurring) (sixth amendment remains source of accused's own right to insist on public proceedings).
32. *Richmond Newspapers*, 448 U.S. at 584-98 (Brennan, Marshall, JJ., concurring); *id.*

papers also noted that this newfound "right of access" was not absolute in that courts might still impose reasonable restrictions to ensure a fair trial.[33]

Despite this acknowledgement of limitations, the expansive scope of the so-called "right of access" was soon articulated in a subsequent decision, *Globe Newspaper Co. v. Superior Court*.[34] There, the Supreme Judicial Court of Massachusetts had construed a Massachusetts statute as requiring, under all circumstances, the exclusion of the press and the public during the testimony of a minor victim in a sex offense trial.[35] On appeal, the United States Supreme Court held that the statute, as construed by the Supreme Judicial Court of Massachusetts, violated the first amendment as applied to the states through the fourteenth amendment.[36] The majority, while recognizing that the "right of access" was not absolute, nevertheless articulated a strict test for the denial of the right: It must be shown that a compelling governmental interest requires the denial of such right and furthermore, that the denial is narrowly tailored to serve that interest.[37] Although the Court found the state's interest in protecting minor victims of sex crimes from further trauma and embarrassment to be compelling, the court-ordered closure was not narrowly tailored to serve that interest.[38] The Court further noted that the state's interest in encouraging such victims to come forward and testify in a truthful and credible manner was not sufficiently compelling to justify the broad reach of the statute.[39]

While the Court's decision in *Globe Newspapers* served to articulate a broad application of the "right of access," it remained unclear to what

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at 601-04 (Blackmun, J., concurring). Justice Stewart would extend the public's "right of access" to civil trials as well. *Id.* at 598-601 (Stewart, J., concurring). For decisions advocating a strong public interest in trial proceedings see *Richmond Newspapers*, 448 U.S. at 573 n.9. Justice Rehnquist dissented, arguing that no constitutional basis can be found for a right of the public to attend a trial when the state, the defendant, and the judge conclude that closure is necessary. *Id.* at 604-06 (Rehnquist, J., dissenting).

33. 448 U.S. at 581 n.18; *accord* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (enunciating test for circumstances in which public may be excluded from sex offense trials); United States v. Hastings, 695 F.2d 1278 (11th Cir.), *cert. denied*, 103 S. Ct. 2094 (1983) (neither the first amendment nor the sixth amendment right to public trial is violated by federal rules that prohibit televising, broadcasting, recording, and photographing proceedings in federal criminal trials).
34. 457 U.S. 596 (1982).
35. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 862-64, 401 N.E.2d 360, 370-71 (1981), *rev'd*, 457 U.S. 596 (1982).
36. 457 U.S. at 603-07 (1981).
37. *Id.* at 606-07.
38. *Id.* at 606-10. Chief Justice Burger and Justice Rehnquist argued in their dissent, however, that the majority opinion was too expansive a reading of *Richmond Newspapers* and that it further failed to recognize the long history of exclusion of the public from trials involving sexual assaults, particularly those against minors. *Id.* at 614. For a discussion of the validity and construction of constitutions and statutes authorizing the exclusion of the public in sex offense cases see generally Annot. 39 A.L.R.3D 852 (1971).
39. 457 U.S. at 607-10.

extent the right applied to the various evidentiary and pretrial hearings that frequently become a part of a criminal proceeding. In this regard, Chief Justice Burger, in his concurrence in *Gannett Co. v. DePasquale*,[40] argued that a pretrial hearing is not a trial and a public right to attend a trial, if it exists at all, does not extend to pretrial hearings.[41] Although the *Gannett* Court as a whole did not address this issue, the majority apparently held the view that a pretrial hearing must be considered part of the trial.[42]

Regardless of the fact that the Supreme Court had not made an unequivocal statement on this issue, two lower courts applied the *Richmond Newspapers* analysis to extend the "right of access" not only to pretrial and other evidentiary hearings, but also to the voir dire of potential jurors. Thus, in *United States v. Pulitzer Publishing Co.*,[43] the Court of Appeals for the Eighth Circuit held that the in-chambers voir dire of jurors in an extortion case was inappropriate in the absence of an inquiry as to alternative solutions.[44] The trial court failed to recognize the public's constitutional right to attend the voir dire examination and further failed to record any reasons for the closure.[45] Also applying the *Richmond Newspapers* analysis, the Court of Appeals for the Ninth Circuit, in *United States v. Brooklier*,[46] rejected the argument that the public's first amendment "right of access" to criminal proceedings applies only to trials, and that, because voir dire takes place prior to trial, the public has no right to be present.

Press-Enterprise Co. v. Superior Court[47] presented the Supreme Court with its first opportunity to consider whether the constitutional guarantees of open public proceedings in criminal trials extend to the voir dire examination of potential jurors. The Court held that criminal trials are presumptively open to the public, and in this case, the presumption of openness had not been rebutted by findings that an open proceeding would threaten the defendant's right to a fair trial and the

40. 443 U.S. 368 (1979).
41. *Id.* at 394-97 (Burger, C.J., concurring).
42. *Id.* at 433-39 (Blackmun, Brennan, White, Marshall, JJ., concurring in part and dissenting in part); *id.* at 397-403 (Powell, J., concurring); *accord* Waller v. Georgia, 104 S. Ct. 2210, 2215 (1984) (writing for the majority, Justice Powell noted that in *Gannett*, although the issue was not reached, a majority of the Court concluded that the public had a "qualified constitutional right to attend such hearings").
43. 635 F.2d 676 (8th Cir. 1980).
44. *Id.* at 679.
45. *Id.*; *In re* Iowa Freedom of Information Council, 724 F.2d 658 (8th Cir. 1984) (court's refusal to hear reporter's objections to closure of contempt hearing was harmless error, because substantial damage to manufacturer's property rights in trade secrets would have occurred had the hearing not been closed, and no reasonable alternative existed); *cf.* Sacramento Bee v. District Court, 656 F.2d 477 (9th Cir. 1981) (court's decision to close two brief hearings during the course of a two month trial, after it had carefully considered alternatives and made findings in support of its closure decision, did not warrant the issuance of a writ of mandamus).
46. 685 F.2d 1162, 1167 (9th Cir. 1982).
47. 104 S. Ct. 819 (1984).

prospective jurors' privacy interest.[48] The Court's reasoning rested upon two major premises: that criminal proceedings historically have been "presumptively open," and that the values inherent in open proceedings are of sufficient weight to mandate a balancing of the public's interest against the defendant's right of fair trial.[49]

The majority opinion[50] relied heavily upon the decision in *Richmond Newspapers* in finding a value of fairness inherent in open proceedings. The Court found that openness enhances not only the basic fairness of a criminal trial, but also the appearance of fairness that maintains the necessary public confidence in the judicial system.[51] The Court also made note of what *Richmond Newspapers* referred to as the "community therapeutic value" of openness,[52] that is, the right to be present at criminal trials provides an outlet for the emotions that arise in a community plagued with crime.[53]

The Court, articulating a standard for rebutting the presumption of openness, drew upon the test enunciated in *Globe Newspapers Co. v. Superior Court*.[54] The presumption may be overcome only through the recognition of an overriding interest that compels a closure narrowly tailored to serve that interest.[55] In addition, that interest is to be clearly articulated along with specific findings so as to enable a reviewing court to determine the propriety of the closure order.[56]

Applying this test to the factual situation in *Press-Enterprise*, the Court found that the presumption of openness had not been rebutted. The trial court had based its closure order on the presence of two interests: the right of the defendant to a fair trial[57] and the right of privacy of

48. *Id.* at 824-26.
49. *Id.* at 822-23. Specifically, the Court found that the jury selection process has also been presumptively open to the public with exceptions "only for good cause shown." *Id.* at 822.
50. The entire Court, with the exception of Justice Marshall, who concurred separately, joined in Chief Justice Burger's majority opinion. Justices Stevens and Blackmun also wrote concurring opinions.
51. 104 S. Ct. at 823.
52. *Richmond Newspapers*, 448 U.S. at 570.
53. 104 S. Ct. at 823-24 ("When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions."). The Court in *Press-Enterprise* focused on the value of openness from the perspective of the attending public. For cases discussing other values implicit in open proceedings see Sheppard v. Maxwell, 384 U.S. 333, 349 (1966) (justice cannot survive in secret trials); Estes v. Texas, 381 U.S. 532, 588 (1965) (openness enhances the effectiveness of judicial proceedings and the sense of responsibility of court officers); *In re* Oliver, 333 U.S. 257, 270 (1948) (openness acts as an "effective restraint on possible abuse of judicial power").
54. *See supra* note 37 and accompanying text.
55. 104 S. Ct. at 824.
56. *Id.*
57. It would appear that the trial judge was of the opinion that closure would assure candid juror answers on voir dire and thus protect the defendant's right to a fair trial. The openness of a criminal proceeding has, however, traditionally been viewed as a necessary incident to a defendant's right to a fair trial. *E.g*, Gannett Co.

the prospective jurors. While recognizing the right of the defendant to a fair trial as a compelling interest, the Court nevertheless declined to uphold the closure order on that basis because the trial court made no findings showing that an open proceeding would threaten that interest.[58] Furthermore, even if such findings had been made, the trial court failed to consider alternatives to protect that interest.[59]

Regarding the privacy interest of prospective jurors, the Court noted that a potential juror may have legitimate reasons for keeping personal matters from public exposure. Furthermore, the Court recognized that, under certain circumstances, such reasons may give rise to a compelling interest.[60] *Press-Enterprise* established a two-step procedure for handling such a situation. According to the Court, the trial judge should first make prospective jurors aware of the general nature of sensitive questions that may arise. Secondly, the judge should allow those jurors who think public questioning will prove embarrassing to request *in camera* questioning. By requiring the juror to make an affirmative request, the trial judge can ensure that a valid basis exists for a belief that disclosure infringes upon a significant privacy interest.[61] The value of open criminal proceedings can further be protected by releasing a transcript of the voir dire, both public and *in camera*, within a reasonable period of time.[62] In *Press-Enterprise*, the trial court not only refused to release a transcript of the voir dire, but also failed to make findings and consider alternatives to closure.

Press-Enterprise Co. v. Superior Court is the first Supreme Court decision to extend the *Richmond Newspapers* concept of "right of access" to the voir dire of prospective jurors.[63] Furthermore, *Press-Enterprise* is

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v. DePasquale, 443 U.S. 368 (1979); Estes v. Texas, 381 U.S. 532 (1965); *In re* Oliver, 333 U.S. 257, 270 (1948).

58. 104 S. Ct. at 824.

59. *Id.*

60. *Id.* at 825. The Court used the facts of this case, in which the trial involved testimony concerning an alleged rape of a teenage girl, to give the example of a juror who had herself been raped at one time but declined to seek prosecution because of embarrassment or emotional trauma. *Id.*

61. *Id.*

62. *Id.*

63. This is not, however, a novel idea. As early as 1977, the Supreme Court of Arkansas found the voir dire to be an integral part of the trial itself and denied the trial court the discretion to prohibit the public and the press from attending. Commercial Printing Co. v. Lee, 262 Ark. 87, 553 S.W.2d 270 (1977). For an analysis of Commercial Printing Co. v. Lee, see Note, *Exclusion of the Press From Voir Dire*, 32 ARK. L. REV. 132 (1978). *See also* Phoenix Newspapers Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971) (defendant not entitled to closure of preliminary hearing despite claim that harmful and prejudicial publicity would endanger his right to a fair trial); Great Falls Tribune v. District Court, 608 P.2d 116 (Mont. 1980) (specifically relying on a Montana constitutional provision providing that no person shall be deprived of the right to observe the deliberations of public bodies); Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138 (1966) (significant in suggesting fourteen years prior to the decision in *Richmond Newspapers* that a public right of access be found in the Constitution).

consistent with a progression of Supreme Court decisions, dating from Justice Blackmun's dissenting opinion in *Gannett Co. v. DePasquale*,[64] that have reflected and expanded the Court's recognition of the public's interest in maintaining open proceedings.[65] The findings of the Court also reflect a growing number of decisions emanating from the United States Courts of Appeals that, relying on *Richmond Newspapers*, have expanded the "right of access" concept to voir dire and other pretrial hearings.[66] Additionally, the Court establishes a clearly articulated test for determining the propriety of closing the voir dire to the public and the press.[67] This standard should adequately guide trial judges to ensure compliance with the "presumption of openness" established in *Richmond Newspapers*.

The Court also recognized the privacy interests of potential jurors. In so doing, the opinion outlines several steps that are reasonably calculated to avoid the infringement of the privacy right. This aspect of the Court's holding is significant; however, it may create some problems of interpretation, especially with regard to the existence and scope of a prospective juror's constitutionally based right of privacy.[68]

Press-Enterprise indicates the willingness of the Court to give a broad interpretation to the "right of access." To what extent this notion of "right of access" will continue to expand remains, as yet, unanswered. In this regard, the Court did not indicate the effect the right will have upon public access to other stages of proceedings such as the grand jury, post-trial hearings, and jury deliberations. The application of *Press-Enterprise* principles to these matters will continue to test the Court's willingness to extend further the "right of access."

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64. 443 U.S. 432-33 (1979) (Blackmun, J., concurring in part and dissenting in part). *See also* 443 U.S. at 392 (Powell, J., concurring) (first amendment based right of access should be recognized).
65. *See supra* notes 22-42 and accompanying text.
66. *See supra* notes 43-46 and accompanying text.
67. 104 S. Ct. at 824.
68. Justice Blackmun would reject a reading of *Press-Enterprise* that would give effect to a right to privacy for potential jurors, arguing that a finding of such a privacy right was not necessary to the decision reached by the Court. *Id.* at 826-27. Justice Blackmun also stated that "we should not assume the existence of a juror's privacy right without considering carefully the implications of that assumption." *Id. See also id.* at 829 (Marshall, J., concurring) (privacy right of jurors should not be permitted to jeopardize constitutional "right of access"). *But see* Comment, *Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708 (1982) (prospective jurors have a constitutionally based privacy interest in non-disclosure).