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MEDIA ACCESS AND NEWSGATHERING IN HIGH PROFILE CASES

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When lawsuits attract intense public attention, judges sometimes feel constrained to take extraordinary steps to insulate the judicial process from media attention, particularly in high profile criminal cases tried before juries. Judicial responses to publicity include sealing court records, gagging trial participants, closing proceedings, imposing "decorum orders" on courthouse conduct by the press, refusing to disclose juror identities, and generally frustrating post-verdict contact with jurors. The result can leave the public with the least information about the cases of greatest interest.

Fortunately, in the decades since the Supreme Court struck down the use of a prior restraint to protect the jury pool in *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976) and recognized an affirmative First Amendment right of access to government proceedings in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980), an extensive body of case law has emerged that protects public access to judicial proceedings and limits the ability of judges to invoke secrecy, even at the pre-trial stage. Over the past several months, these precedents have been tested and reconsidered in high profile cases, in both state and federal courts. For example:

- The authority of a court to impose a prior restraint in order to protect a defendant's fair trial rights was addressed by the Colorado Supreme Court last summer during pre-trial proceedings in the criminal prosecution of Kobe Bryant, and as this Bulletin goes to press the Second Circuit is considering the propriety of a prior restraint that barred publication of jurors names during the highly publicized retrial of investment banker Frank Quattrone, even though the names were disclosed in open court during jury selection.

- Extraordinary restrictions imposed during the jury selection process in the Martha Stewart prosecution were rejected by the Second Circuit last Spring, and requests for various secret proceedings have similarly been rejected or limited in the ongoing prosecution of alleged terrorist Zacarias Moussaoui.

- The authority of courts to seal records and gag trial participants is currently under appellate review in proceedings arising out of the criminal prosecution of Michael Jackson in California, while courts on the opposite coast entered and then vacated prior restraints against the disclosure of names of testifying witnesses and are weighing a blanket order sealing all record material in the prosecution of Father Shanley, a priest accused of sex abuse in Boston.

From steps to obtain access to search warrants before an indictment is handed down to enforcing the right of access to jurors following a verdict, the authors in this impressive collection of essays cover the various phases of high profile litigation, providing both the legal analysis and practical pointers for addressing the thorny issues presented in high profile cases. It has been a pleasure to assist in collecting and editing the materials in this Bulletin, which should prove a valuable resource for media law practitioners.

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CHALLENGES TO THE CORE:
PRIOR RESTRAINTS AGAINST PUBLICATION OF LEGALLY OBTAINED INFORMATION IN HIGH PROFILE CRIMINAL CASES

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Challenges To The Core: Prior Restraints Against Publication Of Legally Obtained Information in High Profile Criminal Cases

Introduction

Prior restraints against publication have long been described by the United States Supreme Court as "the most serious and least tolerable infringement on First Amendment rights" and thus "one of the most extraordinary remedies known to our jurisprudence."[2] In fact, prior restraints are so constitutionally disfavored that legal debate about the subject has tended to relate to how the nearly total ban on prior restraints should be articulated rather than whether such a nearly total ban exists. The United States Supreme Court has never upheld a prior restraint on news reporting by the press, and the authorities generally vary only in their verbal formulations of the proposition that the "chief purpose of the [First Amendment] guaranty [is] to prevent previous restraints upon publication."[3]

Within prior restraint law, there is perhaps one absolute: prior restraints against publication of information obtained legally in open court proceedings are *per se* unconstitutional. A long line of Supreme Court authority, including *Craig* v. *Harney*,[4] *Cox Broadcasting* v. *Cohn*,[5] *Nebraska Press Ass'n* v. *Stuart*,[6] and *Oklahoma Publishing Co.* v. *District Court*,[7] unequivocally makes this clear.

But despite this near absolute ban on prior restraints generally and the absolute ban on information obtained legally in open court, a number of courts have recently imposed prior restraints that test not the outer boundaries of the prior restraint doctrine, but rather its core. Each of these cases involve prior restraints entered against publication of information that was legally obtained by the press, either in open court or through the government itself. In *People* v. *Bryant*,[8] for example, an *en banc* Colorado Supreme Court concluded — in a precedent that will remain on the books — that an order prohibiting the press from publishing portions of a transcript of sealed court proceedings mistakenly emailed to members of the press, was constitutional even though it admittedly constituted a prior restraint on speech. In *United States* v. *Quattrone,*[9] a trial court in the Southern District of New York entered an order prohibiting the press from publishing the names of any prospective or selected juror until the conclusion of trial. And in *Multimedia Holdings Corp.* v. *State of Florida*,[10] a Florida state court judge entered an order in a high profile murder trial threatening a Florida news organization with criminal penalties if it published information from the defendants' grand jury transcript, which had been released voluntarily by public officials in the State Attorney's Office.

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2 *Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539, 559, 562 (1976).

3 *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

4 *Craig* v. *Harney*, 331 U.S. 367 (1947).

5 *Cox Broadcasting* v. *Cohn*, 420 U.S. 469 (1975).

6 *Nebraska Press Ass'n.* v. *Stuart*, 427 U.S. 539 (1976).

7 *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977).

8 *People* v. *Bryant*, 94 P.3d 624 (Colo. 2004) (en banc).

9 *U.S.* v. *Quattrone*, Case No. 03 Cr. 582 (S.D.N.Y. April 13, 2004).

10 *Multimedia Holdings Corp.* v. *State*, Case No. 04-1748-CF (Fla. St. John's Ct.) (July 30, 2004 Order), *on appeal*, Case No. 5D04-2650 (Fla. Dist. Ct. App.).

This article will briefly consider the historical roots of the prior restraints doctrine and trace its modern development concerning the absolute ban on prior restraints on information that is legally obtained in open court proceedings. From this framework, the article will focus on attacks on the core of the prior restraint doctrine in recent high profile criminal cases, including *People* v. *Bryant*, *United States* v. *Quattrone*, *United States* v. *Stewart*, and *Multimedia Holdings Corp.* v. *State of Florida*.

Origins of the Prior Restraint Doctrine

This country's hostility toward prior restraints on publication is deeply rooted in American history. Indeed, the First Amendment itself "developed directly out of attempts to license the press," and, as Professor Thomas Emerson has written, "[n]othing in the growth of modern society has, thus far at least, appealed to the country as grounds for altering the considerations which led to the elimination of prior restraint upon the press."[11] To the contrary, "'[w]e have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers.'"[12]

Those considerations evolved out of and in opposition to the practice of licensing the press in England. The first printed publication in England can be traced to 1476.[13] Predictably, the first restrictions followed closely thereafter when, in 1530, King Henry VIII issued a mandate that no religious book be published until it was first "exam[i]ned and appro[v]ed by the ordinary of the diocese."[14] In a matter of years, the licensing regulations flourished to the point where all publications — including books, pamphlets, plays, and ballads — required approval prior to publication.[15]

Upon this stage entered two of the most notorious forces against a free press: the Stationers Company and the Star Chamber.[16] In 1585, the Queen ordered that there be no printing outside of London, Oxford and Cambridge, and the Stationers Company became a royally-authorized organization, and the only legal source of publications. This ensured a closed circle of printers free from competition and subject to the whim of the government. Meanwhile, the Star Chamber, an unhealthy hybrid of legislature and court, was responsible for enforcing this monopoly by searching out, trying, judging and sentencing independent publishers. Presided over by the King himself, the Star Chamber held unlimited power to search for and confiscate or destroy any unauthorized printing machines or facilities, and even to sentence subversive printers to imprisonment or torture.[17] Parliament succeeded the Star Chamber in 1641, issuing its own licensing law in 1643, which similarly required prior approval of all published works.[18]

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11 Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 662 (1955).

12 *Nebraska Press*, 427 U.S. at 560 (quoting *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring)).

13 *See* Michael Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 298 (2001).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 301.

18 *Id.*

Regardless of who exerted control, these draconian measures failed to prevent the rapid proliferation of independent publishers, and with them, voices advocating a free press. John Milton expressed the urgency with which many saw the predicament in *Areopagitica*, in which he emphasized that prior suppression of a work robbed humanity of ideas for all time. According to Milton, he "'who kills a Man kills a reasonable creature, Gods Image; but he[] who destroy[s] a good Book[], kills reason it self[], kills the Image of God, as it were in the eye . . . sla[y]s an immortality rather then a life.'"[19]

Despite growing dissent, licensing laws continued in England until they last expired in 1695 (after which the courts continued to honor the right of the King to approve or deny publication of works about the government). Enforcing these restrictions became untenable, however, as the number of independent publishers and advocates of a free press surpassed levels that Parliament could effectively control. By the time the United States ratified the First Amendment, a consensus had already developed in England that a free press was necessary, and that publishers should be permitted to print what they wanted, so long as they were willing to accept subsequent punishment for anything that was deemed illegal.[20] Neither administrative licensors, censors, or judges could preview works prior to publication — although punishment could be imposed on authors after-the-fact for publishing libelous works. Sir William Blackstone's famous description of freedom of the press in his *Commentaries on the Laws of England* accurately summarized how the law had developed in England:

> "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."[21]

It is from this history that the First Amendment developed. And it was this history that led Oliver Wendell Holmes to declare that the main purpose of the First Amendment was "'to prevent all such *previous restraints* upon publications as had been practiced by other governments.'"[22]

The Modern Prior Restraints Doctrine.

Modern Supreme Court cases dealing with prior restraints have several elements in common. They all make clear that the ban on prior restraints is not absolute, offer a few hypothetical examples of prior restraints that might theoretically survive constitutional scrutiny, and then proceed to strike down the prior restraint that is before the Court. The Court has never examined a prior restraint that it did not strike down. In fact, the ban against prior restraints has been so nearly absolute that the term has almost become synonymous with unconstitutionality. Some scholars have suggested that the "prior restraint" label has merely become a way for judges to signal their conclusion that a law is constitutionally infirm, rather than a true framework for legal analysis. As Professor Laurence Tribe has noted, the Supreme

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19 *Id.* at 304 (quoting *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parliament of England*, reprinted in 2 Complete Prose Works of John Milton at 492-493 (1959)).

20 *Id.* at 311.

21 4 William Blackstone, *Commentaries* 151-52.

22 *Patterson* v. *Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) (quoting *Commonwealth* v. *Blanding*, 20 Mass. 304, 313 (1825)).

Court "has often used the cry of 'prior restraint' not as an independent analytical framework but rather to signal conclusions that it has reached on other grounds."[23]

Though by no means the first case addressing prior restraints,[24] the most logical starting point for any discussion of modern prior restraints doctrine is the landmark decision in *Near* v. *Minnesota ex rel. Olson*, which is perhaps the first prior restraint case to contain all of the elements listed above.[25] *Near* arose out of a county attorney's efforts to perpetually enjoin the publication of a periodical called *The Saturday Press* pursuant to a Minnesota statute that provided for injunctive relief against "nuisances," which were defined to include persons who or businesses that "'engage[] in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away. . . a malicious, scandalous and defamatory newspaper, magazine or other periodical.'"[26] The paper regularly published anti-Semitic diatribes, including accusations that, as the Court politely put it, "a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties."[27] The language used in the newspaper — some of which was reprinted in a footnote to Justice Butler's dissenting opinion — was much less polite. According to one article in the paper, "[p]ractically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and exbryonic yegg in the Twin Cities is a JEW," and it was simply "a fact . . . that ninety per cent of the crimes against society in this city are committed by Jew gangsters."[28]

The district and appellate courts upheld the injunction, finding that *The Saturday Press* did indeed did engage in the business of producing, publishing and circulating a malicious, scandalous and defamatory newspaper.[29] Accepting these factual findings, the Supreme Court ruled that the statute was an impermissible prior restraint on publication, in violation of the First Amendment. Chief Justice Hughes, writing for the majority, cited *Patterson* v. *Colorado* in stating that the main purpose of the First Amendment was to prevent such prior restraints.[30] The majority opinion expressly noted — in a passage that makes *Near* a quintessential modern prior restraint case — that "the protection as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases."[31] Aside from categories of speech that the Court has repeatedly found to be outside of the scope of First Amendment protection, such as obscenity and incitement, the Court offered only one type of hypothetical example of a prior restraint that would pass constitutional muster: that during war-time, "a government might prevent actual obstruction to its recruiting service or the publication of

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23 Laurence H. Tribe, *American Constitutional Law* §§12-34, at 1040 (2d ed. 1988).

24 *See, e.g., Patterson* v. *Colorado ex rel. Attorney General*, 205 U.S. 454, 462 (1907) ("the main purpose of such constitutional provisions [*i.e.,* the First and Fourteenth Amendments] is 'to prevent all such *previous restraints* against publications as had been practiced by other governments") (internal quotation marks omitted)

25 283 U.S. 697 (1931).

26 *Id.* at 702.

27 *Id.* at 704.

28 *Id.* at 724 n. 1 (Butler, J., dissenting).

29 *Id.* at 706.

30 *Id.* at 714.

31 *Id.* at 716.

the sailing dates of transports or the number and location of troops."[32] The Court further explained just how limited these hypothetical exceptions to the general rule actually were:

> "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints . . . . 'Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.'"[33]

The acknowledged narrow limitations, coupled with the strong language disfavoring such limitations, made it unclear what level of government interest was required in order to overcome the prior restraints doctrine. At least in theory this ambiguity remains. Although some have suggested that prior restraints are subject to strict scrutiny,[34] it is likely that the test is even stricter than that.

The Supreme Court has never found a sufficient government interest to justify prior restraint, but they have also been unwilling to provide a definitive statement that no such interest exists; instead the Court has struggled to find new ways to express the prior restraints doctrine in terms that dance around the absolute protection that the doctrine, in practice, confers. In the absence of any cases finding a sufficient government interest to justify prior restraints, guidance on the full extent of prior restraint protection can only be gleaned from an examination of the numerous circumstances the Court has found insufficient — and those hypothetical circumstances that the Court has posited would likely be sufficient. Even a cursory analysis indicates that circumstances that would justify prior restraint are, at best, highly unlikely to occur.

The hypothetical examples offered by the Court in *Near* of prior restraints that might survive constitutional scrutiny all concerned issues of national security during war-time. In *New York Times Co.* v. *United States* (the *Pentagon Papers Case*),[35] the Court made even clearer that prior restraints imposed in the name of national security would be subject to exacting scrutiny. In the *Pentagon Papers Case,* the United States sought to enjoin the *New York Times* and the *Washington Post* from publishing the contents of a classified historical study concerning Vietnam policy, which was entitled "History of U.S. Decision-Making Process on Viet Nam Policy." In a short *per curiam* opinion, the Court refused to enjoin the newspapers from publication, rejecting the government's argument that national security concerns justified restraining publication.[36] But the Justices wrote separately in a series of opinions that made clear that a majority of the Court had concluded that, even in the national security context, prior restraints would be permitted only in the most extreme of circumstances.

Justices Stewart and White, for example, concluded in a concurring opinion that a prior restraint could only be justified if publication would "surely result in direct, immediate, and irreparable damage

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32 *Id.*

33 *Id.* at 716, 718 (quoting Report on the Virginia Resolutions, *Madison's Works*, vol. iv, 544..

34 *E.g. Burk* v. *Augusta-Richmond County*, 365 F.3d 1247, 1257 (11th Cir. 2004).

35 403 U.S. 713 (1971).

36 *Id.* at 714.

to our Nation or its people"[37] — a standard that was consistent with the types of hypotheticals the Court had previously set forth in *Near*. Justices Black and Douglas noted agreement with Justices Stewart and White, recognizing that the Court was being asked to enjoin publication for what would be the first time in its 182 year history. In refusing to do so, they made clear that, in their view, prior restraints against the publication of newsworthy events were *never* justified: "In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment."[38] Justice Brennan concluded that, under Supreme Court case law, prior restraints were permitted only in "a single, extremely narrow class of cases" — those either arising in time of war or, those in peacetime, that would be tantamount to "suppress[ing] information that would set [off] a nuclear holocaust."[39] In Justice Brennan's view, "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."[40]

Since the *Pentagon Papers Case*, it has been clear that the burden for upholding a prior restraint against the press is extraordinary. Those seeking to restrain publication may not simply assert an important or compelling interest; rather, they will be required to put forth proof of impending danger in a manner so convincing that it is difficult to fathom what would suffice.

Prior Restraints in the Trial Context

Aside from the context of national security, there is only one other context in which the Supreme Court has addressed the topic of prior restraints: those of criminal trials. As in the national security context, the case law in the criminal trial context generally holds that the ban against prior restraints is nearly absolute. And as in the national security context, the Court has never found a real world prior restraint in the criminal trial context that passes constitutional muster.

In the criminal trial context, however, the Court has unequivocally held that the ban against prior restraints is absolute when the information at issue was obtained by the press in open court. In the years since *Near*, the Supreme Court has considered numerous cases involving efforts to restrain the press from publishing information obtained in open court during a criminal trial. The Court has uniformly rejected such efforts, focusing on the important role the press plays in exposing the justice system to public scrutiny, thereby maintaining its credibility.

Cases involving information obtained in open court:

The absolute ban against prior restraints against publication of information legally obtained in open court has its roots in *Craig* v. *Harney*, [41] a case that did not involve prior restraints at all, but rather a *habeas corpus* challenge by a publisher, an editorial writer, and a news reporter who were held in criminal contempt for publishing reports and an editorial that were critical of a judge presiding over a civil trial. The gist of the article was that the judge had improperly coerced the jury to decide the case a certain way, and that the jury did so only after repeatedly returning a contrary verdict that the judge

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37 *Id.* at 730 (Stewart, J., concurring, joined by White, J.).

38 *Id.* at 715 (Black, J. concurring, joined by Douglas, J.)

39 *Id.* at 726 (Brennan, J., concurring).

40 *Id.* at 726-27 (Brennan, J., concurring).

41 331 U.S. 367 (1947).

refused to accept and stating that it was acting "under coercion of the court and against its conscience."[42] The trial judge found the journalists in contempt after concluding that the reports and editorials were "designed falsely to represent to the public the nature of the proceedings and to prejudice and influence the court" in its ruling on a pending motion for a new trial.[43]

The Court reversed the contempt findings, and with the following passage, laid the groundwork for the absolute ban against prior restraints concerning information obtained in open court proceedings:

> "'A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or sensor events which transpire in proceedings before it.'"[44]

This language was later quoted in *Cox Broadcasting Corp*. v. *Cohn*,[45] in which the father of a deceased rape victim sued members of the press for invasion of privacy as a result of the press' decision to broadcast the name of his daughter in a story about the rape prosecution. The reporter who broadcast the rape victim's name learned the name by examining the indictments in the criminal case, which were made available for his inspection in the courtroom. Acknowledging the important privacy concerns at issue, the Court nevertheless concluded that the First and Fourteenth Amendments precluded Georgia from allowing civil suits to proceed on the basis of the publication of the victim's name. In so holding, the Court quoted the holding in *Craig* v. *Harney* and emphasized its repeated prior recognition of the special protected nature of accurate reports of judicial proceedings.[46] The Court explained that this long-standing First Amendment principle prohibited the government from punishing the press for publishing anything learned in open proceedings:

> "The freedom of the press to publish that information [*i.e.*, public records] appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on publication of truthful information contained in official court records open to public inspection. . . . At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. . . . Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast."[47]

The Court concluded that the father's privacy action could not proceed because the information had been made available in court documents that were made available at a public court proceeding.

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42 *Id.* at 369.

43 *Id.* at 370.

44 *Id.* at 374.

45 420 U.S. 469 (1975).

46 *See id*. at 492-93 (quoting *Craig* v. *Harney*, 331 U.S. 367, 374 (1947)).

47 *Id.* at 495-96.

Of course, given the Court's holdings in *Cox Broadcasting* and *Craig* v. *Harney* prohibiting punishment of journalists *after* publication of information legally obtained either in open court or through official court records, it was only a matter of time before this principle was extended to cover prior restraints — the most disfavored of all restrictions on speech — against that same information. One year after *Cox Broadcasting*, the Court decided *Nebraska Press Association* v. *Stuart*,[48] in which it extended the principles espoused in *Cox Broadcasting* and *Craig* v. *Harney* to the prior restraint arena.

In *Nebraska Press*, the Nebraska Supreme Court entered an order that restrained the news media from publishing or broadcasting accounts of confessions made by the defendant to law enforcement officers or third parties other than members of the press, and other facts "strongly implicative" of the defendant.[49] The case presented the classic fair trial/free press conflict between the defendant's Sixth Amendment right to have a fair trial by an impartial jury and the press' right to publish (and the public's right to know about) newsworthy events. The Court recognized that both of these rights were substantial, but held that the right of the press to publish exceeded the Sixth Amendment interests at stake in the case, particularly because the order suppressed truthful information that the press might learn in the course of open court proceedings. On this last point, the Court stated, in absolutist terms, that such prior restraints are always constitutionally off-limits:

> "To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: '(T)here is nothing that proscribes the press from reporting events that transpire in the courtroom'. . . . [O]nce a public hearing had been held, what transpired there could not be subject to prior restraint."[50]

The opinion for the Court in *Nebraska Press*, written by Chief Justice Warren Burger, also articulated an extremely demanding three-part test respecting the issuance of prior restraints on pretrial publicity that has been so strictly applied that prior restraints on publication of any matter relating to the judicial process are all but unknown. A prior restraint in the criminal trial context survives First Amendment scrutiny only upon proof that (1) the nature and extent of pretrial publicity would impair the defendant's right to a fair trial, (2) there are no alternative measures that would likely mitigate the effects of such pretrial publicity, and (3) the prior restraint on publication would effectively prevent the anticipated harm.[51] The test has been interpreted strictly, and has all but assured — perhaps until recently — that prior restraints on publication of lawfully obtained trial-related information could never be found constitutional.

In *Oklahoma Publishing Co.* v. *District Court*,[52] the Court reaffirmed the absolute ban against prior restraints directed at information learned in open court proceedings. The Court concluded that a pretrial order enjoining the media from "publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child in connection with a juvenile proceeding involving that child then pending in that court" violated the First and Fourteenth Amendments.[53] Relying on *Cox Broadcasting*

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48 427 U.S. 539 (1976).

49 *Id.* at 545.

50 *Id*. at 568 (internal citations omitted).

51 *See* 427 U.S. at 562.

52 430 U.S. 308 (1977).

53 *Id.* at 308-09.

and *Nebraska Press*, the Court held that "the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public."[54] The Court noted that, despite the fact that the privacy interests inherent in the juvenile context are greater than that implicated by adult trials, the press had been allowed into the proceeding, and that once allowed into a court proceeding Supreme Court precedent "compelled" the result that the press be permitted to publish what transpired.[55]

The Supreme Court's rationale in *Craig* v. *Harney*, *Cox Broadcasting*, *Nebraska Press Ass'n*, and *Oklahoma Publishing* for absolutely prohibiting prior restraints of — or punishment after the fact for — information obtained in open court seems based on the combination of two significant factors: (1) that the information at issue is obtained legally by the press[56] and (2) that the information is disseminated in a public forum.

Recent High Profile Criminal Cases

Despite the Supreme Court's refusal to ever find sufficient circumstances to justify prior restraints and its absolute ban against prior restraints directed at information learned in open court, it is not uncommon for lower courts to enter prior restraint orders against the press in high profile criminal cases, only to have them overturned by appellate courts.[57] Recently, a number of courts have entered prior restraints that strike at the core of the prohibition against prior restraints. In each of these cases, the press obtained the information at issue legally — and in some of the cases, the press obtained the information in open court. With the exception of one case, in which a final decision has been rendered and a prior restraint has been upheld, it remains to be seen whether these prior restraints will survive appeal.

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54 *Id*. at 310.

55 *Id.* at 310.

56 *See, e.g.*, *Bartnicki* v. *Vopper*, 532 U.S. 514, 533-35 (2001) (barring, on First Amendment grounds, application to media defendants of wiretap acts' prohibition on intentional publication of illegally intercepted communications that the publishing party knows or should know was illegally obtained, when media defendants had no involvement in illegal interception of communication concerning a matter of public importance); *Florida Star* v. *B.J.F.*, 491 U.S. 524, 526 (1989) (precluding, on First Amendment grounds, damages action of rape victim against a newspaper for publishing victim's name obtained from publicly released police report under a Florida statute expressly prohibiting the publication of the name of a victim of a sexual offense); *Smith* v. *Daily Mail Publishing Co*., 443 U.S. 97, 104-06 (1979) (holding statute unconstitutional, on First Amendment grounds, that prohibited newspapers from publishing, without consent of juvenile court, the name of individuals charged as juvenile offenders in case in which newspapers truthfully published alleged juvenile offender's name that was lawfully obtained by interviewing eyewitnesses and monitoring police band radio frequency).

57 Recent cases in which prior restraints on publication have been issued and overturned on appellate review include *CBS Inc.* v. *Davis*, 510 U.S. 1315 (1994) (Blackmun, Circuit Justice); *Procter & Gamble Co.* v. *Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996); *Doe* v. *Roe*, 638 So. 2d 826 (Ala. 1994); *Arkansas Democrat-Gazette* v. *Zimmerman*, 20 S.W.3d 301 (Ark. 2000); *KGTV Channel 10* v. *Superior Court*, 26 Cal. App. 4th 1673, 32 Cal. Rptr. 2d 181 (1994); *South Coast Newspapers, Inc.* v. *Superior Court*, 85 Cal. App. 4th 866, 102 Cal. Rptr. 2d 487 (Ca. Ct. App. 2000); *Clear Channel Communications, Inc.* v. *Murray*, 636 So. 2d 818 (Fla. Dist. Ct. App. 1994); *Times Publishing Co.* v. *State*, 632 So. 2d 1072 (Fla. Dist. Ct. App. 1994); *Jacksonville Television, Inc.* v. *State Department of Health & Rehabilitative Services*, 659 So. 2d 316 (Fla. Dist. Ct. App. 1994); *State* v. *Alston*, 256 Kan. 571, 887 P.2d 681 (1994); *Baltimore Sun Co.* v. *Maryland*, 340 Md. 437, 667 A.2d 166 (1995); *George W. Prescott Publishing Co.* v. *Stoughton Division of the Distrct Court Department of the Trial Court*, 428 Mass. 309, 701 N.E.2d 307 (1998); *Jeffries* v. *State*, 724 So. 2d 897 (1998); *In re Minor*, 341 N.C. 417, 463 S.E.2d 72 (1995); *Ohio ex rel. New World Communications, Inc.* v. *Character*, 100 Ohio App. 3d 773, 654 N.E.2d 1301 (1995); *State ex rel. Sports Management News, Inc.* v. *Nachtigal*, 324 Or. 80, 921 P.2d 1304 (1996); *State* v. *Montgomery*, 929 S.W.2d 409 (Tenn. Crim. App. 1996); *San Antonio Express-News* v. *Roman*, 861 S.W.2d 265 (Tex. Ct. App. 1993); and *State ex rel. Register-Herald* v. *Canterbury*, 192 W. Va. 18, 449 S.E.2d 272 (1994).

United States* v. *Quattrone

A federal district court judge recently entered an order in the high profile criminal trial of investment banker Frank Quattrone, prohibiting the press from publishing the names or identities of actual or potential jurors, even though the names were read aloud in open court. Such a prior restraint strikes at the core of the prior restraint doctrine, as it ignores the overwhelming Supreme Court authority holding that there is an absolute ban on such prior restraints.

Mr. Quattrone was a high power banker at Credit Suisse First Boston, who was convicted of obstructing the government's investigation into mishandling of initial public offerings, through his direction of other bankers to clean up files after he learned of the SEC investigation. Quattrone's first trial ended on October 24, 2003 with a hung jury, following six days of deliberations. It was in the course of the second trial that the issue of prior restraints arose. Despite the consternation of prosecutors stemming from the first attempt at prosecution, there was never a suggestion that press coverage had led to any degree of juror intimidation or prejudice to the defendant.

Shortly before Mr. Quattrone's second trial, however, unprecedented events unfolded in a separate high profile criminal trial in New York City — that of former Tyco CEO Dennis Kozlowski. On April 2, 2004, the Kozlowski trial ended in a mistrial after nearly six months of trial followed by nearly two weeks of jury deliberations, during which there were several notes to the judge about alleged problems with one of the jurors and the possibility of a deadlocked jury.[58] The actions of this juror became the focus of intense press scrutiny, and shortly before the mistrial, two publications disclosed the name of the juror in reporting what the journalists understood to be an effort on her part to signal support for the defendant through a hand gesture made in open court. The judge eventually declared a mistrial, in part as a result of "pressure that has been brought to bear on one woman whose name and background was widely publicized — lawfully but in violation of the convention that is ordinarily observed and wisely observed."[59]

The final pretrial conference in the *Quattrone* case took place only five days after the *Kozlowski* mistrial. At the conference, Quattrone's counsel requested an anonymous jury, arguing (in a veiled reference to the *Kozlowski* case) that the judge should do so in order to keep the juror's names out of the paper. Instead of granting this request, the trial judge expressed concern that anonymity might frighten the jurors. Counsel for the defendant alternatively suggested an "order to the press not to disclose [jurors'] names."[60] The government opposed the request, cautioning that any such order would be a prior restraint.

Jury selection began the next week and was held in open court. After the trial judge called the full names of the first dozen potential jurors, he announced from the bench:

> "Ladies and gentlemen of the jury panel, and any members of the media, should there be any in the room or outside of the room and have notice of what I'm about to say, I am preserving that it's an order of this Court that no member of the press or a media organization is to divulge at any time until further order of this Court the name of any

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58 Karen Frefield, *Tyco Trial Ends; Mistrial Declared,* Newsday, Apr. 3, 2004, at A03.

59 *Id.*

60 *United States* v. *Quattrone*, Case No. 03 Cr. 582 (S.D.N.Y.) (Order of Judge Richard Owen, issued from the bench)(Transcript of Apr. 7, 2004 proceedings at 33-34).

prospective or selected juror. And that's to anybody who has notice of it, and I'm sure that's going to be communicated around."[61]

The trial judge made no factual findings in support of the order and it was never reduced to writing. Once the press heard about the order, a letter was sent to the judge on behalf of a number of media organizations. The judge had a hearing the next day. The trial judge made clear that the impetus for the order was the negative attention received by the juror in the *Kozlowski* case, but did not point to any specific circumstances of the Quattrone trial to justify the order.

The press quickly filed an appeal to the United States Court of Appeals for the Second Circuit, requesting that the prior restraint be reversed. Following the line of Supreme Court cases discussed above, the press argued that this prior restraint went to the very core of protected speech by restraining the press from publishing what they had learned through observance of open court proceedings. The judge's rejection of the request for an anonymous jury indicated a clear less restrictive alternative which could have been employed to achieve the same result. Moreover, lack of any findings that the circumstances of this case required such an order — instead referring only to what had occurred in an unrelated proceeding — failed to meet the strict level of proof required by the Supreme Court.

Rather than contest the press' position, the government submitted a letter to the judge clarifying a few factual matters and indicating that they did not intend to file any additional papers. The Court of Appeals ordered the government to respond substantively. The appeal was heard on November 2.

Multimedia Holdings Corp.* v. *State of Florida

This recent case involved a prior restraint related to a murder trial concerning information that the press obtained legally from the Attorney General of the State of Florida. At issue was a court order preventing publication of a transcript of the defendant's grand jury testimony. The transcript was not acquired illegally, but rather was openly provided to a news organization by the State Attorney's Office as a public record, pursuant to a state statute. Nevertheless, the trial judge issued an order preventing publication, and nearly two weeks later issued an order that was intended to clarify that the order was not a prior restraint but rather was merely an "advisory opinion" that publishing the information would be a crime and grounds for being held in contempt of court.

The media, in particular First Coast News and 17 other news organizations, urged a Florida appeals court to quash the trial court's order on a number of grounds. First, the transcript was a public record provided by the government, all within the bounds of the law. Second, the transcript pertained to a criminal trial and was thus of public concern and at the core of protected speech. Third, there was no indication or finding of any harm, in that the media petitioners found the transcript largely duplicative of publicly available testimony that had already been given in a civil suit. Finally, the court's attempt to sidestep the prior restraint law by construing the later declaration as a "mere" advisory opinion was simply not credible, because any reasonable person would construe the court's statement as a prior restraint. There is no difference between an injunction and an order "advising" that publication will result in criminal contempt and prosecution. As of the date of this publication, there has been no ruling on this case.

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[61] *United States* v. *Quattrone*, Case No. 03 Cr. 582 (ROJ) (S.D.N.Y.) (Order of Judge Richard Owen, issued from the bench)(Transcript of Apr. 13, 2004 proceedings at 56).

People* v. *Bryant

Perhaps the most disturbing of the recent prior restraint cases is that of *People v. Bryant*, in which basketball star Kobe Bryant was accused of rape in a state court in Colorado.[62] The *Bryant* case, which unlike the other two discussed herein, has been ultimately resolved, concluded with a ruling from the Colorado Supreme Court *upholding* what the court admitted to be a prior restraint against publication of transcripts of a closed proceeding that were inadvertently emailed to the press. The clerk had mistakenly sent the transcripts to the wrong email distribution list, which included numerous media companies. Noticing the error, the clerk notified the judge. Five hours after the transcripts had been released the judge issued an order preventing the press from publishing all or any portion of the transcripts, and ordering them to destroy their copies of the transcripts.

The media entities immediately appealed to the Supreme Court of Colorado. In an *en banc* 4-3 decision, the Supreme Court of Colorado upheld the order, acknowledging that it was a prior restraint but holding that it was nonetheless constitutional.[63] The court reasoned that the prior restraint was justified due to the highest order interest involved and its opinion that the impending harm was "great and certain," because the *in camera* proceedings at issue were related to the rape victim's sexual history.[64] The court noted statistics on the existing problem of unreported rapes, as well as the asserted reason that rape victims are hesitant to have their sexual histories aired in court. The court reasoned that the mere presence of the rape shield laws, and the Supreme Court's analysis of rape shield cases, indicated that this was indeed an interest of the highest order. Noting that no Supreme Court case has upheld a prior restraint, the Colorado court instead relied on the fact that many of the Supreme Court cases had left room for the possibility that some set of circumstances would be sufficient. The *Bryant* case, they held, presented appropriate circumstances.

Even so, the Colorado Supreme Court found it necessary to limit the order to so that it not pertain to anything the trial court determined was relevant and material, commenting that such a determination should be made quickly.[65] This narrowing attempted to avoid the precedent which clearly established that there was a public interest in criminal proceedings by excluding anything found relevant thereto. The court also struck the portion of the order requiring that the transcripts be destroyed, and clarified that the order did not prevent the publication of anything contained in the transcripts that the media had also learned independently, noting that these aspects of the order were overly broad.[66] Of course, the impact of these narrowing instructions were dependent entirely on the determinations of the trial court in determining what portions of the transcripts were relevant and material and proper for release.

The three dissenting judges took issue with the majority in large part based on the finding of harm. They agreed with the media entities that harm was not certain or great, given extensive media coverage had already aired many details of the victims sexual history, often in more detail than was

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62 The case was eventually dropped by prosecutors. *See* September 1, 2004 Order Re: Motion to Dismiss, *available at* http://www.courts.state.co.us/exec/media/eagle/08-04/orderremotiontodismiss.pdf (last visited October 27, 2004). Court documents and schedules are available at http://www.courts.state.co.us/exec/media/eagle/courtdocuments.htm

63 *See* 94 P.3d 624 (Colo. 2004) (en banc).

64 *Id.* at 633-635.

65 *See id.* at 637-38.

66 *Id.*

present in the transcripts. The dissent did not agree with the majority that the increased credibility of the information resulting from an official transcript constituted a great and certain harm. As such, the dissent found no interest would be served compelling enough to distinguish the long line of Supreme Court precedent prohibiting prior restraints.[67] The dissent also noted that the duty to protect the information was upon the courts, and that "[h]aving failed, we, the judiciary — the government — cannot now order the media to perform the role that we were obligated, but failed, to do — to protect the privacy interests of the alleged victim."[68]

The media entities appealed to Supreme Court, noting that many of them were holding back news stories they would otherwise publish or broadcast. Citing *Nebraska Press*, the media entities argued that the delay constituted a final determination and restraint with respect to each day that passed. They also took issue with the harm determination. In addition to the reasoning of the dissent below, the media entities also noted the inherent difficulty in meeting the standard of certain harm required by the Supreme Court. "In reality it is impossible to know in advance what will be published and whether the publication will cause the asserted harms. . . because no court, including the courts below, can know what [the media] would choose to publish if the restraint were removed. By definition, therefore, whether any meaningful harm will be caused by such news is at best speculative."[69]

Writing for the Supreme Court, Justice Breyer denied *certiorari* without prejudice, though in doing so he made clear that any significant prior restraint was unlikely to last.[70] Breyer based the decision on the fact that the circumstances were still changing, and that "the trial court's determination as to the relevancy of the rape shield material will significantly change the circumstances that have led to this application." Noting that the court may decide to release all or some portion of the transcripts, Justice Breyer commented that "[t]heir release, I believe, is imminent", and that "a brief delay will permit the state courts to clarify, and perhaps avoid, the controversy at issue."[71] Breyer then denied the application, encouraging the petitioners to file again "in two days' time," after which respondents would be given one day to file a response. These less than subtle hints indicated the Supreme Court's expectation that most if not all of the transcripts be released. Without stating absolutely that no restraint would be justified, the court continued its long trend of indicating that very little restraint, if any, could be tolerated even in the face of an interest of the highest order.

The trial judge followed up with an opinion releasing about 98-99% of the material that the press had sought in the first place. The judge made clear that he felt that his hand had been forced by the pressure he felt from an impending reversal of his order by a higher court:

> "It is with great reluctance that this Court releases these transcripts. The release of these transcripts is contrary to the explicit intent of the Colorado Legislature to secure the privacy of alleged victims of sexual assault offenses and other crimes through the enactment of the Rape Shield statute and the statutory provision pertaining to the

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67 *See id.* at 642.

68 *Id.* at 639-40.

69 Application to Stay Prior Restraint Order of Colorado State District Court Pending Certiorari Review at 19-20, *available at* http://www.courts.state.co.us/exec/media/eagle/07-04/app1pt.pdf (pages 1-20) *and* http://www.courts.state.co.us/exec/media/eagle/07-04/apppt2.pdf (pages 21-35) (*last visited* October 27, 2004).

70 *Associated Press* v. *District Court*, No. 04A73, 2004 WL 1660663 (U.S. July 26, 2004).

71 *Id.* at *2.

> confidentiality of CVC records. The effect of this release is to present narrowly limited, one-sided evidence and argument to the public prior to the selection of a jury and without reference to the totality of the evidence. This Court has struggled for several weeks with the obvious and conflicting convergence of rights presented by this situation."
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> "The privacy rights of the alleged victim, the interests of the participants in conducting a fair trial and the First Amendment rights of the media are each significant rights recognized under the laws of the State of Colorado and United States and Colorado Constitutions. However, there is considerable precedent in the United States Supreme Court decisions which have weighed the various interests and found the First Amendment considerations to be paramount as to prior restraints. This precedent was considered by the Colorado Supreme Court in its decision directing this Court to consider the release as to relevant, material, and admissible portions of these transcripts. After careful consideration of the competing interests, and upon review of the Orders of the Colorado Supreme Court and Justice Breyer of the United States Supreme Court, this Court has concluded that is compelled to release these transcripts notwithstanding the concern that the release will compromise the rights of some of the participants."[72]

Although almost all of the material at issue was released by the trial court, it is worth noting that the press did not appeal as to the remaining, small amount of material that was still not released. Those materials included three things: (1) the name of a person other than Kobe Bryant, who was alleged to have had sex with the rape victim; (2) the psychiatric history of the victim; and (3) an attempt by the defendant to impugn the credibility of the victim because of a past mental condition.

In light of the media's decision not to appeal the prior restraint as to these remaining materials, the finding of the Colorado Supreme Court that the trial court's prior restraint was legally valid, will remain on the books. While the fact that the trial court ultimately felt tremendous pressure from both the Colorado and United States Supreme Courts to release the materials in question as a result of its view that those courts "weighed the various interests and found the First Amendment considerations to be paramount as to prior restraints," there is no doubt that the *Bryant* precedent will be cited in the future by those seeking to uphold prior restraints.

Conclusion

Recent attacks against prior restraints have been made in cases in which the press has obtained information legally, and in some instances, in open court. While it remains to be seen what the outcome will be in the *Quattrone* and *Multimedia Holdings Corp*., the result of the *Bryant* case, which upholds a prior restraint on the merits, is particularly disturbing. But even *Bryant* resulted in tremendous pressures for the suppressed information to be revealed to the public, and, in the end, almost all of it was. The trial court's opinion, reluctantly releasing the information because it felt "compelled" to do so by the orders issued by the Colorado and United States Supreme Courts, seriously limits the precedential effect of the *Bryant* ruling.

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[72] August 2, 2004 Fourth Order Re Release of Transcripts of June 21-22 Pursuant to the Orders of the United States and Colorado Supreme Courts at 3, *available at* http://www.courts.state.co.us/exec/media/eagle/courtdocuments.htm

JUDICIAL PROCEEDINGS AND RECORDS "ANCILLARY TO THE GRAND JURY" IN HIGH-PROFILE CASES: TOWARD A MORE MEANINGFUL RULE-BASED STANDARD FOR ACCESS

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Judicial Proceedings And Records "Ancillary to the Grand Jury" in High-Profile Cases:

Toward a More Meaningful Rule-Based Standard For Access

Courts continue to grapple with the occasional clash between grand jury secrecy and the tradition of openness and public access to the courts. The issue generally arises when grand jury witnesses resist subpoenas in high-profile cases. In such cases, the fact of a grand jury investigation and its targets, witnesses and subject matter are widely known. Recent examples include the ongoing Special Counsel investigation into who leaked CIA official Valerie Plame's name to the press, the probe into the Bay Area Laboratory Co-operative's alleged distribution of steroids to professional athletes, the Catholic Church child molestation controversy, the Michael Jackson child molestation case in California, and Independent Counsel Kenneth Starr's grand jury investigation of President Clinton's alleged false testimony about his relationship with Monica Lewinsky in the Paula Jones case. The proceedings occurring before the grand jury itself are, of course, closed to the public and the grand jurors, prosecutors and court staff are bound by Federal Rule of Criminal Procedure 6(e) to keep all that occurred there secret.[2] But in the federal and most state systems, grand jury witnesses remain free to disclose whatever they want about their testimony.

In most cases, the public never learns about a grand jury probe until there is an indictment and access issues rarely arise. But in high-profile cases, the public frequently learns many details, especially when there are official announcements commencing the investigation like in the *Plame* and *Lewinsky* cases and witnesses go public with their testimony or publicly announce that they are seeking to quash a subpoena on privilege or other grounds. Legal battles before the court, as opposed to the grand jury, sometimes ensue. This creates a tension between the grand jury secrecy rules and the traditional rights of access to judicial records and proceedings. But there is no reason why these doctrines cannot co-exist in a manner that respects the important values that each are intended to protect.

Thus far, courts have rejected the arguments of the press and public that the First Amendment and common law access principles apply to such "ancillary" proceedings. Some courts have, however, recognized a more limited right of access under Federal Rule 6(e), and this line of cases provides a potentially fruitful, but somewhat overlooked, avenue for access to ancillary proceedings. To date, appellate courts have given trial courts broad and largely standardless discretion in administering this rule-based access right, making it difficult to enforce and subjecting the public and press to the whims of the particular judge presiding over the proceedings.

As we show below, the scope of grand jury secrecy is often wildly exaggerated by courts and litigants. There are strong arguments that the presumption of access and openness attaches to judicial records and proceedings that are ancillary to the grand jury.[3] This article, however, focuses on the need for courts to strengthen and give more meaning to the rule-based right of access under Rule 6(e) (and its state law counterparts) by establishing more rigorous standards modeled on the traditional First Amendment and common law principles.

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2 *See* Fed. R. Crim. Proc. 6(e)(2)(a) ("No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(b)."); Fed. R. Crim. Proc. 6(e)(2)(b) ("Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury: (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) [government attorneys under specific circumstances].").

3 *See* Theodore J. Boutrous, Jr., *Rule 6(e) and the Public's Right to Know*, Wall St. J., August 17, 1998, at A15.

I. The Exaggerated Doctrine of Grand Jury Secrecy

A. The Potential Tension Between Grand Jury Secrecy and the Tradition of Openness in Criminal Court Proceedings

Grand jury proceedings that is, the presentation of evidence to a grand jury historically have been held in secret. According to the U.S. Supreme Court, "there are some kinds of government operations that would be totally frustrated if conducted openly," and a "classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'"[4] As a result, "since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye."[5] These principles are codified in Rule 6(e) of the Federal Rules of Criminal Procedure.[6]

By contrast, "[o]ther proceedings plainly require public access,"[7] and the First Amendment affords the public a broad and general right to attend judicial hearings and to obtain and review judicial records in criminal proceedings. The Supreme Court and lower courts have repeatedly confirmed that "[o]penness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[8] Thus, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[9] This presumption "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."[10]

Hearings and proceedings that are "ancillary" to grand jury proceedings like a witness's attempt to quash a grand jury subpoena on privilege or other grounds, or the government's motion to compel a grand jury witness's testimony can fall somewhere in between these competing principles of secrecy

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4 *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) ("*Press-Enterprise II*") (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)).

5 *Douglas Oil Co.*, 441 U.S. at 218 n.9. Even after the grand jury is disbanded, this secrecy generally remains. *Id.* at 222 ("[T]he interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities."); *see also* Fed. R. Crim. P. 6(e)(6) (noting that records relating to grand jury proceedings must be kept under seal "as long as necessary" to prevent the unauthorized disclosure of a matter occurring before a grand jury). Subsequent disclosure of grand jury information to private parties is possible, but it is limited to where the request is "preliminary to or in connection with a judicial proceeding," Fed. R. Crim. Proc. 6(e)(3(E)(i), and the requesting party demonstrates "particularized need." *Douglas Oil*, 441 U.S. at 222 & n.12.

6 *See* Fed. R. Crim. Proc. 6(e)(2)(A)-(B).

7 *Press-Enterprise II*, 478 U.S. at 9.

8 *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). The common law also establishes a right of public access to "inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978).

9 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality); *see also Press-Enterprise I*, 464 U.S. at 508; *Press-Enterprise II*, 478 U.S. at 10-11; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1197-1209 (1999) (summarizing United States Supreme Court's access jurisprudence).

10 *Press-Enterprise I*, 464 U.S. at 510; *see also Globe Newspaper v. Superior Court*, 457 U.S. 596, 606-07 (1982) ("Where . . . 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.") (emphasis omitted).

and openness. The briefing related to such motions, and any hearings addressing them, often will include information revealing what "occurred before the grand jury," and thus implicate grand jury secrecy restrictions. But these judicial records and proceedings also almost always include information, such as legal argument, that is entirely distinct and easily segregable from the secret matters occurring before the grand jury. In high-profile cases, where the public already knows key information about the grand jury's inquiry, the arguments for keeping these judicial records and proceedings totally secret are often weak at best.

Federal Rule of Criminal Procedure 6(e) which many state courts also use for guidance[11] navigates this balance and imposes limited secrecy as to proceedings and records that reveal information about the grand jury.[12] Federal Rule of Criminal Procedure 6(e)(5) dictates that with a limited exception "the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury."[13] Likewise, under Rule 6(e)(6), "[r]ecords, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."[14] These provisions contemplate a certain degree of openness in the ancillary context, and therefore themselves establish at least some boundaries on grand jury secrecy.

B. Secrecy in Grand Jury Proceedings is More Limited than Courts Suggest

1. The Limits of Grand Jury Secrecy Reflected in the Text and Evolution of Rule 6(e)

"Grand jury secrecy" is a convenient, yet overbroad, label for Rule 6(e)'s specific, limited secrecy rules. Even proceedings occurring before the grand jury, let alone ancillary judicial hearings and records, are not truly "secret" because individuals not covered by Rule 6(e)—most important, witnesses called to testify before the grand jury—are not bound by Rule 6(e).[15] "[B]ecause the Rule expressly provides that '[n]o obligation of secrecy may be imposed on any person except in accordance with this rule,'" the prohibition of Rule 6(e) "was not meant to extend beyond that class of persons [specifically identified in the rule]."[16]

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11 *See, e.g., Los Angeles Times v. Superior Court*, 114 Cal. App. 4th 247, 261 (Ct. App. 2003) ("We find the current federal rule addressing ancillary grand jury proceedings to be relevant, reasonable, and persuasive.").

12 Many federal district courts, like the District Court for the District of Columbia also have local rules implementing rule 6(e) that allow for limited access. *See Dow Jones*, 142 F.3d at 500-01 (discussing former district court local rule 302, which is now local criminal rule 6.1); *see generally id.* at 500 n.7 (listing rules from other district courts that "similarly implement" Rule 6(e)(5) and (6)).

13 Fed. R. Crim. P. 6(e)(5).

14 Fed. R. Crim. P. 6(e)(6).

15 *See* Fed. R. Crim. P. 6(e)(2)(B); *see also* Fed. R. Crim. P. 6(e)(2)(A) ("[N]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).") Among the people not listed in Rule 6(e)(2)(B): defense counsel and grand jury witnesses. *See* Fed. R. Crim. P. 6(e)(2)(B); *see, e.g., United States v. White*, 2004 U.S. Dist. LEXIS 21342, at *11 (M.D. Pa. Sept. 22, 2004) ("It is, of course, well known that a defense witness called before the grand jury is not under any obligation of secrecy and may disclose his or her testimony to whomever wishes to listen.").

16 Sara S. Beale *et al., Grand Jury Law and Practice* § 5:4 at 5-13 (2d ed. 1997) (hereinafter "*Grand Jury Law and Practice*") (emphasis added).

Grand jury witnesses, therefore, are free to emerge from the grand jury and, on the courthouse steps, tell the world about the fact they have been called to testify, as well as the substance of the questioning and their testimony.[17] This right is an important check on potential abuse of the grand jury process by prosecutors and grand jurors. The notion that absolute secrecy is crucial to the functioning of the grand jury is, therefore, dramatically exaggerated. In high-profile cases, where the nature, subject, witnesses, and similar key matters are generally known to the press and public, "grand jury secrecy" is an especially confusing misnomer.

The history of Rule 6(e), which "codifie[d] the traditional rule of grand jury secrecy,"[18] also strongly suggests that, as a general matter, judicial hearings ancillary to grand jury proceedings, or at least portions thereof, traditionally were open to the public. Rule 6, as first adopted by the Supreme Court in 1944, did not contain any provision for closed judicial hearings, but instead explicitly limited the scope of grand jury secrecy to matters occurring inside the grand jury room. Rule 6(e), which was then titled "Secrecy of Proceedings and Disclosure," stated in pertinent part as follows:

> [A] juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. *No obligation of secrecy may be imposed upon any person except in accordance with this rule*.[19]

Only the individuals actually present in the grand jury room—jurors, attorneys, interpreters and stenographers—were bound by the secrecy rule, and only to the extent of matters actually occurring "before the grand jury." And by stating that "[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule," Rule 6(e) carefully and explicitly limited the scope of the secrecy that could be imposed. As the Advisory Committee Notes to the original version of Rule 6(e) indicated, the rule was intended to "continue[] the *traditional practice* of secrecy on the part of members of the grand jury. . . ."[20] Thus, neither the original text of Rule 6 nor the accompanying Advisory Committee Notes indicated the intent to impose secrecy on hearings conducted in front of judges, let alone on portions of those hearings that did not reveal what transpired before the grand jury.

It was not until more than 35 years after the initial adoption of Rule 6 that it was first suggested that the rule be amended to permit, in some circumstances, closure of such ancillary hearings, and that proposed amendment was explicitly acknowledged to be a change in traditional practice. In October 1980, the General Accounting Office ("GAO") issued a report entitled *More Guidance And Supervision Needed Over Federal Grand Jury Proceedings* (the "GAO Report"). The GAO Report specifically considered the extent to which ancillary hearings (which the GAO Report referred to as "preindictment proceedings") were then open to the public, and found that a majority of trial judges that

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17 *In re: Motions of Dow Jones & Co., Inc.*, 142 F.3d at 498 (noting that witnesses are not forbidden from disclosing matters occurring before a grand jury).

18 *United States v. Sells Engineering*, 463 U.S. 418, 425 (1983).

19 Order of December 26, 1944, 323 U.S. 821, 837-38 (1946) (emphasis added). Rule 6 and the other federal rules of criminal procedure became effective March 21, 1946. Charles Alan Wright, Federal Practice & Procedure: Criminal 3d § 2 (3rd ed. 1999).

20 Fed. R. Crim. P. 6 advisory committee's note (1944) (emphasis added).

it interviewed either routinely conducted such hearings in open court or only closed such hearings on a case-by-case basis.[21]

The GAO Report also noted that "[o]pen preindictment proceedings are a major source of information" that made it into the public domain, and stated that, "[i]n 25 cases we were able to establish links between open proceedings and newspaper articles. . . ."[22] The Report then concluded that the reason most judges in its study were *not* routinely closing "preindictment proceedings" was their view that since Rule 6(e) did not explicitly authorize such closure, "the absence of a statute authorizing closure means that the proceeding must be held in open court in accordance with the *established practice* of public judicial proceedings."[23] The Report (which, as a policy matter, was critical of open court preindictment proceedings) concluded that Rule 6(e) needed to be amended to provide "specific guidance for handling . . . preindictment proceedings."[24]

In its June 27, 1980 response to a draft of the GAO Report, which was submitted less than a week *prior* to the Supreme Court's July 2, 1980 first holding that the First Amendment established a right of access to judicial proceedings,[25] the Department of Justice expressed concern that the Report was advocating that all ancillary judicial hearings should be "conducted in secret."[26] The Department's letter said that such blanket closure would raise "serious constitutional questions," warning that "secret proceedings" can be "a menace to liberty" and emphasizing "the importance of open judicial proceedings to safeguard against courts being employed as instruments of persecution."[27] The letter also declared that while, from "a purely prosecutorial viewpoint, the Department would favor a rule that such proceedings should be closed," "we recognize and respect the common law rule of open judicial proceedings . . . and would be reluctant to support any rigid national requirement of closed judicial proceedings."[28] These statements on behalf of the Nation's federal prosecutors—who certainly would have pointed out a tradition of closure of ancillary hearings if one had existed—are powerful proof that ancillary judicial hearings relating to grand jury matters were not traditionally closed as a matter of course.

The subsequent 1983 amendment of Rule 6 took a position that fell between the positions advocated by the GAO Report and the Department of Justice. The amendment added subsection (e)(5), entitled "Closed Hearings," which states:

> Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed *to the extent necessary to prevent disclosure of matters occurring before a grand jury*.

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21 Comptroller General, More Guidance and Supervision Needed Over Federal Grand Jury Proceedings 8-9 (1980) ("GAO Report"). *But see Dow Jones*, 142 F.3d at 502-03 (stating that the report "did not suggest that there was any widespread or longstanding history of openness" as to ancillary proceedings relating to the grand jury).

22 *Id.* at 9.

23 *Id.* (emphasis added).

24 *Id.* at 33.

25 *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality).

26 GAO Report, Appendix IV at 60.

27 *Id.*

28 *Id.* at 61.

The Advisory Committee Notes to the 1983 amendment indicated that this amendment was, at least in part, the result of the findings of the GAO Report. But those Notes also indicate that the highlighted language of subsection 6(e)(5), which expressly limits permissible closure of hearings, was included to avoid a clash with any potential rights of First Amendment access that might be identified as the Supreme Court's jurisprudence in the area further developed.[29] Thus, while grand jury proceedings themselves have always been subject to a limited rule of secrecy, that rule traditionally did not preclude public access to judicial hearings and materials that were ancillary to the grand jury proceedings.

2. Prominent Examples of Openness in Ancillary Proceedings

Despite the broad pronouncements by courts about the need for secrecy in the grand jury context, some public information is not anathema to the functioning of the grand jury. Indeed, throughout history, there have been high-profile *public* judicial proceedings addressing matters arising from proceedings occurring before a grand jury.

Nearly two hundred years ago, for example, in *United States v. Burr*,[30] Chief Justice John Marshall delivered the opinion of the trial court that held that Aaron Burr could subpoena President Thomas Jefferson to obtain allegedly incriminating evidence.[31] Burr was accused of planning to invade Mexico and set up a government under his control, and Jefferson purportedly had a letter from a general indicating Burr's plan.[32] But Burr had not yet been indicted when he demanded the evidence against him. The case, and all the allegations and argument described in Marshall's opinion, arose from proceedings occurring before a grand jury.[33]

Even though the judicial matter related to proceedings occurring before a grand jury, the recipient of Burr's subpoena ("the president of the United States"), the items sought by the subpoena (including "an original letter from General Wilkinson), and the legal issues involved (including whether a prisoner should be denied "the process of the court, until the indictment against him was found by the grand jury") were all part of Marshall's publicly issued opinion.[34] There was no indication that closure or secrecy was necessary or expected in the case.

In the 1970s, the circumstances surrounding a grand jury subpoena to President Nixon also demonstrated the limits of grand jury secrecy. Watergate Special Prosecutor Archibald Cox subpoenaed tape recordings made by President Nixon "of his conversations in the Oval Office and other locales."[35]

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29 Fed. R. Crim. Proc. 6 advisory committee's note (1983). Identical limiting language was included in subsection 6(e)(6), added at the same time, which permits sealing of "[r]ecords, orders and subpoenas relating to grand jury proceedings" only "to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury."

30 25 F. Cas. 30 (CCD Va. 1807) (No. 14, 692d).

31 *See id.* at 33 "[T]he court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses."); *id.* at 35 ("The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever. . . .").

32 *See Pennsylvania v. Ritchie*, 480 U.S. 39, 54 n.11 (1987) (describing the alleged evidence against Burr).

33 *See Burr*, 25 F. Cas. at 32 ("In opposition to this motion . . . . [i]t has been insisted by [the prosecution] that, until the grand jury shall have found a true bill, the party accused is not entitled to subpoenas nor to the aid of the court to obtain his testimony.").

34 *Id.*

35 *In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997).

The historical record indicates that, in the ensuing months, numerous hearings before Judge John Sirica—ancillary to the ongoing grand jury investigation—were held in open court, and that the briefs and arguments relating to the grand jury subpoena and privilege issues were public.

Indeed, the docket sheet in that matter is filled with entries concerning hearings, filings and other proceedings, with only a smattering of bench conferences and conferences in chambers kept under seal.[36] The Special Prosecutor's July 23, 1973 subpoena to President Nixon was made public when it was issued.[37] The President's July 25, 1973 letter to the District Court asserting that "the President is not subject to the compulsory process from the courts" also was made immediately public.[38] When the Special Prosecutor petitioned for a show cause order directed to the President, "a quorum of the grand jury was *polled in open court*, and each juror expressed his or her desire that the Court order compliance."[39] The briefs were filed on the public record and their contents contemporaneously discussed at length in the press.[40]

The *Nixon* grand jury subpoena matter came on for hearing on August 22nd, 1973—in a courtroom "packed with about 350 spectators."[41] And when Judge Sirica issued his *public* opinion a week later examining President Nixon's Executive Privilege claims and ordering that the President turn over nine tapes to the court for *in camera* inspection, President Nixon issued a public response announcing that he was considering appealing the order.[42]

The D.C. Circuit's October 12, 1973 decision upholding Judge Sirica's Executive Privilege rulings was issued on the public record.[43] Thereafter, additional proceedings to enforce the grand jury subpoena were held in open court before Judge Sirica. On October 23, 1973, for example, a public hearing was held in which the "White House was to formally respond to [Judge Sirica's] order to begin giving up the tapes."[44] The October 23, 1973 hearing occurred in a "crowded courtroom,"[45] and is

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36 *See generally* Docket Sheet, *In re Grand Jury Proceeding*, United States District Court for the District of Columbia, Misc. Docket No. 47-73 (hereinafter "Docket Sheet") (specifically noting where documents or hearings ordered sealed by court).

37 *See In re Subpoena to Nixon*, 360 F. Supp. 1, 3 (D.D.C. 1973); Carroll Kilpatrick & Susanna McBee, *Tape Battle Starts In Court Today*, Wash. Post, July 26, 1973, at Al, A18; Susanna McBee, *Court Battle Set as Nixon Defies Subpoenas*, Wash. Post, July 27, 1973, at Al, A22.

38 *See In re Subpoena*; 360 F. Supp. at 3; *Court Battle Set, supra*, at A22.

39 *In re Subpoena,* 360 F. Supp. at 4 (emphasis added).

40 *Id.* at 3-14; Docket Sheet, Jul. 26 ("Verified petition for an order directing Richard M. Nixon or any subordinate Officer whom he designates to show cause why certain documents or objects should not be produced in response to a grand jury subpoena duces tecum, Exhibits A, B & C, Filed In Open Court, Heard & Granted; Order Signed"); Susanna McBee, *Cox Presses Nixon On Tapes, ITT Data*, Wash. Post, July 28, 1973, at Al, A10.

41 George Lardner, Jr., *Cox Sees 'Deceit' By Nixon on Tapes*, Wash. Post, Aug. 23, 1973, at Al, A3 (quoting arguments of special prosecutor Archibald Cox and Nixon attorney Charles Alan Wright).

42 George Lardner, Jr., *Sirica Wants To Listen to Nine Tapes*, Wash. Post, Aug. 30, 1973, at A1, A17 (quoting Judge Sirica's "23-page opinion").

43 *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

44 Bob Woodward & Carl Bernstein, *The Final Days* 72-74 (1976).

45 *Id*. at 73.

described in some detail in Bob Woodward and Carl Bernstein's *The Final Days*, including the dramatic moment when the President's lawyer

> rose to announce that the President would comply in full. "This President does not defy the law." The courtroom was silent for a few seconds. Flabbergasted, Sirica broke into a grin. "The court is very happy the President has reached this decision," he said. Reporters almost fell over themselves racing to the telephones.[46]

The next month an 18½-minute gap was discovered on one of the subpoenaed tapes, and this was initially disclosed to Judge Sirica on November 21, 1973 in chambers.[47] But "[l]ater that afternoon, Sirica *made the matter public* and ordered an immediate inquiry, *to be conducted in open court.* For the next two weeks, news of the gap filled the nation's front pages . . . Secret Service personnel and other White House aides were called to the witness stand to explain."[48] This took place in open court, with detailed entries on the public docket.[49]

During the grand jury inquiry conducted by Independent Counsel Kenneth Starr regarding President Bill Clinton, Monica Lewinsky, and others, some judicial proceedings and records ancillary to the inquiry were also open to the public.[50] As discussed in more detail below, in response to motions and appeals from news organizations, the Chief Judge of the District Court for the District of Columbia released numerous judicial records and transcripts relating to a wide variety of issues, including battles over Executive Privilege and alleged grand jury leaks, and held a hearing in open court to address the issue of whether members of the Secret Service could invoke a privilege not to testify before the grand jury.[51] Grand jury witnesses and their lawyers regularly appeared on the courthouse steps to discuss what had just occurred before the grand jury.[52]

Most recently, at least some of the legal arguments related to the ongoing investigation into the potentially illegal disclosure of the identity of CIA official Valerie Plame have been addressed in public court proceedings. Chief Judge Thomas Hogan of the District Court for the District of Columbia held closed hearings and kept briefing secret regarding whether Judith Miller, an investigative reporter for *The New York Times*, and Matt Cooper, Time magazine's White House Correspondent would be forced to comply with grand jury subpoenas related to their conversations with confidential sources.[53] But the court ultimately published its various orders rejecting privilege claims and holding reporters in

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46 *Id.* at 74; Docket Sheet, Oct. 23 ("Counsel for the President informs Court President will comply with Court's order of 8-29-73 & will turn over tapes & other objects.").

47 *The Final Days* at 94.

48 *Id*. at 95 (emphasis added).

49 *E.g.*, Docket Sheet, Nov. 27 ("Hearing resumed; further testimony received from Rose Mary Woods"), Nov. 29 ("Hearing resumed; further testimony received from J. Fred Buzhardt and Alexander Porter Butterfield").

50 *See generally In re: Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. 1998).

51 *See* George Lardner, Jr., & Bill Miller, *Starr Cites Danger in Secret Service Silence*, Wash. Post, May 15, 1998, at A23.

52 *See Dow Jones*, 142 F.3d at 505 ("By the time of the Chief Judge's order it was no longer a secret that the grand jury had subpoenaed Francis Carter. Carter's attorney virtually proclaimed from the rooftops that his client had been subpoenaed to testify before the grand jury.")

53 *See, e.g., In re: Special Counsel Investigation*, 338 F. Supp. 2d 16, 2004 U.S. Dist. LEXIS 18495 (D.D.C., Sept. 9, 2004) ("*In re: Special Counsel Investigation I*").

contempt.[54] Miller appealed these orders to the D.C. Circuit. On appeal, the briefs were permitted to be filed on the public docket and the oral argument regarding the reporters' claims of privilege was held in open court.[55] The case thus demonstrates that courts, when confronted with purely legal issues**,** can hold public hearings about matters ancillary to proceedings occurring before a grand jury.[56]

From near the time of the nation's founding, and continuing through major cases in the more recent past, there is, therefore, strong historical evidence that judicial consideration of claims made in the context of an ongoing grand jury or similar investigation has taken place in public view. "Grand jury secrecy" thus encompasses a much narrower sphere of information than some of the judicial analysis might lead the public and press to believe. The need remains to distinguish between information within the scope of Rule 6(e)'s restrictions and that which must be publicly disclosed. Failure to make this distinction produces unwarranted judicial secrecy that runs counter to our country's tradition of open courts and flies in the face of the Supreme Court's admonition that "the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'"[57]

C. Overbroad Interpretations of Grand Jury Secrecy

Despite the gaping hole in Rule 6(e) that allows any witness to discuss what he or she experienced in the grand jury room, and the tradition of openness attached to ancillary proceedings, courts and parties nevertheless act like grand jury secrecy is absolute, impenetrable and sacrosanct. Cases involving issues ranging from the terrorist attacks of September 11, 2001, to Michael Jackson's alleged sexual assault of a minor have involved attempts to deny public access to information that is clearly outside the well-defined scope of Rule 6(e).

Center for National Security Studies v. U.S. Department of Justice, for example, involved the federal government's detention of individuals as "material witnesses" for possible testimony before a grand jury investigating the September 11, 2001 terror attacks on the United States.[58] In connection with these detentions, the government argued that Rule 6(e) "excuses it from disclosing the names of detainees held on material witness warrants, since 'each of these warrants was issued to procure a witness's testimony before a grand jury.'"[59] The D.C. Circuit had previously, and overbroadly, stated that Rule 6(e) forbids disclosure of "not only what has occurred and what is occurring, but also what is

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54 *See id.* at 16-19; *see also In re: Special Counsel Investigation*, 338 F. Supp. 2d 16, 2004 U.S. Dist. LEXIS 18472 (D.D.C. Sept. 15, 2004) ("*In re: Special Counsel Investigation II*") (unsealing the court's September 9, 2004 order and memorandum opinion).

55 *See, e.g.,* Richard B. Schmitt, *A Sign of Hope for Reporters in CIA Leak Case: One Judge Questions Whether the Government has Unchecked Power to Make Journalists Reveal Their Sources in Issues Before Grand Juries*, L.A. Times, Dec. 9, 2004, at A22 (recounting oral argument before D.C. Circuit).

56 *See also Washington Post v. Robinson*, 935 F.2d 282, 290-91 (D.C. Cir. 1991) (rejecting government's argument that disclosure of a plea agreement "would have risked violating the secrecy of grand jury proceedings" related to alleged drug possession by Washington, D.C., mayor Marion Barry because the plea agreement did not mention any investigation "nor allude to any specific 'matters occurring before a grand jury.'").

57 *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (holding that state rule indefinitely prohibiting grand jury witness from discussing subject of his grand jury testimony violated First Amendment) (citation omitted).

58 331 F.3d 918, 921-22 (D.C. Cir. 2003) ("The district courts before which these material witnesses have appeared have issued sealing orders that prohibit the government from releasing any information about the proceedings.").

59 *Id.* at 948 (Tatel, J., dissenting) (quoting government declaration).

likely to occur" before a grand jury.[60] And according to the government, such non-disclosure is justified even in relation to material witness detainees who are not scheduled to testify before a grand jury, and those released without ever having testified.[61]

But "the 'likely to occur' language must be read sensibly: It does not authorize the government to draw 'a veil of secrecy over all matters occurring in the world that happen to be investigated by a grand jury.'"[62] Thus, in arguing that the government could not use Rule 6(e) to withhold the names of some material witness detainees, Judge Tatel argued in dissent that "[t]o hold otherwise would convert this circuit's carefully crafted standard into an absolute rule that would permit the government to keep secret the name of any witness whom it ever thought might testify at a grand jury proceeding, or who might testify at some indefinite point in the future."[63] According to Judge Tatel, at least, "[n]either Rule 6(e) nor the law of this circuit justifies that result."[64] Nevertheless, the government appears to have seen the effectiveness of invoking general notions of grand jury secrecy to blend truly secret grand jury information with other information that should be disclosed to the public, thereby concealing as much information as possible.[65]

The pending felony child molestation case against Michael Jackson in California reflects a similar approach, under which public access is restricted even though such limitations are legally and practically unjustified. In March 2004, the court issued a Decorum Order that, among other things,

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60 *Dow Jones*, 142 F.3d at 500.

61 *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 949 (Tatel, J., dissenting). Although Judge Tatel's dissent addressed this argument offered by the government, the majority ruled in favor of the government on other grounds. *See id.* at 925. The majority found that the names of the detainees were shielded from disclosure under the Freedom of Information Act by an exemption applicable where disclosure could "reasonably be expected to interfere with enforcement proceedings." *Id.* at 922, 925. Accordingly, the court held that it did not have to address the other exemptions invoked by the government, including one that exempted disclosure because disclosure was unnecessary under Rule 6(e). *Id.* at 925.

62 *Id.* at 949 (Tatel, J., dissenting) (quoting *In re Sealed Case*, 192 F.3d 995, 1001-02 (D.C. Cir. 1999)) (internal quotation marks and citation omitted in dissent).

63 *Id.* (Tatel, J., dissenting).

64 *Id.* (Tatel, J., dissenting); *see also In re Grand Jury Material Witness Detention*, 271 F. Supp. 2d 1266, 1268 (D. Or. 2003) ("[T]hat a material witness is detained to provide testimony before a grand jury, as opposed to detaining a witness to testify at trial, does not mean that the secrecy that accompanies grand jury proceedings renders secret the material witness's identity, status as a material witness or detention."); *In re Application of the United States for Material Witness Warrant, Pursuant to 18 U.S.C. § 3144, for Material Witness No. 38*, 214 F. Supp. 2d 356, 363-64 (S.D.N.Y. 2002) ("While grand jury secrecy is mandated by law, see Fed. R. Crim. P. 6(e)(5) & (6), the determination to jail a person pending his appearance before a grand jury is presumptively public, for no free society can long tolerate secret arrests. Where the two doctrines collide . . . sealing of matters relating to the arrest and detention must be limited to keeping secret only what is strictly necessary to prevent disclosure of what is occurring before the grand jury itself.").

65 See, for example, *In re Application of the United States for a Material Witness Warrant, Pursuant to 18 U.S.C. § 3144, for John Doe*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002):

> The witness who has filed the current motion was taken into custody pursuant to a warrant issued in aid of a grand jury subpoena, and the docket and the record of all proceedings in this matter have been sealed as proceedings ancillary to grand jury proceedings. *See* Fed. R. Crim. P. 6(e)(2), (5) and (6) (setting forth general rule of secrecy and rules for closing of hearings and sealing of records). Accordingly, neither the witness's name nor any identifying facts about him or this matter are set forth in this opinion, except to the extent necessary to treat the legal issues presented.

Id. at 288 n.1.

restricted all persons, even those not involved in the grand jury process, from communicating with any person summoned to appear as a grand juror and imposed a broad gag order on grand jury witnesses.[66] The general order, ostensibly binding the world at large, also mandated that no grand juror, prospective grand juror, or witness could be photographed, even while entering or exiting the courthouse or any other facility utilized by the grand jury.[67] This broad prohibition was in clear conflict with pronouncements by the California courts that it is "well established that injunctions are not effective against the world at large."[68] It also led to disturbing displays of government power. One sheriff's deputy, for example, ordered a freelance photographer on assignment from the Associated Press to delete several photographs from his digital camera because, according to a report of the incident, "they revealed too much of the people entering the building."[69]

The media contested the Decorum Order on an emergency basis, and the trial court responded by modifying some of its provisions, with the court of appeal staying and modifying several others.[70] Nevertheless, several troubling provisions of the Decorum Order remained.[71] And county officials were permitted to continue the extraordinary, and seemingly unprecedented, step of moving the grand jury out of the courthouse to a secret location, and, once that location was discovered, barricading the public streets to exclude the press.[72]

In connection with these grand jury proceedings, the trial court held hearings on various legal issues, some of which were entirely closed to the public.[73] Several of these secret hearings involved a dispute regarding whether information collected by private detective Brad Miller was confidential defense work-product.[74] No advance notice of the hearings was provided, and the Court had not entered any publicly available orders requiring closure or explaining why closure was necessary.

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66 Grand Jury Decorum Order at 2, *In Re Santa Barbara Criminal Grand Jury*, No. 04–002 (Cal. Super. Ct. Mar. 24, 2004).

67 *Id.*

68 *People ex rel. Gwinn v. Kothari*, 83 Cal. App. 4th 759, 765 (2000); *see also id.* at 769 ("[A]n injunction is binding only on parties to an action or those acting in concert with them."); *Planned Parenthood Golden Gate v. Foti*, 107 Cal. App. 4th 345, 354 (2003) (holding that "because [the injunction's notice provision] purports to enjoin all demonstrators in addition to the enjoined parties, the restriction is overbroad on its face").

69 Tim Molloy, *Media Access Again Issue in Jackson Molestation Case*, Associated Press, Mar. 26, 2004.

70 *See* Order, *Nat'l Broad. Co. et al. v. Superior Court*, No. B174116 (Cal. Ct. App. Apr. 1, 2004) (staying provisions of amended decorum order).

71 For example, the amended Decorum Order broadly restricted the ability of grand jury witnesses to talk to anyone to whom they wanted about what they said and observed in the grand jury room. Amended Grand Jury Decorum Order [3–29–04] at 3, *In Re Santa Barbara Criminal Grand Jury*, No. 04–002 (Cal. Super. Ct. Mar. 29, 2004).

72 *See* Dawn Hobbs, *Accuser Testifies Before Grand Jury, Source Says*, Santa Barbara News-Press, Mar. 31, 2004, *available at* www.newspress.com/mjacksonupdate/0331boytestifies.htm (noting that grand jury proceedings were held in "a barricaded area behind the Santa Barbara County Sheriff's Department"); Dawn Hobbs, *Witnesses Testify at "Secret" Location*, Santa Barbara News-Press, Mar. 30, 2004, *available at* www.newspress.com/mjacksonupdate/0330secretlocation.htm ("Undercover deputies shuttled witnesses in unmarked vans with blackened windows to the sheriff's training facility [for grand jury testimony].").

73 *See, e.g.*, Motion Of Certain Non-Party Media Organizations For Advance Notice Of Hearings And Other Judicial Proceedings And Records Ancillary To The Grand Jury And For Release Of Transcripts And Judicial Records, *In Re Santa Barbara Criminal Grand Jury*, No. 04–002 (Cal. Super. Ct. Apr. 7, 2004) [hereafter "Motion for Notice"].

74 *See* Dawn Hobbs, *Private Detective's Role Focus Of Secret Hearing*, Santa Barbara News Press, Apr. 6, 2004, *at* http://www.newspress.com/ mjacksonupdate/0406private.htm) ("At issue is whether information Mr. Miller collected at the direction of lead defense lawyer Mark Geragos is considered confidential, particularly audiotaped interviews").

This secrecy was excessive in part because these legal issues were already the subject of significant amounts of open, public briefing and legal arguments in the trial proceedings, as well as a public order regarding the applicability of the work-product and other privileges to materials seized from Miller.[75] More generally, the case already had been the subject of considerable press coverage, and it was well-known that the target of the grand jury proceedings, Michael Jackson, already was formally charged, had surrendered his passport, and was free on bond.[76] The identities of many of the witnesses were equally well-known. Thus, the grand jury's interest in secrecy necessarily was more circumscribed than in those instances where the target of its probe is presumed to be unaware of the grand jury's investigation.[77] Nevertheless, talismanic assertions of "grand jury secrecy" were again used to justify broad restrictions on public access.

III. The Rule-Based Right of Access to Ancillary Proceedings

A. Rule 6(e) Itself Imposes Limits on The Degree of Secrecy Permissible in Ancillary Judicial Proceedings

Courts have little, if any, authority to utilize Rule 6(e) to justify a "veil of secrecy" broader than is specifically authorized by that rule, which is one of the "'few clear rules which were carefully drafted and approved by [the Supreme Court] and by Congress to ensure the integrity of the grand jury's functions.'"[78]

Judge Easterbrook gave precisely this reading of Rule 6(e) in *In re Krynicki*, 983 F.2d 74 (7th Cir. 1992). Krynicki appealed a contempt citation issued for his refusal to comply with a grand jury subpoena. The government moved the Circuit Court for leave to file its opposition to Krynicki's brief on appeal under seal, arguing that "[t]he record which forms the basis of the instant appeal has been placed under seal," and that it sought "to continue to comply with the requirements of Fed. R. Crim. P. 6(e)."[79] Judge Easterbrook denied the government's motion—which he presumed to also encompass

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75 *See, e.g.*, Findings And Order Re: Claims of Work Product Privilege at 1, *People v. Jackson*, No. 1133603 (Cal. Super. Ct. Mar. 11, 2004) ("On February 13, 2004, the Court heard argument directed to whether work product protection were [sic] applicable to certain videotapes and audiotapes seized pursuant to a search warrant from Bradley Miller's office.").

76 *Id.* at 1.

77 A blanket rule of secrecy also was particularly unjustified because the permissible scope of grand jury secrecy is well established in California under an exhaustive statutory scheme that includes no secrecy restrictions on ancillary legal proceedings before the court (as opposed to matters occurring before the grand jury itself). *See Daily Journal Corp. v. Superior Court*, 20 Cal. 4th 1117, 1122 (1999) (citing sections 888-939.91 and 940-945 as the "extensive rules" governing grand jury proceedings and "implementing the long-established tradition of grand jury secrecy," but which contain no restrictions on ancillary proceedings). Courts must respect these statutory limitations, because "the Legislature has, in effect, occupied the field." *Id.* at 1125.

78 *United States v. Williams*, 504 U.S. 36, 46 (1992) (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (O'Connor, J., concurring in judgment)); *see also id.* at 50 ("[A]ny power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings.").

79 *In re Krynicki*, 983 F.2d at 76.

a request for closed oral argument[80]—noting that the government's brief did not in fact contain any material covered by the limited scope of Rule 6(e):

> The brief tendered with the motion discusses the subject matter of the grand jury's inquiry in only the most general terms, revealing nothing that the prosecutor ha[d] not already communicated to Krynicki. The brief does not discuss evidence produced by other witnesses before the grand jury, and it had no need to. I see no reason why the argument in this case cannot be public.[81]

Recognizing that Rule 6(e)(6) permits sealing only "to the extent or for such time as is necessary to prevent disclosure of matters occurring before the grand jury," Judge Easterbrook stated that, "[i]f, as the United States represents, the district court has sealed the *entire* record of the contempt proceedings against Krynicki, it has exceeded the authority granted by Rule 6(e)(6)."[82] Judge Easterbrook therefore concluded that Rule 6(e) justified sealing *only* "matters occurring before the grand jury," a category *not* including "all of the legal argument," which he concluded "belong[s] in the public domain."[83]

The limits of Rule 6(e) therefore reflect the limits of secrecy in the grand jury context. Anything outside the explicit parameters of Rule 6(e)(5) and (6) need not be withheld from the public. Such facts and legal arguments offer no secret information. Rather, they provide only a broad, non-identifying indication of what is happening in the public's courts. The rule itself shows that there is no legitimate basis for keeping this information under seal.

B. Courts Rejecting the First Amendment and Common Law Access Rights Have Recognized a Rule-Based Right of Access to Ancillary Materials and Proceedings

In the last decade, the few reviewing courts to address public access to ancillary proceedings and documents have recognized that there exists a rule-based right of access. Although they have rejected the notion that the First Amendment or common law compels disclosure in the ancillary context, these courts have acknowledged that some information from proceedings and documents ancillary to grand jury proceedings must be disclosed.

1. D.C. Circuit

In re: Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998) involved motions by the press seeking access to judicial proceedings and records ancillary to the grand jury inquiry conducted by Independent Counsel Kenneth Starr focused on President Clinton, Monica Lewinsky and others.[84] The press sought, among other things, access to hearings and judicial records relating to (1) objection to a grand jury subpoena by one of Monica Lewinsky's lawyers and (2) a motion to show cause filed by

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80 *See id.* at 75.

81 *Id.* at 76-77 (internal citation omitted).

82 *Id.* at 77.

83 *Id.*

84 142 F.3d at 497-99.

President Clinton against Starr for alleged violations of grand jury secrecy.[85] The D.C. Circuit recognized that public disclosure is warranted "if the Chief Judge can allow some public access without risking disclosure of grand jury matters – either because the subject of the proceeding removes the danger or because the proceedings may be structured to prevent the risk without disruption or delay."[86] In fact, according to the court, "Rule 6(e)(5) contemplates that ***this shall be done***."[87] However, the court added, "it will be done because the Federal Rules of Criminal Procedure confer this authority on district courts, not because the First Amendment demands it."[88] The court thus included language encouraging the Chief Judge to release redacted materials if feasible.[89]

The *Dow Jones* court similarly rejected the argument that the common law right of access applied to the ancillary materials in that case. According to the court, "even if there were once a common law right of access to materials of the sort at issue here, the common law has been supplanted by Rule 6(e)(5) and Rule 6(e)(6) of the Federal Rules of Criminal Procedure," and "[t]hese rules now govern."[90] Of course, these rules say nothing about materials that *do not* relate to proceedings occurring before the grand jury, and thus offer no indication that 6(e)(5) or 6(e)(6) negate any common law right of access to such materials.[91] Nevertheless, the court found there was neither a constitutional nor a common law right of public access to the ancillary proceedings and materials. Instead, it left the matter of disclosure for the trial court to decide according to its interpretation of the federal rules and the local rule addressing materials "filed in connection with a grand jury subpoena or other matter occurring before a grand jury."[92]

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85 *Id.* at 499.

86 *Id.* at 502.

87 *Id.* (emphasis added).

88 *Id.*; *see also In re: Sealed Case*, 199 F.3d 522, 523 (D.C. Cir. 2000) ("In [*Dow Jones*], this court held that there is no First Amendment right of access to grand jury ancillary proceedings.").

89 *E.g., Dow Jones*, 142 F.3d at 506 (If "the press clearly requests redacted versions of these transcripts in the future, we are confident that the Chief Judge would act on the motion consistent with the limits of Rule 6(e)(6) and local Rule 302.").

90 *Dow Jones*, 142 F.3d at 504.

91 *See In re: Special Grand Jury*, 674 F.2d 778, 780 (9th Cir. 1982) (finding common law right of access to "ministerial" grand jury records, which "generally relate to the procedural aspects of the empanelling and operation of the Special Grand Jury, as opposed to records which relate to the substance of the Special Grand Jury's investigation"). Although the Ninth Circuit court remanded the access determination to the district court, it observed that the common law right of access would apply to materials not covered by Rule 6(e). *See id.* at 781 ("The importance of public access to judicial records and documents cannot be belittled. We therefore hold that, as members of the public, the appellants have a right, subject to the rule of grand jury secrecy, of access to the ministerial records in the files of the district court having jurisdiction of the grand jury.").

92 *Id.* at 500-01 (citing D.D.C.R. 302 (now Local Criminal Rule 6.1)). The local rule leaves disclosure to the discretion of the D.C. district court, stating that "[p]apers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public by the Court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." D.D.C.R. 302 (now Local Criminal Rule 6.1); *see also id.* at 500 (stating that the rule "gives [the press] the most it could expect from its constitutional claim").

The D.C. Circuit did acknowledge, however, that secrecy of even the grand jury information under Rule 6(e) no longer applies "when information is sufficiently widely known,"[93] and "the press is not . . . barred from receiving non-protected details about what transpired before the court."[94]

The court also narrowly interpreted the district court's local rule regarding grand jury secrecy, and therefore re-iterated the limits of grand jury secrecy under Rule 6(e). This rule, which is now Local Criminal Rule 6.1, states in part that:

> All hearings on matters affecting a grand jury proceeding shall be closed, except for contempt proceedings in which the alleged contemnor requests a public hearing. Papers, orders and transcripts of hearings subject to this Rule, or portions thereof, may be made public by the Court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury.[95]

The court rejected a strict interpretation of the local rule that would require closure of the courtroom regardless of whether the hearing would reveal matters occurring before the grand jury.[96] Instead, it found that "local Rule 302 appears to mean only that, as an initial matter, all proceedings relating to the grand jury shall be closed, subject to an order opening the proceedings."[97] The court expressly refused to decide "whether, on the stricter reading, the rule would exceed the district court's authority to implement Rule 6(e)(5)."[98] But, in doing so, the D.C. Circuit suggested that a district court clearly *could* exceed the scope of Rule 6(e)(5) by closing too much.[99] The Chief Judge, based on this ruling, subsequently held a major hearing in open court concerning whether there is a "Secret Service" privilege and released thousands of pages of redacted briefs, motions and transcripts.

The D.C. Circuit remanded the case for reconsideration of the Chief Judge's order insofar as it denied the media's motion for entry of items on the public docket. According to the court, "[w]e can understand why a descriptive caption on a case might reveal grand jury matters, but we cannot understand why a designation such as '*In re Grand Jury Proceedings*,' followed by a miscellaneous case

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93 *Dow Jones*, 142 F.3d at 505 (citations omitted); *see also id.* (noting that Francis Carter's attorney "virtually proclaimed from the rooftops that his client had been subpoenaed to testify before the grand jury," and so greater public disclosure possibly was warranted where "it was no longer a secret that the grand jury had subpoenaed Carter"). Unlike the D.C. Circuit, the Third Circuit suggested that public disclosure of information relating to the grand jury could not eliminate the need for secrecy. According to *Smith*, "a court is simply not powerless, in the face of an unlawful disclosure of grand jury secrets, to prevent all further disclosures by the government of those same jury secrets." 123 F.3d at 154. But the court was unclear about the extent to which a court could withhold information that was once made available to the public, noting that "even if grand jury secrets are publicly disclosed, they ***may*** still be entitled to at least ***some*** protection from disclosure." *Id.* (emphasis added).

94 *Id.* at 504.

95 D.D.C. Local Criminal Rule 6.1 (formerly Local Rule 302).

96 *Dow Jones*, 142 F.3d at 501.

97 *Id.*

98 *See id.*

99 *See In re: Sealed Case*, 199 F.3d 522, 523 (D.C. Cir. 2000) ("The decision in *Dow Jones* . . . made it clear that appellants have neither a statutory right, ***apart from Federal Rule of Criminal Procedure 6(e)***, nor a common law right of access to matters before the grand jury.") (emphasis added).

number would have that consequence."[100] On remand, the district court rejected the contention that it should recognize a general rule requiring public docketing of grand jury-related matters in every case.[101]

The media appealed, and in *In re: Sealed Case*, 199 F.3d 522 (D.C. Cir. 2000), the D.C. Circuit again took up the issue. The court agreed with the district court that there is no general requirement for public docketing of court proceedings related to the grand jury.[102] However, the court also held that when a party requests a public docket in a specific case, under the local rule implementing Rule 6(e) the district court must consider the request and, if it is denied, offer some explanation that "bear[s] some logical connection to the individual request."[103] This explanation "must rest on something more than the administrative burdens that justified the denial of across-the-board docketing, and it must be more substantial than, say, an arguable possibility of leaks."[104] According to the court, "Rule 6.1 would be heartless,"[105] and make "little sense,"[106] without such a procedure to address specific requests for a redacted public docket.

The D.C. Circuit therefore recognized the need for a procedural framework to protect the public's rule-based right of access, and thereby set the stage for a more rigorous rule-based standard in high-profile cases. Indeed, the court found that its approach was consistent with the notion that the local rule implementing Federal Rule of Criminal Procedure 6(e) "means what it says in providing a limited right of access with respect to grand jury ancillary proceedings in which continued secrecy is not necessary to prevent disclosure of matters before the grand jury."[107] In a high-profile case, the detailed explanation why secrecy is necessary in *that particular case* is essential because far more information is available to the public. A legitimate explanation is rightfully more difficult to formulate under those circumstances.

2. Third Circuit

The Third Circuit also took a rule-based approach regarding access to ancillary proceedings and records in *United States v. Smith*, 123 F.3d 140 (3d Cir. 1997) and *In re: Newark Morning Ledger Co.*, 260 F.3d 217 (3d Cir. 2001). *Smith* involved a sentencing memorandum that contained grand jury material.[108] The government posted the memorandum on its website at the same time that it submitted the memorandum to the district court.[109] Two of the defendants, a defendant's employer, and uncharged individuals mentioned in the sentencing memorandum complained that the memorandum contained grand jury material and that the government had violated Rule 6(e) by disclosing it to the public.[110] The

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100 *Dow Jones*, 142 F.3d at 504.

101 *In re: Sealed Case*, 199 F.3d 522, 523 (D.C. Cir. 2000).

102 *Id.*

103 *Id.* at 527.

104 *Id.*

105 *Id.* at 523.

106 *Id.* at 527.

107 *Id.*

108 123 F.3d at 143.

109 *Id.*

110 *Id.*

district court ordered the memorandum sealed until the court determined which materials and aspects of the proceedings related to the sealing order could be released in conformance with Rule 6(e).[111]

As the D.C. Circuit would later hold in *Dow Jones*, the *Smith* court held that the First Amendment and common law did not create a public right of access to any materials or proceedings that were ancillary to a proceeding occurring before the grand jury.[112]

The Third Circuit used two separate rationales in its decision. As to the *entire* ancillary proceedings and documents, the court found that because "the briefs and hearing will necessarily reveal grand jury material. . . . the briefs and hearing to which the newspapers seek access are afforded secrecy under Fed. R. Crim. P. 6(e)(5) and 6(e)(6)."[113] Therefore, according to the court,

> [n]ot only was the district court justified in sealing them, it was required to do so absent a showing of an overriding interest. As such, there is no presumptive right of access thereto. For this reason, our inquiry ends here, and we do not reach the question whether the district court made particularized findings that the need for closure outweighed the interest in public access, as is required . . . when a presumptive First Amendment right of access is established.[114]

In other words, "there is no presumptive First Amendment or common law right of access . . . if secret grand jury material would be disclosed by that access."[115]

But this approach would not apply to *portions* of ancillary proceedings and materials that did not identify matters occurring before the grand jury. The court held that it would not require the district court to provide access to this information because of its concerns about judicial efficiency:

> Even if it were possible for the district court to identify material that potentially implicates Rule 6(e) in advance and to restrict access only to that particular material without the benefit of oral argument, we would not require the district court to do so. The newspapers would, in essence, have the district court conduct a "revolving door" hearing to which the media would be let in and then excluded from time to time (or minute to minute) depending on whether grand jury material (or putative grand jury material) was under consideration. But courts cannot conduct their business that way, and we will not tie the hands of the district court in this fashion.[116]

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111 *See id.*

112 *See Smith*, 123 F.3d 140, 149 153; *see also Dow Jones*, 142 F.3d at 503 ("We therefore agree with *Smith* that neither the press nor any member of the public has a First Amendment right to demand that the Chief Judge conduct open ancillary hearings in a way that would not reveal grand jury matters.").

113 *Smith*, 123 F.3d at 151.

114 *Id.*

115 *Id.* at 143.

116 *Smith*, 123 F.3d at 153; *see also Dow Jones*, 142 F.3d at 502 ("Recognizing a First Amendment right to force ancillary proceedings to be conducted without referring to grand jury matters would create enormous practical problems in judicial administration, and there is no strong history or tradition in favor of doing so.").

According to the court, requiring access to some aspects of the hearing under these circumstances would be "cumbersome, impractical, and inefficient."[117] "The same would be true of requiring the district court to redact the briefs," [118] though the court did not explain why.

Essentially, the Third Circuit rejected the public's fundamental constitutional right of access to criminal proceedings because it thought requiring such disclosure would be too burdensome. *Dow Jones* reached a similar conclusion, explaining that "[t]o suppose that the First Amendment compels the court to conduct such hearings by placing the witness behind a screen and by emptying the courtroom each time a grand jury matter reaches the tip of an attorney's or the judge's tongue is to suppose the ridiculous."[119] But both courts failed to explain why a trial court could not redact documents and transcripts without excessive difficulty. Courts routinely are expected to make such determinations, parsing language to make sure any secrecy is "narrowly tailored."[120] And any difficulties posed by attempts to separate secret grand jury information from non-secret information do not justify the refusal to redact documents, which is much more feasible.[121]

Although the Third Circuit refused to recognize a duty under the common law or First Amendment to release non-secret information that is ancillary to proceedings before a grand jury, it did require disclosure of such information. The court held that "[i]f and when the district court determines that aspects of those briefs and hearings are nonsecret, ***it shall . . . disclose those aspects to the public***."[122] Without a more rigorous rule-based approach, however, it will be difficult, if not impossible, for the public to determine when this would be done, and to evaluate the district court's determinations of just how much information was "non-secret."

The Third Circuit's subsequent decision in *In re: Newark Morning Ledger Co.*, 260 F.3d 217 (3d Cir. 2001), showed the problems with this standardless approach. The case involved a motion filed under seal in the district court that sought contempt proceedings against Justice Department attorneys or agents for leaking secret grand jury information to the media, in violation of Rule 6(e)(2).[123] Like *Dow Jones* and *Smith*, the court noted the boundaries of Rule 6(e) and called for the release of non-secret information. According to the court, "[t]he secrecy afforded to grand jury materials under Fed. R.

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117 *Smith*, 123 F.3d at 153.

118 *Id.*

119 *Dow Jones*, 142 F.3d at 501.

120 *See, e.g., Globe Newspaper v. Superior Court*, 457 U.S. 596, 606-07 (1982) ("Where . . . 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.") (emphasis omitted); Cal. R. Ct. 243.1(e)(ii) (A California court must "direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document[] or page must be included in the public file.").

121 *See In re: Providence Journal Co.*, 293 F.3d 1, 15 (1st Cir. 2002) ("Courts have an obligation to consider all reasonable alternatives to foreclosing the constitutional **right of access.** Redaction constitutes a time-tested means of minimizing any intrusion on that right.") (internal citation omitted); *id.* ("The [trial] court did say, generally, that 'in those rare cases where counsel find it necessary to refer to **grand jury** matters or other matters not properly disclosable, those references are almost invariably dispersed throughout the memoranda and inextricably intertwined with the references to applicable legal authority.' D. Ct. Op. at 13. But the First Amendment requires consideration of the feasibility of redaction on a document-by-document basis, and the court's blanket characterization falls well short of this benchmark.").

122 *Smith*, 123 F.3d at 144 (emphasis added).

123 *Newark Morning Ledger*, 260 F.3d at 219.

Crim. P. 6(e) extends beyond the actual grand jury proceeding to collateral matters, including contempt proceedings, which relate to grand jury proceedings and may potentially reveal grand jury information."[124] But this did not bar disclosure of non-secret information, and the court held that the district court "properly ***delayed*** public access to the materials and proceedings until a proper determination could be made whether the motion implicated secret grand jury information."[125]

According to the court, however, this "proper determination" was not subject to the well-defined standards applicable to the First Amendment right of public access: "As we held in Smith, once the court finds that neither experience nor logic require a presumptive First Amendment right of access, there is no need to address whether the court's actions were narrowly tailored."[126] Similarly, the court did not establish any rule-based standards limiting the length of the delay in releasing the materials. In fact, nearly a month after the district court's final order denying the motion for contempt proceedings, the *Newark Morning Ledger* court had to prod the trial court to release the non-secret materials:

> On June 20, 2001 the District Court issued a final order denying the complaining party's motion for contempt proceedings. But the District Court did not unseal all the records pertaining to the motion nor did it lift the seal on future proceedings. Under Smith, we believe the District Court should complete its review of the proceedings and after determining what, if any, materials contain secret grand jury information, unseal all non-secret material.[127]

Once again, a reviewing court conveyed its understanding that non-secret ancillary materials must be disclosed to the public, though it again rejected a First Amendment or common law right of public access to these materials.

3. California

State courts have taken a similar approach, relying on Federal Rule of Criminal Procedure 6(e)(5) and (6) to establish boundaries for what must be kept secret and what must be released to the public.[128] In *Los Angeles Times v. Superior Court*, 114 Cal. App. 4th 247 (2003), the California Court of Appeal recently addressed ancillary proceedings for the first time.[129] The case involved a grand jury investigation into allegations that certain Roman Catholic priests committed acts of child molestation.[130] The grand jury issued subpoenas to the custodian of records for the Archdiocese of Los Angeles, which several priests moved to quash.[131] The trial court sealed the documents produced

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124 *Id.* at 226.

125 *Id.* (emphasis added).

126 *Id.* at 224 n.9.

127 *Id.* at 228 n.18.

128 *See, e.g., State ex rel. Beacon Journal v. Waters*, 67 Ohio St. 3d 321 (1993) (relying on federal cases construing former Rule 6(e)).

129 *See Los Angeles Times*, 114 Cal. App. 4th at 248 ("No California case has dealt with the problem of so-called *ancillary grand jury proceedings*, proceedings that relate to a grand jury's investigation but do not occur in front of the grand jurors themselves. . . .") (emphasis in original).

130 *Id.* at 251.

131 *Id.*

by the archdiocese and a discovery referee sealed the motion to quash proceedings and any orders and decisions related to the motion.[132]

The California Court of Appeal looked to Federal Rule of Criminal Procedure 6(e)(5) and (6), which the court considered "relevant, reasonable and persuasive."[133] Based on its interpretation of the rule, and citing the D.C. Circuit's opinion in *Dow Jones*, the court held that the "*ancillary proceeding should be closed and sealed to the extent necessary to prevent disclosure of matters occurring before the grand jury*."[134] The court acknowledged that "[t]his rule will necessitate an individualized determination whether a given disclosure will, when reasonably considered in the context of the particular grand jury inquiry, tend to reveal some secret aspect of the grand jury investigation."[135] And "this procedure may sometimes require considerable expenditure of judicial time to carry out the often close analysis necessary to determine whether disclosure of given documentary evidence will reveal the nature, scope, or direction of grand jury proceedings."[136] Nevertheless, the court felt that this approach balanced the "grand jury's effective operation" and the possibility that some information could be safely disclosed.[137]

Like the federal decisions preceding it, *Los Angeles Times* held that "there is no public right of access to grand jury proceedings and materials, and it is the party seeking disclosure who has the burden of overcoming a presumption of grand jury secrecy."[138] Also like the federal decisions, the California court held that "[t]his strong principle of grand jury secrecy warrants applying the same nondisclosure presumption to the ancillary grand jury proceeding at issue here."[139] Once again, therefore, a court recognized the need to disclose information that does not reveal grand jury matters while rejecting any common law or First Amendment requirement to do so.

But the court did not discuss how to enforce and protect this rule-based right of access. The court talked about the "close analysis" necessary to determine whether secrecy was justified, but there was no mention of a need for courts to articulate their findings and thus explain the basis for their "individualized determinations." And, again, the appellate court did little to prevent unreasonable delay in opening proceedings and records to the public. The potentially wide discretion bestowed on trial courts is, therefore, arguably unchecked, and unless standards are established and enforced it threatens to swallow up the rule-based right of public access.

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132 *Id.* at 252 & n.1, 262.

133 *Id.* at 261.

134 *Id.* at 262 (emphasis in original).

135 *Id.* (internal quotations omitted).

136 *Id.* (internal quotations omitted).

137 *Id.* at 262, 263; *see id.* at 263 ("[I]t is at least theoretically possible that some aspect of this privilege litigation can be safely disclosed. Therefore, we will remand this matter to the superior court so the referee may make the individualized disclosure determinations we have described in this opinion.").

138 *Id.* at 263.

139 *Id.*

IV. Defining a New Rule-Based Standard for High-Profile Cases

A. The Need for Procedural Safeguards to Ensure Public Access

Courts have given the rule-based right of access little dimension. They identify the limitations of grand jury secrecy pursuant to Rule 6(e), but do little, if anything, to ensure that these boundaries are respected. The principles underlying the First Amendment and common law rights of access are well-established, and courts should draw from these standards to flesh out the rule-based standard and thereby infuse it with more meaning and substance.[140]

Courts must be especially sensitive to the limits of grand jury secrecy, and to the corresponding need to protect public access to non-secret information, in cases where certain facts related to the grand jury probe are already publicly known. Where, for example, the nature and subject matter of the probe, the identity of the target, the identities of witnesses, or the contents of witness's testimony are public knowledge, the need for secrecy as to these matters is diminished, if not eliminated.[141] Courts that maintain the pretense of absolute secrecy under such circumstances undermine the public's trust in the judicial system. Openness, on the other hand, fosters confidence in the system and protects against abuses.[142] And because of the high-profile nature of these proceedings, there is even less of a chance that some openness in ancillary matters will contaminate the grand jury proceedings. In such circumstances, the rule-based right of access, animated by the First Amendment and common law principles of public access, may be enforced in a manner that strikes a proper balance between the competing interests of openness and secrecy that inevitably come into play in these cases.

B. Specific Procedural Safeguards to Bolster the Rule-Based Right of Access

1. Notice and Opportunity to be Heard

When a member of the press or public files a motion seeking access to court records or a hearing, the courts should provide basic procedural safeguards to ensure the effective exercise of the rule-based right of access. In such circumstances, at the very least, the courts should provide notice and

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140 As Judge Easterbrook observed in refusing to seal all the appellate briefs and related materials in *In re Krynicki*, 983 F.2d 74 (7th Cir. 1992):

> What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; *this requires rigorous justification*.

Id. at 75 (emphasis added).

141 *See, e.g., Dow Jones*, 142 F.3d at 505 (noting that Francis Carter's attorney "virtually proclaimed from the rooftops that his client had been subpoenaed to testify before the grand jury," and so greater public disclosure possibly was warranted where "it was no longer a secret that the grand jury had subpoenaed Carter"); *cf. Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) ("Because disclosure of the contents of the plea agreement would only have confirmed to the public what was already validated by an official source . . . it could hardly have posed any additional threat to the ongoing criminal investigation.").

142 *See Press-Enterprise I*, 464 U.S. at 508 (Openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."); *Globe Newspaper Co.*, 457 U.S. at 604 (Access to judicial proceedings is necessary "to protect the free discussion of governmental affairs" so that "the individual citizen can effectively participate in and contribute to our republican system of self-government.").

an opportunity to be heard before closure of an ancillary judicial hearing.[143] Public knowledge of the subject matter of the hearing is an important factor in determining whether closure protects "secret" grand jury information. Some form of advance notice therefore is necessary to enable the public and press to have the opportunity to assert the rule-based right to pursue disclosure of non-secret judicial matters ancillary to the grand jury proceeding.[144] This notice could take the form of a redacted public docket, or the posting of notice on the court's website or at the courthouse.[145] The bottom line is that judges supervising the grand jury and hearing ancillary matters should not be permitted simply to ignore requests for public access; rather, they should be required to provide the public with a meaningful opportunity to assert their rights of access under the rules.[146]

2. Specific Findings

Once the court provides the opportunity for the public to make its case for access, to justify closure or sealing, the court should be required to make specific enough findings to permit appellate review.[147] Otherwise, the rule-based right of access will be rendered meaningless; a court could simply declare information within the purview of Rule 6(e)(5) or (6) and a reviewing court often would have no real way to effectively evaluate this determination.[148] This creates the risk that courts will seal more information than is justified and such rulings will be almost impossible to challenge on appeal. But if

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143 *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (noting that to facilitate a trial court's case-by-case determination of closure, "representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion.") (internal quotations omitted).

144 *See Dow Jones*, 142 F.3d at 504 ("If the press is given no access to the fact that some sort of ancillary proceeding has taken place, or will take place, it may be unable to invoke Rule 302," the D.C. district court's local rule implementing Rule 6(e).); *cf. Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 95 (2d Cir. 2004) ("History . . . demonstrates that docket sheets and their equivalents were, in general, expected to remain open for public viewing and copying."); *id.* at 93 (noting that "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible").

145 These steps would convey the necessary information to apprise the public of the existence and general purpose of court proceedings without revealing the substance of matters occurring before a grand jury. *See Dow Jones*, 142 F.3d at 504 ("We can understand why a descriptive caption on a case might reveal grand jury matters, but we cannot understand why a designation such as "*In re Grand Jury Proceedings*," followed by a miscellaneous case number would have that consequence.").

146 *See In re: Sealed Case*, 199 F.3d at 527 (requiring the district court to provide detailed explanation if it denies a request for a redacted public docket in a particular case and noting that the local rule implementing Rule 6(e) "would make little sense without the possibility of such an *ad hoc* procedure").

147 *See, e.g., Press-Enterprise I*, 464 U.S. at 510 (holding that an overriding interest justifying closure "is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered").

148 *Dow Jones* reflects how the absence of specific findings makes appellate court review virtually impossible. The D.C. Circuit could only speculate that "[t]he Chief Judge may have believed that to have granted even the press's motion for redacted versions of transcripts or other papers would have been to confirm the identity of a person the grand jury had subpoenaed." 142 F.3d at 505. Of course, the public was well aware that Francis Carter was the person who had been subpoenaed, and "[i]f the blanket denial of the motion rested on that ground," the D.C. Circuit "[did] not believe it [could] be sustained." *Id.* On the other hand, "the Chief judge may have refused to provide redacted versions of the material requested by the press (as local Rule 302 contemplates) for reasons other than protecting the secrecy of Carter's identity." *Id.* But if it was because redaction was "not possible," as "may have been the Chief Judge's reasoning," the court could not tell from the explanation in her order. *Id.* The court's "only recourse," therefore, was to vacate the order as it related to requested redactions and remand the case for reconsideration. *Id.*; *see also id.* at 504 ("The Chief Judge, in her memorandum opinion, did not explain why, in light of Rule 302, there has been such a blanket sealing of the docket. As to this subject, we will therefore remand the case for reconsideration.").

trial courts are at least required to provide some specific and reasoned explanation, that will provide a predicate for those seeking access to challenge orders on appeal. While appellate courts likely will find that such applications of the rules are subject to "abuse of discretion" review, to the extent a trial court misapplies Rule 6(e) that may well constitute a legal error subject to *de novo* review.[149]

3. Narrow Tailoring

Rule 6(e) by its terms already seems to require some version of "narrow tailoring" so that only that material covered by Rule 6(e)'s secrecy mandate may be shielded from public view. The Rule expressly states that no other obligation of secrecy may be imposed beyond those established by the Rule. Especially when an ancillary battle concerns some important legal issue—like whether there exists a certain privilege—courts should be able to allow large portions (and sometimes all) of the briefs and oral arguments to be open to public scrutiny. Targeted redactions of briefs and transcripts, rather than wholesale sealing, should be required where feasible, and appellate courts should rigorously enforce this mandate.

4. "Reasonable Promptness"

Finally, the rule-based right of access should include a "reasonable promptness" requirement. In the First Amendment context, courts have recognized time and again that the right of access is defeated by undue delay. A delay of only 48 hours in unsealing judicial records "is a total restraint on the public's first amendment right of access even though the restraint is limited in time."[150] To be sure, the nature of the grand jury process may well justify something less than absolute contemporaneous access to allow the trial court to ensure that the secrecy rules are not being violated. But any postponed access must be limited by a reasonableness requirement that ensures that the public's right of access is not nullified by undue delay.

V. Conclusion

"Grand jury secrecy" is not so broad as some courts make it seem. They act as though the integrity of the grand jury process will burst with any pin-prick of publicly disclosed information. Rule 6(e) and prominent cases throughout our nation's history indicate otherwise. In high-profile cases above all, the rule-based right of access can be enforced in a manner that balances the need for proper grand jury secrecy with the need for public access. To do this, courts should adapt the First Amendment and common law access principles and their procedural safeguards to the Rule 6(e) setting. These protections, which include notice and opportunity to be heard, specific findings justifying closure or sealing, a narrow tailoring requirement, and a "reasonable promptness" requirement, will breathe life into a right of public access that is mandated by the Federal Rules of Criminal Procedure and many state and local analogues.

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149 *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

150 *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983).

SEARCH WARRANTS: A QUALIFIED RIGHT OF ACCESS

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Search Warrants: A Qualified Right of Access

In June 1988, as part of an investigation into potential fraud and bribery in defense contracting, federal agents simultaneously executed over 40 search warrants at different sites throughout the country. These warrants spawned a series of decisions by federal courts of appeals addressing the public's right of access to search warrants that created a classic split among the circuits that remains today. Since then, various state and other federal courts also have considered the issue, with similarly contradictory results. Overall, most (but not all) courts have recognized some qualified right of access to search warrants, but they differ on many details, including whether the right stems from the constitution or the common law, when the right attaches, and what type of showing will overcome the right.[2]

Existing case-law suggests that a number of factors influence the nature of the right and the likelihood that it can be overcome. The most significant appear to be the stage of the underlying criminal proceeding and the position the government takes with respect to access. No right of access has been recognized, for obvious reasons, before a search warrant is executed. When the warrant has been executed but no one has been indicted or charged, access often depends on whether the trial court believes the investigation that produced the warrant is ongoing. If the target of the warrant has been charged with a crime in connection with the search, access rights peak and rarely are overcome unless the material is so prejudicial as to jeopardize the right to a fair trial. Given the varying legal standards and multitude of factors that may influence the outcome, the likelihood of obtaining access to search warrants in any particular high-profile matter will depend on the specific circumstances of that case.

I. Criminal Procedure

To fully appreciate the nuances in the case-law addressing the right of access to search warrants, it is necessary to have a basic understanding of the process surrounding a warrant. In a federal case, a "search warrant" generally includes an application for the warrant, the probable cause affidavit (or testimony and documents) supporting the application, the warrant itself, the return, and the inventory of items seized.[3] The warrant does not include the basis for the search, but merely describes the place to be searched, the items that are being searched for, the date and time it is issued, and the name of the judicial officer issuing the warrant. Following execution of the warrant, the warrant, return, and inventory are returned to the judicial officer who issued them (generally a magistrate) and the magistrate is required to file those documents and "all other papers" including the probable cause affidavit with the clerk of the court.[4]

The search warrant documents in high-profile cases – in particular, any affidavits, testimony, and documents submitted to establish probable cause – often contain information of great interest to the media. Personal information about the subjects of the search, evidence of alleged criminal acts, and names and other identifying information of witnesses and victims commonly are found in the paperwork

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[2] Separate and apart from the public and press, the targets of search warrants often attempt to gain access to the documents underlying search warrants. Because those cases generally involve different considerations and interests, they are not addressed in this article.

[3] See Johnson and Gardner, Access to Search Warrant Materials: Balancing Competing Interests Pre-Indictment, 25 U. Ark. Little Rock L. Rev. 771, 772-73 (Summer 2003).

[4] *Id.* Fed. R. Crim. P. 41.

supporting a warrant.[5] Law enforcement techniques and procedure also may be revealed, explicitly or implicitly, by warrant materials.[6]

States and in some cases individual localities each have their own rules and system for handling search warrants. Many, but not all, follow the federal model. In New York City, for example, the Borough Chief Clerk of the New York Criminal Court allows warrants and related documents to remain in the custody of the Manhattan District Attorney's Office. In the State of Washington, there is no consistent practice. In some counties, the issuing judge keeps the search warrant documents in his chambers; in other counties, the materials are filed for public inspection unless a sealing order is entered.[7]

Search warrants generally are used as preliminary investigative tools. As a result, not all search warrants are followed by the filing of criminal charges. And, even when charges are filed, often there is a time lag between execution of the warrant and the filing of charges. Once charges are filed, however, except in extraordinary circumstances, the warrant and related materials are turned over to the defense and ultimately become part of the public court proceedings. [8]

II. The Circuit Split

From 1988-1991, four federal courts of appeals issued six decisions in high-profile cases addressing the scope of the public's right of access to search warrants. The first case to be decided stemmed from the *St. Louis Post-Dispatch*'s efforts to gain access to all documents relating to search warrants executed at the St. Louis area offices of two McDonnell Douglas Corporation employees as part of a nationwide investigation into defense contracting. At the time the newspaper sought access to the warrant materials in June 1988, no criminal charges had been filed.[9] Applying the *Richmond Newspapers* "experience and logic" test, the Court found that the first amendment right of access extends to search warrants.

On the experience prong, the Court separated the process for obtaining the warrant, which traditionally has been closed, with the paperwork associated with the warrant after the search has been executed. In the case of the latter, the Court observed that, "[S]earch warrant applications and receipts are routinely filed with the clerk of court without seal."[10] Relying on this specific practice and the common law tradition of open judicial records and documents, the Eighth Circuit found the "experience" prong to weigh in favor of the existence of a constitutional right of access.

On the logic side of the equation, the Court took a traditional approach. It observed that public access to search warrants will increase understanding of the criminal justice process. Moreover, the Court found, search warrant materials are at the center of suppression hearings that often determine the

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5 Johnson and Gardner, 25 U. Ark. Little Rock L. Rev. at 779-81.

6 *Id.*

7 The Seattle Times Company v. Eberharter, 105 Wn.2d 144, 150-51 (1986).

8 Johnson and Gardner, 25 U. Ark. Little Rock L. Rev. at 779-81; Fed. R. Crim. P. 12, 16.

9 Because there was no pending case in which the newspaper could intervene, it filed a motion to unseal pursuant to Fed. R. Civ. P. 41 and the district court treated the motion as a new miscellaneous matter. *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569, 571 (8th Cir. 1988).

10 *Id.* at 573.

outcome of criminal prosecutions and the first amendment right of access to proceedings attaches to those hearings. Finally, the Court noted that public access to search warrant materials may operate as a curb on prosecutorial or judicial misconduct. Finding that the logic prong also weighs in favor of access, the Eighth Circuit concluded that there is a first amendment right of access to search warrants and the associated documents.[11]

Nonetheless, after finding there to be a constitutional right of access to the warrant materials, the Eighth Circuit went on to affirm the district court's sealing order. The appellate court concluded that the government's need to protect its ongoing investigation is a compelling interest sufficient to overcome the public's right of access. The Court then observed:

> These documents describe in considerable detail the nature, scope and direction of the government's investigation and the individuals and specific projects involved. Many of the specific allegations in the documents are supported by verbatim excerpts of telephone conversations obtained through court-authorized electronic surveillance or information obtained from confidential informants or both. There is a substantial probability that the government's on-going investigation would be severely compromised if the sealed documents were released.[12]

Redaction also was rejected as impractical, because virtually every page of the documents included information from wiretapped conversations, mention of individuals other than the subjects of the warrants, or references to the "nature, scope and direction" of the ongoing investigation.[13]

Undeterred, the newspaper tried again six months later. Only this time the government withdrew its opposition to disclosure of most of the sealed search warrant information because "its investigatory objectives [had] been attained."[14] The targets of the warrant, however, objected vigorously. McDonnell Douglas Corp. and several individual employees intervened and objected to release of the warrant materials, claiming it would violate Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968[15] ("Title III"), impinge on their constitutional right to privacy, and damage their reputation.[16] Although six months had passed since execution of the warrants, indictments or charges still had not been filed against anyone based on the warrants or information located in the searches.

In the second case, the Eighth Circuit's opinion focused on Title III, because the intervenors' argued that the newspaper's constitutional right of access was overcome by their compelling privacy interests and because much of the information contained in one of the warrant affidavits was based on telephone conversations intercepted by court-approved wiretaps. After quickly disposing of competing arguments and finding that Title III's disclosure prohibitions continue to apply once the information from the wiretap is included in a search warrant affidavit but that a statute cannot override a constitutional right, the Court found that the intervenors had a right to "conversational privacy"

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11 *Id.*

12 *Id.* at 574.

13 *Id.*

14 *John Does I-V v. The Pulitzer Pub. Co.*, 895 F.2d 460, 462 (8th Cir. 1990).

15 18 U.S.C. §§ 2510-2520.

16 *John Does I-V*, 895 F.2d at 461.

protected by the Fourth Amendment (and embodied in Title III).[17] Thus, it reasoned, "what is required is a careful balancing of the public's interest in access against the individual's privacy interests …."[18]

In striking a balance between the public's right of access and the target's privacy rights, the Eighth Circuit focused on the status of the government's investigation. The absence of any indictment of any of the individuals whose privacy interests are implicated by the wiretap evidence contained in the warrant materials, although it had been almost 18 months since the warrants were served by the time the decision was published, "weighs heavily in favor of the privacy interests and non-disclosure."[19] The Court noted that the warrant affidavits implicate numerous individuals directly and indirectly as having engaged in criminal conduct, but without a pending criminal trial, those individuals have no forum in which to vindicate themselves once the damaging information is released. And, the Court seemed particularly troubled by the fact that the government appeared to have concluded that it cannot prove its claims because it did not bring charges against anyone, but instead was seeking to try the targets "in the court of public opinion."[20] Thus, the Eighth Circuit held that the pre-indictment status of the criminal investigation "tips the balance decisively" in favor of intervenors' privacy interests and once again ruled against disclosure of even redacted versions of the search warrants. It then invited the newspaper to try again after indictments are issued.[21]

In between the two Eighth Circuit decisions, *The Los Angeles Times* and other California media organizations sought access to four search warrants issued in the Central District of California and one in the Southern District of California, all arising from the same investigation into fraud in the procurement of military weapons systems. The district court magistrates issued conflicting decisions and the cases were consolidated on appeal. The Ninth Circuit then expressly rejected the reasoning and conclusion of the Eight Circuit and held that, "[M]embers of the public have no right of access to search warrant materials while a pre-indictment investigation is underway."[22]

As the Eighth Circuit did, the Ninth Circuit applied the *Richmond Newspapers* "experience and logic" test. On the experience prong, the Court determined that warrant proceedings have traditionally been closed to the public prior to execution and that while the documents are publicly filed after service in many cases, courts have never hesitated to seal warrant files upon a showing by the government that an ongoing investigation requires closure. Thus, it found no historical tradition of open search warrant materials.[23]

Similarly, although the Ninth Circuit acknowledged the general benefit of open proceedings to discouraging corruption and fostering confidence in the system, it found the benefits to be substantially outweighed by the benefits of secrecy of warrant materials. The Court found the warrant process to be equivalent to a grand jury proceeding, where openness would hinder the government's ability to conduct a criminal investigation. Therefore, having found no tradition of warrant materials being open and

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17 *Id.* at 464-466.

18 *Id.* at 466.

19 *Id.*

20 See *id.,* quoting *United States v. Ferle*, 563 F. Supp. 252, 254 (D.R.I. 1983).

21 *Id.* at 467.

22 *The Times Mirror Company v. United States District Court for the Central District of Calif.,* 873 F.2d 1210, 1211 (9th Cir. 1989).

23 *Id.* at 1214-15.

having found that secrecy benefits the public and the criminal investigative process, the Ninth Circuit held that there is no constitutional right of access to search warrant proceedings and materials while a pre-indictment investigation is ongoing.[24]

After rejecting a constitutional right of access, the Ninth Circuit quickly tossed aside the notion of a common law right of access. Relying on *Nixon v. Warner Communications, Inc.*[25] and its progeny, the Court determined that a common law right of access has not generally extended to documents that, like search warrants, have traditionally been kept secret for policy reasons. Absent a history of access, the common law right attaches only when openness serves "the ends of justice."[26] Having already concluded that the "ends of justice would be frustrated" by disclosure of warrant information while a pre-indictment investigation is ongoing, the Ninth Circuit had no difficulty rejecting the existence of a common law right of access to the warrant materials.[27]

Shortly after the Ninth Circuit's decision, the Fourth Circuit took its turn. The FBI had served three search warrants in January 1988 as part of an investigation of fraud and organized crime in the health care industry. In March, the magistrate unsealed the warrants and returns but left the supporting affidavits sealed. *The Baltimore Sun* then petitioned to intervene for access to the warrant affidavits. The magistrate denied the request and while *The Sun*'s appeal was pending, indictments were returned and the affidavit was unsealed. The Fourth Circuit concluded that the matter was "capable of repetition, yet evading review" and refused to dismiss the appeal as moot.[28] It then rejected the notion of a constitutional right of access to pre-indictment search warrant materials, but held that the common law right of access to judicial documents attaches and can be overcome only by a showing that is nearly identical to the *Press-Enterprise* test for overcoming a qualified constitutional right of access.[29]

Unlike in the Eighth and Ninth Circuit cases, in *The Baltimore Sun Company v. Goetz*, the government argued first that the warrant affidavit is not a judicial record at all, but a document ancillary to the investigation of a crime to which no right of access can attach. The Fourth Circuit was not persuaded. It noted that a judicial officer must review and rely on the affidavit in deciding whether or not to issue the warrant and that determination is subject to further review by the district and appellate courts if an effort is made to suppress the materials seized in the search. The Federal Rules of Criminal Procedure require that the warrant and all related papers be filed with the clerk of the district court. Thus, the Fourth Circuit held, "affidavits for search warrants are judicial records."[30]

Next, the Fourth Circuit outlined the split between the Eighth and Ninth Circuits on the constitutional issue and sided with the Ninth, holding that neither experience nor logic supports the existence of a first amendment right of access to warrant affidavits. However, as it already determined

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24 *Id.* at 1215-18. The Ninth Circuit left for another day the question of whether a First Amendment right of access may exist after the investigation has concluded or indictments have been returned.

25 435 U.S. 589 (1978).

26 *The Times Mirror Company,* 873 F.2d at 1218-19.

27 *Id.*

28 *The Baltimore Sun Company v. Goetz*, 886 F.2d 60, 62-63 (4th Cir. 1989).

29 Id. at 65-66.

30 *Id.* at 63-64.

that the warrant affidavit is a judicial document, the Fourth Circuit concluded that the qualified common law right of access to judicial records attaches to pre-indictment warrant materials.[31]

In an odd twist, however, the Fourth Circuit then found that the common law right of access to warrant materials can be overcome only when the judicial officer finds that closure is "essential to preserve higher values and is narrowly tailored to serve that interest" and after the judicial officer has considered alternatives to closure.[32] The Court spent considerable time in its opinion outlining the different burdens that must be met to overcome, on the one hand, a common law right of access and, on the other hand, a constitutional right of access. It noted that the latter can be overcome only by showing that closure is "narrowly tailored" to serve "a compelling government interest," while the former can be overcome by a discretionary finding by a trial judge who has balanced the relevant facts and circumstances of the case.[33] After holding that a common law right attaches to the search warrant materials, the opinion reiterates that the common law right "is committed to the sound discretion of the judicial officer taking the warrant."[34] Then, however, the opinion lays out the findings the judicial officer must make to support maintaining the seal on a search warrant affidavit and the language is that of the constitutional test.

The Second Circuit's chance to consider the public's right of access to search warrants came in 1990, in a case that also focused on intercepted telephone conversations. *Newsday* sought access to another warrant affidavit stemming from the federal investigation into defense department procurement practices. The search warrant contained information gleaned from a court-authorized wiretap of a former Unisys Corporation employee whose home was the subject of the warrant. Shortly after the warrant had been executed, the judge from the United States District Court for the Eastern District of New York, who had issued the warrant, granted limited access to the newspaper, releasing a small portion of the documentation and redacting the rest. No one was ever charged with any crime in New York. However, the target of the warrant later pled guilty to related crimes in the Eastern District of Virginia, after which the government withdrew its objection to disclosure of the warrant materials. *Newsday* then renewed its application for access to the complete warrant.[35]

Although the government no longer objected to release of the warrant, the subject of the warrant, whose telephone conversations were reflected in the documents, strongly objected on privacy grounds. He argued that Title III prohibits disclosure of the warrant materials. The district court disagreed, and held there to be a constitutional right of access to the materials and that Title III did not bar disclosure of court records. It then balanced the privacy rights of the individuals against the public right of access and found that the legitimate public interest in the case outweighed the privacy interests, which had been diminished in any event by the guilty plea and the fact that the conversations reflected in the affidavit were of a "mundane business nature."[36] The court ordered release of the warrant materials with the exception of the names of any corporations or individuals who had not been indicted or previously identified publicly, which should be redacted.

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31 *Id.* at 64-65.

32 *Id.*

33 *Id.* at 64.

34 *Id.* at 65.

35 *Gardner v. Newsday, Inc.*, 895 F.2d 74 (2nd Cir.), cert. denied, 496 U.S. 931 (1990).

36 Id. at 75-76.

When the case reached the Second Circuit, that court dealt with the Title III issue first and found that while the statute does address confidentiality of wiretap materials, it does not address the issue of public access to those materials when the communications become part of a public court record. As a result, it held that Title III does not forbid nor authorize public access to search warrant materials containing wiretap information.[37]

Next, the Second Circuit considered the core issue of whether or not there is a right of access to search warrant materials. The Court set aside as irrelevant the Ninth Circuit decision, since that case arose during the pre-indictment state of an ongoing investigation while the target of the warrant the Second Circuit was considering already had pled guilty, albeit in another jurisdiction. Citing to the Fourth Circuit's reasoning, the Second Circuit found the warrant to be a judicial record ordinarily subject to a common law right of access. Then, addressing the specific question presented to it, the Court found that the presence of Title III communications in the warrant materials does not change the status of the materials, which remain public documents subject to a common law right of access.[38]

After determining there was a qualified right of access, the Second Circuit considered whether the common law right of access had been overcome in the case before it. The Court observed that the common law right of access is qualified "by recognition of the privacy rights of the persons whose intimate relations may thereby be disclosed…."[39] The district court had given consideration to the privacy rights of the parties to the intercepted conversations and ordered them disclosed. Under the circumstances, the Second Circuit found the court had not abused its discretion in ordering release of the redacted affidavit and affirmed the decision.[40] Once it determined that the common law right of access mandated disclosure, the Second Circuit avoided the constitutional question.

Finally, in 1991 the Fourth Circuit faced the issue of public access to search warrants again, in a case that presents another classic circumstance that arises in high profile cases: a criminal defendant who claims that the information contained in the warrant is so prejudicial that he will be unable to get a fair trial if it is released.[41]

In 1989, a five year old girl disappeared from a community Christmas party in suburban Virginia. Not surprisingly, the media descended. Television stations blanketed the airwaves with videotape from the Christmas party and newspaper coverage was intense. The girl was never found and nearly a year later, Caleb Hughes was indicted on the charge of abduction with intent to defile. Shortly thereafter, *The Washington Post* requested that the search warrant for Hughes' home be unsealed.[42] Hughes objected, claiming that release of the warrant would jeopardize his Sixth Amendment right to a fair trial. The government, without an ongoing investigation to protect, agreed with the newspaper that the affidavit could be released, except for one paragraph which it believed would be prejudicial.

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37 *Id.* at 76, 78.

38 *Id.* at 78-79.

39 *Id.* at 79.

40 *Id.* Interestingly, the Second Circuit ignored the fact that the district court's determination had been made after finding a constitutional right of access to the material.

41 *The Washington Post Company v. Hughes*, 923 F.2d 324 (4th Cir.), cert. denied, 500 U.S. 944 (1991).

42 The warrant had been executed ten months earlier and only two weeks after the girl's disappearance. At the time, the magistrate denied a motion by *The Post* for access to the warrant materials, finding closure was necessary to protect the government's ongoing investigation. *Id.* *The Post* did not appeal that decision.

The district court engaged in a traditional access analysis and considered whether or not the defendant's right to a fair trial could be ensured by alternatives to continued sealing of the warrant. The trial judge found that voir dire would ensure that a fair jury was empanelled and ordered release of the warrant affidavit.[43] The Fourth Circuit affirmed, finding that "fair trials can coexist with media coverage…."[44] The Court endorsed the notion that properly conducted voir dire can guarantee that a criminal defendant receives a fair trial and held that the district court did not abuse its discretion in finding that method would be sufficient in this case.[45]

Since 1991, there have not been any federal appellate court decisions involving a news media request for access to a search warrant. Although not addressed in any opinion, it seems generally accepted that prior to execution, no public right of access applies to search warrants. After the target of the warrant is indicted or charged, a qualified right of access applies. After the warrant has been executed but before anyone has been indicted, however, the situation remains unclear. In the Eighth Circuit, there is a constitutional right of access to search warrant documents pre-indictment. In the Fourth Circuit, there is a common law right of access that can be overcome if the trial judge, in his discretion, determines that the constitutional test has been met. In the Ninth Circuit, there is no right of access to pre-indictment search warrant materials. Regardless of the test applied, however, because of ongoing criminal investigations and the privacy rights of individuals who are considered innocent when they have not been charged, no federal court of appeals has ordered a pre-indictment warrant to be unsealed.

III. Federal District Courts

Once the circuit split became entrenched, numerous trials courts in other circuits found themselves faced with local media seeking access to search warrants. The vast majority of district courts rejected any constitutionally-based right of access.[46] Most also rejected the Ninth Circuit's conclusion that no right of access exists at all, choosing instead to follow the middle path and recognize a common law right of access to search warrant materials.[47] Recognition of the right, however, has not opened search warrant files for regular examination in high profile criminal matters. Courts seem extremely reluctant at the pre-indictment stage to second-guess the government when it claims that an

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43 *Id.* at 326.

44 *Id.* at 329.

45 *Id.* at 327-30.

46 See, e.g., *In re Search Warrants in Connection with Investigation of Columbia/HCA Healthcare Corp.*, 971 F. Supp. 251, 252 (W.D. Texas 1997); *In the Matter of Search Warrants Issued June 13, 1988*, 1989 U.S. Dist. Lexis 5240, *3-4 (D.D.C. 1989); *In the Matter of the Search of 1993 Jeep Grand Cherokee*, 1996 U.S. Dist. Lexis 19821, *9-29 (D. Del. 1996); *In the Matter of Search of Office Suites for World and Islam Studies Enterprise,* 925 F. Supp. 738, 740-42 (M.D. Fla. 1996); *In re Four Search Warrants*, 945 F. Supp. 1563, 1567 (N.D. Ga. 1996); *In re the Macon Telegraph Pub. Co.*, 900 F. Supp. 489, 491-92 (M.D. Ga. 1995); *In re Search Warrant*, 1994 U.S. Dist. Lexis 18360, *6-20 (S.D. Ohio 1994).

47 See, e.g., *In the Matter of the Search of 1993 Jeep Grand Cherokee*, 1996 U.S. Dist. Lexis at *29-50; *In the Matter of Search of Office Suites for World and Islam Studies Enterprise,* 925 F. Supp. at 742; *In re Four Search Warrants*, 945 F. Supp. at 1567-69; *In re the Macon Telegraph Pub. Co.*, 900 F. Supp. at 490-91; *In re Search Warrant*, 1994 U.S. Dist. Lexis at *20-32. But see *In re Search Warrants in Connection with Investigation of Columbia/HCA Healthcare Corp.*, 971 F. Supp. at 253 (finding no common law right of access to search warrant materials prior to an indictment).

ongoing investigation will be jeopardized by release of the warrant.[48] On the other hand, when the government consents to disclosure even though no charges have been brought, courts also are sometimes protective of the privacy and reputation interests raised by targets of the warrants, who are considered innocent until proven guilty.[49] Whether or not the privacy interest asserted by those mentioned in the warrant ultimately serves to preclude disclosure seems very case specific, with different courts taking different approaches.[50] Either way, it seems that only in unique circumstances have media efforts to access warrant information in high profile cases been successful at the pre-indictment stage.

For example, Atlanta media successfully obtained access to the search warrant affidavits for Richard Jewell's home that the FBI executed shortly after the bombing at Centennial Olympic Park during the 1996 Olympics. By the time the matter came before the district court, the property seized from Jewell had been returned to him and the government had publicly stated that it was pursuing other suspects. Jewell did not assert any privacy interest, which in any event would have been a difficult argument to make in light of the pervasive publicity. The government nonetheless objected to disclosure of the affidavits, stating that its investigation into the bombing is ongoing and, more generally, that disclosure of search warrant information would be a "dangerous precedent that would jeopardize future investigations."[51] The court was not convinced. Relying on the common law right of access to judicial documents, the district court ordered the warrant affidavits to be disclosed.[52] It found that the criminal investigation into Jewell's alleged participation in the bombing had ended and that the information in the affidavits already had been the subject of widespread news reports, seemingly as a result of government leaks. Therefore, the district court concluded, the common law right of access had not been overcome and the affidavits should be released.[53]

Similarly, the United States District Court for the District of Delaware also released the search warrant materials in a high-profile, 1996 case. In June 1996, the scheduling secretary for the Governor of the State of Delaware disappeared and a multi-agency kidnapping investigation was launched. The Court authorized a number of search warrants directed to Thomas J. Capano. Initially, the warrants were sealed and the court refused to grant access to the newspaper because the government asserted the

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48 See, e.g., *In the Matter of Search of Office Suites for World and Islam Studies Enterprise,* 925 F. Supp. at 742-44; *In the Matter of the Search of 1993 Jeep Grand Cherokee*, 1996 U.S. Dist. Lexis at *53-57; *In re the Macon Telegraph Pub. Co.*, 900 F. Supp. at 492-93; *In the Matter of Search Warrants Issued on June 11, 1988*, 710 F. Supp. 701, 704 (D. Minn. 1989).

49 See, e.g., *In the Matter of the Search of 1993 Jeep Grand Cherokee*, 1996 U.S. Dist. Lexis at *58-60; *In re the Macon Telegraph Pub. Co.*, 900 F. Supp. at 492-93; *In re Search Warrant*, 1994 U.S. Dist. Lexis at *22-28 ; *In re Search Warrants Issued June 13, 1988*, 1989 U.S. Dist. Lexis at *5-9; *In the Matter of Search Warrants Issued on June 11, 1988*, 710 F. Supp. at 704.

50 Compare cases cited in previous footnote to *In the Matter of the Search of the Premises Known As: L.S. Starrett Company*, 2002 U.S. Dist. Lexis 20101, *20 (M.D.N.C. 2002) ("this Court rejects those holdings which would suggest that in making a decision to seal search warrant documents, a court may rely on an independent, general right of privacy for potential targets or innocent third parties named in the documents."); *In the Matter of the Search of 1993 Jeep Grand Cherokee*, 958 F. Supp. at 208, 210-11 (target's name and many details already known due to pervasive publicity and other information not of intimate personal nature).

51 *In re Four Search Warrants*, 945 F. Supp. at 1568.

52 The government redacted information which may have tended to make the investigation into the identity of the bomber more difficult, such as the government's investigative methods and details concerning the explosive device, and the newspapers did not object to these redactions. *Id.* at 1570.

53 *Id.* at 1565. In addition to the investigatory information, the court also redacted the names of any witnesses that had not already been made public. *Id.* at 1570.

ongoing investigation would be jeopardized and because the government asserted that the privacy rights of the target would be implicated.[54] Two months later, however, the government sought to unseal the affidavits, asserting that disclosure would not longer impede the ongoing investigation. Capano then moved to intervene for the first time, asserting his own privacy interests.[55] The second time, with the government advocating for disclosure, the Court held that Capano had no legitimate expectation of privacy in the information from third parties that is included in the affidavit and that the information is not of "such an intimate nature" to overcome the media's right of access.[56]

Although pre-indictment access to search warrants is the exception, access to search warrants becomes closer to the rule once the target of the warrant has been charged. In those situations, courts more often then not have found the right of access to be stronger than the interests asserted by those opposing access.[57] In the reported cases, the government generally has not objected to disclosure once charges have been filed, as there is no longer a threat to the ongoing investigation, and, in any event, the defendant is entitled to see the warrants. Indicted defendants' privacy interests rarely have been found to be sufficient to overcome the public's right of access, with the exception tending to involve warrants based on Title III wiretap material that has not yet been deemed admissible by the trial court.[58] And, only in extraordinary circumstances has the defendant's Sixth Amendment right to a fair trial been found to overcome the right of access to search warrant materials.[59] In most cases, voir dire was deemed to be sufficient to protect the defendant's rights.[60]

IV. State Courts

State courts generally follow the same pattern as federal district courts, although some of the issues are more complicated due to different procedures for handling warrants than those provided in the Federal Rules of Criminal Procedure.[61] The vast majority have rejected a constitutional right of access to search warrants.[62] Most have found search warrants and supporting documents to be judicial records

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54 See *In the Matter of the Search of 1993 Jeep Grand Cherokee*, 1996 U.S. Dist. Lexis at *53-61.

55 See *In the Matter of the Search of 1993 Jeep Grand Cherokee*, 958 F. Supp. at 207-09.

56 *Id.* at 210-11.

57 See, e.g., *United States v. Thomas*, 1997 U.S. Dist. Lexis 7161 (E.D. Pa. 1997); *In re Search Warrants Issued on May 21, 1987*, 1990 U.S. Dist. Lexis 9329 (D.D.C. 1990)

58 See, e.g., *United States v. Inzunza*, 303 F. Supp. 2d 1041 (S.D. Cal. 2004); United *States v. Shenberg*, 791 F. Supp. 292 (S.D. Fla. 1991).

59 See, e.g., *United States v. Cianci*, 175 F. Supp. 2d 194 (D.R.I. 2001).

60 See, e.g., *In the Matter of the Application of The Buffalo News*, 969 F. Supp. 869, 871 (W.D.N.Y. 1997) (search warrant for home of Oklahoma City bomber Timothy McVeigh's father and sister); *In re Search Warrants Issued on May 21, 1987*, 1990 U.S. Dist. Lexis 9329.

61 In Vermont, for example, the State Rules of Criminal Procedure expressly require that the warrant, return, and inventory be filed with the court of issuance, but the Rule is silent on whether the affidavit and other papers supporting the warrant also must be filed. *See* V. R. Cr. P. 41(d); *In re Sealed Documents*, 172 Vt. 152, 159 (2001).

62 See *Westerfield v. Superior Court of San Diego County*, 98 Cal. App. 4th 145, 150 (2002); *In the Matter of 2 Sealed Search Warrants*, 710 A.2d 202, 210 (Del. Super. 1997); *Newspapers of New England, Inc. v. Clerk-Magistrate*, 403 Mass. 628, 637-38 (1988), cert. denied 490 U.S. 1066 (1989); *Newsday v. Morganthau*, 4 A.D.3d 162, 163 (1st Dept. 2003), appeal dismissed, 3 N.Y.3d 651 (2004); *In re Sealed Documents*, 172 Vt. at 155; *The Seattle Times Company*, 105 Wn.2d at 144.

subject to a common law right of access.[63] One state – Vermont – has determined that there is a statutory right of access to the materials.[64] Apart from the origin of the qualified right, the test for overcoming the right identified by various state courts is essentially the same, with only slight variations: the party seeking to seal the documents must demonstrate a substantial or compelling interest that cannot be addressed in a less restrictive way.[65]

Pre-indictment, two compelling interests generally are cited by parties seeking to seal search warrant materials. The first – that the release of the information contained in the warrant will harm an ongoing criminal investigation – generally succeeds.[66] The second commonly asserted interest is the privacy rights of the targets or others who have not been charged with any crime but who may be mentioned in the warrant documents. Like with federal courts, state courts are less consistent in their approach to these types of claims, but some have found them sufficient to support sealing all or part of a search warrant.[67]

Once criminal charges have been filed, state courts also generally recognize a qualified right of access for the public.[68] As in federal cases, the most common claim to defeat access in these circumstances is assertion by the defendant that his right to a fair trial will be jeopardized.[69] There are too few reported state cases involving media efforts to obtain access to search warrant materials in pending criminal trials to identify any specific patterns, most likely because the warrant materials rarely remain sealed once the criminal proceedings are underway.

V. Procedure

The process for seeking access to search warrant information varies depending on the jurisdiction and the status of the case. Efforts by the media to gain access to search warrants rarely have been snagged due to procedural defects, and therefore reported cases are for the most part bereft of a detailed discussion of procedure. In general, the media appears to have sought access either by motion to intervene in a pending criminal matter – the case against the defendant, if charges already have been filed, or the search warrant proceeding which exists because the prosecution has filed a motion to seal the papers, if charges have not been filed – or by filing a more generic motion for access to the warrant

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63 See *Westerfield*, 98 Cal. App. 4th at 151; *In the Matter of 2 Sealed Search Warrants*, 710 A.2d at 210; *Newspapers of New England, Inc.*, 403 Mass. at 631; *The Republican Company v. Appeals Court*, 442 Mass. 218, 222 (2004); *Petition of State of New Hampshire (Bowman Search Warrants)*, 146 N.H. 621, 625-26 (2001); *Newsday*, 4 A.D.3d at 163; *PG Publishing Co. v. District Attorney of Erie County*, 532 Pa. 1, 5-6 (1992); *The Seattle Times Company*, 105 Wn.2d at 147. See also *In re Sealed Documents*, 172 Vt. at 159 (citing authorities).

64 *See In re Sealed Documents*, 172 Vt. at 159.

65 *Id.* at 161.

66 See, e.g., *In the Matter of 2 Sealed Search Warrants*, 710 A.2d at 211-13; *The Republican Company*, 442 Mass. at 221; *Petition of State of New Hampshire (Bowman Search Warrants)*, 146 N.H. at 629; *Newsday*, 4 A.D.3d at 162; *PG Publishing Co.*, 532 Pa. at 8.

67 See *In the Matter of 2 Sealed Search Warrants*, 710 A.2d at 211-12; *The Republican Company*, 442 Mass. at 226; *In re Sealed Documents*, 172 Vt. at 159.

68 Some state courts have recognized a constitutional right of access to search warrants once a defendant has been charged. See *Connecticut v. Clein*, 1996 Conn. Super Lexis 1292 (1996) (newspaper has qualified first amendment right of access to search warrant in criminal case); *The Seattle Times Company*, 105 Wn.2d at 156 (suggesting state constitution provides right of access to search warrant affidavit when charges relating to the investigation involving the affidavit are filed).

69 See, e.g., *Westerfield*, 98 Cal. App. 4th at 152-53.

documents pursuant to Federal Rule of Criminal Procedure 41.[70] Occasionally, the media have chosen other approaches in federal cases, such as to proceed by order to show cause.[71] In addition, some court decisions have indicated that a motion seeking access to a search warrant that is not attached to a pending criminal case can be treated as a new miscellaneous (civil) matter.[72] None of these approaches has been rejected by the courts.

In addition, the approach taken by the media in individual cases does not seem to have a significant impact on the ability to appeal a denial of access. Rather, the status of the proceedings below is the determinative factor in the proper appellate procedure. In cases where no underlying criminal case is pending other than the search warrant file itself, federal courts of appeals have considered an order denying immediate access to be a final appealable order under 28 U.S.C. § 1291 without resorting to the collateral order doctrine.[73] A petition for writ of mandamus ordering the magistrate to release the material also has been accepted by a federal appeals court.[74] On the other hand, if criminal charges are pending and the original effort to access the search warrant information was through intervention in the criminal case, then at least one court has suggested that a petition for writ of mandamus would be the only procedurally proper approach to seeking appellate review before the underlying case is concluded.[75]

State courts have their own processes and procedures and a variety of different approaches have been taken. A motion to intervene in a search warrant or criminal proceeding is common.[76] Other approaches have included a simple request or motion to unseal or release the search warrant documents, which may rest on a state statute.[77] The procedure for appeal from a decision denying access will depend on state procedural rules.[78]

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70 See, e.g., *United States v. Inzunza*, 303 F. Supp. at 1043 (motion to intervene in pending criminal case); *In the Matter of the Saerch of the Premises Known as: L.S. Starrett Company*, 2002 U.S. Dist. Lexis at *4 (motion to intervene in matter pending to address motions to seal search warrants); *United States v. Cianci*, 175 F. Supp. at 198-99 (motion for access to warrant affidavit in pending criminal case considered by court although newspaper was neither party nor intervenor because no party challenged its standing); *In the Matter of the Search of the 1993 Jeep Grand Cherokee*, 958 F. Supp at 206 n. 1 (motion to intervene in search warrant proceeding); *In re Search Warrants In Connection with Investigation of Columbia/HCA Healthcare Corp.*, 971 F. Supp. at 252 (motion to unseal search warrant affidavits); *In re: Four Search Warrants*, 945 F. Supp. at 1565 (motion to intervene in search warrant proceeding to move for access).

71 See, e.g., *In the Matter of the Application of the Buffalo News*, 969 F. Supp. at 870.

72 See *The Times Mirror Company*, 873 F.2d at 1212; *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d at 572.

73 See *John Does I-V*, 895 F.2d at 462; *The Times Mirror Company*, 873 F.2d at 1212; *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d at 572.

74 See T*he Baltimore Sun Company*, 886 F.2d at 62.

75 See *The Times Mirror Company*, 873 F.2d at 1212, n.2.

76 See, e.g., *Westerfield*, 98 Cal. App. 4th at 148 (intervention in pending criminal proceeding); *In the Matter of 2 Sealed Search Warrants*, 710 A.2d at 204 (intervention in search warrant proceeding); *In the Matter of the Search of Office Suites for World and Islam Studies Enterprise*, 925 F. Supp. at 739 (intervention in pending search warrant); *PG Publishing Company*, 532 Pa. at 3-4 (intervention in search warrant proceeding).

77 See, e.g., *State of Connecticut v. Clein*, 1996 Conn. Super. at *1; Petition *of State of New Hampshire (Bowman Search Warrants)*, 146 N.H. at 622; *The Seattle Times Company*, 105 Wn. at 146.

78 See, e.g., *The Seattle Times Company*, 105 Wn. at 146 (petition for writ of mandamus).

In states with complicated or unique procedures or structures, such as New York, or in local jurisdictions where the search warrant documents are not filed with the court clerk, the appropriate procedures for seeking access to search warrants may be far from clear. For example, in a recent case the New York Court of Appeals rejected intervention in the warrant proceeding as a viable method for seeking access. In that case, the warrant turned out to be a mistake and an innocent citizen died after police burst into her home to execute the "no-knock" search warrant. How the police obtained a valid search warrant for the home of an innocent City employee was obviously of great public interest and the media filed a motion in the issuing court to unseal the affidavit on which the warrant was based.[79] The motion was denied. The intermediate appellate court upheld the denial of access as necessary to protect the identity of the confidential informant and an ongoing investigation.[80] The newspaper appealed, but the Court of Appeals dismissed the appeal. New York's highest court stated that the criminal procedure law does not provide an avenue for review of an order denying access until the criminal case has concluded. Instead, it suggested that because the warrant documentation is maintained by the Manhattan District Attorney's office, the newspaper should have made a request for the documents under the state Freedom of Information Law or initiated a civil suit, presumably against the District Attorney or the court clerk, rather than filing a petition in the court that issued the warrant.[81]

VI. Conclusion

The law regarding access to search warrants in the crucial period between execution of the warrant and indictment of the target remains unsettled. Most federal and state courts acknowledge that at least a qualified common law right of access applies to the documents, but the right is limited by the judiciary's reluctance to overrule law enforcement authorities when they assert that release of the warrant materials will jeopardize an ongoing investigation. The media's successes during that stage of the criminal process have tended to come only when it is evident that the government's investigation has run its course, sometimes on the second or third motion for access. The situation is far better once charges have been brought against the target of the warrant. The search warrant becomes part of the court file available to the defendant, the public's right of access is more entrenched, and the arguments on the other side tend to be those the press is used to fielding from criminal defendants seeking to minimize access in all aspects of a high profile prosecution. In either situation, the facts and circumstances of the individual investigation and prosecution associated with the search warrants will determine the whether and when the public will gain access to those documents.

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79 See Karen Freifeld, "Media Denied Spruill Info," *Newsday*, June 11, 2003; Karen Freifeld, "DA Opposes Access to Warrant; Urges denial in Spruill case," *Newsday,* June 67 2003.

80 *Newsday, Inc.*, 4 A.D.3d at 162-63.

81 See *Newsday, Inc. v. Morganthau,* 3 N.Y.3d 651 (2004). Significantly, the newspaper's appeal had begun as a civil suit, pursuant to Article 78 of the New York CPLR, against the trial court judge who had refused to grant access to the warrant affidavit. The Appellate Division rejected the application for an order pursuant to Article 78 and converted the matter into an appeal, after which it ruled on the merits of the petition. *Newsday, Inc. v. Soloff*, 2003 N.Y. App. Div. Lexis 11333 (1st Dept. 2003). It was the newspaper's appeal from the decision on the merits that was dismissed as procedurally improper.

GAG ORDERS:
SPEAKING FREELY AND HIGH PROFILE CASES

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GAG ORDERS: SPEAKING FREELY AND HIGH PROFILE CASES

Fifty years after the murder of Marilyn Sheppard and the resulting Supreme Court decision *Sheppard v. Maxwell*,[2] courts continue to struggle with balancing the right of defendants to a fair trial against the right of lawyers and other trial participants to speak freely—and the press and the public to receive information—about the workings of the criminal justice system. Recent cases involving celebrity defendants or notorious crimes have generated publicity so intense and widespread that courts have increasingly turned to that "most serious and least tolerable infringement on First Amendment rights"[3]—the prior restraint, in the form of gag orders prohibiting attorneys and other trial participants from publicly discussing at least certain aspects of cases in which they are involved. It is not always clear whether these gag orders are intended primarily to safeguard Sixth Amendment rights or to protect some more generalized notion of the "integrity" of the judicial proceedings—particularly where the defendant himself has resisted the issuance of the order. But whatever the motivating concerns, it is clear that trial judges are now routinely entering gag orders in any case that has attracted public attention on a national scale. Thus, as national coverage of criminal proceedings expands via outlets such as Court TV and the Internet, the media can expect to encounter more and more sources who are prohibited from speaking. And media attorneys will have to work harder to make sure trial courts actually comply with First Amendment standards requiring on-the-record findings about the effects of trial publicity and the expected efficacy of any gag order.

Setting the Stage: From Sheppard *to* Simpson *to the Age of Court TV*

In 1954, Marilyn Sheppard was bludgeoned to death in the bedroom of her suburban Ohio home. Her husband, local doctor Samuel Sheppard, was tried for the murder amidst extensive and highly sensational media speculation as to his guilt. Despite the jury's exposure to information that would not be allowed at trial—for instance, a female inmate's allegation that Dr. Sheppard was the father of her illegitimate child—the court denied Sheppard's motions for change of venue, continuance, and mistrial. Sheppard was convicted and spent ten years in prison before the United States Supreme Court granted his petition for writ of *habeas corpus* on the grounds that the publicity surrounding his trial had deprived Sheppard of his right to a fair trial.

Forty years later, Nicole Brown Simpson and Ron Goldman were murdered in Simpson's home in Brentwood, California. Simpson's ex-husband, football celebrity O.J. Simpson, was tried for the murders in what was perhaps the most highly publicized trial in American history. National television networks broadcast unprecedented "gavel-to-gavel" coverage of the 133-day trial. Despite the publicity frenzy, Judge Lance Ito did not prohibit Simpson trial participants from discussing the case with the media.

Ironically, Judge Lance Ito's decision not to issue a gag order in the Simpson case may have set the stage for gag orders in following years, including those in the recent trials of Scott Peterson, Michael Jackson, and Kobe Bryant. Despite the lack of any evidence that the Simpson media coverage had prejudiced Simpson's right to a fair trial—the jury acquitted Simpson after less than four hours' deliberation—the sheer spectacle of the trial (and the public's voracious appetite for it) appears to have made judges uneasy. Indeed, in the ensuing civil trial against Simpson, Judge Hiroshi Fujisaki cited the

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2 384 US 333 (1966).

3 *Nebraska Press Association v. Stuart*, 427 U.S. 539, 558 (1976).

"experience of the criminal trial" in his order gagging the trial participants and banning cameras from the courtroom.[4]

The Supreme Court has observed that the tension between guaranteeing the freedom of the press and the right to an impartial jury is "almost as old as the Republic."[5] Impaneling a jury to try Aaron Burr for treason in 1807 was difficult because "[f]ew people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public."[6] Even before the advent of cable television and the Internet, the Court noted that the "speed of communication and the pervasiveness of the modern news media" had exacerbated the free press-free trial conundrum.[7] With a national television network built around covering "America's most newsworthy and controversial legal proceedings"[8] and online "blogs" devoted to high profile trials,[9] the geographic scope and speed of dissemination of trial news has exploded beyond even what was available at the time of the O.J. Simpson murder trial. Given this proliferation of media trial coverage, courts have begun to issue gag orders as a matter of course whenever a notorious crime or celebrity defendant stirs the passions of the public on a national scale, and the careful constitutional bulwark built to guide decisions on such matters is under increasing strain.

This article provides a brief summary of the development of standards applicable to gag orders imposed on trial participants, a survey of several recent high-profile cases in which gag orders issued, and some practical suggestions for media attorneys seeking to oppose such gag orders.

The Development of Standards Applicable to Trial Participant Gag Orders

The Supreme Court's excoriation of the *Sheppard* trial court for its failure to protect Sheppard from the "virulent publicity" that had surrounded the trial laid the foundation for future restrictions on the speech of trial participants.[10] "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors," the Court said, "the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[11] As the Ninth Circuit later recognized, "the *Sheppard* court unequivocally imposed a duty upon trial courts to

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4 Order Banning Media Coverage and Gag Order, *Sharon Rufo, et al. vs. Orenthal James Simpson* (Superior Court of California, County of Los Angeles) (August 23, 1996) (Case No. SC 031947 consolidated with Case No. SC 036340 and Case No. SC 036876). Judge Fujisaki weighed the implicated free speech rights against the court's duty "to conduct the trial in a neutral and detached environment necessary to insulate rational argument and dispassionate decision-making from the passions that will inevitably arise from extra-judicial commentary on the part of those who are hereby constrained."

5 *Nebraska Press*, 427 U.S. 539 at 547.

6 *Id.* at 548.

7 *Id.*

8 *About CourtTV*, CourtTV.com, available at http://www.courttv.com/about/.

9 *See, e.g.*, Gail Diane Cox, *Blogs Dot the Litigation Landscape*, NATIONAL LAW JOURNAL, July 29, 2004. Examples of celebrity trial blogs include www.mjjsource.com (Michael Jackson) and www.marthatalks.com (Martha Stewart).

10 *Sheppard*, 384 U.S. at 354.

11 *Id*. at 362-63.

take affirmative steps to insure the fairness of a criminal proceeding in the face of excessive publicity," including in the form of gag orders on trial participants.[12]

When a Nebraska court attempted to neutralize potentially prejudicial publicity by forbidding the press to publish certain information regarding a small-town, multiple-murder trial, however, the Supreme Court rejected the effort as an impermissible prior restraint on speech.[13] To evaluate whether the prior restraint at issue in *Nebraska Press* was justified, the Court considered the evidence that had been before the trial judge to determine "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[14] The Court found that the trial court was justified in determining that the publicity surrounding the case would be "intense and pervasive," but that it had failed to make express findings that no measure short of restraining the media would have preserved the defendant's right to a fair trial.[15] Alternative measures such as change of venue, trial postponement, searching questioning of prospective jurors, jury sequestration, emphatic jury instructions, or, most notably, orders limiting what trial participants could say might have negated any prejudicial pretrial publicity.[16] Moreover, the Court observed that "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial."[17] Finally, the Court noted that in light of the practical difficulties involved in actually enforcing pretrial restraining orders, it was not clear that the trial court's order would have stopped publicity or protected the defendant's rights.[18]

Although the reasoning in *Nebraska Press* should also apply to prior restraints imposed on trial participants, in the wake of that decision, trial courts began relying more heavily on such orders, either in reliance on the Court's inclusion of trial participant gag orders in its list of potentially acceptable alternative measures to restraints on the press itself, in the sincere (though mistaken) belief that such orders are less harmful to First Amendment interests than prior restraints on the press, or in an effort to evade complying with the stringent *Nebraska Press* test.

In 1991, the Supreme Court rejected the argument that the *Nebraska Press* standard was applicable to the speech of attorneys in criminal trials.[19] Although the controversy in *Gentile v. State*

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12 *Levine v. U.S. District Court for the Central District of California*, 764 F.2d 590, 596 (9th Cir. 1985). The *Levine* court ultimately found the gag order at issue to be unconstitutionally overbroad.

13 *Nebraska Press Association v. Stuart*, 427 U.S. 539, 558 (1976).

14 *Id.* at 562.

15 *Id*. at 562-63.

16 *Id*. at 563-64 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 361-62 (1966)).

17 *Id*. at 565.

18 *Id*. at 565-67.

19 *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

Bar of Nevada arose from a state disciplinary rule rather than a gag order,[20] the Court explicitly considered whether attorney speech might be regulated differently than the speech of the public at large. Defense attorney Dominic Gentile's client, the owner of a private security vault company, was accused of stealing money and cocaine from a safe deposit vault that had been used by undercover police officers. Gentile maintained that the police detectives themselves were the most likely suspects and that his client was being used as a scapegoat. Concerned about adverse pretrial publicity generated in large part by law enforcement personnel, Gentile held a press conference hours after his client was indicted and six months before the trial began. Despite Gentile's attempts to comply with a local disciplinary rule governing pretrial publicity, the Southern Nevada Disciplinary Board of the State Bar found that he

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[20] Many states have adopted some version of the American Bar Association's Model Rule 3.6, governing extra-judicial statements by attorneys. The ABA Model Rule specifies that:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
> (b) Notwithstanding paragraph (a), a lawyer may state:
>
> > (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
> > (2) information contained in a public record;
> > (3) that an investigation of a matter is in progress;
> > (4) the scheduling or result of any step in litigation;
> > (5) a request for assistance in obtaining evidence and information necessary thereto;
> > (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
> > (7) in a criminal case, in addition to subparagraphs (1) through (6):
> >
> > > (i) the identity, residence, occupation and family status of the accused;
> > > (ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;
> > > (iii) the fact, time and place of arrest; and
> > > (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
>
> (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
> (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

States that have adopted this model rule or similar professional conduct rules include Arkansas, Ark. Disc. Rule Prof. Conduct 3.6; Arizona, Ariz. Ethical Rule 3.6; California, Cal. Rule Prof. Conduct 5-120; Colorado, Colo. Disc. Rule Prof. Conduct 3.6; Connecticut, Conn. Rule Prof. Conduct 3.6; Florida, Fla. Rule Prof. Conduct 4-3.6; Illinois, Ill. Rule Prof. Conduct 3.6; Louisiana, La. Rule Prof. Conduct 3.6; Maryland, Md. Lawyer's Rule Prof. Conduct 3.6; Michigan, Mich. Rule Prof. Conduct 3.6; New Jersey, N.J. Rule Prof. Conduct 3.6; New York, N.Y. Disc. Rule 7-107(A); Ohio, Ohio Disc. Rules 7-107 and 7-111, Ohio Ethical Consideration 7-33; Oregon, Or. Disc. Rule 7-107; Pennsylvania, Pa. Disc. Rules Prof. Conduct 3.6; Rhode Island, R.I. Disc. Rule Prof. Conduct 3.6; South Carolina, S.C. Rule Prof. Conduct 3.6; Texas, Tex. Disc. Rule Prof. Conduct 3.07; and Washington, D.C., DC Rule Prof. Conduct 3.6.

Some of the courts issuing gag orders in recent high-profile cases have stated that the existence of relevant rules of professional conduct have not been sufficient to prevent the dissemination of potentially prejudicial information by trial participants. *See, e.g.*, Amended Protective Order/Decision, *People of the State of California v. Scott Lee Peterson* at 4 (California Superior Court, County of Stanislaus, July 12, 2003) (No. 1056770).

had violated the rule by holding the press conference. After the Nevada Supreme Court affirmed the Board's decision, the Supreme Court reversed, citing concerns about vagueness and selective enforcement of the rule.[21]

Although the Supreme Court held that the rule was void for vagueness as applied to Gentile, a 5-4 majority also held that restrictions on the speech of attorneys representing clients in pending cases is subject to a less demanding First Amendment standard than that of *Nebraska Press* because such attorneys are "key participants in the criminal justice system."[22] The Court noted that "[b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative."[23] It is not necessary, therefore, for the state to show that "further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court,"[24] in order to curb attorney speech. Rather, the "substantial likelihood of material prejudice" standard is a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."[25]

Because the attorney speech in *Gentile* had already occurred by the time the attorney was disciplined, however, there was no prior restraint at issue in the case. Commentators have argued that the lesser "substantial likelihood of material prejudice" standard is therefore inapplicable to gag orders and other prior restraints on speech.[26] Moreover, because this standard was confined to attorneys based on their "special access to information" and appearance of authority, *Gentile* would appear to have left the *Nebraska Press* strict scrutiny rule in place insofar as it applies to gag orders imposed on other trial participants.

Language in the *Gentile* decision itself also demonstrates that the Court did not intend the "substantial likelihood" standard to serve as a mere rubber stamp in any case involving extensive press coverage. In fact, the Court observed that "the drafters of Model Rule 3.6 apparently thought the substantial likelihood of material prejudice formulation approximated the [*Nebraska Press*] clear and present danger test,"[27] and made a special point of emphasizing that pervasive publicity does not automatically result in material prejudice.[28]

Prior to *Gentile*, circuit courts were split as to the proper standard for evaluating a gag order on trial participants. The most rigorous tests were the clear and present danger test applied by the Sixth

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21 *Gentile*, 501 U.S. at 1033-34.

22 *Id.* at 1074.

23 *Id*.

24 *Nebraska Press*, 427 U.S. at 569.

25 *Gentile*, 501 U.S. at 1075.

26 *See, e.g.*, Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311 (1997).

27 *See Gentile*, 501 U.S. at 1037 (citing, *inter alia*, ABA Annotated Model Rules of Professional Conduct 243 (1984) ("formulation in Model Rule 3.6 incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality."

28 *Id.* at 1054.

Circuit in *U.S. v. Ford*[29] and the serious and imminent threat test applied by the Sixth Circuit in *CBS v. Young*,[30] the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*,[31] and the Ninth Circuit in *Levine v. U.S. District Court*.[32] In contrast, the Second, Fourth, and Tenth Circuits applied a much less stringent reasonable likelihood of prejudice test.[33]

The *Gentile* decision has not resulted in uniformity of the standards that lower courts apply to gag orders on trial participants. Although many courts have adopted the substantial likelihood of material prejudice test,[34] others have construed *Gentile* as merely establishing a minimum standard for trial participant gag orders and have continued to apply a higher standard.[35] Some courts have even reached the troubling conclusion that *Gentile* creates a ceiling for the standards that may be applied to trial participant gag orders and that less stringent tests are constitutionally permissible.[36] Courts also disagree as to whether the *Gentile* standard should be limited to attorney trial participants or extended to all trial participants.[37]

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29 830 F.2d 596 (6th Cir. 1987).

30 522 F.2d 234 (6th Cir. 1975).

31 522 F.2d 242 (7th Cir. 1975).

32 764 F.2d 590 (9th Cir. 1985).

33 *In re Dow Jones & Co., Inc*., 842 F.2d 603 (2d Cir. 1988); *In re Russell*, 726 F.2d 1007 (4th Cir. 1984); *U.S. v. Tijerina*, 412 F.2d 661 (10th Cir. 1969).

34 *E.g., U.S. v. Salameh*, 992 F.2d 445 (2d Cir. 1993) (vacating an attorney gag order that was not narrowly tailored and that had been issued without an exploration of less restrictive alternatives); *U.S. v. Scarfo*, 263 F.3d 80, 94 (3rd Cir. 2001) (invalidating gag order on defendant's former attorney); *U.S. v. McVeigh*, 964 F.Supp. 313 (D. Colo. 1997) (denying motion to set aside gag order); *U.S. v. Walker*, 890 F.Supp. 954 (D. Kansas 1995) (denying gag order requested by defendant); *U.S. v. Davis*, 904 F.Supp. 564 (E.D. La. 1995) (denying press' motion to vacate gag order); *U.S. v. Louisiana Clinic*, 2002 WL 32850 (E.D. La. 2002) (denying motion for gag order); *Liz Claiborne, Inc. v. Consumer Product Recover, LLC*, 2004 WL 1243166 (N.D. Tex. 2004) (denying motion for gag order); *Berndt v. Cal. Dept. of Corrections*, 2004 WL 1774227 (N.D. Cal. 2004) (denying motion for gag order and noting that after *Gentile*, the Ninth Circuit follows the substantial likelihood of material prejudice standard instead of the clear and present danger standard); *Atlanta Journal-Constitution v. State*, 266 Ga.App. 168 (Ct. App. 2004) (adopting *Gentile* standard for evaluating extrajudicial comments by trial participants and invalidating order supported only by reasonable likelihood of prejudice); *Pennsylvania v. Lambert*, 723 A.2d 684 (Pa. Super. Ct. 1998) (adopting *Gentile* standard for speech of attorneys in pending litigation); *Tennessee v. Carruthers*, 35 S.W.3d 516, 563 (Tenn. 2000) (adopting substantial likelihood of material prejudice test for gag orders on lawyers, parties, and witnesses).

35 *E.g., U.S. v. Carmichael*, 326 F.Supp.2d 1267, 1293 (M.D. Ala. 2004) ("[W]hile the Supreme Court in *Gentile* approved the use of the 'substantial likelihood' standard, it did not compel the use of that standard. Put another way, the Court held that the 'clear and present danger' standard is not required, but it did not hold that it is prohibited.").

36 *U.S. v. Brown*, 218 F.3d 415, 426-27 (5th Cir. 2000) ("In *Gentile*, the Supreme Court merely approved Nevada's 'substantial likelihood' standard when applied to gag orders imposed on attorneys, but did not mandate is as a constitutional minimum necessary to justify a judicially-imposed restriction on attorney speech. . . . We decline to adopt [a clear and present danger or imminent threat standard] because *Gentile* appears to have foreclosed the applicability of those tests to the regulation of speech by trial participants.").

37 *E.g., Brown*, 218 F.3d at 427-28 (declining to distinguish between attorney and non-attorney trial participants where "the mischief that might have been visited upon the [proceedings] would have been the same whether prejudicial comments had been uttered by the parties or their lawyers"); *Karhani v. Meijer*, 270 F.Supp.2d 926, 933 n.8 (E.D. Mich. 2003) (disagreeing with *Brown's* "extension of *Gentile* to prior restraints of mere trial participants"); *Carmichael*, 326 F.Supp.2d at 1294 (construing *Gentile* standard as applying only to attorneys and not to the parties themselves).

Standards applied by state courts to gag orders on trial participants are similarly varied, with decisions seldom mentioning *Gentile*. Although some courts have applied a more exacting standard than substantial likelihood of material prejudice,[38] others have required only a reasonable likelihood of prejudice to a fair trial.[39]

Whatever the standard applied, it appears that many courts are increasingly entering gag orders without first making a factual determination based on concrete evidence that a risk of prejudice actually exists.

Recent Gag Orders in High Profile Cases

Decisions to enter gag orders in the recent criminal cases of Kobe Bryant, Scott Peterson, and Michael Jackson reflect the disarray of this area of law. They also demonstrate an alarming trend in which courts readily accept the presumption that extensive pretrial publicity always threatens a defendant's right to a fair trial.

People of the State of Colorado v. Kobe Bean Bryant

Soon after basketball star Kobe Bryant was charged with sexual assault in 2003, information about his accuser, including her name and reports of a suicide attempt, began circulating online, over the radio, and in tabloids. County Court Judge Frederick Gannett promptly issued a gag order, *sua sponte*, "in response to the intense interest of the media in this matter and the amount of publicity which has

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[38] *E.g., Hurvitz v. Hoeflin*, 84 Cal. App. 4th 1232 (2000) ("Gag orders on trial participants are unconstitutional unless the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest."); *Breiner v. Takao*, 73 Haw. 499, 505 (Haw. 1992) ("[E]xtrajudicial statements of attorneys may be subject to prior restraint by a trial court upon a demonstration that the activity restrained poses a serious and imminent threat to a defendant's right to a fair trial and to the administration of justice."); *Care and Protection of Edith*, 421 Mass. 703, 706 (Mass. 1996) (vacating gag order on father of children in care and protection proceeding for lack of "findings of fact and rulings that demonstrate a compelling State interest that could only be met by the order entered in this case"); *Albuquerque Journal v. Jewell*, 130 N.M. 64, 67 (N.M. 2001) ("[A] court may not use a gag order to silence a willing speaker unless it makes detailed factual findings supporting the existence of a compelling state interest and concludes that less restrictive alternatives would not advance that interest."); *Sherrill v. Amerada Hess Corp*., 130 N.C.App. 714, 719 (Ct. App. 1998) (showing of "clear threat to the fairness of the trial" required to rebut presumption of unconstitutionality of gag orders on trial participants); *Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992) ("[A] gag order in civil judicial proceedings will withstand constitutional scrutiny only where there are specific findings supported by evidence that . . . an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute.").

[39] *See, e.g., South Bend Tribune v. Elkhart Circuit Court*, 691 N.E. 2d 200, 202 (Ind. App. 1998) (holding that gag order on trial participants is not a prior restraint on the press and applying reasonable likelihood of prejudice standard); *James v. Hines*, 63 S.W.3d 602, 607 (Ky. Ct. App. 1998) (citing *Gentile* but adopting reasonable likelihood of prejudice standard); *Washington v. Bassett*, 128 Wash.2d 612, 616 (Wash. 1996) (holding that gag order on trial participants requires "at least" a reasonable likelihood that pretrial publicity will prejudice a fair trial but vacating gag order as overbroad and for failure of court to make findings as to less restrictive alternatives).

resulted."[40] Citing *Sheppard* and *U.S. v. Davis*,[41] Judge Gannett expressed the court's concern "that the extensive participant and public comment will disrupt the processes by which a fair trial may be preserved." Judge Gannett conceded that "certain matters concerning extrajudicial statements and disclosures may require consideration of the specific facts, the opportunity for an evidentiary hearing and argument; consideration of less restrictive alternatives and consideration of the scope of the restrictions."[42] Accordingly, the gag order was preliminary in nature, "in order to advise and remind those interested in this matter of the applicable restrictions," and was subject to reconsideration upon proper motion and/or request for hearing.[43]

This initial gag order prohibited "[a] lawyer or law enforcement agency or officer who is participating or has participated in the investigation or litigation of this matter" from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer or law enforcement agency or officer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The order did provide, however, that "a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[44] The order recited the *Gentile*-sanctioned "substantial likelihood of material prejudice" standard and also took into account the possibility of countering the effect of existing prejudicial publicity, as Dominic Gentile had sought to do.

Although this safe harbor for counteracting prejudicial information leaked by the other side was not included in the gag order issued by the Eagle County District Court judge several months later,[45] instead of the "substantial likelihood of materially prejudicing an adjudicative proceeding" standard set forth in the July 24 Order, the later Order employed a stricter standard, prohibiting any extrajudicial statement "the lawyer or officer knows or reasonably should know is likely to create a grave danger of imminent and substantial harm to the fairness of the trial."[46] The Oct. 31 Order also listed certain

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40 Order re Pretrial Publicity, *People of the State of Colorado v. Kobe Bean Bryant* (County Court, Eagle County, CO July 24, 2003) (No. 03 CR 204) ("July 24 Order"). Several days later, the court, *sua sponte*, issued a Decorum Order prohibiting the media from, among other things, "broadcast[ing], publish[ing], or otherwise disseminat[ing] the image or name" of the alleged victim. Decorum Order, *People of the State of Colorado v. Kobe Bean Bryant*, (County Court, Eagle County, Colo., July 28, 2003) (No. 03 CR 204). Members of the media promptly objected that the order had been entered without notice to the press or an opportunity to be heard and requested clarification of the prohibition on publishing the alleged victim's name "as [the media members] presume[d] the Court did not intend to impose an unconstitutional prior restraint on the publication of truthful and lawfully obtained information in a matter of public concern." Motion to Clarify and/or Modify the Court's Sua Sponte Decorum Order at 2, *People of the State of Colorado v. Kobe Bean Bryant*, (County Court, Eagle County, Colo., July 30, 2003) (No. 03 CR 204). The court amended its order to specify that "[c]onsistent with Colorado law, the media and all other persons are *encouraged* not to broadcast, publish, or otherwise disseminate the image or name of [the alleged victim]." Amended Decorum Order, *People of the State of Colorado v. Kobe Bean Bryant*, (County Court, Eagle County, Colo., Oct. 7, 2003) (No. 03 CR 204) (emphasis added).

41 904 F.Supp. 564, 569 (E.D. La. 1995).

42 *Id*.

43 *Id*.

44 *Id.*

45 Order re Pretrial Publicity, *People of the State of Colorado v. Kobe Bean Bryant* (District Court, Eagle County, Colo. Oct. 31, 2003) (No. 03 CR 204) ("Oct. 31 Order").

46 *Id.* These categories of acceptable statements track Colorado's disciplinary rule on extra-judicial statements by attorneys. Colo. Disc. Rule Prof. Conduct 3.6.

categories of statements that were off-limits for extrajudicial statements by trial participants, including "the character, credibility, reputation or criminal record of the defendant or of a witness, or concerning the expected testimony of the defendant or of a witness," "any opinion as to the guilt or innocence of the defendant," and "information the lawyer or officer knows or reasonably should know is likely to be inadmissible in the trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial."[47] The Oct. 31 Order also enumerated categories of statements that were fair game for extrajudicial comment, including information in the public record, the scheduling or result of any step in the litigation, and requests for assistance in obtaining evidence.[48]

Sensitive information from the Bryant trial continued to be disseminated, however, including an apparently accidental e-mailing by court personnel to media outlets of court transcripts containing evidence that might have been barred under Colorado's rape-shield law. On August 4, 2004, the court issued a far more sweeping gag order upon Bryant's motion in which it abandoned even the substantial likelihood standard used in the preliminary gag order in the case.[49] This order included a finding that "as trial is set to commence in this matter in 23 days, . . . there is a high likelihood that extrajudicial statements by trial participants will disrupt the process by which a fair trial may be preserved and that immediate action is necessary to secure the same." Accordingly, the court ordered that "all trial participants and their attorneys are prohibited from making *any extrajudicial comments* that a reasonable person would expect to be disseminated by any means of public communication."[50]

Various media representatives, the alleged victim herself, the prosecution, and a lawyer acting as a television legal analyst lodged objections to the far-reaching August 4 Order. The media intervenors argued that in addition to the press' own right to receive information from speakers who would willingly speak to them, the press also has standing to assert the interests of the public, "who enjoy a constitutionally protected right to receive information about their government institutions, including the courts."[51] Citing *Gentile*, the media intervenors argued that the gag orders on trial participants "must be justified by detailed factual findings (made on the record) that the order is necessary to serve an important state interest, *is narrowly tailored to serve that interest*, and that no less restrictive alternative exists to adequately protect that interest."[52] The court's August 4 Order had failed to include the necessary findings and was unconstitutionally overbroad both as to the scope of topics and the universe of people subject to the order.[53] Rather than reducing the quantity of information reported about the trial, the media intervenors argued, "the gag order will result in the [press] being forced to rely on off-the-record comments, second-hand sources, and rank speculation."[54]

The alleged victim of the sexual assault objected that the August 4 Order was issued after damaging testimony by a defense expert witness had already been erroneously leaked to the public and

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47 *Id*.

48 *Id*.

49 Order re Extrajudicial Comments by Trial Participants, *People of the State of Colorado v. Kobe Bean Bryant* (District Court, Eagle County, Colo. Aug. 4, 2004) (No. 03 CR 204) ("August 4 Order").

50 *Id.* (emphasis added).

51 News Media's Opposition to the Court's Blanket Gag Order Entered August 4, 2004 at 2-3, *People of the State of Colorado v. Kobe Bean Bryant* (District Court, Eagle County, Colo., Aug. 5, 2004) (No. 03 CR 204).

52 *Id.* at 3.

53 *Id*. at 4-6.

54 *Id*. at 6.

that the order would ensure " … by silencing all participants – that this one-sided account of the events is preserved in its maximum prejudicial effect until the criminal trial begins."[55] She also accused the court of using the gag order to shield itself from criticism rather than to protect the defendant's right to a fair trial.[56] The prosecution joined in the alleged victim's response to the August 4 Order and also objected to the overbreadth of the Order as to topics of speech and categories of speakers.[57] The prosecution further contended that Bryant's defense team had violated the previously issued gag order and had continued to leak information, but that the court had "rebuffed" the prosecution's requests for sanctions or an investigation into the leaks.[58]

The fourth objection was lodged by David Lugert, an attorney who shared office space with an individual defined as a trial participant by the August 4 Order and who was therefore himself subject to the Order.[59] Lugert argued that he had not been provided with a copy of Bryant's motion for the sweeping gag order and had thereby been deprived of a meaningful way to respond to the motion, its content, or the resulting August 4 Order. Furthermore, the Order would prevent Lugert from serving as a legal analyst for a local television news station. The court excused Lugert from the Order four days later.

The court amended the August 4 Order two weeks later, noting the various objections raised but stating that "[e]xtrajudicial statements, which are substantially likely to directly or indirectly interfere with [the right to a fair trial by impartial jurors] may constitutionally be prohibited" and that "as a result of the content and inflammatory language of recent extrajudicial comments as well as the lack of any reasonable alternative, this Court is compelled to intervene and prevent the substantial prejudice to the fairness of the trial that will result should the current pattern of advocacy continue."[60] The court noted that the extent of publicity "negates any realistic possibility that *voir dire* or a change of venue would be an effective remedy." The court asserted that the order "is by no means intended to preclude all comment on this case or shield [the court] from criticism," but that:

> inflammatory comments intended merely to undermine and impugn the integrity of the Court and the judicial process pose a substantial threat to the ability of the Court to conduct a fair trial. Accordingly, this Order is intended to restrict the comments of the participants who are in a position to create the greatest potential for prejudice and also to ensure the participants remain cognizant of the absolute necessity to preserve a fair trial for both the Defendant and the People.

The court also noted that "the public will not be deprived of information or comment pertaining to this case, since proceedings to date have been followed by media reportage of actual events, commentary by

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55 Objection and Memorandum of Law of Victim to the Blatantly Unconstitutional, Unfair and Overbroad Gag Order Entered by This Court on August 4, 2004 Without Due Process of Law at 2, *People of the State of Colorado v. Kobe Bean Bryant* (District Court, Eagle County, Colo., Aug. 5, 2004) (No. 03 CR 204).

56 *Id*.

57 Motion to Reconsider, *People of the State of Colorado v. Kobe Bean Bryant* (District Court, Eagle County, Colo., Aug. 5, 2004) (No. 03 CR 204).

58 Id. at 2 ("It is noteworthy that when the defense complains of statements that do not violate the Court's decorum order, this Court enters an obviously unconstitutional order within a day of the request.")

59 Objection to Order (of 08-04-04) re Extrajudicial Comments by Trial Participants at 2, *People of the State of Colorado v. Kobe Bean Bryant* (District Court, Eagle County, Colo., Aug. 5, 2004) (No. 03 CR 204).

60 Amended Order re Pretrial Publicity, *People of the State of Colorado v. Kobe Bean Bryant* (District Court, Eagle County, Colo. Aug. 17, 2004) (No. 03 CR 204) ("Aug. 17 Order").

knowledgeable members of the legal profession (who are not trial participants), and commentary from other interested persons, such as victim advocates." The resulting order prohibited trial participants from making extrajudicial statements that they know or reasonably should know "will have a substantial likelihood of (1) materially prejudicing an adjudicative proceeding in this matter; or (2) interfering with the fair trial of the pending charges; or (3) otherwise prejudicing the due administration of justice." The August 17 Order also reincorporated the same enumerated categories of forbidden topics (character, credibility, reputation, or criminal record of any party or witness, *etc.*) that were listed in the October 31 Order. Two weeks later, prosecutors dropped the charges against Bryant, rendering the gag order effectively moot.

People of the State of California v. Michael Joe Jackson

Meanwhile, in another celebrity criminal proceeding the king of pop, Michael Jackson, was charged with seven counts of child molestation and two counts of administering an intoxicating agent for the purpose of a committing a felony. Unlike the *Bryant* orders, the Jackson order referenced no particular standard for balancing the First Amendment rights of the trial participants against Jackson's right to a fair trial. In response to a motion by Santa Barbara District Attorney Tom Sneddon, the court ordered that:

> No attorney connected with this case as Prosecutor or Defense counsel, nor any other attorney working in or with the offices of either of them, nor their agents, staff, or experts, nor the defendant, Michael Jackson, nor any judicial officer or court employee, nor any law enforcement employee of any agency involved in this case, nor any persons subpoenaed or expected to testify in this matter, shall do any of the following:
>
> (1) Release or authorize the release for public dissemination of any purported extrajudicial statement of either the defendant or witnesses relating to this case;
>
> (2) Release or authorize the release of any documents, exhibits, photographs, or any evidence, the admissibility of which may have to be determined by the Court;
>
> (3) Make any statement for public dissemination as to the existence or possible existence of any document, exhibit, photograph or any other evidence, the admissibility of which may have to be determined by the Court;
>
> (4) Express outside of court an opinion or make any comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence;
>
> (5) Make any statement outside of court as to the content, nature, substance, or effect of any statements or testimony that have been given, or is expected to be given, in any proceeding in or relating to this matter;
>
> (6) Issue any statement as to the identity of any prospective witness, or the witness's probable testimony, or the effect thereof;

> (7) Make any out-of-court statement as to the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter."[61]

The order also enumerated categories of statements that are permissible under the order, including "quotations from, or any reference without comment to, public records" of the court.[62]

Media advocates sought relief from the gag order seeking a writ at the Court of Appeal and, after that request was denied, petitioning the California Supreme Court.[63] Jackson's lawyer Mark Geragos also protested the gag order until Jackson replaced him with new counsel, who, along with the District Attorney, supported the measure. Ultimately, the California Supreme Court refused, without comment, to take any action with respect to the gag order.[64]

In July, Jackson filed a request for clarification of the gag order, alleging that District Attorney Tom Sneddon had told fellow district attorneys attending a conference that he had "sent letters to some people saying [that the prosecution] intended to call them as witnesses in order to keep them off TV."[65] Jackson's request for clarification asked the court whether the statement attributed to Sneddon violated the order. When Sneddon's office denied that any such statement had been made or that the office had noticed witnesses in order to prevent their public comment, Jackson filed a second request for clarification, seeking a court ruling as to whether *that* statement violated the gag order.[66] After hearing arguments, however, the court determined that the statements at issue did not violate the gag order and left the order intact.[67]

People of the State of California v. Scott Lee Peterson

Although he was a fertilizer salesman rather than a celebrity athlete or performer, Scott Peterson became infamous when he came under suspicion for the murder of his pregnant wife, Laci Peterson. Like Dr. Sheppard fifty years before him, Scott Peterson quickly became the object of public fascination and intense media attention. The attention was not limited to Peterson's hometown in Modesto, California – or even to California. That the publicity in Peterson's case was national in scope was the first finding set forth in the gag order issued on June 12, 2003, by Judge Girolami:

> [T]he amount and nature of the pre-trial publicity has been massive. The local print media rarely does not have a daily front page article on this matter. Besides extensive

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61 Protective Order, *People of the State of California v. Michael Joe Jackson* (Cal. Superior Court, County of Santa Barbara, January 23, 2004) (No. 1133603).

62 *Id*. at 3.

63 Petition for Writ of Mandamus, *National Broadcasting Co., et al. v. Superior Court of Santa Barbara et al.*, (Cal. Ct. App., Div. 6, April 8, 2004) (No. B174352); Petition for Review, *National Broadcasting Co., et al., v. Superior Court of Santa Barbara* (Cal. Supreme Ct., April 23, 2004) (No. S124326).

64 Order Denying Petition for Review, *National Broadcasting Co., et al., v. Superior Court of Santa Barbara* (Cal. Supreme Ct., May 19, 2004) (No. S124326).

65 Mr. Jackson's Request for Clarification of the Court's Protective Order, *People of the State of California v. Michael Joe Jackson* (Cal. Superior Court, County of Santa Barbara, July 26, 2004) (No. 1133603).

66 Supplemental Request by Mr. Jackson for Clarification of the Court's Protective Order, *People of the State of California v. Michael Joe Jackson* (Cal. Superior Court, County of Santa Barbara, July 29, 2004) (No. 1133603).

67 Minute Order, *People of the State of California v. Michael Joe Jackson* (Cal. Superior Court, County of Santa Barbara, August 23, 2004) (No. 1133603).

> local television and radio coverage, the national television media has embraced this case with a passion providing frequent commentaries from notables like Larry King, Geraldo Rivera, and Katie Couric. In addition, there have been a number of national programs where professionals involved in the criminal justice system have opined their views on the evidence and possible trial strategy. Even Defense Counsel was a regular commentator prior to the Defendant's arrest and his being retained in the case. Also, Second Counsel gave a lengthy televised interview prior to the arrest. During the investigation, the Modesto Police Department made a number of press releases covering various aspects of the investigation. Not only the families of both the Defendant and the Decedent but even the Defendant, prior to his arrest, was involved in a lengthy nationally televised interview with Diane Sawyer.[68]

The court noted that "[t]he nature of the publicity is especially troubling as it often involves leaks of information that could be considered favorable for one side or the other," including information contained only in a sealed autopsy report.

The court chose to apply the "reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial" standard articulated in the California case *Younger v. Smith*.[69] Although it rejected the more stringent "clear and present danger" standard that had been applied in the civil context in the more recent case of *Hurvitz v. Hoefflin*,[70] the court explained that "in the unique facts of this case, there is a clear and present danger because of the modern media's capability easily to store and recall bits of information in order to relate them at any time including during jury selection. Further compounded in this case is the fact that the publicity is nationwide and cannot be automatically cured by a change of venue or extensive voir dire."[71]

Peterson himself opposed the gag order issued in his trial. Objecting on "practical grounds," Peterson, through his attorney Mark Geragos, contended that "even if the participants are gagged it will

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[68] Amended Protective Order/Decision, *People of the State of California v. Scott Lee Peterson* (California Superior Court, County of Stanislaus, July 12, 2003) (No. 1056770).

[69] 30 Cal. App. 3rd 138 (Cal. Ct. App. 1973). The *Younger* court adopted the "reasonable likelihood of publicity tending to prevent a fair trial" standard instead of the "clear and present danger to the administration of justice" standard after concluding that "the two tests are really one: a reasonable likelihood of an unfair trial is, in itself, a clear and present danger to the administration of justice." *Id*. at 161. The *Younger* court preferred the reasonable likelihood test for its "honesty": because a gag order involves speech that has not yet been uttered, to ask the court to determine the need for a gag order "by a finding that the situation presents a clear and present danger to the administration of justice is simply to require him to palm off guesswork as finding." *Id*. at 163-64. "A 'reasonable likelihood' test, on the other hand, permits the court to consider openly and frankly the many future variants which collectively may amount to a reasonably likelihood but, by their very contingent nature, can never amount to a clear and present danger." *Id*. at 164. While candid, this reasoning leads to the troubling – and likely unconstitutional – conclusion that gag orders warrant a lower standard of scrutiny precisely because they are prior restraints.

[70] 84 Cal. App. 4th 1232 (Cal. Ct. App. 2000). The *Hurvitz* court adopted the standard for evaluating a gag order that had been articulated by the Ninth Circuit in *Levine v. U.S. District Court for the Central District of California*, 764 F.2d 590, 595 (1985). *Hurvitz*, 84 Cal.App. 4th at 1241-1242.

[71] In October, the court further curtailed publicity by extending the gag order to Michael Cardoza, a former prosecutor who had performed as a legal analyst for several television networks in connection with the Peterson trial after Cardoza disclosed that he had coached Peterson through a mock cross-examination at the request of Peterson's lawyers. The order abruptly ended Cardoza's stint as a Peterson trial color commentator. Kim Curtis, *Judge Gags Lawyer-Analyst Who Helped Peterson Defense*, LAW.COM, October 21, 2004.

do little to stop the tsumani of coverage of this matter."[72] Not only would a gag order not protect his right to a fair trial, Peterson argued, "all that a 'gag' order would do is increase the breadth and depth of misinformation and scurrilous accusations that swirl around this case, with no ability to mitigate the damage."[73] In support of his objection, Peterson cited a poll indicating that 59.3 percent of people polled in Stanislaus County believed that Peterson was "probably guilty" or "guilty beyond a reasonable doubt."[74] A change of venue, Peterson implied, and not a gag order would be the only effective safeguard of his right to a fair trial.[75] Gagging trial participants would not protect Peterson and would instead "result in the unfair and inaccurate reporting of this case."[76]

The court acknowledged that Peterson opposed the order and that "the main purpose of a Protective Order is to allow the Defendant to have a fair trial," but supported its issuance of the order by citing the *Sheppard* Court's admonition that "[t]he Court should have made some effort to control the release of leads, information, and gossip to the press by the police officers, witnesses, and counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion."[77] Despite Peterson's arguments that a gag order would actually undermine his ability to have a fair trial, the court issued the order after balancing "the due process and fair trial rights in this case" and "the public's right of access to the proceedings herein and the right of free speech of the participants."[78] The factor tipping the scale in favor of the gag order may have been the interest in "protect[ing] against the disruption of the proper administration of justice." It is not clear from this invocation of "the proper administration of justice" whether Judge Girolami simply disagreed with Peterson's contention that a gag order would impair rather than protect his right to a fair trial or whether he meant to protect a separate and different interest—something like the "integrity of the judicial process," discussed in *Levine* or the "neutral and detached environment" cited by Judge Fujisaki in the O.J. Simpson civil trial gag order.[79] In November 2004 the jury convicted Peterson of murder and the following month recommended that he be sentenced to death.

Conclusion

Despite the gag orders issued in the Bryant, Jackson, and Peterson trials, publicity surrounding each proceeding continued to be intense and widespread. Of course, it is impossible to know how different the publicity would have been without the gag orders—whether the courts' fears of

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72 Defendant's Memorandum in Response to Court's Inquiry re 'Gag' or Protective Order, *People of the State of California v. Scott Lee Peterson* (Cal. Superior Court, County of Stanislaus, July 12, 2003) (No. 1056770).

73 *Id*.

74 *Id.*

75 The Peterson trial was moved from Modesto in Stanislaus County to Redwood City in San Mateo County. Peterson's request for a second change of venue was denied.

76 *Id*.

77 *Id*., quoting *Sheppard*, 384 U.S. at 359.

78 *Id*.

79 The Levine court noted that the Sixth Amendment "does not give the prosecution the right to a fair trial," but also observed that "[w]e must consider the fundamental interest of the government and the public in insuring the integrity of the judicial process. Society has the right to expect that the judicial system will be fair and impartial to all who come before it. . . . The circus-like environment that surrounds highly publicized trials threatens the integrity of the judicial system." 764 F.2d at 596-98; Order Banning Media Coverage and Gag Order, *Sharon Rufo, et al. vs. Orenthal James Simpson* (Superior Court of California, County of Los Angeles) (August 23, 1996) (Case No. SC 031947 consolidated with Case No. SC 036340 and Case No. SC 036876).

inadmissible evidence poisoning the jury pools would have been realized to a greater extent than with the gag orders in place, or, as media representatives, legal commentators, and even criminal defendants themselves have argued, gag orders on trial participants only cause the media and the public to rely on degraded information while depriving participants of a means of counteracting already existing adverse publicity.

At the center of the gag order debate is a lack of empirical evidence that pretrial publicity actually undermines defendants' rights to a fair trial.[80] The Supreme Court in *Gentile* noted that "[o]nly the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances where jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court."[81] With today's media capabilities, the traditional alternatives to gag orders—in particular, the change of venue—may no longer appear as a viable antidote to pretrial publicity. As long as courts assume that publicity inevitably leads to prejudice and that "it is axiomatic that statements made by counsel present a significantly greater threat of prejudice to the fairness of the proceedings," gag orders on trial participants may continue to issue with regularity in the proceedings that most interest the public.

Practical Suggestions for Media Attorneys Opposing Gag Orders in High Profile Cases

In view of the trend favoring entry of gag orders as a matter of course—and even over the objections of defendants—in high profile cases, the role of the media and media attorneys in monitoring and challenging these orders has become more important than ever. One obvious long-term need is for empirical evidence, perhaps based on outcomes in trials where gag orders were not imposed, showing that publicity does not necessarily taint a trial. For the short-term however, what follows are several tips to keep in mind in the event you are representing the press in connection with its coverage of a high profile case where you anticipate (or are already faced with) a motion for a gag order by one or both of the parties or a *sua sponte* order by the judge:

(1) Always monitor the docket as well as courtroom proceedings to be sure that you have the earliest possible notice that a gag order is being sought or has been issued. The parties' attorneys are often the best sources regarding such matters.

(2) Obtain a copy of any gag order, proposed gag order, or, in the event of oral proceedings, transcript setting forth the terms of a gag order as soon as possible.

(3) In reviewing a motion for a gag order, determine (a) whether the moving party has presented any evidence and/or justifications for entering an order; (b) the scope of the proposed order as to persons gagged (*e.g.,* attorneys only? all trial participants? people associated with trial participants?); and (c) the scope of the proposed order as to what information may or may not be discussed.

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80 *See, e.g.*, Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998); Steven Helle, *Publicity Does Not Equal Prejudice*, 85 ILL. B.J. 16 (Jan. 1997).

81 501 U.S. at 1054, citing Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977) and Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1 (1989).

(4) In reviewing an already-entered gag order, determine (a) whether the court has reviewed evidence, made factual findings and/or offered any justification for entry of the order; (b) the scope of the order as to persons gagged; and (c) the scope of the order as to what information may or may not be discussed.

(5) Alert the court immediately to any objections by the media and request an opportunity to be heard. This is particularly crucial if there is no noticed motion, and thus no scheduled opportunity to respond and oppose entry of a gag order. If permitted by local rules, consider submitting a preliminary letter brief asserting the media's standing (see tip # 6 below), raising the media's objections in summary form and requesting an opportunity to submit an opposition (or motion to lift the gag order if already entered).

(6) In any letter brief, opposition, or motion to lift a gag order, be sure to include at least the following:

> (a) Assertion of the media's standing. The law on this issue will differ from jurisdiction to jurisdiction, but standing will generally be based on the media's own right to gather information, as recognized in *Branzburg v. Hayes*,[82] and/or on the media's role as the "eyes and ears" of the public;
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> (b) Procedural challenge, if warranted by, *e.g.*, a failure to provide opponents of the gag order with an opportunity to be heard; the absence (or insufficiency) of findings supporting the order or portions thereof; and/or the failure to consider less restrictive alternatives; and
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> (c) Substantive challenge. As discussed above, the standard applied will vary by jurisdiction, so thorough research regarding the applicable test is crucial. Because the presumption of prejudice is so strong in high profile cases regardless of the standard applied, it is also important to explain why, in your particular case, more information will better serve the interests of justice and, if possible, to present examples—whether in the form of legal decisions or anecdotal or survey evidence, to demonstrate that publicity does not automatically result in prejudice. If warranted, the substantive challenge should also address overbreadth as to persons gagged or subject matter, explaining why the gag order sweeps more broadly than necessary.

(7) Where possible, enlist the support of one or more of the parties. As discussed above, courts will not always honor a defendant's objection to entry of a gag order,[83] but having the defendant on the media's side will serve, at the very least, to diminish the force of the argument that a gag order is necessary to protect the defendant's right to a fair trial.

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82 408 U.S. 665 (1972).

83 In this regard, *see also*, *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000) (upholding gag order over criminal defendant's objection that it violated his First Amendment rights).

SEALED COURT RECORDS:
PRIVACY AND FAIR TRIAL ISSUES

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Sealed Court Records: Privacy and Fair Trial Issues

The legal elements of the public's constitutional and common law rights of access to judicial documents are well known to media law practitioners. As media lawyers also know, ensuring that courts apply the correct legal standard is, although essential, not sufficient. Regardless of who technically bears the burden of proof, when closure is sought as a means of protecting the fair trial or privacy rights of defendants, victims or witnesses, the media must demonstrate that individual rights are in fact best protected by open court proceedings and records. In many high-profile cases, that means the media must convince courts that the important public policy principles on which the public's right of access is based are not just platitudes being cited in the service of the economic interests of a news and entertainment industry. The task is further complicated if judges believe they are balancing ephemeral rights of a faceless, intervening "public" against the interests of parties and victims who understandably are more concerned about the actual outcome of their case than the "community therapeutic value" that results from "public acceptance of both the process and its results." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570-71 (1980).

To put the matter more bluntly, the media must be prepared to effectively counter arguments that (a) the sometimes sensationalistic coverage of trials means that denying access will not restrict serious communications about the functioning of government; (b) the overall cost to society of *denying* access to the records of any given case is likely minimal, since most court records will remain open, as will the trial itself; (c) the cost of *granting* access, in contrast, is irreparable if publicity concerning the case deprives the defendant of a fair trial, prejudices an ongoing criminal investigation or invades a protectable privacy interest.

This article examines such arguments in the context of recent decisions concerning the public's right of access to court records in high-profile cases. Section 1 briefly summarizes the legal standards governing the public's constitutional and common law right of access to court records. Section 2 examines recent decisions concerning the public's right of access to various types of court records, focusing on the fair trial and privacy concerns in high-profile cases. Finally, Section 3 reviews some practical considerations in arguing access motions in high-profile cases.

1. The Governing Legal Standards for the Public's Constitutional and Common Law Right of Access to Court Documents

Under the familiar First Amendment test, court records may not be sealed from the public absent specific findings that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). When the interest asserted in support of closure is the defendant's fair trial rights, closure is appropriate "only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986) ("*Press-Enterprise II*").

The component parts of this test illustrate how difficult it is to satisfy. Although "[n]o right ranks higher than the right of the accused to a fair trial," *Press-Enterprise I*, 464 U.S. at 508, the trial court in *Press-Enterprise II* committed constitutional error by basing a closure order on a finding of a "*reasonable likelihood*" that publicity would prejudice the defendant's fair trial rights. 478 U.S. at 5, 14

(emphasis added). Only a finding of a "substantial probability" of harm to the defendant's fair trial rights will suffice. And even that is not enough.

The substantial probability of harm to a defendant's fair trial rights must be based on publicity "that closure would prevent." *Press-Enterprise II*, 478 U.S. at 14. A closure order therefore must *effectively* protect the defendant's fair trial rights, a finding that cannot be made if the public record contains equally or more damaging information that will inevitably be disclosed to the potential jury pool. *See generally Press-Enterprise I*, 464 U.S. at 510 (requiring findings that "closure is *essential* to preserve higher values") (emphasis added); *Globe*, 457 U.S. 596, 607 n.19, 610 (1982) (assessing effectiveness of closure order in protecting juvenile rape victims required distinguishing injury caused by testifying in general from incremental injury caused by testifying in the presence of the press). Finally, so long as reasonable alternatives to closure such as *voir dire,* emphatic jury instructions or partial redactions are available, a sealing order cannot survive constitutional scrutiny. *Press-Enterprise II*, 478 U.S. at 15; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563-64 (1976). *See generally In re The New York Times Company*, 828 F.2d 110, 114 (2d Cir. 1987); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 505 (1st Cir. 1989); *United States v. Antar*, 38 F.3d 1348, 1360 (3rd Cir. 1994).

Apart from the First Amendment, there is a longstanding and strong common law presumptive right to inspect and copy judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).[2] Under the common law, "[o]nly the most compelling reasons can justify non-disclosure of judicial records." *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983). The party seeking to seal bears the burden of persuasion. *Federal Trade Comm'n v. Standard Financial Management*, 830 F.2d 404, 411 (1st Cir. 1987); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Conclusory assertions of the need for closure are not accepted as surrogates for hard facts, and doubts are to be resolved in favor of public access. *Continental Illinois Securities Litigation*, 732 F.2d at 1313; *Standard Financial Management*, 830 F.2d at 412; *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998).

Although the public's common law right of access is "no paper tiger," *Standard Financial Management*, 830 F.2d at 410, the standard "does not afford as much protection to the interests of the press and the public as does the First Amendment." *Rushford*, 846 F.2d at 253. In addition, constitutional access claims receive *de novo* review on appeal, while common law claims are reviewed under a more deferential abuse of discretion standard. *In re Providence Journal Company*, 293 F.3d 1, 10-11 (1st Cir. 2002); *Virginia Department of State Police v. The Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004).

Among the reasons to assert a common law right of access, however, is the reluctance of courts to unnecessarily decide constitutional claims, as well as differing views concerning the scope of the constitutional right of access to judicial records. *See e.g., The Hartford Courant Company v. Pellegrino*, 380 F.3d 83, 91-96 (2d Cir. 2004) (First Amendment right of access applies to docket sheets); *Anderson v. Cryovac*, 805 F.2d 1, 11-13 (1st Cir. 1986) (refusing to recognize First Amendment right of access to documents filed in connection with civil discovery motions); *Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) ("the First Amendment guarantee of access has been extended

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[2] *See generally Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 180 (4th Cir. 1988); *Bank of America National Trust and Savings Ass'n v. Hotel Rittenhouse Associates*, 800 F2.d 339, 343 (3d Cir. 1986); *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165, 1179 (6th Cir. 1983); *In the Matter of Continental Illinois Securities Litigation,* 732 F.2d 1302, 1308 (7th Cir. 1984).

only to particular judicial records and documents"); *United States v. Chang*, 47 Fed. Appx. 119 (3rd Cir. 2002) (discussed *infra*) (finding common law right of access to sentencing letters and therefore refusing to reach constitutional issue).

2. Recent Case Law Concerning the Public's Right of Access to Court Records

A. Access to Pretrial Documents

It seems fair to say that, in the post-O.J. era, no trial has received more publicity than the murder trial of Scott Peterson, charged and later convicted of brutally murdering his wife and unborn son. In an unpublished opinion, the California Court of Appeal reversed a trial court's order releasing to the public pre-arrest search warrants, affidavits and returns filed in connection with the case, holding that disclosure might prejudice the ongoing criminal investigation and the defendant's fair trial rights. *Peterson v. Superior Court*, 2003 WL 21757854 (Cal. Ct. App. 2003) (not certified for publication).

The *Peterson* trial court initially denied the media's request for immediate access to the search warrant materials, ruling that disclosure of the materials would "irreparably harm" the investigation, "unduly alert any potential suspect," likely cause evidence to be destroyed, adversely impact the reliability of past and future tips, witnesses and likely impair the suspect's fair trial rights. 2003 WL 21757854 *1. The trial court also found that disclosure would likely impair the suspect's fair trial rights. *Id.* The court nevertheless ordered the materials released upon the filing of a criminal complaint or the passage of three months time, whichever came first. *Id.*

In the first of two appellate rulings, the Court of Appeal affirmed the portion of the trial court's order sealing the search warrant materials, but reversed the order insofar as it provided for disclosure upon the filing of a complaint or the passage of three months. 2003 WL 21757854 *2. According to the appellate court, the filing of a complaint would not alter any of the facts that the trial court had found justified sealing the materials. More specifically, the court reasoned that since there was no assurance that the complaint would be filed against the "*actual* perpetrator," the trial court's disclosure order was based on the erroneous assumption that an arrest would remove the "possibility, among others, that a 'potential suspect' would be alerted, that evidence would be destroyed, or that witnesses would be discouraged." 2003 WL 21757854 *2 (emphasis in original).

After Scott Peterson was arrested and charged with murder, the trial court granted another request to unseal the search warrant materials. According to the trial court, "the entire thrust of the People's evidence presented [in support of a sealing order] was directed toward preserving the integrity of the investigation before an arrest was made in order to avoid alerting any suspect." 2003 WL 21757854 *3 (emphasis in original; bracketed materials omitted). The trial court also found that the prosecution had not produced any evidence indicating it was investigating other suspects. *Id.*

Showing no deference to the trial court's findings, the Court of Appeal again reversed. The court essentially ignored the trial court's conclusion that the prosecution had based its argument only on the need for confidentiality before an arrest was made. According to the appellate court, if it was reasonable to conclude before the arrest that disclosure would prejudice the investigation, it was no less reasonable to reach the same conclusion after his arrest. 2003 WL 21757854 *3. Conspicuously absent from the court's analysis was any discussion of the fact that the search warrant materials had by this time been provided to Peterson and his counsel, *id.* at 4, thereby exposing the previously anonymous witnesses and evidence to contacts by the defense.

The appellate court also held that the publicity attending the case provided further grounds to reverse the trial court's disclosure order.

> [T]he potential for prejudice from the release of the Materials is enhanced rather than diminished by the arrest of [Peterson] and the filing of the complaint against him. The relationship of [Peterson] to the victims only serves to stimulate the public's appetite for the case, an appetite we would expect the media to satisfy. Release of the Materials would undoubtedly be followed by their widespread dissemination and dissection in every sort of media medium, including daily television and parades of "experts" endless commenting about likely prosecution and defense strategies, opining about the strengths, weaknesses and admissibility of the various factual tidbits disclosed by the Materials, and venturing predictions about the probable outcome of the trial against [Peterson]. How a fair trial for both parties – and particularly how an untainted jury could be found anywhere – in the aftermath of such a frenzy escapes us.

2003 WL 21757854 *4. Given the extent of the publicity that continued unabated throughout the *Peterson* trial, including "parades of 'experts' endless[ly] commenting about likely prosecution and defense strategies," Peterson's appeal may present the appellate court with an opportunity to express a different view about the likely effects of pretrial publicity on the defendant's fair trial rights.

In *Virginia Department of State Police v. The Washington Post*, 386 F.3d 567 (4th Cir. 2004) ("*VDSP*"), the Fourth Circuit Court of Appeals was less willing to unquestionably accept a law enforcement agency's argument that the disclosure of portions of its investigatory file would prejudice an ongoing criminal investigation. The plaintiff in *VDSP* was a convicted murderer who after 20 years in prison was pardoned because of newly discovered DNA evidence. The plaintiff filed a civil action challenging his arrest and conviction, and subpoenaed the Virginia State Police Department's investigatory file concerning the murder. The Police Department produced the file subject to a protective order. After portions of the file were submitted under seal to the court in connection with various motions, the plaintiff and intervening media organizations moved for public access to the submissions. The trial court ordered the release of all materials filed with the court, with the exception of one witness statement containing previously undisclosed facts about the murder. The Police Department appealed, arguing that the ongoing investigation would be prejudiced if the materials were released. 386 F.3d at 573.

On appeal, the Fourth Circuit held that the First Amendment right of access applied to the portions of the investigatory file submitted to the court in connection with summary judgment motions. Noting its "complete agreement with the general principle that a compelling government interest exists in protecting the integrity of an ongoing law enforcement investigation," 386 F.3d at 579, the court nevertheless observed that "not every release of information contained in an ongoing criminal investigation file will necessarily affect the integrity of the investigation." *Id.* The Court found that the bulk of the materials under seal related to the identity of a suspect whose name had been disclosed in documents the Police Department allowed to be released (and had been reported on in the local press). Under these circumstances, the court held that the Police Department had failed to present a compelling government interest sufficient to seal documents containing information already in the public domain. *Id.*

In *The Republican Company v. Appeals Court*, 442 Mass. 218, 812 N.E.2d 887 (2004), the Massachusetts Supreme Judicial Court rejected claims that the disclosure of search warrant materials would prejudice a murder investigation and violate a suspect's privacy rights. The search warrant materials related to a 30-year old investigation into the murder of a 13-year old alter boy. The only

suspect ever identified by the police was a former priest by the name of Richard Lavigne who had since been convicted of sexually molesting other children. The prosecution argued that although the murder investigation was 30 years old, disclosure of the search warrant materials obtained some 10 years earlier would prejudice its ongoing investigation. Lavigne, who had never been charged with the murder, argued that disclosure also would violate his privacy rights. The trial court vacated the sealing order, finding no evidence that the investigation was ongoing in any meaningful way and further finding that much of the information still under seal already had been disclosed by local news reports. An intermediate appellate court judge reversed the trial court's order, concluding that the newspaper had failed to demonstrate a material change in circumstances warranting a modification of the sealing order.

In affirming the trial court's order releasing the search warrant materials, the Supreme Judicial Court held that sealing orders carry no continuing presumption of validity. The court ruled that the burden of demonstrating the existence of good cause always remains with the party urging continued closure and that a party seeking the release of sealed court records does not bear the burden of demonstrating either that there has been a material change in circumstances or that whatever good cause may once have justified their impoundment no longer exists. 442 Mass. at 225, 812 N.E.2d at 893.

Turning to the merits, the court held that the public has a common law right of access to search warrant materials because of the legitimate public interest in the methods and techniques of police investigations. 442 Mass. at 222, 812 N.E.2d at 892, *citing Matter of Application & Affidavit for a Search Warrant*, 923 F.2d 324, 331 (4th Cir.), *cert. denied sub nom., Hughes v. Washington Post Co.*, 500 U.S. 944 (1991). The court also held that the trial court had properly ruled that in view of Lavigne's long-known status as a suspect in the investigation, the prior publicity concerning details of the investigation, and the availability of voir dire and change of venue to protect Lavigne's fair trial rights, the interests in continued impoundment were outweighed by the public's interest in learning of Lavigne's alleged patterns of sexual abuse, whether his superiors were aware of his conduct, and the government's thus-far unsuccessful murder investigation. 442 Mass. at 226-27, 812 N.E.2d at 894-95. *Compare United States v. Inzunza*, 303 F. Supp.2d. 1041 (S.D. Cal. 2004) (holding that the First Amendment does not provide a right of access to search warrant affidavits or Title III materials until and unless the materials are admitted in evidence at trial or at a suppression hearing); *Newsday Inc. v. Morgenthau*, 4 A.D.3d 162, 771 N.Y.S.2d 639 (2004) (no First Amendment right of access to search warrant materials; common law right of access outweighed by interests in protecting the identity of a confidential informant and avoiding compromising an ongoing investigation).

The Supreme Court of Kentucky took a somewhat different approach to the sealing of records concerning alleged clergy abuse. *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724 (Kentucky 2002). The trial court in *Noble* had granted a motion to strike certain allegations of the plaintiff's complaint alleging sexual abuse by members of the clergy but had refused to seal the stricken allegations. On appeal, the Kentucky Supreme Court held that there was no First Amendment right of access to the stricken materials. The Court found no historical right of access to "sham, immaterial, impertinent, redundant or scandalous materials," and concluded that access to such information would not play a positive role in the functioning of the judicial process. 92 S.W.3d at 733.

The *Noble* Court held that the trial court had erred by concluding that it lacked the authority to seal stricken material. The case was remanded to determine whether the common law right of access required disclosure of the stricken materials. Following the framework of the Second Circuit Court of Appeals in *United States v. Amodeo*, 71 F.3d 1044, 1048-49 (2nd Cir. 1995), *Noble* required the court to employ a "sliding-scale approach," according documents that play an important role in determining substantive rights the greatest presumption of access. *Noble*, 92 S.W.3d at 732.

The *Noble* Court also rejected the argument that the case was rendered moot when the stricken allegations were published on the front page of the local newspaper. The court acknowledged that the publication of the material "diminished the force of the argument in favor of sealing the material," but found that access still could be denied to prevent the parties from using the court "as a megaphone to amplify and give credence to scandalous and salacious allegations." 92 S.W.3d at 734. Concluding that those concerns survived any out of court publication of the stricken material, the *Noble* Court held that the trial had the power to seal information that already was in the public domain. *Id.*, 92 S.W.3d at 734. *See also People v. Bryant*, 94 P.3d 624, 636-37 (Col. 2004) (extensive news reports concerning alleged rape victim's sexual activity did not support unsealing of testimony which would "add a level of official legitimacy and detail to the information that does not attend press reports – the ring of authenticity, the stamp of authority").

B. Access to Trial Documents

The so-called "Plunder Dome" prosecution of former Providence, Rhode Island Mayor Vincent A. ("Buddy") Cianci, Jr. on public corruption charges recently gained renewed notoriety when the case led to Rhode Island television reporter James Taricani's conviction for criminal contempt. Taricani was sentenced to six months home confinement for refusing to comply with a court order requiring him to disclose the identity of a confidential source who allegedly violated a protective order by leaking an undercover prosecution videotape showing a city official taking a bribe. *See In re Special Proceedings*, MISC. 01-47T (D. R.I.). Even before the district court commenced proceedings to prosecute violations of the protective order, the First Circuit Court of Appeals had affirmed the trial court's generally restrictive approach to access issues that arose during the course of the Mayor's prosecution. *In re Providence Journal Company*, 293 F.3d 1 (1st Cir. 2002).

The *Providence Journal* Court considered three issues concerning the public's right of access to records of the Plunder Dome prosecution. The first issue was the Rhode Island district court's blanket policy of not filing legal memoranda in the clerk's office. The second issue was the district court's ruling that the publicity surround the Plunder Dome cases warranted an individualized order requiring all memoranda to be temporarily filed under seal pending a review by the court to determine if redactions were required to protect the defendants' fair trial rights. The final issue was the district court's denial of the media's request for copies of the undercover tape recordings admitted as evidence at trial.

The First Circuit had no hesitation in declaring that the court's blanket policy of refusing to file legal memoranda violated the public's constitutional right of access to court records. The district court had defended the practice on the basis of administrative convenience, the need to prevent overzealous counsel from attempting to gain an unfair advantage by filing papers designed to influence the public, and the risk of disclosing grand jury materials. "None of these reasons," held the First Circuit, "justify the constitutional intrusion that results from the District of Rhode Island's standard practice of treating legal memoranda as presumptively nonpublic." 293 F.3d at 12.

When it came to the district court's individualized order presumptively sealing legal memoranda in the Plunder Dome cases, however, the First Circuit was much more deferential. The court noted that the Plunder Dome cases had received "pervasive publicity" both before and after the Mayor's indictment. The court characterized leaks of information as a "persistent problem" during the grand jury investigation, citing two specific examples. 293 F.3d at 5. One example was that an Assistant United States Attorney had played an FBI surveillance tape for several of his friends. In fact, as the district court had found in fining the prosecutor $500 and suspending him from the case for 30 days as a sanction for his transgression, the disclosure was limited to a few people present in the prosecutor's home and had not

caused any publicity threatening the defendant's fair trial rights. The second example cited by the court was a local television station's broadcast of the tape received by Taricani from his confidential source. 293 F.3d at 5. Although not noted by the First Circuit, the contents of the tape had been quoted in the public indictment and the broadcast had occurred over one year before the trial began.

The First Circuit nevertheless described the district court as having "cited book and verse, cataloguing specific incidents that fueled its concerns that the defendants' ability to receive a fair trial was in danger of being substantively compromised by unrestrained disclosures." 293 F.3d at 14. Because of the notoriety of the case and the incidents recited by the district court, the First Circuit was "convinced that the court's perception of a threat to the defendants' fair trial rights was objectively reasonable." *Id.* This, according to the court, was enough to satisfy the requirement that the court find a "substantial probability" that the accused's right to a fair trial would be prejudiced absent a closure order. 293 F.3d at 13. *Compare Press-Enterprise II*, 478 U.S. at 5, 14 (reversing closure order based on finding of a reasonable likelihood that publicity would prejudice the defendant's fair trial rights).

Having found a sufficient threat to the defendants' fair trial rights, the court framed the remaining issue as whether the trial court was therefore empowered to adopt a procedure that reverses the presumption of public access and automatically seals all filings until the judge determines that a specific document poses no undue risk to the defendant's fair trial rights. *Providence Journal*, 293 F.3d at 14. The court answered that issue in the affirmative, describing the "temporary" sealing as "narrowly tailored." *Id.* The only error found by the court was the district court's refusal incorporate a specific timetable to perform its self-imposed screening responsibilities, its refusal to review any submission until opposition papers were filed, its further refusal to consider document-by-document redaction as an alternative to blanket sealing, and the lack of any provision as to whether and when sealed documents would be released to the public after trial. 293 F.3d at 15.

Nowhere in the court's opinion are the remaining elements of the *Press-Enterprise II* test addressed. The court did not consider whether the temporary sealing of legal memoranda would effectively prevent damage to the defendants' fair trial rights given the multiple other sources of the "pervasive publicity" about the case. Nor did the court consider whether alternatives to a sealing order such as jury voir dire, emphatic instructions, or even a change of venue could have adequately protected the defendants' fair trial rights.

The final issue addressed by the First Circuit was the district court's refusal to provide the press with copies of the video and audiotapes played at trial. Applying the common law right of access, the court was unwilling to second-guess the district court's conclusion that copying the materials – which in fact were excerpts of the underlying tapes played on Sanctions trial software used by many trial lawyers – was a "far more daunting task than merely duplicating existing source materials." 293 F.3d at 17. The media submitted an affidavit to the court establishing that all that was required to accomplish that "daunting task" was to buy a RadioShack RF Modulator Box for $29.99 along with wires for the connections at a cost of $14.98. Ironically, the tapes became public when they were filed by the defendants in their appeal from their convictions. *Compare United States v. Sampson*, 297 F.Supp.2d 342 (D. Mass. 2003) (trial court presiding over Federal Death Penalty Act case ruled that public had common law right of access to audio recordings of defendant's confession and a 911 telephone call in which he unsuccessfully attempted to turn himself in before committing another murder and ordered court personnel to copy the tapes and make them available to the public during the trial).

In *Boston Herald, Inc. v. Connolly*, 321 F.3d 174 (1st Cir. 2003), the First Circuit held that neither the First Amendment nor the common law granted the public a right of access to financial

affidavits and documents submitted by a criminal defendant seeking public funding for a portion of his legal fees under the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A. John Connolly was a former FBI agent accused of having illegal relationships with notorious criminals who served as his informants. After a highly publicized trial, Connolly was convicted of racketeering and obstruction of justice. Shortly before trial, Connolly submitted an application for public funding of a portion of his criminal defense fees, asserting that he was financially unable to pay his substantial legal fees. A Magistrate Judge granted the application, as well as Connolly's motion to seal documents he had submitted to demonstrate his CJA eligibility. 321 F.3d at 176-77. The Magistrate ruled that disclosure would "unduly intrude" on the privacy of Connolly and his family and that the documents should be sealed least until Connolly exhausted his appeals. 321 F.3d at 179-80.

On appeal, the First Circuit first expressed grave doubts as to whether the CJA documents were in fact judicial records at all, since they are generated by the Administrative Office of the United States Courts, and filed with the Office of Pre-Trial Services rather than with the clerk of the court or the judge. 321 F.3d at 180-81. Nevertheless, perhaps because the documents ultimately were relied on by the Magistrate in granting the CJA Application, the court chose not to rely on that as a basis for its decision, noting only that "the administrative process of determining CJA eligibility is far removed from the core of the judicial function." 321 F.3d at 181.

Turning to the First Amendment claim, the court found no historical right of access to documents such as CJA applications, and analogized the materials to applications for government benefit programs administered by the executive branch. 321 F.3d at 185. In so doing, the court refused to accept the view that because an erroneous denial of CJA funds could be grounds for reversal of a conviction on Sixth Amendment grounds, the "process" is inextricably tied to the conduct of the trial itself and therefore traditionally open to the public, as are fee-shifting determinations in civil cases. 321 F.3d at 184-85. As for whether public access would play a positive role in the functioning of the process, the court found that (a) "access to the defendant's CJA financial statements does not provide an 'outlet for community concern, hostility, and emotion' concerning a crime"; (b) CJA decisions "never" impose official or practical consequences on members of society at large; and (c) "[a]s to the 'effective check' rationale, we have doubts about whether public scrutiny of an applicant's financial data would actually improve judges' decision-making as to CJA eligibility" 321 F.3d at 187.

Concerns about the financial privacy rights of criminal defendants was critical to the court's constitutional analysis. The court noted that a "constitutionally-based right of access to otherwise private personal financial data of one's own and one's family imposes a high price on the exercise of one's constitutional right to obtain counsel if in financial need." 321 F.3d at 187. The "spectre of disclosure," theorized the court, might discourage eligible defendants from obtaining counsel and lead other defendants to withhold information they otherwise would disclose. 321 F.3d at 188. The court concluded that the First Amendment does not grant a right of access, over the defendant's objections, to financial documents submitted to demonstrate the defendant's eligibility for CJA counsel funds and further held that the CJA regulatory framework, in which these materials are typically disclosed unless the court decides that the documents should be sealed, is constitutional. 321 F.3d at 189.

The *Connolly* Court also rejected the common law claim of access to CJA records, reiterating its doubts that the materials constitute "judicial records." Even assuming the right applied, however, the court found that it was overcome by what it believed were compelling privacy interests of the defendant and his family. 321 F.3d at 190-91.

Judge Lipez authored a lengthy dissent countering much of the majority's analysis. Unlike the majority, the dissent characterized CJA rulings as important judicial decisions that "determine[e] an applicant's substantive right to counsel under both the Sixth Amendment and the DJC itself…." 321 F.3d at 196 (Lipez, J., dissenting). The dissent also took a broader view of whether access would play a positive role in the functioning of the process, positing that the benefits accruing to society from public access are assumed prima facie. 321 F.3d at 201 (Lipez, J., dissenting). At bottom, the dissent asserted that both the First Amendment and the common law required trial courts to balance the public interest in access against the individualized need for privacy in any particular case, a task the lower court had failed to undertake in deciding that there was no public right of access to CJA materials. 321 F.3d at 204 (Lipez, J., dissenting).

C. Access to Post-Trial Documents

Two high-profile criminal cases recently resulted in differing decisions concerning the public's right of access to sentencing letters. In *United States v. Gotti*, 322 F.Supp. 2d 230 (E.D. N.Y. 2004), the district court denied the media's request for access to sentencing letters written by a notorious criminal defendant's wife and his girl-friend, the latter of whom had committed suicide before the court's ruling. Prior to the court's ruling, the New York Post published excerpts from both letters.

The *Gotti* Court ruled that there was no First Amendment right of access to sentencing letters, finding no history of access to such documents and reasoning that public disclosure would frustrate the sentencing process by chilling communications with the court. The Court nevertheless held that the common law right of access applied to the sentencing letters, distinguishing the letters from confidential presentence reports because they are "sent directly to the Court [and] are designed to have a direct impact on the Court's sentence…." 322 F.Supp. 2d at 249. The strength of the presumption of access to sentencing letters, according to the court, depended on the extent to which the court relied on the letters in making its sentencing decision. "If the court gives little weight to the letters, the privacy rights of the writers should be accommodated; however, if the letters should have a significant impact on the court's sentence, the public is entitled to know this." 322 F.Supp. 2d at 250. Perhaps not surprisingly, the court found that it gave little weight to the letters in making its sentencing decision and therefore refused to release the documents. For the benefit of future cases, however, the court stated that sentencing letters from public officials seeking to use their offices to impact a sentence will "invariably be disclosed." *Id.*

In *United States v. Chang*, 47 Fed. Appx. 119 (3rd Cir. 2002) (unpublished), the court granted access to a government sentencing letter that almost surely would reflect poorly on then-United States Senator Robert Torricelli of New Jersey. Observing that, "jurisprudentially, there is nothing new here," the court held that the common law right of access applied because the government's letter was filed with court and used in adjudicatory proceedings as a basis for departing from the sentencing guidelines. 47 Fed. Appx. at 122. The court summarily rejected the government's argument that disclosure of the letter would reveal "prosecutorial methodology," and "disadvantage law enforcement in its future efforts," or have a "chilling effect on prosecutorial disclosures in sentencing memorandums." 47 Fed. Appx. at 122-23. The court found that the sentencing letter was the "best evidence" against such arguments and held that the government's "bald and unsupported assertions" failed to overcome the strong common law presumption of access. 47 Fed. Appx. at 123.

The *Chang* Court also ruled that Senator Torricelli's privacy interests were insufficient to justify sealing the letter from the public. The court recognized that in some circumstances legitimate privacy concerns may overcome the presumption of access but held that "this is not one of those times." 47 Fed. Appx. at 123. First, the contents of the letter were substantially the same as that of the government's

sentencing memorandum, which had been published by the press. "As far as the Senator's privacy is concerned," opined the court, "the ink was in the milk and nothing in the government's memorandum worsened the situation for him." *Id.* The court also ruled that because of Torricelli's public connection with the trial, including public statements he had made attempting to refute the material he was seeking to seal, the disclosure of the sentencing letter was not an unwarranted invasion of privacy. *Id.*

United States v. Moussaoui, 65 Fed. Appx. 881 (4th Cir. 2003) (unpublished) addressed the public's right of access to portions of the written record and oral argument in an appeal taken in the prosecution of Zacarias Moussaoui, charged with participating in the terrorist attacks of September 11, 2001. The Fourth Circuit approved a procedure under which Moussaoui's pleadings with the court were initially filed under seal to give the government an opportunity to propose redactions. The court noted that the media did not object to the procedure and ruled that the procedure was necessary to omit irrelevant and inflammatory material and to prevent Moussaoui from attempting to communicate information to other terrorists. 65 Fed. Appx. at 888-89.

Addressing the merits of the appeal, the court found no doubt that the government's interest in protecting the security of classified information was a compelling one. The court also noted that the media had disavowed any interest in obtaining the release of classified information and therefore concluded that all such material filed with the court would remain under seal. 65 Fed. Appx. at 887.

The court rejected the media's argument that sealing was not required with respect to information contained in the pleadings that had been publicly reported. Quoting earlier decisions, the court noting that there is a difference between "speculation and confirmation," and stated that it is "one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." 65 Fed. Appx. at 887 n.5 (citations and internal quotations omitted). On the other hand, the court unsealed documents containing information that was apparent from other public documents on file with the court. 65 Fed. Appx. at 890.

Turning to the media's request for access to portions of the record appendices in the case, the court ruled that the appendices containing unclassified materials might be subject to either the First Amendment or common law right of access. Because under either standard the burden of establishing that a particular document should be sealed rests on the party promoting the denial of access, the court required the government to file a submission justifying the continued sealing of unclassified materials. The court reserved for itself the task of examining each document at issue to determine whether a right of access exists, the source of that right, and whether the document should remain sealed in whole or in part. 65 Fed. Appx. at 888-89.

3. Practical Considerations in High-Profile Access Litigation

Although high-profile cases present fair trial and privacy issues not present in garden variety cases, the strength of the public's right of access to court records is not -- and cannot be -- inversely related to the amount of public attention being given to any particular case. Indeed, the public's right of access was established in high-profile cases. The defendant in *Richmond Newspapers* was on trial for murder for the fourth time in two years. 448 U.S. at 559. The trial court's closure order came after a news report that a "key piece of evidence" was a bloodstained shirt obtained from the defendant's wife -- evidence that the Virginia Supreme Court earlier had ruled was inadmissible -- and after an earlier prosecution ended in a mistrial apparently caused by prospective jurors being exposed to newspaper coverage of the case. *Id.* The defendant in *Press-Enterprise I* was on trial for the rape and murder of a

teenage girl, 464 U.S. at 503, "a *capital* case involving an interracial sexual attack that was bound to arouse a heightened emotional response from the affected community" 464 U.S. at 522 (Marshall, J., concurring) (emphasis in original). And the defendant in *Press-Enterprise II* was a nurse charged with murdering 12 patients and whose prosecution had generated national publicity. 478 U.S. at 4.

It is not surprising, therefore, to find the *Richmond Court* stating that "[w]hen a shocking crime occurs, a community reaction of outrage and public protest often follows." 448 U.S. at 571. Although the Court was dealing with a high-profile trial, it stated that "the people generally – and representatives of the media – have a right to be present, and … their presence historically has been thought to enhance the integrity and quality of what takes place." 448 U.S. at 578.

Accordingly, when the media argues that all of the benefits of an open judicial process described by the Supreme Court – the community therapeutic value, the assurance that proceedings are conducted fairly, safeguarding against perjury, misconduct or bias, and ensuring informed communication on the functioning of government – apply with full force to high profile cases, their position is firmly grounded in Supreme Court precedent. For that matter, it does not stretch the point too far to argue that some of the enumerated benefits of public access, such as community catharsis and informed public debate, can only be achieved when a certain amount of publicity accompanies a case. At a bare minimum, it seems beyond debate that high-profile cases are by definition ones in which the public's confidence in the judicial process either can be strengthened or broken, making public access all the more important in such cases.

To be sure, trial courts may have understandable concerns about prejudicial pretrial publicity in high-profile cases. Too often, however, those concerns seem to wax and wane depending on whether it is (a) the media arguing that access will not prejudice a defendant's fair trial rights; or (b) a defendant arguing that a conviction should be reversed on the grounds of prejudicial pretrial publicity. In either instance, the governing constitutional principles are the same. "Qualified jurors need not … be totally ignorant of the facts and issues involved" in a case. *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). "To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). "[P]retrial publicity," in short, "even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Nebraska Press*, 427 U.S. at 565.

Justice Kennedy's opinion in *Gentile v. State Board of Nevada*, 501 U.S. 1030(1991), although addressing speech restrictions imposed on trial counsel, underscores the extraordinary burden required to show a substantial probability that pretrial publicity will prejudice a defendant's fair trial rights, particularly if the publicity does not occur on the eve of trial.

> [I]n *Mu'Min v. Virginia*, 500 U.S. 415 (1991)…, the community had been subjected to a barrage of publicity prior to [the defendant's] trial for capital murder. News stories appeared over a course of several months and included, in addition to details of the crime itself, numerous items of prejudicial information inadmissible at trial. Eight of the twelve individuals seated on Mu'Min's jury admitted some exposure to pretrial publicity. We held that the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity. In light of that holding, the … conclusion that …

> abbreviated, general comments six months before trial created a "substantial likelihood of materially prejudicing" the proceeding is, to say the least, most unconvincing.
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> A statement which reaches the attention of the venire on the eve of *voir dire* might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process. *See* ABA Annotated Model Rules of Professional Conduct 243 (1984) (timing of statement a significant factor in determining seriousness and imminence of threat). As turned out to be the case here, exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date.

501 U.S. at 1039, 1044.

A return to basic principles also may be helpful in assessing whether asserted privacy interests justify a sealing order. Even Warren and Brandeis recognized that the right to privacy "does not prohibit any publication of matter which is of public or general interest." S. Warren and L. Brandeis, *The Right to Privacy*, IV Harvard Law Review 193, 214 (1890). *See also Restatement (Second) of Torts*, § 652D, cmt. d (1978) ("When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy."). "Those who commit crime or are accused of it may not only not seek publicity but may make every effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public interest. These persons are regarded as properly subject to the public interest…." *Id.*, cmt. f.

It is hard to imagine a privacy interest that is more compelling than that of a young rape victim. Yet the Supreme Court has held that, "as compelling as that interest is," trial courts must determine on a case-by-case basis whether the State's legitimate interest concern for the well-being of a minor victim necessitates closure. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-609 (1982). Significantly, "the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying *in the presence of the press and the general public*." 457 U.S. at 607 n.19 (emphasis in original). Similarly, where the rape victim's testimony is available from other sources, a closure order does not effectively advance the state's interest, and therefore cannot survive First Amendment scrutiny. 457 U.S. at 610. *See generally Restatement (Second) of Torts*, § 652D, cmt. b ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public."). Finally, general assertions that confidentiality will enhance the quality and credibility of testimony or encourage other victims to come forward is both speculative and "contrary to the very foundation of the right of access recognized in Richmond Newspapers: namely, 'that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.'" *Globe*, 457 U.S. at 609-10 & n.26 (citation omitted).

In sum, high-profile cases present unique challenges and opportunities for members of the media seeking access to court records. The very fact that a case has generated publicity – often seen by judges as by itself raising potential fair trial and privacy concerns – makes it essential that the public understand and accept the judicial process and outcome of such cases, one of the most compelling reasons to enforce rather than constrict the public's right of access.

JURORS AND JUROR INFORMATION:
UNLOCKING THE JURY ROOM DOOR

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Jurors and Juror Information: Unlocking the Jury Room Door

I. Introduction

An open trial and a fair trial are nearly always one and the same. That, of course, was the underlying policy point made explicit in *Press-Enterprise Co. v. Superior Court ("Press-Enterprise I")*.[2] It is also the point frequently lost on trial courts when confronted with high-profile defendants, a press corps whose size is often matched only by its zeal, and a reading and viewing public that has come to expect more information faster on a continuous news cycle.

Seeking to provide a fair trial under the Sixth Amendment or to protect an amorphous right of juror privacy, a number of trial judges have responded recently to the spotlight of publicity and the logistical difficulties of a high-profile case by trying to limit public access to, among other things, *voir dire*, jury questionnaires, juror identities, and post-trial contact with jurors. In quick succession, media access in some form was restricted in the Neulander murder trial in New Jersey, the trial of an alleged Al Qaeda affiliate in Detroit, the Martha Stewart and Frank Quattrone trials in New York, the Michael Jackson case in Los Angeles, and pretrial proceedings in the Kobe Bryant case in Colorado.[3]

This article surveys the law and legal strategies for defeating, or minimizing, restraints on juror access in high-profile litigation. In particular, we focus on access to (1) *voir dire* and jury questionnaires; (2) juror identities (and the right to publish identities); and (3) jurors themselves for post-verdict interviews.

Often the battle for media lawyers in high-profile cases is to help the courts resist the temptation to under-analyze and overreach by mandating restrictions that exceed any possible justification. Specifically, media lawyers need to be prepared to help courts distinguish the cases in which the potential harm to the jury or the defendant is real from those in which it is not, and, in extraordinary cases, to assist the court in identifying narrowly tailored remedies that protect both openness and fairness.

II. The Legal Foundation: "A Trial is a Public Event"

The basic premise of the access argument – court proceedings are public, absent special circumstances – is set out in a line of Supreme Court decisions construing the First Amendment.[4] These cases have established a general rule of public access to trials as well as preliminary hearings, *voir dire*,

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[2] 464 U.S. 501, 508 (1984) (an open courtroom "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.").

[3] *See State v. Neulander*, 801 A.2d 255 (N.J. 2002); *United States v. Koubriti*, 252 F. Supp. 2d 424 (E.D. Mich. 2003); *United States v. Stewart*, 305 F. Supp. 2d 368 (S.D.N.Y. 2004); *United States v. Quattrone*, 2003 U.S. Dist. LEXIS 17234 (S.D.N.Y. Sept. 30, 2003); *People v. Bryant*, 94 P.3d 624 (Colo. 2004); S. Chawkins, "Appellate Court is Asked to Unseal Jackson Papers," *L.A. Times*, p. B6 (July 16, 2004).

[4] *See, e.g. Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("A trial is a public event. What transpires in the courtroom is public property. . . .") (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947).

and the names of parties or victims.[5] The Court has further emphasized that the bare desire to control publicity in a high-profile case cannot justify restraints on public access.[6] The seminal decisions in this area have recognized that transparency *furthers* fairness in the vast majority of cases, rather than impeding it.[7]

The First Amendment test for determining when access to court proceedings may be limited was set out in *Press-Enterprise I*.[8] The party seeking closure must demonstrate that (1) an overriding interest is substantially likely to be prejudiced by publicity; (2) a restraint on the media is essential to protect the overriding interest; and (3) the limitation on access is narrowly tailored.[9] In addition, the court is required to meet certain procedural requirements: The closure decision must be supported by specific factual findings, and reasonable alternatives to closure must be considered before access is limited.[10]

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5 *See id.* (rejecting an invasion of privacy cause of action for publishing the name of a rape victim); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (invalidating a prior restraint on the publication of preliminary hearing evidence); *id.* at 587 (Brennan, J., concurring) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values."); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (invalidating a prior restraint on the publication of the name or any picture of a minor involved in juvenile proceedings); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (invalidating, on First Amendment grounds, a West Virginia statute barring the publication of the name of minor in juvenile proceedings); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (absent compelling findings of an overriding interest, the First Amendment guarantees the right to attend criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (First Amendment guarantees the right of the press to witness and report on the testimony of an underage victim in a sex-crime trial); *Press-Enterprise I*, 464 U.S. 501 (unanimously holding that absent specific and compelling findings of an overriding interest, *voir dire* must be open to the public); *Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*, 478 U.S. 1 (1986) (finding that the right of access extends to preliminary hearings); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (invalidating a Florida statute barring publication of sex-crime victim names). *See also Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (holding that the open courts doctrine extends to civil proceedings).

6 *See Nebraska Press Ass'n v. Stuart*, 427 U.S. at 565 (stating that even "pervasive and concentrated" pretrial publicity "cannot be regarded as leading automatically" to an unfair trial); *see also, ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (2d Cir. 2004) ("The mere fact that the suit has been the subject of intense media coverage is not, however, sufficient to justify closure."); *NBC Subsidiary v. Superior Court*, 980 P.2d 337 (Cal. 1999) (holding that the possibility that publicity will bias the jury pool is insufficient to justify closure).

7 The Sixth Amendment, of course, treats openness as an element, not an enemy, of fairness. U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial."). Moreover, a founding premise of the open courts doctrine is that honesty, integrity, and fairness are encouraged, not undermined, by transparency. *Globe Newspaper*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process . . . ."); *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (noting that a public trial ensures "that judge and prosecutor carry out their duties responsibly . . . and discourages perjury").

8 *Press-Enterprise I*, 464 U.S. at 510 ("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.").

9 *See id.*; *see also United States v. Antar*, 38 F.3d 1348, 1359 (3d Cir. 1994) ("[A] court ordering closure must first establish that the competing interest asserted is not only 'compelling,' but also that it outweighs the First Amendment right of access. Second, it must determine that the limitations imposed are both necessary to and effective in protecting that interest. One part of establishing the necessity of a limitation is a consideration of alternative measures and a showing that the limitation adopted is the least restrictive means of accomplishing the goal.").

10 *See ABC, Inc. v. Stewart*, 360 F.3d at 98-99 (2d Cir. 2004); *Antar*, 38 F.3d 1348; *Cable News Network, Inc. v. United States*, 824 F.2d 1046 (D.C. Cir. 1987); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985); *In re Memphis Publ'g Co.*, 887 F.2d 646 (6th Cir. 1989); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *In re Pulitzer Publ'g Co.,* 635 F.2d 676 (8th Cir. 1980).

But before the *Press-Enterprise* analysis will be applied, it must first be shown that a First Amendment right of access exists as to the particular proceeding or document.[11] That turns on a two-prong test. First, the proceeding at issue must be one that has historically been open. Second, there must be a showing that "logic and experience" dictate that openness will advance the goals of the given proceeding. If a court concludes that no qualified First Amendment right of access attaches – because of a failure to meet the history and logic/experience tests – most courts will then look to whether a common law right of access should be applied. Under the common law analysis, there is a presumption of access but the decision as to whether to grant access to a given proceeding or document is left to the discretion of the court.[12] However, the leading cases make clear that the presumption of access is strongest, and access should be normally be granted, where proceedings or documents were central to the court's adjudicatory powers.[13]

III. Access to *Voir Dire* and Jury Questionnaires

In high-profile cases, the first legal skirmish over access often involves attempts to prevent the press from covering *voir dire* and obtaining jury questionnaires. Typically, the parties will argue that some form of closure is necessary to protect juror privacy, ensure juror safety, or promote candor by prospective jurors during the *voir dire*. In many instances, the parties will attempt to seek, or the court will be tempted to fashion, partial restraints such as prohibiting live coverage but later releasing transcripts, or withholding the questionnaires until jury selection is complete.

The recent and sensational Martha Stewart prosecution dramatically underscored the critical legal point that must be made over and over in high-profile access cases: The mere fact that there is high media and public interest in a case is not enough to justify closure. Put differently, whether no one wants to attend the trial or the courtroom is mobbed, the same rules apply, and the same constitutional test must be met, under *Press-Enterprise*.

In *United States v. Stewart*, citing concerns that jurors would not be candid, Judge Miriam Cedarbaum of the Southern District of New York closed *voir dire* to the media and justified the closure

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11 *Press -Enterprise II*, 478 U.S. at 8 ("[B]ecause a 'tradition of accessibility implies the favorable judgment of experience,' we have considered whether the place and process have historically been open to the press and general public." (internal citations omitted)). While many courts have held that judicial documents are, like proceedings, subject to a First Amendment right of access, others have reserved on the question of whether document access is subject solely to a common-law right of access or to a First Amendment right as well. *See Hartford Courant Co. v. Pellegrino*, 371 F.3d 49 (2d Cir. 2004) (finding both the First Amendment and common law provide access to judicial records); *United States v. Mousaoui*, 65 Fed. Appx. 881 (4th Cir. 2003) (access to documents arises under both First Amendment and common law); *In Re Providence Journal*, 293 F.3d 1 (1st Cir. 2002) (recognizing both common-law and First Amendment rights of access, but noting that the United States Supreme Court has not ruled on document access under the First Amendment); *United States v. McVeigh*, 119 F.3d 806, 811-12 (10th Cir. 1997) (finding common-law right of access but declining to rule on whether First Amendment applies to documents).

12 *See Nixon v. Time Warner*, 435 U.S. 589, 598-99 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . It is uncontested, however, that the right to inspect and copy judicial records is not absolute.").

13 *See, e.g., United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) ("[T]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts . . . .").

by noting the widespread and intense publicity.[14] Unconvinced, the Second Circuit reversed, observing that if widespread publicity "alone were sufficient to warrant closure, then courts could routinely deny the media access to those cases of most interest to the public, and the exception to openness would swallow the rule."[15]

The Second Circuit's conclusion flowed from *Press-Enterprise I* and from later decisions extending the same principles of openness to jury questionnaires.[16] Whether safety, privacy, or candor is cited as the rationale for seeking closure, the decisions make clear that the mere possibility that publicity will cause harm does not suffice to shut the courtroom door.[17] Rather, restraints on *voir dire* access are appropriate only in exceptional cases in which open proceedings would seriously and directly threaten juror privacy, safety, or candor, and in which the demanding legal test of *Press-Enterprise* is met.[18] However, the legal argument to be made will vary depending on the interest being asserted by the proponents of closure.

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14 *United States v. Stewart*, 2004 U.S. Dist. LEXIS 426, at *1-2 (S.D.N.Y. Jan. 15, 2004) ("Whereas, in a case that has generated such widespread publicity, it is essential that prospective jurors disclose what they have read or heard about defendants . . . .").

15 *ABC, Inc. v. Stewart*, 360 F.3d at 101.

16 *See Beacon Journal Publishing Co. v. Bond*, 781 N.E.2d 180, 188 (Ohio 2002) ("Consistent with our reasoning, we note that virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness."); *United States v. McDade*, 929 F. Supp. 815, 817 n.4 (E.D. Pa. 1996) ("I construe this holding [*Press Enterprise I*] as encompassing all voir dire questioning – both oral and written."); *Antar*, 38 F.3d at 1359-60 ("[W]e find that the right of access to voir dire examinations encompasses equally the live proceedings and the transcripts which document those proceedings. . . . It is access to the content of the proceeding – whether in person, or via some form of documentation – that matters." (citations omitted)); *Application of Washington Post, United States v. George*, No. 92-301, 1992 U.S. Dist. LEXIS 16882, at *10 (D.D.C. July 23, 1992) ("In the present case, the court shall make public the jury questionnaires of those jurors who appeared for individual voir dire. Answers on these questionnaires that contain intensely personal information that would be inappropriate for public disclosure, however, shall be redacted."); *Copley Press, Inc. v. Superior Court*, 278 Cal. Rptr. 443, 451 (Cal. Ct. App. 1991) ("[T]he blanket denial of access to the questionnaires here was unconstitutional."); *Lesher Communications, Inc. v. Superior Court*, 274 Cal. Rptr. 154, 156 (Cal. Ct. App. 1990) ("It follows that the public access mandate of *Press-Enterprise* applies to voir dire questionnaires as well as to oral questioning."); *In the Matter of Newsday, Inc.*, 552 N.Y.S.2d 965, 967 (N.Y. App. Div. 1990) ("Therefore, the presumption of openness applied to these questionnaires."); *Bellas v. Superior Court*, 102 Cal. Rptr. 2d 380, 386-87 (Cal. Ct. App. 2000) ("For our purposes, it is enough that these decisions make clear that the content of juror questionnaires are publicly accessible unless the reason for ordering them sealed outweighs the presumption of open access to records of judicial proceeding, the limitation on access is tailored as narrowly as possible, and the trial court's findings are articulated with enough specificity that a reviewing court can determine whether a confidentiality order was properly entered.").

17 *See supra* note 5; *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054-55 (1991) ("Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict on the evidence presented in court. . . ."). *But see Koubriti*, 252 F. Supp. 2d at 433 (closing *voir dire* in part to avoid prejudicing the pool of prospective jurors).

18 *See Press-Enterprise I*, 464 U.S. at 511 (jurors have a right to privacy as to "deeply personal matters that person has legitimate reasons for keeping out of the public domain"); *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997) (authorizing anonymous jury to protect juror safety); *United States v. King*, 140 F.3d 76 (2d Cir. 1998) (closing *voir dire* to ensure juror candor regarding racial bias).

Juror Privacy

The courts have generally held that the "juror privacy" exception should be applied on a juror-by-juror basis and cannot support the blanket closure of *voir dire* for all the potential jurors.[19] Under *Press-Enterprise I*, a juror must affirmatively request an *in camera* examination and must show that the questioning touches on "deeply personal" attitudes or experiences.[20] The private questioning should be limited to examination on the sensitive topic as a narrowly tailored exception to the rule of openness.

Various courts have addressed the types of "deeply personal" information that could, upon affirmative juror request, support *in camera voir dire* or jury questionnaire redaction. For example, the Supreme Court suggested in *Press-Enterprise I* that questioning as to whether a juror or a family member had ever been raped could proceed in private.[21] Similarly, the lower courts have safeguarded juror privacy regarding, among other things, religious belief, sexual and medical history, income, and social security numbers.[22] Occasionally, courts seek to impose a broader view of privacy; for example, in *United States v. McDade*,[23] the judge kept secret the title of whatever books jurors were reading at the time. Media lawyers need to distinguish between information that is generally kept confidential elsewhere in life from information that a potential juror may simply prefer was not known. The mere fact that a case is high profile and subject to press coverage should not change the rules that would apply. A routine trial, just like a high-profile trial, creates a public record open to inspection by all, and the privacy line should be drawn based on the type of information to be disclosed, not the degree of public attention that is anticipated.

Where a legitimate privacy interest is asserted and a narrow closing is allowed, media lawyers may want to consider whether to ask the trial court to release transcripts of the *in camera* questioning with the jurors' names redacted. That requires a calculation with the lawyer's client as to what is more important: the name of the juror or the substance of the answers to the sensitive questions.

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19 *See Cable News Network*, 824 F.2d at 1049 (holding that while some questions might merit private questioning to protect jurors' privacy, there must be a specific reason for private questioning in each case). *See also United States v. Sampson*, 297 F. Supp. 2d 340, 341 (D. Mass. 2003) ("While the process of jury selection is presumptively public, there may be compelling reasons that justify protecting the confidentiality of certain personal information concerning a potential juror."); *Beacon Journal*, 781 N.E.2d at 189-90 ("Consistent with *Press-Enterprise I*, trial judges should inform prospective jurors of their right to request an in-camera hearing, on the record and with counsel present, regarding any written question during the voir dire process. . . . [T]rial judges should make no . . . promise of confidentiality, but instead conspicuously advise prospective jurors that . . . their responses may be subject to public disclosure.").

20 *Press Enterprise I*, 464 U.S. at 512 ("[A] trial judge . . . should inform the array of prospective jurors . . . that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.").

21 *Id.* ("For example a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode.").

22 *See, e.g., United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979) ("[O]ur jury selections system was not designed to subject prospective jurors to a catechism . . . ."); *United States v. McDade*, 929 F. Supp. 815, 817-19 (E.D. Pa. 1996) (protecting jurors from *voir dire* inquiry into medical history, income, and even "what book a juror is currently reading"); *Beacon Journal Publishing Co. v. Bond*, 781 N.E.2d at 190 (protecting juror social security, telephone, and driver's license numbers). *See generally* David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMPLE L. REV. 1 (1997).

23 *United States v. McDade*, 929 F. Supp. at 819.

Juror Safety

Juror safety is a second and more compelling ground for restricting access to *voir dire*. Indeed, as discussed more fully in Part IV, *infra*, concerns about jury harassment or violence often require the empanelment of an anonymous jury. As the Second Circuit once put it: "If a juror feels that he and his family may be subjected to violence . . . how can his judgment be as free and impartial as the Constitution requires?"[24] Mafia trials surely fall into this category, along with certain drug cartel prosecutions and terrorist cases.[25]

In most instances, where a threat to safety has been established, the proper remedy will be anonymity. If that is so, there should be no need to also close *voir dire* or seal questionnaires, except for responses that would lead to identification. To impose both anonymity and closure would contradict *Press-Enterprise*'s teaching that the remedy be no broader than necessary.

Juror Candor

More recently, a number of trial courts have restricted *voir dire* access on the theory that an open courtroom would inhibit candor during questioning of potential jurors and thus undermine the defendant's right to a fair trial. This rationale is controversial, and dubious. In *United States v. Stewart*, for example, the trial court made the classic mistake of simply equating publicity with unfairness when it held that open proceedings "would prevent prospective jurors from giving full and frank answers to questions posed to them during *voir dire*."[26] The Second Circuit not only rejected this reasoning, but found that the precisely opposite conclusion should be drawn: "Where, as here, the *voir dire* proceedings do not explore particularly sensitive or controversial issues, knowledge that reporters are present probably discourages fabrication and ensures honesty on the part of venirepersons."[27]

The upshot of *ABC, Inc. v. Stewart* is that *voir dire* must remain open unless the examination touches on "particularly sensitive" topics where candor may be discouraged in an open proceeding. What qualifies as "particularly sensitive"? To date, the principal exception has involved inquiry into racial or religious bias. One example is *United States v. King*, where the Second Circuit held, over the dissent of Judge Cabranes, that in light of the "racial tensions" involved in the wire fraud prosecution of boxing magnate Don King, jury examination touching on the jurors' racial attitudes should proceed *in camera*.[28] The *King* panel rejected the media's argument that an anonymous jury, rather than the blanket closure of *voir dire*, would suffice to facilitate juror candor.[29]

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24 *United States v. Barnes*, 604 F.2d at 140-41.

25 *See* Part IV, *infra* (looking at anonymous juries).

26 *United States v. Stewart*, 2004 U.S. Dist. LEXIS 426, at *1.

27 *ABC, Inc. v. Stewart*, 360 F.3d at 102.

28 *United States v. King*, 140 F.3d at 82-83.

29 *Id.* at 83 ("We do not believe that, on the especially aggravated facts of this case, the District Court was required to conclude that juror anonymity would adequately guard against the risk that prospective jurors would significantly shade their responses after being exposed, directly or indirectly, to press accounts of what other jurors were reported to have said.").

A similar result was obtained in *Koubriti*, a prosecution of alleged Al Qaeda affiliates in Detroit.[30] In *Koubriti*, the district court restricted media access to *voir dire* touching on the jurors' attitudes toward Muslims and Arabs on the ground that in the "first post-September 11 case involving allegations of international terrorism," the "jurors' complete candor is absolutely essential to flesh out their views and biases."[31] Based on the expressed reservations of certain jurors, the court concluded that "the entire objective of pursuing candor and eliminating the potential for taint through individual *voir dire* would be greatly compromised by permitting daily media coverage of juror testimony."[32] A few older decisions are to the same effect.[33]

Nonetheless, the "juror candor" doctrine should remain an extraordinary exception, principally because of its inconsistency with the accepted notion that candor and honesty are generally enhanced, not inhibited, by open proceedings.[34] Looking forward, the media must vigorously oppose the extension of *King* and *Koubriti*, lest the "juror candor" exception metastasize in an era of heightened concern about personal privacy.

"Juror candor" cases also present a strategic challenge. While there are two obvious strategies to propose to a court concerned about candor – sidebar questioning limited to the sensitive topic, or, in extraordinary cases, an anonymous jury – those strategies were rejected in *King* and *Koubriti*. *King* stated that anonymity is no safeguard to the "chilling effect" of discussing sensitive racial matters in public, and *Koubriti* held that continuous sidebar conferences would unduly prolong jury selection.[35] It is difficult to accept either reasoning. With respect to the "chilling effect," *King* elsewhere rests its closure decision on the argument that "jurors would fear the adverse reaction of friends, employers, or others who might" disapprove of their "candid views."[36] But if the jurors remain anonymous, where is the risk? As to the *Koubriti* court's concern that sidebar questioning could unduly delay the empanelment of a jury, the short answer is that the interest in haste does not fare well in a collision with the First Amendment. Because the public's right to know justifies extending the time of *voir dire*, issue-specific sidebars are an acceptably narrow remedy to the ostensible problem of juror candor.

Even where a court has decided to conduct *voir dire* confidentially in chambers, media lawyers should not overlook strategies that may lead to partial access. While the "half loaf" is never satisfying when a court is closing the proceeding in error, media clients will be better off with something rather than nothing when an appeal is unavailable, untimely, or unlikely to succeed. Even in *United States v. Stewart*, prior to the Second Circuit ruling, the court released daily transcripts of the in-chambers *voir*

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30 *Koubriti*, 252 F. Supp. 2d 424.

31 *Id.* at 433.

32 *Id.*

33 *See, e.g., In re South Carolina Press Association*, 946 F.2d 1037 (4th Cir. 1991) (closing *voir dire* in a case in which race was one of the issues); *In re Greensboro News Co.*, 727 F.2d 1320 (4th Cir. 1984) (closing *voir dire* to the public in a case that involved the Ku Klux Klan and National Socialist Party of America among its parties).

34 *See ABC, Inc. v. Stewart*, 360 F.3d at 102 (open *voir dire* "discourages fabrication and ensures honesty"), citing *Globe Newspaper*, 457 U.S. at 609 n. 26 ("Openness in court proceedings may improve the quality of testimony."); *but see* Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 155 (1996) (noting the inconsistency between the media's argument for open *voir dire* and its "passionate and steadfast defense of confidentiality for its own sources").

35 *King*, 140 F.3d at 82; *Koubriti*, 252 F. Supp. 2d at 434.

36 *King*, 140 F.3d at 80.

dire. Similarly, in *United States v. Quattrone*,[37] the court allowed pool reporters to attend the parts of *voir dire* conducted in chambers. In both instances, the courts appeared to think the problem was not the fact that the answers would be publicized, but rather the degree to which the juror felt under scrutiny by a watching press and public at the time of the responses. While this flawed logic calls into question the entire rationale of closure, these examples do help in framing arguments against the total closure that some judges may instantly reach for when they think candor will be threatened.

IV. Access to Juror Identities: Anonymous Juries and Beyond

While the Supreme Court has never directly addressed the issue of access to juror identification, a host of lower courts have, with a majority concluding that the public has a right to know the identities of people called to *voir dire* and of those who sit as jurors.[38] Broadly speaking, these decisions fit into two categories. First are the cases in which there is a claim that jurors' safety is at risk, such as certain mob prosecutions and terrorism cases. In these cases, there is true anonymity – that is, the identities are shielded not merely from the public and the press, but from the defendant as well. This line of cases must be distinguished from a second type of case in which the issue is one of privacy and the parties propose that the identities of the jurors be kept from the public and press, but not from the parties and their counsel. Two rationales are typically offered for such partial anonymity: to prevent improper influence on the jurors during deliberations, and to deter harassment of juries following an unpopular verdict. Although rarely spoken of in decisions, many judges also believe in the "black box" theory – that the public legitimacy of the verdict comes in part from not knowing how the decision was reached in the jury room.

In the safety line of cases, in which the jury's well-being is demonstrably at risk, challenges to anonymity will rarely meet with success. The courts have repeatedly authorized completely anonymous juries in "extraordinary" circumstances where "the jurors may have something to fear from the

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37 *Quattrone*, 2003 U.S. Dist. LEXIS 17234.

38 *See Beacon Journal*, 781 N.E.2d at 194 ("[W]e hold that the First Amendment qualified right of access extends to juror names and addresses, thereby creating a presumption of openness . . . ."); *In re Disclosure of Juror Names and Addresses*, 592 N.W.2d 798, 809 (Mich. Ct. App. 1999) ("We therefore hold that the trial court cannot deny media access to jurors' names and addresses without first making a determination that concerns for jurors' safety are legitimate and reasonable."); *Sullivan v. Nat'l Football League*, 839 F. Supp. 6 (D. Mass. 1993) (holding that jurors' names would be made public, but not until ten days after the verdict); *In re Indianapolis Newspapers, Inc.*, 837 F. Supp. 956, 958 (S.D. Ind. 1992) (releasing the names of the jurors because seven days had passed); *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990) (holding that barring specific, valid reasons, such as juror safety, the judge should release the names of the jurors after the verdict); *United States v. Doherty*, 675 F. Supp. 719, 723 (D. Mass. 1987) ("This Court thus concludes that, under the First Amendment, the public has a general right, at some reasonable time after a verdict is delivered, to the names and addresses of the jurors discharging this important public trust."); *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988) ("After a jury has been seated, however, as true in this case when the petition for mandamus was filed, the names of those jurors are just as much a part of the public record as any other part of the case, and we think so also are their addresses in order to identify them.").

accused."[39] In *Paccione*, the Second Circuit articulated the leading multi-factor test for the determination of whether "there is a strong reason to believe the jury needs protection."[40] *Paccione* considered a variety of factors: Is the defendant involved in organized crime? Is the defendant associated with a group with the capacity to harm jurors? Has the defendant in the past attempted to interfere with the judicial process? Is the defendant facing a long sentence or substantial monetary penalties? Is the prosecution the subject of widespread publicity? Where factual findings establish that these factors are present, courts will grant anonymity as means of protecting the safety of the jury and ensuring the fairness of the trial.[41]

The juror privacy cases, on the other hand, provide a less compelling rationale for anonymity. To begin, both the public and the defendant benefit from having jurors known to the public. An anonymity order from the court is likely, in the words of the Massachusetts Supreme Court, "to taint the jurors' opinion of the defendant, thereby burdening the presumption of innocence."[42] With respect to the public, a First Circuit panel including then-Chief Judge Breyer cogently observed that many of the purposes "which open justice serves are equally served by access to the identities of the jurors. Knowledge of juror identities allows the public to verify the impartiality of key participants in the administration of justice, and thereby ensures fairness, the appearance of fairness and public confidence in that system."[43] These twin concerns – preserving the defendant's presumption of innocence and the

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39 *United States v. DeLuca*, 137 F.3d 24, 31 (1st Cir. 1998); *see also United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988) (upholding the decision by the trial judge's to keep the jury anonymous because the decision was based on concerns for juror safety); *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991) (upholding the use of an anonymous jury in a mob case); *United States v. Crockett*, 979 F.2d 1204 (7th Cir. 1992) (finding that the district court was justified in keeping the jury anonymous in a case in which a witness had already been killed and there was legitimate concern for juror safety); *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994) (approving an anonymous jury in another mob case); *United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997) (affirming the district court's decision to impanel an anonymous jury in an organized crime case); *Commonwealth v. Angiulo*, 615 N.E.2d 155 (Mass. 1993) (stating that anonymous juries are subject to due process scrutiny and should only be used when juror safety requires it); *State v. Samonte*, 928 P.2d 1 (Haw. 1996) (permitting an anonymous jury in a non-mob case, but a case in which juror safety was nonetheless at issue); *State v. Tucker*, 657 N.W.2d 374 (Wis. 2003) (allowing an anonymous jury if juror safety so necessitates, though the necessary factors were not present here).

40 949 F.2d at 1192. Courts adopting the *Paccione* test include the 11th Circuit (*Ross*, 33 F.3d at 1520) and the Hawaii Supreme Court (*Samonte*, 928 P.2d at 14).

41 But some dissenting commentators suggest that the concern for "juror safety" is overblown. *See, e.g.* Abraham Abramovsky & Jonathan Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHNS. J. LEGAL COMMENT. 457, 466 (1999) ("In the 200-year history of the American justice system, there are few if any instances in which jurors have been injured, and none in which a juror has been killed, as a result of his service on a jury.").

42 *Commonwealth v. Angiulo*, 615 N.E.2d 155, 171 (Mass. 1993) (citations omitted).

43 *In re Globe Newspaper Co.,* 920 F.2d at 94.

public's interest in open courts – are central to the appellate courts' repeated invalidation of anonymous jury orders absent a threat to juror safety.[44]

The courts are split on the legal foundation for the right to have access to identifying information for jurors and potential jurors. Some courts have found the right based in the First Amendment and employed a *Press-Enterprise* analysis; others have relied on a common law theory or even statutory law.

In *United States v. Antar*, the Third Circuit used a First Amendment approach in granting access to juror names and addresses that are included in the transcript of *voir dire* proceedings.[45] While recognizing that the right of access to juror names is not unlimited and can be restricted based on specific findings of "an impending threat of jury harassment," the court in *Antar* stated that "generalized social claims should not bear upon a decision whether limitations should be placed upon the press's ability to have post-trial access to jurors."[46]

Other courts have likewise turned to the Constitution to grant access to the names.[47] A recent case from the Ohio Supreme Court offers a useful discussion of *Press-Enterprise I* and its application to the question of juror information.[48] Under the "experience" test, which asks whether the information has historically been open to the press and public, the court found that "the long tradition of access to juror names and addresses favors disclosure."[49] Under the "logic" analysis, the court found that access to juror identities helps to ensure fairness and the appearance of fairness, and that post-trial interviews (facilitated by access to juror names) play a valuable role in educating the public about the system, providing insight into the process, and possibly even illuminating areas in need of judicial or legislative reform.[50]

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44 *See, e.g. Tucker*, 657 N.W.2d 374, 381-82 (invalidating an anonymous jury based on lack of individualized determination that jurors needed protection, and not taking steps to minimize prejudicial effect to defendant); *Beacon Journal*, 781 N.E.2d 180 (allowing access to jurors' names and addresses); *State v. Neulander*, 801 A.2d 255, 260-64 (N.J. 2002) (invalidating trial court order barring publication of jurors identified in open court); *Times Publishing Co. v. Florida*, 632 So.2d 1072 (Fla. Dist. Ct. App. 1994) (noting that if jurors are identified in open court, the media can publish identifying information); *Commonwealth v. Genovese*, 487 A.2d 364 (Pa. Super. Ct. 1985) (refusing to permit the order restraining the media from publishing jurors' names); *Des Moines Register and Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa 1976) (holding that a jury list is a public record to which the media was entitled). *See also Commonwealth v. Dupont*, No. 85-981-987, 1998 Mass. Super. LEXIS 476 (Mass. Super. Aug. 24, 1998) (discussing the grave constitutional questions raised by an anonymous jury).

45 *Antar*, 38 F.3d 1348.

46 *Id.* at 1363-64.

47 *See, e.g., In re Bay City Times*, 143 F.Supp. 2d 979 (E.D. Mich. 2001) (releasing juror names in the criminal trial of a local official because no countervailing interest outweigh the media's constitutional right to the information, which was a matter of public record); *Copley Press v. Superior Court*, 278 Cal. Rptr. 443 (Cal. Ct. App. 1991) (granting public access to juror questionnaires containing identifying information in future cases); *Lesher Communications, Inc. v. Superior Court*, 274 Cal. Rptr. 154 (Cal. Ct. App. 1990) (granting access to juror questionnaires containing identifying information); *Beacon Journal*, 781 N.E.2d 180 (ordering jurors' names and addresses to be released); *People v. Mitchell*, 592 N.W.2d 798 (Mich. Ct. App. 1999) (holding that the press has a qualified right of post-verdict access to jurors' names and addresses); *State v. Swart*, 20 Media L. Rep. 1703 (Minn. Ct. App. 1992) (releasing the names of jurors in a criminal trial because the reasons advanced to support closure of the record were insufficient to overcome the First Amendment interest in access).

48 *Beacon Journal*, 781 N.E.2d 180.

49 *Id.* at 193.

50 *Id.* at 194.

The Fourth Circuit similarly found a right of access to juror identities but rooted its decision in common law.[51] In *The Baltimore Sun Co.*, the Fourth Circuit instructed the district court to release the names and addresses of both sitting jurors and venirepersons in a highly publicized Savings and Loan prosecution.[52] The court explicitly declined to base its holding on First Amendment principles[53] and instead relied on the history of juries in the United States to grant the media access to the jurors' and venirepersons' names and addresses.[54] The court stated that "[a]fter a jury has been seated . . . the names of those jurors are just as much a part of the public record as any other part of the case, and we think so also are their addresses in order to identify them."[55] The court noted that "[w]hen the jury system grew up" in this country, members of the community knew the identities of their neighbors who had been called for jury duty and were seated to hear a particular case.[56] The court therefore saw the release of jurors' names and addresses as an extension of that history to today's society: "We think it no more than an application of what has always been the law to require a district court, upon the seating of the panel of a jury and alternates, if any, which will hear a case, to release the names and addresses of [the] jurors . . . ."[57]

In the First Circuit, the court took yet another approach in relying on a federal statute. In *Globe Newspaper Co.*,[58] the First Circuit ordered juror names and addresses to be released in a highly publicized criminal trial involving a prominent Boston defense attorney and a reputed Mafia member, but based its decision on the Jury Selection and Service Act of 1968 and implementing legislation.[59] While the court discussed First Amendment principles, the narrow holding of the case was that the jury plan established by rules of the District of Massachusetts permitted the trial judge to withhold juror identities only when he or she determines by specific, individualized findings that the interests of justice so require.[60]

One older federal appellate case has held that there is no First Amendment right of access to juror information, but that case was decided before *Richmond Newspapers* and the Supreme Court's later First Amendment access decisions.[61] Subsequently, in *Gannett v. State*, the Supreme Court of Delaware held that there is no First Amendment right to have jurors' names read aloud during a criminal trial and found that written records identifying jurors were administrative records and not judicial documents subject to access.[62] That view remains a decidedly minority view.[63]

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51 *Baltimore Sun*, 841 F.2d 74.

52 *Id.*

53 *Id.* at 76 n.4 ("We see no need to and do not base our decision on the First Amendment.").

54 *Id.* at 74-76

55 *Id.* at 75.

56 *Id.*

57 *Id.*

58 920 F.2d 88.

59 28 U.S.C. § 1861, *et seq*.

60 *Id.* at 91, 97.

61 *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977).

62 *Gannett Co. Inc. v. State*, 571 A.2d 735 (Del. 1990), *cert. denied*, 495 U.S. 918 (1990).

63 *See, e.g., Beacon Journal*, 781 N.E.2d at 190 (noting the presumption that juror questionnaires will become part of the public record).

But merely establishing a qualified First Amendment right does not necessarily mean the information will be forthcoming. The retrial of former Louisiana Governor Edwin Edwards highlighted the difficulties that media lawyers can face in seeking access to juror identities. The trial court permanently sealed the portions of the record containing jurors' names.[64] The Fifth Circuit found that the redaction of the transcript was a permissible restriction on the qualified First Amendment right. [65] Under the order, individual jurors remained free to waive their anonymity and discuss the verdict (though not the jury's deliberations) if they so desired, but the court found that nothing compelled the end of juror anonymity when the trial ended.[66] The original order was issued because of charges of witness tampering against the defendants, and the concern for jurors' safety and the integrity of the system remained applicable, according to the court, after the trial's conclusion.[67] The court struck down only so much of the order as restricted the press from circumventing the order and obtaining the names and addresses through independent newsgathering.[68]

Brown is troubling for many reasons – including its endorsement of letting the courts permit the jurors to decide whether they are to be identified. Lost in this "privatization" of judicial information is the public interest in knowing who sat on the jury. The post-verdict proceedings in *Stewart* highlighted the public value served by disclosure of the jurors' names. The *Stewart* defense learned from a member of the public that a sitting juror had been convicted of a crime, a fact not disclosed during *voir dire*. While the judge ultimately rejected the lack of disclosure as a basis for a new trial, the incident underscored how public identification of jurors helps insure accountability and integrity of the proceedings. *See United States v. Stewart*, 317 F. Supp.2d 432 (S.D.N.Y. 2004). In any event, *Brown* does not appear to be typical of high-profile cases. In most high-profile cases, the judge is concerned about pressure from the public coming to bear on jurors. In *Brown*, by contrast, the charges included witness tampering, and thus its rationale more closely aligns with decisions growing out of mob and terrorism prosecutions.

In some ways, the harder legal question involves not *whether* juror identification information can be public but *when*. Courts are increasingly tempted to withhold the information in *voir dire* until the particular venireperson is excused and for sitting jurors until a verdict is reached. This marks something of a shift in the relationship between the press and the courts. Traditionally, the information identifying jurors has been public, but the press has voluntarily refrained from publishing the information until a verdict is reached. That informal arrangement seems to serve well the purposes of both the press and the judiciary. The press sees no particular news value in the names during trial but has the information in case something extraordinary happens that makes a sitting juror newsworthy. If a juror is found to be sitting illegally, engages in conduct that prompted a mistrial, or becomes the subject of a reprisal from the defense, the press has the identifying information and can quickly do the necessary reporting. Courts, on the other hand, by relying on the informal arrangement do not need to sort out the legal questions that arise whenever sealing or closure is sought.

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64 *United States v. Brown*, 250 F.3d 907, 910-11 (5th Cir. 2001).

65 *Id.* at 918-19.

66 *Id*. at 921.

67 *Id.*

68 *Id.* at 916-17. *See also id.* ("Because the media did not challenge the anonymous jury order, they should not be able to back into the issue with a collateral attack [by arguing now that sequestration should have been more adequately considered as an alternative].").

That informal bargain came under piercing scrutiny, however, in April 2004 when two newspapers ran stories about a juror in the trial of Dennis Kozlowski, the Tyco CEO, as deliberations were ongoing. The juror had become the subject of attention after her fellow jurors wrote a note to the judge asserting that she was not deliberating in good faith. While other news organizations chose not to name her, published reports detailed her biography and included comments from the doorman at her building. In the immediate wake of the reports, the judge met with the juror and concluded that deliberations could continue. A few days later, however, after the juror received what she characterized as a threatening letter, a mistrial was declared.

In the days immediately after the mistrial, the issue of juror privacy became the subject of heated debate, both in legal circles and on editorial pages. Staff members from the Senate Judiciary Committee began collecting information as part of a review of whether federal law governing juror privacy needed to be amended. A state commission on jurors in New York decided to investigate the issue. And a federal judge in New York, hearing the retrial of prominent investment banker Frank Quattrone, ordered reporters at the trial not to disclose the names of jurors – even though they were a matter of public record – until the trial had ended, a clear prior restraint, the appeal of which was heard by the Second Circuit on November 2, 2004. No decision had been issued as of the date of this article. Whether the reporting in the Tyco case was proper or excessive may be debated, but it is indisputable, based on the performance of the press both before and after, that the case stands as a singular aberration in how jury trials are covered by the modern news media.

Despite the media's generally recognized right to have the identifying information, courts that wish to delay release of the information for a short period of time – either until the verdict or even for a short while after – will find support in the law.[69] In *United States v. Doherty,*[70] the court applied the *Press-Enterprise* analysis and found that "under the First Amendment, the public has a general right, at some reasonable time after a verdict is delivered, to the names and addresses of the jurors."[71] The *Doherty* court imposed the seven-day post-verdict delay on release of the jurors' information to "accommodate[] all the relevant interests without the necessity of balancing one against the other."[72] The court reasoned that the period was necessary to allow jurors, especially those who have been sequestered, to reconnect with family, to "resume [their] normal round of activities, and grants [them] a short breathing space to reflect on the experience of jury service and, after consultation with family and friends, determine what, if anything, the juror wishes to discuss with the press" and that the delay did not substantially infringe upon the media's First Amendment right of access.[73] While the court said that access to identifying information post-trial was a protected right, "the right of the Court to protect the anonymity of the jury through trial, deliberations, and verdict appears undoubted."[74]

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69 *See, e.g., United States v. Espy*, 31 F. Supp. 2d 1 (D.D.C. 1998) (releasing the names of jurors in the criminal prosecution of former Secretary of Agriculture Michael Espy after seven days); *Sullivan*, 839 F. Supp. 6 (releasing the names of jurors in a civil action ten days following the return of the verdict); *United States v. Butt*, 753 F. Supp. 44 (D. Mass. 1990) (releasing juror names in a highly publicized criminal case seven days following the return of the verdict); *Doherty*, 675 F. Supp. 719 (releasing the names and addresses of jurors seven days after the return of the verdict). *See also Indianapolis Newspapers*, 837 F. Supp. 956 (releasing jurors' names and addresses, in part due to the fact that the order was being issued one week after the jury had returned its verdict).

70 *Doherty*, 675 F. Supp. 719.

71 *Id.* at 723.

72 *Id*. at 725.

73 *Id.*

74 *Id.* at 722 n.4

Most media clients would find the seven-day waiting period to be an unacceptable delay in seeking comments from willing jurors and in providing timely news to readers or viewers. And, in fact, the more common procedure in high-profile cases in which names have been withheld during trial is to have the court release the names at verdict, if by no other mechanism than by polling the jury by a public roll call. Appellate decisions on the timing question are rare, but media lawyers have had success in prodding courts to release the names at the verdict. Often, letters will be written by counsel to the court at the end of testimony asking the court to release the names at verdict or, if the court is inclined not to do so, to allow counsel to be heard. The argument to be made is straightforward: (a) the names are presumptively public under the Constitution and common law; (b) the risk of undue influence on a verdict passes at the end of deliberations; and (c) the public benefit of juror comments comes from helping the public understand why a verdict was reached, and that benefit dissipates when that commentary is not available at the time the verdict is being reported. More fundamentally, juries exercise power, and one check on the power is being held accountable to the public. Anonymity is a breeding ground for irresponsible verdicts.

V. Post-Trial Access to Discharged Jurors

Although the United States Supreme Court has not specifically addressed the issue of post-trial juror contact, appellate courts, either considering restrictions as a denial of access under the rationale of *Globe Newspaper Co. v. Superior Court*,[75] or as a prior restraint,[76] have generally subjected attempts to prohibit post-trial access to a compelling interest, narrowly tailored examination.[77]

Applying that test has resulted in two generally (but not always) accepted rules: (1) some limitations on the approach to and manner in which jurors are interviewed will be permitted; and (2) a complete ban on post trial jurors interviews will not. As to the latter, a highly publicized trial -- *State v. Neulander*,[78] served as the exception and a vehicle for the New Jersey Supreme Court to bar all post-trial interviews with discharged jurors.

Partial Limitations On Post-Trial Juror Interviews

There are two interests that the courts usually rely on to justify limitations on post-trial interviews: preventing juror harassment and protecting the sanctity or privacy of juror deliberations.[79]

Preventing juror harassment is generally viewed by the courts as a duty of the court, and one that can be achieved without interfering with the recognized rights of the press by having the court instruct

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[75] 457 U.S. 596, 606-07 (1982) ("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.").

[76] *See Nebraska Press Ass'n*, 427 U.S. at 561, 570 (holding that "the barriers to prior restraint remain high", and the gag order did not meet it in this case).

[77] *See, e.g., In re Express News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982) (holding that a broad rule against any juror speaking about deliberations or the verdict was unconstitutional); *Antar*, 38 F.3d at 1351 (finding that restrictions on access were overly broad); *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236-37 (10th Cir. 1986) (finding that a judge's order forbidding press contact with former jurors, without time or scope limitations, was overly broad).

[78] *State v. Neulander*, 801 A.2d 255 (N.J. 2002).

[79] For a summary of most arguments against post-verdict interviews, *see* Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295 (1993).

discharged jurors "that they may refuse interviews and seek the aid of the court if interviewers persist after they express a reluctance to speak."[80] Upon such instruction, it is generally presumed that individual jurors will feel free to make their own choices about whether or not they wish to be interviewed by members of the press.

However, there are additional limitations that the courts may impose (and seem more likely to do so) in high profile cases. For example, without any muss or fuss, or, for that matter, any need for a hearing, the Fifth Circuit in *United States v. Harrelson* held that an order stating that "no person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed" passed constitutional muster.[81] Based upon the highly publicized nature of the trial – a murder prosecution of a federal judge – the court found it unnecessary to hold a hearing or for the judge to make specific findings about the need for the restrictions.

> The trial of Judge Wood's assassins was as widely followed and publicized a one as could well be imagined. No hearing was required to ascertain this, nor was one requisite to a determination that reporters are persistent and tenacious in pursuing information and that they seek it regarding the nonpublic portions of legal proceedings (jury deliberations, bench conferences between court and counsel, excluded evidence, etc.) as well as the public ones. *These are truisms known to all, and if they form a sufficient basis for the court's order, it is not invalid merely because he held no unnecessary hearing and wrote no redundant findings of fact concerning them before handing it down. Specific matters outside common knowledge, however, doubtless could not be urged in support of the order without such a proceeding*.[82]

The last two lines of the quoted passage, which perhaps reveals a willingness to consider the need and the process for imposing the restriction in a less publicized case, again demonstrates the courts' unfortunate tendency to view high-profile cases as being subject to different rules.

By contrast, in a high-profile criminal case involving Crazy Eddie's, the Third Circuit in *United States v. Antar* found that the "narrowly tailored" part of the *Globe Newspaper* test had not been met when limitations akin to those in *Harrelson* were imposed.[83] The Third Circuit held that a court must "carefully articulate specific and tangible, rather than vague and indeterminate, threats to the values which the court finds override the right of access,"[84] and that in the inquiry, "generalized social claims should not bear upon a decision whether [to place] limitations . . . upon the press's ability to have post-trial access to jurors."[85] Guided by this rationale, the Third Circuit overturned prohibitions against "repeated" juror contacts by the media and against attempts to resume a juror interview once a juror expressed a desire to conclude it because there was "no evidence, or even allegation, of misbehavior by

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[80] *Mechem*, 801 F.2d at 1237; *see also Antar*, 38 F.3d at 1364 (noting that jurors are traditionally given the advice that they are not obliged, and cannot be compelled, to grant an interview).

[81] *United States v. Harrelson*, 713 F.2d 1114, 1117-18 (5th Cir. 1983).

[82] *Id.* at 117 (citation omitted) (emphasis added).

[83] *Antar*, 38 F.3d 1348.

[84] *Id.* at 1351.

[85] *Id.* at 1363.

the press."[86] Unlike the Fifth Circuit, the Third Circuit would not presume that the restriction was necessary merely because there was publicity.[87]

Protecting the "privacy of silent jurors" or the "sanctity of the jury room" from being disturbed by those jurors who voluntarily speak to the media post-verdict have also been interests invoked to prohibit inquiry into juror deliberations.[88] Again, the appellate courts are divided in both their analysis and approach to a blanket restriction against asking jurors about deliberations. The Fifth Circuit in *Harrelson* upheld an order prohibiting anyone from asking jurors to reveal statements and votes of *other* jurors or the deliberations of the jury as a whole. The Court found no right of access to that information: "[M]embers of the press, in common with all others, are free to report whatever takes place in open court but enjoy no special, First Amendment right of access to matters not available to the public at large. The particulars of jury deliberation fall in the latter class. . . . '"[89]

Fifteen years later, the Fifth Circuit reaffirmed *Harrelson* in *United States v. Cleveland* and upheld an order that "no juror may be interviewed by anyone concerning the *deliberations* of the jury."[90] Finding the order functionally equivalent to the order upheld in *Harrelson*, i.e., that it only prohibited willing jurors from breaching the confidence of *other* jurors or the group, the court reiterated that the press had no special right of access to know about jurors' deliberations; it did, however, test the restriction as to whether it was "narrowly tailored to prevent a substantial threat to the administration of justice."[91] Again, without much difficulty, or apparent thought or proof, the court found that it was—it was designed to prevent the "threat presented to freedom of speech within the jury room by the possibility of post-verdict interviews."[92]

The Tenth Circuit, in *Journal Publishing Co. v. Mechem*, also found such a restraint permissible.[93] Although the Court analyzed restraints on juror interviews as a prior restraint affecting the gathering of news, and recognized that such a restraint could only be "necessitated by a compelling government interest,"[94] it did no more than assume such a conclusion when it said it would have approved an order telling "the jurors not to discuss the specific votes and opinions of noninterviewed jurors in order to encourage juror deliberation in the jury room."[95]

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[86] *Id.*

[87] *See also* Copernicus T. Gaza, Note, *Getting Inside the Jury's Head: Media Access to Jurors After the Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 311 (1995) (analyzing the *Antar* decision and finding that while a balance between the competing interests is necessary and complete bans are prohibited, First Amendment concerns do not weigh as heavily as do concerns about protecting jurors' privacy and/or about a defendant's right to a fair trial).

[88] *See, e.g.*, Goldstein, *supra* note 81 at 307 ("[J]urors have rights of privacy and a wide range of critically important doctrines and practices depend upon the secrecy of the jury's deliberations.").

[89] *Harrelson*, 713 F.2d at 1118.

[90] *United States v. Cleveland*, 128 F.3d 267, 269 (5th Cir. 1997) (emphasis altered).

[91] *Id.* at 270.

[92] *Id.*

[93] *Mechem*, 801 F.2d 1233.

[94] *Id.* at 1236.

[95] *Id*. at 1237.

Taking a more deliberate, considered approach, the Third Circuit in *Antar* held that the trial court needed to *articulate* the necessity for the restriction in *a particular* case before approving it.[96] It too, like the other courts, recognized that in a particular case an instruction that "no inquiry may be made into the specific votes, statements, opinions or other comments of any juror during deliberations other than the juror being interviewed" may be justified; it held, however, that such a restriction had to be justified on an individual case basis.[97]

Given that jurors are often seen on morning television in high profile cases questioned by the media about the basis for the jury's decision, and yet other jurors continue to serve and deliberate on juries, it is hard to understand why courts think a restriction on juror interviews to protect the sanctity of the deliberations is necessary for the process; nonetheless, the reported appellate cases do, with a varying degree of scrutiny, allow for such restriction.[98]

Complete Ban on Juror Interviews

Despite judicial willingness to put some limitations on access to jurors post-verdict and, in some cases, to encourage jurors not to talk to the press, barring all access had not been a step the courts had been willing to take -- that is, until the New Jersey Supreme Court decided *State v. Neulander*.[99]

The Fifth, Ninth and Tenth Circuits all struck down as unconstitutional complete bans on juror interviews.[100] In *In re Express News Corp.*, a local court rule prohibiting any person from "interview[ing] . . . any juror, relative, friend or associate thereof . . . with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown" was

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[96] *Antar,* 38 F.3d at 1351.

[97] *Id.* at 1355, 1364.

[98] For commentary, see William R. Bagley, Jr., *Jury Room Secrecy: Has the Time Come to Unlock the Door?*, 32 SUFFOLK U. L. REV. 481 (1999) (arguing that because information about juror deliberations already leaks out in a haphazard way, the judicial system should take the step of recording deliberations and making them part of the public record); Nicole B. Cásarez, *Examining the Evidence: Post-Verdict Interviews and the Jury System*, 25 HASTINGS COMM. & ENT. L.J. 499 (2003) (conducting an empirical study of post-trial juror comments to the media and concluding that any concerns about juror privacy are speculative and not supported by evidence, whereas the First Amendment rights of the media to question jurors and publish comments, the jurors to speak their minds, and the public to learn about the criminal justice system is obvious and should outweigh any speculative concerns); Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465 (1997) (outlining the competing interests and advocating for compromise proposals that protect jurors' privacy interests while allowing the media to conduct post-verdict interviews); Christine J. Iversen, Comment, *Post-Verdict Interviews: The Key to Understanding the Decision Behind the Verdict*, 30 J. MARSHALL L. REV. 507 (1997) (calling for a limited period of time before jurors' names are released, thereby balancing competing concerns); Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886 (1983) (recommending that judges discourage jurors from discussing deliberations, but not issue orders to that effect); David Weinstein, *supra* note 21 (arguing for stronger reform to protect jurors' privacy); Kelly L. Cripe, Comment, *Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System*, 6 UCLA Ent. L. Rev. 235 (1999) (suggesting that juries should publish their own opinion, explaining why they reached the result that they did).

[99] *Neulander*, 801 A.2d 255.

[100] *In re Express News Corp.*, 695 F.2d 807 (5th Cir. 1982); *United States v. Sherman*, 581 F.2d 1358 (9th Cir. 1978); *Mechem*, 801 F.2d 1233. Additionally, in dicta, the Sixth Circuit has also indicated an unwillingness to completely ban all juror interviews. *See In re Petitions of Memphis Publ'g Co.*, 887 F.2d 646, 649 (6th Cir. 1989) ("[I]f the trial court's statement were indeed a post-trial gag order of the scope alleged by petitioners [forbidding jurors to talk to the press post-trial], it would trammel First Amendment values, and thus fail to pass Constitutional muster.").

challenged.[101] The Fifth Circuit declared the rule unconstitutional as applied to the post-verdict context because of its sweeping nature.

> The rule is unlimited in time and in scope, applying equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications, and foreclosing questions about a juror's general reactions as well as specific questions about other jurors' votes that might, under at least some circumstances, be inappropriate.[102]

Similarly, in *United States v. Sherman*, an order barring all persons from contacting jurors in a criminal case was held by the Ninth Circuit not to meet the First Amendment's "heavy presumption against . . . [the] constitutional validity" of prior restraints.[103] And, in *Mechem*, the Tenth Circuit overturned the trial court order instructing jurors that: "You should not discuss your verdict after you leave here with anyone."[104] Applying the presumption that such restraints violate the First Amendment, the court ruled that, "Judge Mechem's order restricting press contact with former jurors was impermissibly overbroad. It contained no time or scope limitations and encompassed every possible juror interview situation."[105]

State and lower federal courts have similarly struck down other attempts to ban all contact with discharged jurors. In *Cincinnati Post*, the Supreme Court of Ohio considered a post-verdict order that "[n]o one . . . talk to the jurors about the case."[106] While acknowledging the ability of the court to protect jurors, the Ohio Supreme Court vacated the order because it was not narrowly tailored. The court suggested the tailored type of restrictions upheld in *Harrelson*, discussed above, would have more appropriately protected juror privacy and deliberations.[107]

Although the typical case involves an order barring the press from approaching jurors, some courts have sought to achieve the same ends by issuing orders prohibiting the jurors from speaking.[108] While such an order does not directly limit the rights of journalists, the courts have generally agreed that

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[101] *Express News*, 695 F.2d at 808.

[102] *Id.* at 810.

[103] 581 F.2d at 1361.

[104] 801 F.2d at 1235.

[105] *Id.* at 1236.

[106] 570 N.E.2d at 1102.

[107] *Id.* at 1103 (comparing the *Harrelson* instructions and finding them to be more appropriate). *See also United States v. Franklin*, 546 F. Supp. 1133 (N.D. Ind. 1982) (finding that an order barring questioning of jurors by "anyone" should be scaled back to restrain the media only from juror harassment and interview requests at the courthouse); *Contra Costa Newspapers, Inc. v. Superior Court*, 72 Cal. Rptr. 2d 69, 72-73 (Cal. Ct. App. 1998) (holding that an order that jurors are not to be contacted by the press, because they have already stated their preference not to be contacted, was "impermissibly overbroad [because] it contained no scope or time limitations"). For an example of a lower state court finding that complete bans on juror interviews are overly broad and therefore invalid, *see also Sentinel Comm. Co. v. Watson*, 615 So. 2d 768 (Fla. Dist. Ct. App. 1993).

[108] *See Cincinnati Post v. Court of Common Pleas*, 570 N.E.2d 1101 (Ohio 1991) (finding that while a more narrow order might have been upheld, a general order forbidding jurors to talk to anyone about the trial violated the First Amendment); *Mechem*, 801 F.2d at 1235-36 (finding that an order that, "You should not discuss your verdict after you leave here with anyone," was overly broad).

the press has standing to challenge the orders, at least where there is reason to believe that a "willing speaker" exists and would provide information to the media but for the order.[109]

Whether focusing on the First Amendment rights of the would-be interviewers or the First Amendment rights of the jurors themselves – and the restraint is an obvious prior restraint as to them – the courts have taken a dim view of such orders. As one federal district court put it, "This court is aware of the general proposition that it cannot order a juror to refrain from speaking, post-verdict."[110] In *Cincinnati Post*, the judge issued the post-verdict gag order on the jurors after the jury foreman told the court that the jurors did not want to talk to the press.[111] The Ohio Supreme Court struck down the order, noting that, even if the foreman spoke for the group, the order was invalid because it did not allow for the possibility that some jurors might change their minds and want to speak.[112] Similarly, in *Mechem*, the court found that the gag order on jurors was impermissibly overbroad because it had no limitations on how long it would last or what kind of juror-press contact would be barred.[113] While these latter cases leave open the possibility that a narrowly tailored juror gag order might survive court scrutiny, as a practical matter the orders will be subject to the same exacting scrutiny as an order barring the press from doing interviews and, like those orders, seem unlikely to survive a constitutional challenge.

Or at least that was the case until *State v. Neulander*.[114] Judicial reluctance to ban all post-trial contacts with discharged jurors ceased in that case.

The 2002 highly publicized murder trial of Rabbi Fred Neulander was exceptional in many ways. Neulander, the once popular leader of a large synagogue in Southern New Jersey, was accused of hiring two hit men to murder his wife. Following sensational revelations of compulsive adultery, a confession by the hit man, weeks of gavel-to-gavel Court TV coverage, a mistrial, a retrial, the damaging testimony of his own children, and Neulander's dramatic refusal in the second trial to testify, Neulander was convicted of capital murder and sentenced to life in prison. Along the way, however, it was not only the rabbi whose liberty was threatened – four *Philadelphia Inquirer* journalists were charged with contempt for violating an order relating to post-trial interviews of discharged jurors from the first trial. [115]

Prior to the first trial, the trial court had entered an order providing, *inter alia*, that "[m]edia representatives shall not contact or attempt to interview any juror or potential juror."[116] After the first

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[109] *In Re Dow Jones & Co.*, 842 F.2d 603 (2d Cir. 1987) (deciding that where the media is prevented from talking with a willing speaker because of a gag order, the media has standing to challenge the gag order); *see also Sioux Falls Argus Leader v. Miller*, 610 N.W.2d 76, 80-81 (S.D. 2000) (holding that the media had standing to challenge a participant gag order).

[110] *United States v. Gotti*, No. CR-90-1051(S01), 1992 U.S. Lexis 11400, *14 (E.D.N.Y. June 24, 1992).

[111] *Cincinnati Post*, 570 N.E.2d at 1104.

[112] *Id.* ("Second, even if the foreman did speak for everyone on the jury, Judge Ruehlman's order does not allow for the possibility that some jurors may change their minds and choose to talk about the case.").

[113] *Mechem*, 801 F.2d at 1236-37 ("[T]he court could not issue a sweeping restraint forbidding all contact between the press and former jurors without a compelling reason.").

[114] *Neulander*, 801 A.2d 255.

[115] Although originally found to be in contempt at the trial court level, the appellate court eventually reversed the contempt finding holding that the trial court order only prohibited actual interviews with discharged jurors and not contacts with them, and as no actual interviews had been proven to have taken place, the reporters could not be held in contempt.

[116] *Neulander*, 801 A.2d at 258.

jury deadlocked and the trial court declared a mistrial and discharged the jurors, the trial court refused to vacate or relax its earlier order, ruling that the media would still be prohibited from conducting interviews of any of the discharged jurors. The trial court's reasoning was twofold: (1) the court surmised that the retrial jurors' knowledge that their counterparts from the first trial had been interviewed by the media would "have the capacity to chill the free exchange of ideas in the jury room"; and (2) post-trial interviews and the corresponding publicity could prejudice the prospective jury pool for the retrial.[117] Not surprisingly, the media appealed the trial court's ruling, losing first at the intermediate appellate level before being heard by the New Jersey Supreme Court.

On appeal, the New Jersey Supreme Court modified the trial court's order with respect to contacts with the discharged jurors in two ways: (1) the application of the order would only extend until the conclusion of the retrial and the return of the verdict; and (2) the restriction would apply not only to media-initiated communications with the jury, but also to juror-initiated communications as well.[118]

In making its ruling – which was more prohibitive than the trial court's order, the New Jersey Supreme Court expressed disagreement with the trial court's underlying rationale in restricting media access to jurors. Although the trial court justified its restriction on post-trial interviews by "focusing on the possible adverse effects on the retrial jury," the New Jersey Supreme Court refused to credit this justification because it was "too speculative."[119] Rather than relying on the possible adverse effects on the retrial jury, the New Jersey Supreme Court instead focused on the fact that it was a death penalty case. Noting that courts should be "extremely cautious concerning juror interviews when a death penalty retrial is pending," the Court expressed deep concern that interviews with jurors could afford the prosecution insight into the deliberative process, including the evidentiary basis for the jurors' decisions, and could "provide the prosecution with an undue advantage in the retrial proceeding."[120] Ultimately, the Court found that these concerns, which implicated the defendant's Sixth Amendment rights, outweighed the media's First Amendment interests.[121] Why the Court did not think its own rationale "speculative," it did not explain.

Most cases should be readily distinguishable from *Neulander*. Assuming it appropriate, focus should be on the fact that the case arose in the context of a mistrial of a death penalty case, where a retrial was guaranteed. Indeed, the New Jersey Supreme Court tried to so confine its decision by presenting the issue: "[T]he power of the court, following a *hung* jury in a *capital* murder trial that will result in defendant's *imminent* retrial for capital murder, to prohibit representatives of the press from attempting to conduct interviews of the jurors after the trial court declared a mistrial."[122]

While the facts may be distinguishable, we should be aware of the potential for *Neulander*'s extension beyond the hung-jury capital murder case. In *Neulander*, the Court expressed concern with the pollution of a defendant's Sixth Amendment rights by disclosing the discharged jurors' view to the prosecution. If such a concern is credited, it is not difficult to see *Neulander's* application to any case

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[117] *Id.* at 272.

[118] *Id.* at 257.

[119] *Id.* at 272.

[120] *Id.* at 272-73.

[121] *Id.* at 274.

[122] *Id.* at 257 (emphasis added).

where there has been a criminal conviction – retrial is always a possibility upon appeal – and as a theoretical matter, one can fairly ask the question why, if a Sixth Amendment right is somehow threatened by interviews with discharged jurors, is it only at risk in a death penalty case?

A frontal attack on the decision in *Neulander* may be necessary (and surely appropriate). While the New Jersey Supreme Court criticized the lower court for its "speculative" reasoning, its own reasoning was not based on anything but speculation.[123] There were no facts to support the Court's conclusion that the prosecution could be so advantaged by the interviews as to deny a defendant his Sixth Amendment rights. Although the Sixth Amendment rights of a criminal defendant are a compelling interest, no basis exists for concluding that they are threatened by disclosure of the discharged juror's viewpoints, especially when there was a televised proceeding, with the potential for shadow juries. Here publicity should weigh in our favor. Surely, there have been many a retrial even after the jurors have spoken to the press or even given testimony, without Sixth Amendment rights having been found to have been violated.[124]

VI. Conclusion

In the end, the recent trend in access to juror information and proceedings presents something of a paradox: limitations on access are becoming more common, but the law itself remains largely unchanged and highly favorable to the press. Unfortunately, restrictions that would likely fall or be significantly curtailed are allowed to stand because any appeal would be untimely or prohibitively costly. At the same time, trial courts are being asked to rule on access at a time when there are burgeoning concerns about privacy across society – witness the attention paid to identity theft and the new medical privacy regulations – and there is an understandable judicial uneasiness with the way some high-profile cases have been covered by the press. No silver bullet exists. Instead, media lawyers need to continue doing the things that matter: before the trial courts, stressing the constitutional issues involved and highlighting that the rights involved are those of the public, not merely those of the press; finding venues outside the courtroom and before high-profile cases arise for dialogues with local judges about the law of access; and carefully selecting cases for appeal that will reaffirm the constitutional principles at issue. The Supreme Court has said that what transpires in the courtroom is public property, and as media lawyers, we must act like the most interested of all stakeholders.

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[123] *Id.* at 272.

[124] Indeed, the New Jersey Supreme Court in *State v. Cruz*, 794 A.2d 165, 166 (N.J. 2002), (a case decided about the same time as *Neulander*,) held a capital murder case that had resulted in a mistrial could be retried without offending principles of "double jeopardy or fundamental fairness." To reach its decision, the court relied on a report of the jury's deliberations from the jury foreperson in *Cruz* (which was disclosed, of course, to the prosecution) in determining that it was fair to allow a retrial; doing so certainly was inconsistent with its ruling in *Neulander* that disclosing juror deliberations to the prosecution somehow might undermine a defendant's Sixth Amendment right to a fair retrial.

IN-CHAMBERS CONFERENCES

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In-Chambers Conferences

When the United States Supreme Court declared in 1980 that the First Amendment afforded the press and the public a right to observe criminal trials, which justice said: Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings?

Dont peak at *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) before answering. Although the cautionary, guarding-against-expansion tone of that dicta sounds like a Nixon appointee, the answer is Justice William Brennan, in his concurring opinion (at 598).

Since then, trial court judges have occasionally retreated to chambers to conduct adjudicatory business in the face of active press and public attention, testing Justice Brennans cautionary observation, sometimes successfully. But, the press triumphed in two leading cases that presented similar scenarios.

When Clint Eastwoods real-life housemate and former regular co-star, Sondra Locke, sued the actor in California court during the mid-1990s, the tabloids and the mainstream press took notice. Locke claimed that Eastwood breached promises to develop her film career and film projects, seeking, among other things, money for career damage.

Although one would expect that watching Lockes performances in Eastwoods 1970s movies would produce summary judgment on the theory that the career damage was a self-inflicted wound, the case went to trial. The trial judge decided *sua sponte* that he should allow the press and the public in the courtroom only when the jury was in the courtroom. The judge expressed the conviction that there should be no chance that the jurors would be exposed to information and argument that was outside the jurys presence. For various reasons, the judge decided against sequestering the jury.

The trial then proceeded like court-ordered musical chairs. A witness would testify, then the jurors, press, and public would be ushered out. The court would hear and decide a motion for nonsuit, take it under advisement, and then allow everyone back in. The next witness would testify. Then, the court would usher everyone out, hear argument about whether the next witness should be allowed to address a particular topic, make a ruling, and then allow everyone back in to hear that witness. Eventually, Sondra Locke testified. In the middle of her direct examination, the court shooed everyone from the courtroom, heard a motion for mistrial, and decided not to grant it, then allowed everyone back in. The same routine continued throughout Lockes case and Eastwoods defense.

In the middle of the trial, Los Angeles television station KNBC-TV challenged the staccato courtroom closings by petitioning the trial judge. That yielded an amended order purporting to transform the courtroom into a sort of in-chambers ante room. This court has insufficient room in chambers for litigants and counsel, so these proceedings in the absence of the jury are held in the courtroom as an extension of chambers, the court ruled.

KNBC then petitioned the California court of appeal for a writ of mandamus. The court of appeal issued it while the trial was still underway. The trial judge then moved from the ante room to his chambers where he excluded the press and the public from hearing a motion to allow a witness to testify as an expert, a motion about the admissibility of particular accounting evidence, and hashed out jury instructions. While the jury was deliberating, Locke and Eastwood settled.

KNBCs challenge nevertheless went to the California Supreme Court, which resoundingly and unanimously ruled for KNBC. Californias highest court rejected the trial courts assertion that chambers proceedings are categorically not part of the trial process – and hence are not subject to the First

Amendment right of access. The court recognized that, although in some situations it may be appropriate to exclude the public and the press from chambers proceedings, a proceeding that would be subject to a right of access if held in open court does not lose that character simply because the trial court chooses to hold the proceeding in chambers. The court added: shifting portions of the proceedings to a bench conference or an in camera proceeding to escape the open-trial right goes beyond the historically accepted uses of these proceedings and is unconstitutional.

The court saw as overboard the trial courts effort to guarantee that jurors from evidence and argument that was not presented to them in the trial. There are no true guarantees in constitutional law, including the right to a fair trial, the court effectively observed. Trying to guard against juror taint from extrajudicial information cannot, by itself, justify booting the press and the public from the courtroom whenever the jury is excused. The court ruled that the trial judge should have afforded the press and the public notice and an opportunity to be heard, and objectively decided whether there was a narrowly tailored, compelling reason to go in-chambers. *KNBC-TV v. Superior Court*, 20 Cal.4th 1178, 86 Cal.Rptr.2d 778 (1999).

In barring similar in-chambers proceedings, the Virginia court of appeals rejected a trial judges justification much like that of the California trial court in the Clint Eastwood case. At the start of a three-day criminal trial in Virginia state court, the trial judge *sua sponte* suggested that voir dire of potential jurors occur in chambers, and that other proceedings convene there when the jury was excused. While in-chambers, the judge decided a motion for a mistrial based on opening statement, motions to strike, motions to disallow certain evidence, and a motion to set aside the jurys verdict.

Like the California trial judge, the Virginia judge feared that the non-sequestered jurors would read press accounts of information that was not presented to them during the trial. The judge justified his procedure principally on two grounds: (1) no jury room was available to which the jurors could be ushered, and the courtrooms design would not accommodate putting them anywhere while the court heard information and argument that the jury was not supposed to hear, making his chambers the only viable forum for the court to hear those matters outside the jurys presence, and (2) there was insufficient room in the judges chambers for the press and the public.

Publisher Times-World Corporation challenged the judges procedure in an original mandamus action in the Virginia court of appeals and won. The court of appeals recognized that the judge based his justifications for the closed in-chambers hearings chiefly on inconvenience to the court, which failed to qualify as the compelling justification needed to overcome the constitutional right of access to criminal trial proceedings.

Because the substance of the in-chambers hearings addressed matters that usually occur in open court – hearing and deciding motions and the admissibility of evidence – the court rejected the argument that the hearings held in chambers were mere side-bar conferences not subject to the first amendment rights of the public and press. *In re Times-World Corp*., 373 S.E.2d 474, 479 (Va. App. 1988).

A leading case that allows closed in-chambers proceedings is a 1995 ruling by a panel of the United States Court of Appeals for the Seventh Circuit. *B.H. v. McDonald*, 49 F.3d 294. There, the ACLU sued the Illinois Dept. of Children and Family Services on behalf of a class of 25,000 children, claiming that the state failed to provide adequate food, shelter, clothing, and health care to the children. After two years of extensive discovery, the parties agreed to a consent decree in 1991 issued by the United States District Court for the Northern District of Illinois.

Three years later, when all sides agreed that the state had failed to comply with the consent decree, the parties and the district court agreed to hold in-chambers hearings to negotiate ways for the

state to comply. The court preferred closed in-chambers hearings because press coverage of open court proceedings in the case had, in the courts view, caused the attorneys for the parties to engage in excessive posturing.

The court recognized the substantial public significance of the case, and noted that the consent decree had been a campaign issue in the Illinois governors race. Nevertheless, the court decided that it could better assist the parties in reaching solutions in closed in-chambers conferences without the dysfunction caused by the presence of the press.

In the meantime, Patrick Murphy, the Cook County Public Guardian, who was the guardian ad litem for most of the plaintiff class and for thousands of other children in Cook County, moved the district court to conduct all proceedings in open court. The district court denied the motion, ruling that the public right of access to court proceedings did not extend to in-chambers conferences between the parties and the court.

Murphy appealed to the Seventh Circuit, which unanimously affirmed the district courts ruling. In an opinion by Judge Goodwin assigned from the Ninth Circuit, the panel found that the First Amendment right of access does not apply to in-chambers conferences in the context of administering complex consent decrees. Unlike trials, which focus on guilty or not guilty, true or false, the administration of consent decrees involve decision making by means of negotiation . . . and search for least worse solutions. The court added: The goal is to allow the parties to ventilate their views and resolve their differences in a neutral forum, where they are encouraged to work toward compromise rather than to advance polarized adversary positions.

Emphasizing that the in-chambers proceedings will not be adjudicating anyones rights or enforcing any provision of the consent decree, the court speculated that public scrutiny of in-chambers conferences could undermine their very function because the conferences require a certain degree of give-and-take negotiation, particularly where the purpose is to further an alternative dispute resolution mechanism. The upshot:

> In discussing these subjective areas of social policy, candor and free flow of discussion are expedited and enhanced through face-to-face encounters between the parties in chambers. An enforceable right of bystander access to these processes could change the way the conference works and impede, rather than advance, problem-solving.
> 49 F.3d at 301.

Consequently, non-parties have no . . . right to observe, monitor, or participate in implementation hearings following a consent decree where the court will not be adjudicating any issues on the merits.

Although finding that post-decree conferences have not historically been public, the Seventh Circuit expressed no disagreement with the general constitutional notion that, if the substance of the proceeding were one to which the constitutional right of access ordinarily attaches, convening the proceeding in the judges chambers does not limit or negate that right.

Regardless of whether an appellate court has agreed with a trial judges decision to convene closed in-chambers proceedings, all agree on one core principles. They all disapprove of trial judges taking proceedings that, in the norm, occur in the courtroom, and moving them to closed in-chambers proceedings. They disapprove of the court deciding motions by hearing argument in-chambers, and they reject the notion that preserving the constitutional right to a fair trial automatically justifies limiting public and press observation to only those portions of a trial that the jury hears.

THOUGHTS ON THE CONSTITUTIONALITY OF TELEVISED TRIALS IN THE AGE OF INFORMATION AND THE ERA OF INFOTAINMENT

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Thoughts on the Constitutionality of Televised Trials in the Age of Information and the Era of Infotainment

This essay sketches the central arguments to be made in support of a constitutional right to televise trials. In one respect, they are of all but academic interest: Forty-two states now permit some form of audiovisual access to trial court proceedings. And, despite predictions of doom arising out of the O.J. Simpson criminal proceedings, justice has not unraveled — convictions have not been reversed; witnesses and jurors have been neither seduced by the supposed lure of the camera nor intimidated by it into avoiding duties; and judges and lawyers have not turned trials into drama.

More interesting – particularly in light of the current culture of press bashing – the trend since the Simpson trial has been to expand televised access to trials. In the last ten years, six states began to permit cameras in their trial courts – a 17% increase. In the past two years alone, the Supreme Court of Mississippi opened that state's courtrooms to cameras, reversing longstanding policy; and the New Hampshire Supreme Court revised that state's guidelines to create a presumption in favor of televised trials that may be overcome only by meeting closure standards akin to those demanded by the Supreme Court's First Amendment access cases. As I write, a webcast from a security camera in a rural Delaware courtroom provides gavel-to-gavel coverage — complete with links to pleadings and exhibits— of the trial of members Walt Disney Board of Directors arising out of highly publicized financial actions involving Michael Eisner and Michael Ovitz.[2]

Things have gone differently in New York. There, a long-simmering legislative battle has left intact a fifty-year-old statutory ban on the televising of all trials. In 2000, the dispute moved to the courts and is now before the New York Court of Appeals, the state's highest court. Next spring, the Court is expected to rule on claims asserted by Court TV that the First Amendment, and its state counterpart, no longer permit any outright ban on television cameras in courts. The Court's decision will likely constitute the most significant appellate ruling in a generation on the question of whether constitutional law requires some amount of televised access to trials.

And so the matter is far from academic — or even local. How the Court resolves it will act as a kind of free press/fair trial Rorschach test: it will tell us much about the seriousness with which the judiciary takes constitutional principles of access to government. And it may measure the extent to which judicial scrutiny of those principles has been influenced by the daily denunciation of news, and especially television news, as nothing more than profit-driven entertainment. The pages below attempt to explore these issues.[3]

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2 *See* Jack Elliott, *Ruling Opens Mississippi Courts to Cameras*, Associated Press Online, Apr. 17, 2003, available at 2003 WL 19159999; *Petition of WMUR Channel 9*, 813 A.2d 455 (N.H. 2002); Eric Schumacher-Rasmussen, *Courtroom Connect Streams Disney's Defense*, streamingmedia.com (Oct. 26, 2004).

3 My focus here is on federal constitutional law, both because it is relatively well developed in the area of access and for the practical reason that many readers reside in other jurisdictions. It is not a reflection of my views on the significance of New York law in the case now pending before the Court of Appeals — especially given the Court of Appeals' prior holdings that press and newsgathering protection provided by Article I, Section 8 of the state constitution "is often broader than the minimum required by the First Amendment." *O'Neill v. Oakgrove Construction Co*., 528 N.Y.S.2d 1, 4 (N.Y. 1988); *see generally Immuno, AG v. Moor-Jankowski*, 566 N.Y.S.2d 906 (N.Y.), cert. denied, 500 U.S. 954 (1991).

The New York Background

In 1952, New York enacted Section 52 of its Civil Rights Law. Reflecting the concern of the Legislature that "[b]atteries of cameras, microphones and glaring lights" would jeopardize witnesses' rights and convert "official proceedings" into "indecorous spectacles," Section 52 made it a crime, punishable by imprisonment, to "televis[e], broadcast[], or tak[e] motion pictures . . . of proceedings, in which the testimony of witnesses by subpoena or other compulsory processes is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state." Because it permitted no televising of any proceedings in which compelled testimony "may" be taken, the statute by definition constituted an absolute ban on televised coverage of all trials and virtually all trial court proceedings in the State.[4] In the middle of the last century, New York was hardly unique in banning cameras from courtrooms.[5] By 1965, when the Supreme Court reversed a criminal conviction in part because of the role in-court cameras had played in the defendant's trial and pre-trial proceedings, *Estes v. Texas*, 381 U.S. 532, 548 (1965), bans existed in all but two states.

In the decades that followed, however, advances in technology to make cameras less intrusive and the increasing reliance by the public on television news, led some states to begin experimenting with television cameras in trial court proceedings. The rules that permitted such experimentation generally contained procedural protections for certain types of witnesses (*e.g.*, minors, undercover police officers), barred coverage of some proceedings (*e.g.*, suppression hearings), and, to greater or lesser extent, granted the presiding judge discretion in deciding whether to permit any given trial to be televised. *See, e.g.*, *In re Petition of Post Newsweek Stations, Inc.*, 347 S. 2d 402 (1977). Throughout the 1970s and into the 1980s, many of these states issued reports and studies assessing how cameras had affected the proceedings. *See* note 6 *infra*. By the time the Supreme Court ruled in *Chandler v. Florida*, 449 U.S. 560 (1981), that the televising of the criminal trial of two defendants did not constitute a *per se* denial of their Sixth Amendment rights, twenty-three states had enacted rules permitting, and guidelines concerning, in-court cameras. *Id.* at 566 n.6. The year following *Chandler*, the Chief Judge of New York issued a set of coverage rules as well, effective if and when the Legislature suspended Section 52.

In 1987, the Legislature did just that. It enacted Section 218 of the New York Judiciary Law, which lifted Section 52's *per se* ban for an 18 month "experiment".[6] As did its counterparts in other jurisdictions, Section 218 contained detailed restrictions on the kind and scope of coverage permitted, with the ultimate

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[4] The curious language of Section 52 — emphasizing the rights of witnesses compelled by subpoena to testify — was in large part driven by the politics of anti-communism. Virtually the entire legislative history of the statute focuses upon concerns with witnesses compelled to appear before legislatures and other inquests during the height of McCarthyism. *See* Association of the Bar of the City of New York, "Report on Radio and Television Broadcasting of Hearings of Congressional Investigating Committees" (1951) (contained in Bill Jacket, N.Y.S. Senate Bill Nos. 268, 3436 [N.Y.Civ.Rights L. § 52] (1952); *see generally People v. Santiago*, 712 N.Y.S. 2d 244, 254 (Crim. Ct. N.Y. 2000).

[5] Bans on audiovisual coverage of court proceedings have been frequently traced to the 1935 trial of Bruno Richard Hauptmann, convicted and executed for the murder of the son of Charles Lindbergh. In response to what one observer called the "Roman Holiday" surrounding both the in-court and out-of-court media coverage of that trial, nearly every state, the federal criminal courts, and the American Bar Association enacted rules severely restricting any in-court audio-visual coverage. Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, Judicature, Vol 63, No. 1 (1979).

[6] In its official findings, the legislature stated as follows: "Experience in forty-three states suggests that such audio-visual coverage of judicial proceedings may take place, under continuing judicial scrutiny and supervision, without jeopardizing the judicial system. Individuals participating in televised judicial proceedings in these states have reported that coordinated, supervised audio-visual coverage has had no measurable adverse effect on the administration of justice, and in some cases has even contributed to an atmosphere of calm and dignity in the courtroom." L. 1987, Ch. 113, § 1 (contained in Bill Jacket, N.Y.S. Assembly Bill No. 77-B [Jud. L. § 218] (1987)).

decision resting with the presiding judge; and as had other jurisdictions, New York subsequently evaluated the success of its experiment. In March 1989, the State's Chief Administrative Judge issued a report recommending that the Legislature make Section 218 permanent, concluding that the presence of cameras in courtrooms had not influenced the outcome of any proceeding. *See* "Report of the Chief Administrative Judge to the Legislature, the Governor, and the Chief Judge of the State of New York on the Effect of Audio-Visual Coverage on the Conduct of Judicial Proceedings" (March 1989).

Over the next eight years, the Legislature enacted Section 218 for temporary periods of experimentation three more times. The second experiment ended with another report from a different Chief Administrative Judge, who also recommended that Section 218 become permanent. "Report of the Chief Administrator to the New York State Legislature the Governor and the Chief Judge on the Effect of Audio-Visual Coverage on the Conduct of Judicial Proceedings" (March 1991) ("1991 New York Report"). A third experiment followed, this time accompanied by a twelve-member committee appointed by the Legislature to perform further study. Eleven members of that committee responded with detailed written findings to support making Section 218 permanent. "Report of the Committee on Audio-Visual Coverage of Court Proceedings" (Hon. Burton B. Roberts, Chair; May 1994) ("1994 New York Report"). In a fourth experiment — which took place during and after the O.J. Simpson criminal proceedings in California — yet another committee gathered yet more data, and issued a fourth report. "An Open Courtroom: Cameras in New York Courts 1995-1997" (Dean John D. Feerick, Chair; Apr. 4, 1997) ("1997 New York Report").

As had its predecessors, the 1997 New York Report recommended Section 218 be made permanent: it noted prominently that the committee had re-examined all ten years' worth of New York's experience, and — cameras having been admitted into more than 1,700 proceedings (*see* 1997 New York Report, Appendix A at 1) — it could find not one appellate decision overturning a judgment verdict or conviction based on the presence of cameras. 1997 New York Report at 68. It found no witness intimidation or example of compromised witness testimony. *Id*. at 73. It called "unsupported" the claim that jurors would watch television coverage of a case or see evidence ultimately suppressed. *Id*. at 71-72. It found that attorneys did not "play to the cameras" and concluded that cameras had improved the demeanor of judges. *Id*. at 74-75.[7]

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[7] The New York findings were consistent with numerous other reports issued between the late 1970s through the 1990s — including the reaffirmation by California of televised proceedings after the Simpson case had ended. Task Force on Photographing, Recording and Broadcasting in the Courtroom, "Report from the Task Force on Photographing, Recording and Broadcasting in the Courtroom" May 10, 1996. *See also* Ernest H. Short and Associates, Inc., "Evaluation of California's Experiment With Extended Media Coverage of Courts" (1981); *In re Petition of Post-Newsweek Stations, Inc.*, 370 So. 2d 764 (Fla. 1979); Federal Judicial Center, "Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals" (July 1994); Alaska Judicial Council, "News Cameras In The Alaska Courts: Assessing the Impact" (Jan. 1988); Judicial Information Officer, Superior Court of Maricopa County, "Cameras and Recorders in Arizona's Trial Courts" (Feb. 1983); Hon. Maurice J. Sponzo, "Report of the Chief Court Administrator on the 'Cameras-In-The-Court' Experiment in the State of Connecticut" (May 1, 1983); C. Robert Taylor, *et al*., "Report of the Bar-Bench-Press Conference of Delaware on Television in the Courtroom" (March 16, 1981); Howard Schwartz, "Memo[randa] to Justices of [Kansas] Supreme Court" (Oct. 3, 1984; Nov. 5, 1985); Hon Guy E. Humphries, Jr., District Judge, State of Louisiana, "report on Pilot Project on the Presence of Cameras and Electronic Equipment in the Courtroom" (dated in or about 1979); Supreme Judicial Court of the State of Maine, Administrative Order: Cameras in the Courtroom," Dkt No. SJC-228 (July 11, 1994); Maryland Judicial Conference, Official Transcript of Proceedings, Murphy C.J., presiding (May 8, 1980); Herbert F. Travers, Justice, Mass. Superior Court, *et al*., "The Advisory Committee To Oversee The Experimental Use of Cameras and Recording Equipment in Courtrooms to the Supreme Judicial Court" (July 16, 1982); "Report of the Minnesota Advisory Commission on Cameras in the Courtroom," Administrative Office of the Courts of Nevada, "Final Statistical Report: Cameras in the Courtroom in Nevada" (May 7, 1981); Norman W. Shibley, *et al*., "Report and Recommendations of the Ad Hoc Committee of the Bar Association of Greater Cleveland on the Effect of Cameras in the Courtroom on the Participants in Such a Trial," *Cleveland Bar J*. 172-77 (May 1980) (transmitted to Ohio Supreme Court); Hon. Ralph B. Hodges, Chief Justice, Oklahoma Supreme Court, *et al*., "Recommended Proposal of the

From their inception, the New York experiments generated fierce opposition, particularly from the criminal defense bar and crime victims' rights advocates. Opponents not only challenged the educational value of televised proceedings, but also emphasized repeatedly the proposition of the Legislature in its official findings that "court proceedings are complex, often involving human factors that are difficult to measure." L. 1987, Ch. 113, § 1. The 1994 New York Report generated a single dissent from a well-known criminal defense lawyer, who challenged the objectivity of the committee and who was critical of the failure of the committee to conduct a content analysis of televised coverage or to conduct a "matched control group study." Jack T. Litman, "Minority Report of the Committee on Audio-Visual Coverage of Court Proceedings (Dec. 1994) ("Litman Rep."), at 25. He seized upon some of the percentages reflected in participant questionnaires (*e.g.*, 37% of attorneys reported a "tense" atmosphere in covered cases, 38% reported that testimony of witnesses was "affected," 44% reported that coverage affected trials negatively, Litman Rep. at 16-17) as evidence that the conclusions of the committee were not supported by the evidence it had reviewed. The lone dissent from the 1997 Report, also submitted by a noted criminal defense attorney, was to the same effect, stressing results from a public opinion poll conducted during the fourth experiment indicating some public apprehension to serve as witnesses in, and disapproval of the content of, televised trials. *See generally*, Leonard Noisette, "New York State Committee to Review Audiovisual Coverage of Court Proceedings (Apr. 1, 1997) ("Noisette Rep.").

The most revealing aspect of these dissents (or the data to which they pointed) was not their substance; as the 1991 New York Report submitted in support of the second experiment concluded (at 171), "[p]rincipled disagreements over the concept of cameras in the courts will always be with us." What was revealing was that the dispute boiled down to an almost legalistic question of where to place the burden of proof. The 1997 dissent concluded: "The overarching problem with [the 1997 New York Report] is that it presumes that the burden is on those opposed to cameras in our courts to prove the harm they cause, instead of recognizing that camera proponents should be required to demonstrate the benefits that accrue for allowing such access." Noisette Rep. at 2. The 1994 dissent had made a similar point, and went further, implying that any evidence that did not predict with 100% certainty that cameras would never cause any prejudice was insufficient to justify full access. Litman Rep. at 43. Left unanswered in all of this was the question of why justification for placing cameras in courtrooms should require any different allocation of presumptions — or any greater quantum of proof — than more traditional forms of access, irrespective of whether factors in either context were "difficult to measure"[8] and no matter that "double blind studies" had not been demanded in order to establish the latter.

These dissents eventually carried the day in the Legislature. Negotiations to reach a compromise on an extension of Section 218 foundered on efforts by the defense bar and victims advocates to amend Section 218 to permit any witness, including parties, to veto coverage of his or her testimony (as well as by a proposed requirement that the presiding judge, in evaluating an application for coverage find that the "benefit to the public of audio visual coverage [in each case] substantially outweighs any risks presented by such coverage." *See* Gary Spencer, *Effort on Cameras in Court Dies*, N.Y.L.J. (July 16, 1997) at 1 (quoting proposed bill). Section 218 sunset on June 30, 1997. Bills to allow cameras back into courtrooms have since been introduced, but have never been acted upon.

Committee on Radio and Television in the Courtroom"; Hon. James A. Noe, "Cameras in the Courtroom — A Two Year Review of the State of Washington" (Sept. 11, 1978); Committee of the Supreme Court of the State of Wisconsin, "Report of the Supreme Court Committee to Monitor and Evaluate the Use of Audio and Visual Equipment in the Courtroom" (Apr. 1, 1979).

[8] *Compare e.g.,* Brief on Behalf of Appellees, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (No. 79-243), 1980 WL 339527 (The "establishment [of a First Amendment right to criminal trials] poses a myriad of imponderables that may seriously threaten the central purpose of criminal trials.") *with Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (establishing First Amendment right to criminal trials).

Court TV v. NY

On September 5, 2001, Court TV initiated an action in state court in New York seeking a declaration that Section 52 violated the First Amendment to the United States Constitution and Article I, Section 8 of the Constitution of the State of New York. *Courtroom Television Network LLC. v. State of New York*, Index No. 116954/01 (N.Y. Sup. Ct. N.Y. Co.) (hereinafter "*Courtroom Television*"). The case arose out of litigation the prior year in which New York trial courts had struck down Section 52 as unconstitutional on nine separate occasions in connection with requests to televise particular proceedings. *E.g., People v. Boss*, 701 N.Y.S. 2d 891 (N.Y. Sup. Ct. Albany Co. 2000) (the Amadou Diallo police brutality case). After a few months of this activity, an intermediate appellate court put a stop to it in *Santiago v. Bristol*, 709 N.Y.S.2d 724 (N.Y. App. Div. 4th Dep't 2000), issuing a writ of prohibition enjoining one trial court from permitting televised coverage. In that case, various press organizations sought to intervene in a trial for the purpose of obtaining an order permitting audiovisual coverage. Citing Section 52 and relying upon dicta in *Nixon v. Warner Communications*, 435 U.S. 589, 610 (1978), *see* note 29 *infra*, the Court held that "[b]ecause intervenors have no constitutional or statutory right to broadcast, respondent was without authority to permit them to intervene." *Santiago*, 709 N.Y.S.2d at 726. "Rather than moving in county court for an order permitting audiovisual coverage of [the trial]," the Court continued, "intervenors should have commenced a declaratory action in [a trial court] challenging the constitutionality of the statute and rule barring such coverage." *Id*. Court TV took precisely that action.

However, on July 15, 2003, the trial court denied Court TV's motion for partial summary judgment and granted a cross-motion by the State, declaring Section 52 "not unconstitutional." *Courtroom Television Network LLC v. State of New York, et al.*, 769 N.Y.S. 2d 70 (N.Y. Sup. Ct. N.Y. Co. 2003). The First Department of the Appellate Division affirmed the dismissal of Court TV's constitutional challenge. *Courtroom Television Network LLC v. State*, 779 N.Y.S. 2d 74 (N.Y. App. Div. 2004). On October 22, 2004, the New York Court of Appeals indicated that it would hear the appeal.

The Argument From Access Law

The most obvious argument in support of a presumptive right to televised trials — or, at the least in support of a declaration that a *per se* ban on all such coverage is unconstitutional — is the one that has been rejected most frequently: that it is required by any meaningful reading of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny.

In *Richmond Newspapers*, the Supreme Court held for the first time that the arbitrary closing of a criminal trial to the public and the press violated the First Amendment. But in articulating the scope of this new right, the Court eschewed talismanic phrases: It was "not crucial" whether it was described as a "'right of access' or a 'right to gather information.'" 448 U.S. at 576 (citations omitted). Rather, the Court's concern was expressed by the proposition that "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much [of their] meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Id*. at 576-77 (emphasis added). Or, as Justice Burger said definitively, the "community" could not be forced arbitrarily to "surrender its right to observe the conduct of trials . . . ." *Id.* at 576 (emphasis added). Closure, the Court ruled, was permitted only when justified by "an overriding interest based on findings that [it] is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise v. Superior Court,* 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*").

Virtually all of the litigation arising out of *Richmond Newspapers* (or seeking to extend it) has revolved around the question of the *kind* of proceeding to which a party seeks access. *See generally, e.g.,*

Dan Paul, *et al*., ACCESS, Practicing Law Institute (Nov. 2003), available on WESTLAW at 769 PLI/Pat 69 (collecting cases by type of proceeding). Indeed, the Court devised its now familiar two part inquiry to determine when the right attaches — whether "place and process have historically been open to the press and general public" and whether "public access plays a significant positive role in the functioning of the particular process," *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press Enterprise II*") — both to account for the "special nature" of the First Amendment claim to knowledge about judicial proceedings, while avoiding the "'theoretically endless'" application of it to processes that could properly be claim some secrecy (*e.g*., grand jury proceedings). *Richmond Newspapers*, 448 U.S. at 586, 588 (Brennan, J., concurring); *accord Press-Enterprise II*, 478 U.S. at 9.

Considerations of the history and function of access to a particular process, however, are of limited assistance in answering the basic question of what, precisely, the Court meant when it affirmed a "right to observe the conduct of trials". And, to be sure, most courts confronted with that question have held that the right consists merely of a right to be present, physically, in the courtroom. *E.g.*, *Courtroom Television*, 779 N.Y.S. 2d at 75-76; *Westmoreland v. Columbia Broadcasting Systems, Inc.*, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983).

But, nothing in *Richmond Newspapers* — or any other Supreme Court case — suggests that the right was so limited. *See Westmoreland*, 752 F.2d at 24 (Winter, J., concurring) (noting that First Amendment right of access presumptively includes television coverage of proceedings); *Cosmos Broadcasting Corp. v. Brown*, 471 N.E. 2d 874 (Ohio Ct. App. 1984) (same). To the contrary. In his concurring opinion in *Richmond Newspapers*, Justice Stevens described it as a "watershed case." 448 U.S. at 582. Adverting to his dissent in *Houchins v. KQED*, 438 U.S. 1, 30-38 (1978),[9] he emphasized that "never before" had the Court accorded any constitutional protection to the "acquisition of newsworthy information," *Richmond Newspapers*, 448 U.S. at 582, and, most particularly, to "access to information about the operation of their government, including the Judicial Branch." 448 U.S. at 584. *Richmond Newspapers* was, in fact, a logical application of the core insight of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that the First Amendment's "central meaning" was to ensure the conditions of self-government through the "free public discussion of the stewardship of public officials. . . . ." 376 U.S. at 275.[10] Quoting prior case law recognizing a right to "receive information and ideas,"[11] *Richmond Newspapers* emphasized that "[p]eople 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." 448 U.S. at 572.

Others have written eloquently about the centrality of the principles set forth *Richmond Newspapers* and its progeny to press freedoms and newsgathering generally, *see, e.g*., Lee Levine & Monica Langley, *Branzburg Revisited: Confidential Sources And First Amendment Values,* 57 Geo. Wash. L. Rev. 13, 35-39

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[9] "The reasons which militate in favor of providing special protection to the flow of information to the public about prisons relate to the unique function they perform in a democratic society. . . . [T]he probable existence of a constitutional violation rested upon the special importance of allowing a democratic community access to knowledge about how its servants were treating some of its members who have been committed to their custody." *Houchins*, 438 U.S. at 36, 38.

[10] "[T]he Constitution created a form of government under which '[t]he people, not the government, possess the absolute sovereignty.' The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels." 376 U.S. at 274 (citation omitted). This necessitated an altogether "different degree of freedom" as to discussion about government than had previously existed prior to the founding of the Republic. *Id*. at 275.

[11] *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'") (citation omitted); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("[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.").

(1988). But there is no dispute about the context in which the Court articulated and applied these principles: that most basic of government functions, criminal trials. *Richmond Newspapers*, 448 U.S. at 576 ("Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people then the manner in which criminal trials are conducted . . . ."). In his concurring opinion, Justice Brennan explicitly invoked a "structural model of the First Amendment," locating access to information about trials — and judges — in the same constitutional corner as the civil rights statements held protected by his opinion for the Court in *Sullivan*. 448 U.S. at 588.[12] Hence

> the trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers — a coordinate branch of *government*. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the trial is the mechanism for judicial fact-finding, as well as the initial forum for legal decision-making, it is a genuine governmental proceeding.

448 U.S. at 594-95 (footnote omitted; emphasis in original). Two years later, the Court adopted Justice Brennan's structural model as a basis for striking down a *per se* ban on access to all trials involving allegations of sexual offenses committed against minors. *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 596, 604 (1982) (right recognized in *Richmond Newspapers* "ensure[s] that this constitutionally protected 'discussion of governmental affairs' is an informed one").[13]

In response to all of this, the State and the lower courts in *Courtroom Television*, made two central points: first, that the Supreme Court in *Richmond Newspapers* implicitly rejected a right to television cameras because it repeatedly emphasized the historical practice of physical "attendance" supplemented by members of the press acting as "surrogate" for those who could not attend; and second, that televised trials played no necessary role in ensuring the fulfillment either of procedural fairness, or of its appearance.

But these arguments turn the decision inside out. The Court's ten page description of a thousand years of "unbroken, uncontradicted history," 448 U.S. at 573, of the "public character of the trial", *id.* at 566, was nothing more than evidence of the norm of access to information about trials, and its reference to

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12 "Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964), but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication." *Richmond Newspapers,* 448 U.S. at 588 (footnotes omitted).

13 *Richmond Newspapers* was of a piece with yet other decisions, drawing inspiration from *Sullivan*, recognizing the centrality of information concerning court proceedings. Protests both outside and inside courthouses are fully protected. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971). The press may publish — with impunity — inculpatory information about a criminal defendant. *E.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). Statutes punishing publication of news of minors or rape victims that are part of court records are unconstitutional. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Punishing the publication of photographs of juvenile offenders entering the courthouse — even where the court proceedings involving that offender legitimately have been closed to the public — has likewise been found unconstitutional. *Oklahoma Publishing Co. v. District Court In and For Oklahoma County*, 430 U.S. 308 (1977) (per curiam). *See generally Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 838, 839 (1978) (reporting of judicial disciplinary proceedings "lies near the core of the First Amendment" on the basis that "the operations of the courts and the judicial conduct of judges are matters of utmost public concern").

the press as "surrogate" was entirely consistent with the proposition that cameras, no less than the pens and pencils of news reporters and sketch artists, may transmit information to the world outside. Indeed, the Court's description emphasized changing methods of information dissemination, while also stressing the constant of access to that information: "Looking back, we see that when the ancient 'town meeting' form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials. The people retained a 'right of visitation' which enabled them to satisfy themselves that justice was in fact being done." 448 U.S. at 572. The Court made a similar point about the modern era: "Instead of acquiring information about trials by first-hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media." *Id*. at 572-73; *accord id*. at 577 n.12, 586 n.2 ("As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals.") (Brennan, J., concurring).

What in all of this precedent *excludes* from the stock of information available to the public the observation of trials — even snippets of them — on television (or, for that matter, on a computer screen)?[14] Surely, the fact that the technology did not exist in the eighteenth century to transmit images from inside the courtroom to those outside is not itself an argument to permit the banning — in every case, as a categorical matter — of those images today. *See, e.g.*, *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) ("[F]or what exists of the right of access if it extends only to those who can squeeze through the door?"). If anything, constitutional doctrine points in the opposite direction; courts routinely readjust constitutional rights to new forms of technology. *See, e.g., Turner Broadcasting, Inc. v. FCC,* 512 U.S. 622 (1994) (recognizing cable operators are entitled to the benefits of strict scrutiny of regulations aimed at the content they carry). As Justice O'Connor has observed:

> Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communications may be changed as technologies change; and in expanding those entitlements the Government has no greater right to discriminate on suspect grounds than it does when it effects a ban on speech against the backdrop of the entitlements to which we have been more accustomed.

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 802-03 (1996) (O'Connor, J., concurring in part and dissenting in part) (citation omitted); *accord, e.g., id.* at 777 (Souter, J., concurring); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 698 (1992) (O'Connor, J., concurring); *cf. Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 503 (1985) (courts have the "power, indeed the duty, to assure that the protections provided by our State Constitution remain meaningful in light

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[14] Indeed, much of *Richmond Newspapers*, whether intended or not, valorized direct, first hand observation: Attendance at proceedings in medieval England had been compulsory by all freemen in order that they could pronounce judgment, *id*. at 565; but the evolution of the jury system did not affect the open character of the proceedings for non-jury citizens "remained constant," *id*. at 566, with trials '"done openlie in the presence of . . . so manie as will or can come so neare as to hear [them] . . . that all men may heare from the mouth of the depositors and witnesses what is saide.'" *Id*. at 566 (quoting T. Smith, *De Republica Anglorum* 101 (Alston ed. 1972) (emphasis deleted)). The Court analogized the right to attend and observe as of the time of the Constitution's enactment to the ancient "right to access to places traditionally open to the public [where] people assemble . . . not only to speak or to take action, but also to *listen, observe and learn* . . . ." 448 U.S. at 577, 578 (emphasis added).

of emerging needs and changing social values.").[15] *Richmond Newspapers* passed not at all on the *method* by which information about trials is to be received, nor on how many people should receive it;[16] it said only that the First Amendment begins with the presumption that the public *should* receive it.[17]

Thus, the proposition that public scrutiny of judicial proceedings does not include observing trials on television misses the point of *Richmond Newspapers*. When the Appellate Division in *Courtroom Television* wrote that "the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known," 779 N.Y.S.2d at 76, it curiously deployed the right of some citizens to watch a trial (inside a courtroom) as ammunition to bar others from doing so (outside a courtroom). But the assertion that a limited amount of information about trials serves First Amendment purposes can hardly be adduced as proof that more information does not do so.

The Appellate Division likewise noted that the "value of openness" existed to promote both fairness itself and the "appearance of fairness." But it made no mention of the structural value of the First Amendment recognized by Justice Brennan and the Court in *Globe Newspaper*. It does not lie only in the effect it has on the proceedings; it lies in the effect it has on the amount of public discussion about the proceedings, given the centrality of the judiciary as a coordinate branch of government — a rationale that could hardly be better served than by television cameras. *E.g.*, *Cable News Networks, Inc. v. American Broadcasting Cos.*, 518 F. Supp. 1238 (N.D. Ga. 1981); *see generally ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004) ("[O]ne cannot transcribe an anguished look or a nervous tic. The ability to see and hear a proceeding as it unfolds is a vital component of the First Amendment right of access — not, as the government describes, an incremental benefit.").

But one ought not need to rest on the unique capabilities of television in order to place the information it conveys under the ambit of presumed First Amendment protection. One ought not even need emphasize the absorption by access law of democratic theory. It ought to be enough to establish at least a presumption of televised access[18] that cameras, when placed in courts, convey information about the

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15 *Accord, e.g., Daniel v. Dow Jones & Co.,* 520 N.Y.S.2d (Civ. Ct. N.Y. Co 1987) ("Methods for news delivery have advanced apace with general scientific achievements. While town criers had for centuries informed the local citizenry, general circulation newspapers eventually made criers superfluous. . . . In the last few years, instantaneous news had become available to subscribers with access to a microcomputer and a telephone, even at home.").

16 In its decision, the trial court below raised the spectre of "Yankee Stadium show trials". *Courtroom Television*, 769 N.Y.S.2d at 99. Not only has the Supreme Court already suggested that this is an inapposite analogy to televising trials, *Chandler*, 449 U.S. at 580, the reference misses the point about the poison of show trials: it is not that many people watch them; it is that they are not real trials.

17 To be sure, *Richmond Newspapers* affirmed the inherent power of a court to "impose reasonable limitations on access to a trial," 448 U.S. at 581 n.18, analogizing it to the power of government to "impose reasonable time, place and manner restrictions" upon the use of city streets. *Id.* (*citing Cox v. New Hampshire*, 312 U.S. 569 (1941). Courts, including the lower courts in *Courtroom Television*, have frequently cited this passage in declining to read *Richmond Newspapers* as encompassing any right to televised trial coverage. The problem this analysis is two-fold: first, the question of whether information obtained from in-court cameras is presumed to fall within the scope of the qualified First Amendment right is analytically separate from the question of the standards to be applied to bar such access. *See Westmoreland*, 752 F.2d at 24 (Winter, J. concurring). Second, nothing in the oft-cited last footnote of *Richmond Newspapers* even hints at justification of a ban on whole categories of televised information, let alone all of it, such as is imposed by Section 52. Indeed, the Court refused in the same footnote to "define the circumstances" of any restrictions, and the 1941 case it quoted concerning such restrictions spoke only of specific cases. 448 U.S. at 581 n.18 ("'*a trial judge*, in the interest of the fair administration of justice [may] impose reasonable limitations an access to *a trial*. The question *in a particular case* is whether that control is exerted so as not to deny or abridge'" speech) (emphasis added). *See* note 31 *infra* and accompanying text.

18 "The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." *Estes v. Texas*, 381 U.S. at 614-15 (Stewart, J., dissenting).

proceedings. *See Westmoreland*, 752 F.2d at 24 (Winter, J., concurring) ("[A]ccess to the courts for the purpose of conveying information to the public about judicial proceedings falls within the area of protected speech under the First Amendment. . . . [L]ive television is one of the many ways in which such information may be conveyed ...").

The Argument From Factual Change

No less an obvious argument to support the existence of a constitutional right flows directly from the only Supreme Court decision ever to pass upon the question, *Estes v. Texas,* 381 U.S. 532 (1965). In *Estes*, a 5-4 majority reversed the criminal conviction of a criminal defendant in part as a result of the prejudicial impact of his pre-trial hearing and portions of his trial.[19] In so holding, four members of the Court emphasized the same considerations — participant distraction, sensational trials, potential harm to fair trial rights — that have been relied upon to justify Section 52. In his separate concurrence, the dispositive vote for reversal, Justice Harlan voiced similar concerns.

But it was what the Court did *not* hold that provides the basis for a claim to be made some four decades later. It did not hold that television was an inherent denial of due process or inherently prejudicial.[20] Nor did it hold that an absolute ban in cameras was necessarily justifiable; no such ban was at issue in the case. In its decision sixteen years later in *Chandler v. Florida*, 449 U.S. 560 (1981), the Court identified these limitations, noting that Justice Harlan's dispositive concurrence was "limited to the proposition that *'what was done in this case* infringed the fundamental right to a fair trial.'" 449 U.S. at 573 (quoting Justice Harlan; emphasis in *Chandler*). In determining that Justice Harlan's concurrence "must be read as defining the scope of [the *Estes*] holding," *id*. at 582, *Chandler* thus limited *Estes* to its facts.[21]

In so confining his concurrence, then, Justice Harlan all but invited reconsideration of the constitutional question at a time in the future when cameras no longer posed the prejudice reflected by the 1962 proceedings at issue in *Estes*:

> [W]e should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination . . . .

Estes, 381 U.S. at 595-96. Twenty years later, and before any cameras had ever entered a New York courtroom, the Second Circuit echoed Justice Harlan's sentiment, upholding a *per se* ban on access to certain federal proceedings, but leaving open the possibility of doctrinal evolution. *Westmoreland*, 752 F.2d at 22. Noting that it was "not yet prepared" to take the "leap" to recognize the right to televise trials, the Second Circuit nonetheless acknowledged that "[t]here may indeed come a time" when it would do so, upon dissipation of asserted risks. *Id*.

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19 "[T]he picture presented was not one of that judicial serenity and calm to which petitioner was entitled. . . . Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table." *Estes*, 381 U.S. at 536 (citation omitted).

20 Chief Justice Warren's concurrence, with three votes, was the only opinion in *Estes* to so suggest. 381 U.S. at 578.

20 Because improvements in technology had greatly reduced the "'Roman Circus' atmosphere" deemed to have deprived the defendant in *Estes* of due process, the Court in *Chandler* held that, "[a]bsent a showing of prejudice of constitutional dimensions," the Sixth Amendment does not prohibit states from permitting televised court proceedings. 449 U.S. at 582.

All of the empirical considerations emphasized by these courts now cut sharply in favor of at least *some* presumptive First Amendment protection. The *Estes* majority found "most telling" and "weighty evidence" that, in 1965, only two states permitted coverage, 381 U.S. at 546, 544; today, forty-two states permit coverage. More fundamentally, not only has the technology been transformed to be unobtrusive,[22] but the evidence dispels any argument that participants will be seduced into self-consciousness or distraction. Indeed, the *Chandler* court *rejected* precisely this latter concern, 449 U.S. at 576 n.11. Twenty years of additional study now have taken place, and as the 1997 New York Report concluded, "[f]ears regarding the impact of cameras on trial participants have [not] been realized." With appropriate safeguards and subject to the discretion of the presiding judge, televised coverage "does [not] interfere[] with the fair administration of justice." 1997 New York Report at 71, 1.

None of this is to suggest that there are no risks in permitting cameras into trial courts. But risks are "present in any publication of a trial," *Chandler*, 449 U.S. at 575, and there is no serious basis for the doctrinal fork in the road by which one form of speech that occasions those risks is presumed protected while the other is presumed excluded. Attorney grandstanding is not unique to televised trials.[23] Nor is lack of witness candor.[24] Nor are prosecutors or judges immune from abusing publicity even in untelevised cases.[25] Nor can the length of trials be blamed upon,[26] or are attempts by participants to seek to become famous unique to,[27] televised trials. Sensational trials are not even creatures of the television era.[28] It was indeed generalized prediction of just these sorts of concerns that were asserted as bases for closure of proceedings in *Richmond Newspapers* and its progeny.[29] Those who relied on them lost. The reason was

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22 As one of the New York committees reported in 1994, "[i]mprovements in technology have rendered cameras no more, and possibly less, conspicuous than the newspaper reporter with pencil and notebook and the courtroom artist with crayon and sketch pad." 1994 New York Report at vii.

23 Lawrence M. Friedman, *Crime and Punishment in American History* 252-53 (1993).

24 *Great American Trials* (Edward D. Knappman ed. 1994) 351-52, 354 (Scottsboro rape case), 295 (Fatty Arbuckle's trial for rape and manslaughter).

25 *Great American Trials* 295-98 (prosecutor in Fatty Arbuckle case), 472-73 (judge in Sam Sheppard trial).

26 John Carman, *TV Drama of the "High Noon" Order*, S.F. Chron., Oct. 4, 1995, at A4 (McMartin child abuse trial or the trial of the Chicago Seven).

27 *E.g.,* David Smith, *Beyond All Reason: My Life With Susan Smith* (1995); Jean S. Harris, *Stranger in Two Worlds* (1986); Vincent Bugliosi, *Helter Skelter: The Story of the Manson Murders* (1974).

28 The twentieth century's first "trial of the century" was that of Harry K. Thaw, who murdered famed architect Stanford White on the rooftop of the original Madison Square Garden. *See New York Times*, Jan. 23, 1907, *quoted in* Paul R. Baker, *Stanny: The Gilded Life of Stanford White* 340, 385-97 (1989). Television had not yet been invented; yet "the nation hung on every word of [Thaw's] trial[], a trial that hinged on the arcane testimony of experts and seemed to go on forever." Frank Whelan, *Hanging on Every Word: Trial in 1907 for Architect's Slayer Was as Sensational as the O.J. Simpson Case Today*, Morn. Call, June 26, 1995, at D1, 1995 WL 9494748. Testimony recounting sexual relationships of the two men, including of a purported rape, led Congress and President Theodore Roosevelt to seek to ban as obscene the press' coverage and transcripts of testimony. Baker, 387-88; *accord* Whelan, 1995 WL 9494748, at 6.

29 *E.g.,* Brief on Behalf of Appellees, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (No. 79-243), 1980 WL 339527 (The "establishment [of a First Amendment right to criminal trials] poses a myriad of imponderables that may seriously threaten the central purpose of criminal trials."); Brief of the Appellee, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (No. 81-611), 1982 WL 608562 (relying on "the proposition that the prospect and experience of trial testimony will prove traumatic for a youthful victim and deter or inhibit her effective appearance at trial . . . Publicity per se intimidates her from the process of prosecution and inhibits her necessary courtroom appearance"); Brief of Respondent on the Merits, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (No. 82-556), 1982 U.S. Briefs LEXIS 556, at 8 (identifying as "disturbing" and a "hardship on the jury system if prospective jurors gave testimony about their most intimate and personal lives" in open voir dire).

not that the risks could not be said to exist; it was that modern First Amendment law teaches that obtaining as much information as possible about trials is worth incurring them.

Indeed, both the Supreme Court and the New York Court of Appeals have explicitly rejected claims to uphold categorical bans based on the mere assertion of risk — even where those risks appear to be palpable. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.20 (1982); *Associated Press v. Bell*, 70 N.Y.2d 32 (1987). In *Globe Newspaper*, the Supreme Court struck down a Massachusetts statute banning the public from attending all testimony provided at any trial of minor victims of sexual offenses, despite acknowledging that protection of such witnesses was a "compelling state interest". In *Bell* — one of New York's most highly charged criminal proceedings of the last quarter century, that of the so-called "preppie murderer," Robert Chambers — the Court of Appeals ruled similarly with regard to the "peculiar risk" posed to jury impartiality by public disclosure of suppression hearings. The Court stated that

> a hypothetical risk of prejudice or taint cannot justify *categorical denial* of public access to suppression hearings because, as a general matter, the important interests of both the accused and the public can be accommodated. In individual cases, through careful voir dire a court can identify any potential jurors whose prior knowledge of the case would deter them from rendering an impartial verdict, and thus protect the right of the accused to a fair trial.

70 N.Y.2d at 38 (citation omitted; emphasis added); *accord Press Enterprise II*, 478 U.S. at 15 (The "risk of prejudice does not automatically justify refusing public access to hearings on *every* motion to suppress.") (emphasis added).

It is against this backdrop that much of the case law concerning the constitutional right to televise trials must be assessed. By far, the vast majority of cases declining to recognize the right date back twenty years or more, before all any of the New York experiments, *e.g.*, *Westmoreland*, and in many cases simply universalizing the facts of *Estes* which themselves date to the dawn of the age of television. *E.g.*, *Nixon v. Warner Communications*, 435 U.S. 589, 610 (1978).[30] The later the date of the decisions addressing the constitutional question of televised trials, the more frequently courts, albeit trial courts, have recognized the right. *E.g.*, *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580 (S.D.N.Y. 1996);[31] *People v. Boss*, 701 N.Y.S.2d 891 (N.Y. Sup. Ct. Albany Co. 2000). These latter decisions are persuasive not because they are binding on anyone; they are persuasive because they explicitly take account of data developed in the 1990s, such as the New York reports, as well as California's own reaffirmation after Simpson of its willingness to permit trials to be televised. *See* note 6 *supra*.

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30 *Nixon* in any event is inapposite. In dicta, the Court indicated that there may not be a constitutional right to have live testimony recorded and broadcast. But it did not purport to so state as a matter of the First Amendment. The Court in *Nixon* was simply repeating what was then understood to be the scope of the Sixth Amendment public trial right: that "the requirement of a public trial is satisfied by the opportunity of members of the public and press to attend the trial and to report what they have observed." *Id*. at 610. Decided before *Richmond Newspapers*, Nixon can hardly be read as the final word on the Court's First Amendment analysis of access to information about trials.

31 "Twelve years after the *Westmoreland* decision and twenty-two years after the *Estes* holding, the advances in technology and the above-described experiments have demonstrated that the stated objections can readily be addressed and should no longer stand as a bar to a presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings on television." *Katzman*, 923 F. Supp. at 589 (dicta; citations omitted).

The Argument Against Legislative Deference

The most vexing barrier to be overcome by opponents of a constitutional right has always been the implications for closure. The cases arising out of *Richmond Newspapers*, after all, have set an imposing standard to justify limiting, or banning, access. Where a presumptive First Amendment right attaches,

> the proceedings cannot be closed unless specific findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." If the interest asserted is the right of the accused to a fair trial, the [proceeding] shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.

Press Enterprise II, 478 U.S. at 13-14 (citations omitted). A defendant cannot overcome the presumption in favor of openness with a "conclusory assertion that publicity might deprive [him] of" a fair trial. *Id*. at 15. Moreover, "a mandatory rule, requiring no particularized determination in individual cases, is unconstitutional". *Globe Newspaper*, 457 U.S. at 611 n.27.[32] The application of this "strict scrutiny" standard may well call into question the constitutionality of some state access regulations. *But see Petition of WMUR*, 813 A.2d 455, 461 (N.H. 2002) (declining to find First Amendment right, but holding that common law access right includes presumption in favor of televised access, to be overcome only if "closure advances an overriding interest that is likely to be prejudiced" and is "no broader than necessary to protect that interest", and court "considers reasonable alternatives to closing the proceeding" and "makes particularized findings to support the closure on the record").

It may thus be in part because of the demanding scrutiny applied to limitations on access that courts refusing to recognize the right to televise trials frequently invoke the proposition that because minds can — and still do — differ about the reasonableness of banning cameras, the matter is one for policymakers, not courts. *E.g., United States v. Hastings*, 695 F.2d 1278, 1282 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983) (upholding ban on televising of federal criminal proceedings; "promulgation of [camera access rules] in a legislative manner is more appropriate than a case-by-case approach . . . ."); *United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985) (same; "[i]t is not unreasonable to operate with a nondiscretionary rule and not on an ad hoc basis [because] these matters are the subject of debate"). The two decisions in *Courtroom Television* expressly emphasized legislative deference. 779 N.Y.S.2d at 76 ("[T]his is a matter that can be reviewed by the State Legislature should it decide to do so.") (Appellate Division); *Courtroom Television*, 769 N.Y.S.2d at 101 ("The record contains evidence upon which the New York legislature could reasonably conclude that its legitimate interest in fair trials outweighs the benefits of permitting camera coverage, even on a discretionary basis.") (trial court).

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[32] Some courts have attempted to avoid these standards by classifying a camera access ban as a "limitation" on access and not "closure" — a trial is always "open" to members of the public and press — and thus not subject to the level of scrutiny set forth above, but, rather, to be judged under the standards applicable to "reasonable" time, place and manner speech restrictions. *E.g., Kerley*, 753 F.2d at 621. There are two problems with sustaining a *per se* ban on these grounds. First, the act of reclassification is little more than wordplay; the fact that information is available by means other than cameras no more makes a *per se* rule a "limitation" than does a ban on physical attendance where information is available by transcript. Precisely that argument failed in *Globe Newspaper*. 457 U.S. at 615 (quoting dissent: The "Commonwealth has not denied the public or the media access to information as to what takes place at trial. As the Court acknowledges, Massachusetts does not deny the press and the public access to the trial transcript or to other sources of information about the victim's testimony. Even the victim's identity is part of the public record. . . ."). Second, as I suggest below, a content neutral time, place and manner regulation that imposes special burdens on the press — as Section 52 plainly does — is subject to heightened scrutiny, and cannot be sustained on the mere grounds that it is "reasonable". *See Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

But the presence of differing opinions about cameras in courtrooms surely does not dispose of the matter. The existence of legislative dispute cannot serve as a basis for sustaining a constitutionally impermissible ban. Indeed, when the Supreme Court stuck down as unconstitutional the Massachusetts statute that categorically banned access in *Globe Newspaper*, it did so in spite of the dissent's emphasis on absolute legislative deference. 451 U.S. at 612-13.

What ought not be in dispute is that a flat ban on camera access to trials, such as that in section 52, does indeed restrict speech — speech at the heart of the First Amendment. Thus, the rule of reason that ordinarily sustains statutes on the basis of legislative deference cannot apply. It is settled that "laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-41(1994) (citation omitted). This follows from the longstanding rule that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Thus, "[w]here a law is subject to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (holding that rule banning cable company from attaching equipment to utility poles not entitled to benefit of rational basis scrutiny).

In light of this, one can imagine application of the *Turner* rule of intermediate scrutiny as a kind of judicially-brokered middle ground that takes into account the indisputable fact that bans on camera access to trials, no less than bans on press access generally, implicate the heart of the First Amendment, while also acknowledging that — forty years of experiments notwithstanding — television in courts may carry with it risks different in kind than those posed by the mere presence of reporters. The law on this score is well-settled: content-neutral regulations that nevertheless "suppress, disadvantage, or impose differential burdens upon speech," *Turner*, 512 U.S. at 642, must (1) "further[] an important or substantial government interest"; (2) be "unrelated to the suppression of free expression"; and (3) employ means "no greater than essential to the furtherance of any asserted state interest." *Id* at 662. (citations omitted).[33] Under this standard, "a regulation need not be the least speech-restrictive means," *Turner*, 512 U.S. at 662; but neither may a court simply defer to the legislature where less restrictive alternatives exist. *E.g., Galvin v. Hay*, 361 F.3d 1134, 1146-47 (9th Cir. 2004) ("[A]lthough the regulation need not be minimally restrictive, the availability of several obvious less-restrictive alternatives is pertinent in deciding whether regulation burdens substantially more speech than necessary . . . ."). Rather, it must be demonstrated, by the State, that "the means chosen" do not "'burden substantially more speech than is necessary to further the government's legitimate interest.'" *Turner*, 512 U.S. at 662 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

However malleable this standard, it ought at least render impermissible an absolute ban on all in-court cameras in every case. *See Metropolitan Council, Inc. v. Safir*, 99 F. Supp. 2d 438, 445 (S.D.N.Y. 2000) (complete ban on sleeping or lying on public sidewalks burdens more speech than necessary); *R.V.S. v. City of Rockford*, 361 F.3d 402, 413-414 (7th Cir. 2000) (virtual *per se* ban on nude dancing not narrowly tailored; "Rockford has not presented justification why it is essential to regulate such a wide universe of [activity]."). Under the New York statute that provided guidelines for televising trials during the ten years of experiments in that state, for example, a court was required to order that the face of a non-party witness in criminal cases be visually obscured upon request by the witness, Former Jud. L. § 218(5)(c). The New York statute also barred all coverage of *voir dire*, § 218(7) (c); presumptively barred coverage of the testimony of a victim of a sexual offense, but granted the presiding judge discretion to permit it upon a request made by the witness, *id*. § 218(7)(g); and barred all coverage of the testimony of undercover officers in the absence of consent of

[33] The burden to demonstrate that the restriction satisfies these criteria is on the state. *Turner*, 512 U.S. at 664-65.

the witness. *Id*. § 218 (7)(e). Finally, it granted the presiding judge discretion to exclude cameras to prevent interference with the administration of justice, the advancement of a fair trial, or the rights of the parties. § 218 (3) (c). In sum, the statute plainly attended to all asserted government interests, demonstrating that a *per se* ban is surely "burdens substantially more speech than necessary" to protect them.

The Not-So Hidden Antipathy to the Press

All of this assumes, of course, that the constitutional question does not devolve into a judgment of the content of news reporting or of the "sensational" nature of some trial coverage. Relying upon such a judgment to sustain a ban on televised trials without question would be unconstitutional as a violation of the content-neutrality principle.[34] As the Supreme Court stated in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (emphasis added):

> The choice of material to [be published], and the decisions made as to . . . content of the paper, and treatment of public issues and public officials — *whether fair or unfair* — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved over time.

Accord, e.g., Rinaldi v. Holt, Rinehart & Winston, Inc., 366 N.E. 2d 1299, 1308 (N.Y. 1977); *Time Warner Cable of New York City v. City of New York*, 943 F. Supp. 1357, 1403 (S.D.N.Y. 1996). The principle is no less compelling in the context of reporting on the judicial process and the administration of justice. *E.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (barring civil liability for publication of name of rape victim contained in publicly-available records; "[i]n this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast"); *Bridges v. California*, 314 U.S. 252, 270 (1941) (overturning contempt conviction for implicit criticism, in editorial entitled "Probation for Gorillas?," of judge who was to conduct probation hearing for two criminal defendants; "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions").

But can judges avoid making content-based judgments?

On September 14, 1990 — two days after the Judicial Conference of the United States endorsed implementation of an experimental program in which television cameras would record the civil proceedings of several federal district and appellate courts — then-New Hampshire Supreme Court Judge David Souter appeared before the Senate Judiciary Committee for the first day of hearings on his nomination to the United States Supreme Court. Judge Souter was asked by Senator Herb Kohl about his views on television cameras. He responded that he was of "two minds" about them. He volunteered that, while a judge in New Hampshire, he found them "distracting" when they made a "sound" such as "clicking." But when Senator Kohl inquired whether he thought there might be educational benefits to "bringing the courts into our

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[34] It is a "bedrock principle" of First Amendment law that government may not restrict speech because it disapproves of the content of its message. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *accord, e.g., Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content"). The Supreme Court has frequently reasserted that "[t]he government may [not] regulate . . . based on hostility—or favoritism—towards the underlying message expressed," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992), nor regulate so as to favor the views of one speaker over those of another. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). "Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message . . . pose[es] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or manipulate the public debate through coercion rather than persuasion." *Turner,* 512 U.S. at 641 (citations omitted).

homes," Judge Souter responded that "[t]here is no question that there is as [sic] value there."[35] That was the sum and substance of Judge Souter's response on the issue.

On March 28, 1996 — five months after the verdict in the O.J. Simpson trial — Associate Supreme Court Justice Souter sat before a House appropriations subcommittee overseeing funding for the judiciary. Asked whether the Simpson trial ought lead to any reforms in the jury system, Justice Souter responded in the measured and deliberate manner for which he is known: Although he had not watched any of the coverage of the Simpson trial, it was his observation that when given clear instructions by a presiding judge, juries "take their responsibilities" "enormously seriously." As a trial judge in New Hampshire, Justice Souter had been "simply amazed at the basic common sense" of jurors. As to the threat of jury nullification raised by the Simpson case, it had existed since the time the jury "reached its modern form." Finally, although there "has been a lot to be alarmed about recently," he would "go slow" in initiating any reforms.[36]

But then the subject turned to cameras in courtrooms. Justice Souter's message on this was uncharacteristically unequivocal — and far more fulsome than his 1990 confirmation testimony: "I think the case is so strong," he began, "that I can tell you that the day you see a camera coming into our courtroom it is going to roll over my dead body." Having sat as a judge on the New Hampshire Supreme Court, where proceedings were, and still are, permitted to be televised

> I can testify from personal experience that cameras certainly affected my behavior because I knew that there were some questions that I might ask that would be the excerpts, the sound bites, totally out of context, on the six o'clock news. . . . Quoted that way, it would create a misimpression either about what was going on in the courtroom or about me or about my impartiality or about the appellate process. So I did not ask that question.

There was, as well, a

> larger reason not to allow cameras into a court room, and I feel, I think, if anything, more strongly about this reason. . . . I think the people of the United States ought to be entitled to know that the judiciary is an institution which is not a political institution. The whole point of it is not to be one. Nor is it, on the other hand, part of the entertainment industry in the United States.

Rather,

> [it] is a place where, perhaps in frequently dull and tedious ways, a kind of plodding process is supposed to go on of trying in the most impartial way that human beings are capable of, to reach truth about some fact and to dispose of it in a reasoned way. I . . would be very happy to have the Judiciary an exception to televised scrutiny.

House Hrg. 31.

To be sure, Justice Souter's comments five years earlier had hardly constituted a ringing endorsement of cameras. But neither had he then indicated any sharp views on the subject — and, more

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[35] *Hearings Before the Senate Comm. Of the Judiciary*, 101st Cong., 2nd Sess. (1990)

[36] *Hearings Before Subcomm. Of the House Comm. On Appropriations*, 104th Cong., 2nd Sess. 26, 27, 29 (1996) ("House Hrg.")

important for purposes here, he never suggested that news reports had distorted his views or that the judiciary risked being co-opted by the entertainment industry. The question raised by the difference between the two appearances is whether views such as these about the way television reports on judicial proceedings — notwithstanding that the Simpson proceedings are passing their tenth anniversary — will find their way into constitutional doctrine.

The recent picture is unsettling. In the criminal trial of Martha Stewart, Judge Miriam Cedarbaum excluded the press from chambers *voir dire* on the bases that the trial has "generated immense public interest", that the press had reported in ways "which have nothing to do with the trial of the case of the merits of the case . . ." and "commentators [had] already made up their minds" and "formed judgments" (quoted in *ABC v. Stewart*, 360 F.3d 90, 96 (2d Cir. 2004)). And the trial court opinion in *Courtroom Television* came dangerously close to sustaining Section 52 on grounds of public and scholarly dissatisfaction with "outside coverage".[37] An amicus brief submitted in the appellate court in *Courtroom Television* by the New York State Association of Criminal Defense Lawyers Association minced no words, explicitly urging that the Court take account of editorial choices: "[W]hether it be *Cops*, the nightly news coverage, Court TV, or any one of a number of broadcast venues," content providers make "programming choices on the basis of ratings and profit motives," which leads to a fixat[ion] on the violent, salacious and sensational" that "perpetuates a distorted image of the criminal judicial system . . . ." Brief of Amicus Curiae New York State Association of Criminal Defense Lawyers, *Courtroom Television Network LLC v. State of New York, et al*., May 7, 2004, at 19, 27.

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I do not intend by any of this to predict that personal taste is likely to persuade the New York Court of Appeals as it takes up the constitutional question in *Courtroom Television*. But this is an era in which First Amendment principles have been unable to persuade federal judges from ordering reporters to jail for refusing to disclose sources about, of all things, leaks reflecting political matters of the highest significance. *See* Nicholas D. Kristof, *Our Not-So-Free Press*, The New York Times, Nov. 10, 2004 at A25. *Richmond Newspapers* was decided in the afterglow of Watergate and the Pentagon Papers litigation, when the press' role in reporting upon leaks about government activity, and the public's symbiotic participation in that work, were viewed far differently. Will courts in the middle of the information age locate the place of cameras in constitutional law guided by that tradition and the by the image of the video now streaming out of Delaware to interested Disney shareholders? Or will they be guided, however impermissibly, by different conceptions of the press and the public that relies upon it?

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[37] The court referred extensively through its opinion to complaints about insufficient "content analysis," 769 N.Y.S.2d at 85-86, skepticism of educational benefits due to editorial choices (*e.g.*, disproportionate coverage of criminal proceedings), *id*. at 95, and criticism by scholars of the use of "'exciting visuals,'" "deceptive 'illusion'", or "snippets of coverage". *Id*. at 84, 90, 95. These considerations appear to have influenced the court's willingness in its holding to give weight to evidence before the legislature that coverage exerted "external social pressures . . . in the courtroom," *id*. 100, and to have relied upon the view of an public opinion poll that 61% of New York "voters" considered televised trials a "'bad idea'". *Id*. at 103 (The Court's quotation was taken from the answer to an opinion poll question in which respondents were asked whether they thought it was a "bad idea for courtroom trials to be shown on television." The two questions that followed queried whether cameras "sensationalize" trials and whether cameras were more a "source of entertainment." The percentage of respondents who agreed with the latter questions were, respectively, 65% and 61%.)

WHEN THE MEDIA COME TO TOWN:
PROTOCOLS AND PRACTICES

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When the Media Come to Town: Protocols and Practices

Most courthouses are visited regularly by the local media, who write about local cases for their readers, addressing issues of concern to that community. Occasionally, however, the nation becomes interested in events in the local courthouse. Whether it is because a nationally recognized personality is involved – as in the Martha Stewart and Kobe Bryant cases – or because the crime has received national attention – as in the John Allen Muhammad and Scott Peterson cases – the media responds to the public's interest in and demand for information about that case. They travel to the courthouse and prepare to cover the events there, usually for many months. Some courthouses, such as the Los Angeles County Superior Court, have housed a number of high profile trials and already have been called upon to address the many logistic problems that come with such cases. They have developed "Media Plans" that anticipate and attempt to address some of those problems. Most courthouses, however, have never dealt with a high profile case. Court personnel and the local lawyers are usually unprepared to address the many issues that may arise in such a case. This article is intended to identify and address some of those concerns.

Access to Court Proceedings and Documents

Most court personnel are unprepared for the deluge of media that follow a high profile trial. As discussed below, court personnel are obligated to be responsive to media requests, but they also have many other obligations to the court and the trial participants – usually in addition to a large caseload. Consequently, the best thing the media can do is quickly offer to be self-sufficient and then follow through on that offer. Resolve problems internally without involving court personnel. Designate a spokesman or intermediary – frequently a member of a representative association – to speak to the court on behalf of the media and then funnel requests through that individual. Make sure that the court is not burdened with administrative details such as distributing copies of documents or exhibits. More than anything else, this will ensure that the media and the court work well together to achieve what is usually a common goal of providing the public as much information as reasonably possible about the trial. Below are a few of the issues that have arisen and how the participants have resolved them.

Access to Court Proceedings

It is, of course, well established that the public is entitled to observe court proceedings absent compliance with a strict test. *E.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). Although the right originally was recognized in connection with criminal trials, the Supreme Court has confirmed that this right applies with equal force to proceedings taking place outside the presence of a jury and the related pleadings, either before or during trial. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (*voir dire* proceedings presumptively open); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) ("*Press-Enterprise II*") (preliminary hearing presumptively open). In *Press-Enterprise I*, the Supreme Court created a strict test for the closure of criminal proceedings: "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is narrowly tailored to serve that interest." 464 U.S. at 510. The trial court considering closure must "articulate[]" the "interest" being protected, "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* If the trial court fails to make specific findings, and fails to consider alternatives to closure, the closure order must be vacated. *Id*. at 513.

Numerous courts have extended this right to civil trials. *E.g., NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1223-25 (1999). In reaching this conclusion, the California Supreme Court discussed the settled U.S. Supreme Court authority holding that criminal trials are presumptively open, *id.* at 1197-1207, and the numerous lower cases that have held that civil trials also are presumptively open, *id*. at 1208-1209. The Court explained that,

> [E]very lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials.

Id. at 1208 (citations omitted). Joining this uniform authority, the California Supreme Court also held that a constitutional right of access applies to civil trial. *Id.* at 1212.

It also is clear that the media and the public are entitled to intervene to protect this right of access. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610 n.24 (1982) (media and public "must be given an opportunity to be heard on the question of their exclusion"); *Gannett Newspaper Co. v. DePasquale*, 443 U.S. 368, 401 (1978) (Powell, J., concurring) ("[i]f the constitutional right of the public and press to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion"). Although the procedure may vary from state to state – and county and county – in most courts a short motion to intervene accompanied by the substantive papers will suffice.

Access to Court Documents

As everyone who has followed any trial knows, the documents in the court's file sometimes can be more important than what happens in the courtroom. The law is fairly settled that the public and press have a presumptive right of access to court documents. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978) ("[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") (citations omitted); *cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975) (rejecting attempt to impose liability for publishing information contained in public record and stating "[t]he freedom of the press to publish [] information [that appears in judicial records] appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business").

The federal Circuit Courts almost uniformly have found that a right of access exists, although some rely on the common law as the source of that right rather than the Constitution. *E.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment standard applies to documents filed in connection with a summary judgment motion in a civil case); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1181 (6th Cir. 1983) (vacating district court's sealing of all documents filed in a civil action based on First Amendment and common law right of access); *Grove Fresh Distribs. Inc v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (recognizing First Amendment right of access to civil proceedings and records); *Foltz v. State Farm .Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (reiterating common law right of access to court records; "[i]n this circuit, we start with a strong presumption in favor of access to court records"). Most state courts also recognize this right and some state legislatures have enacted rules confirming this presumptive right of access. *E.g., Estate of Hearst*, 67 Cal. App. 3d 777, 782 (1977); Cal. Rule Court 243.1, *et seq.*[2]

[2] The right of access applies to all documents in a court's file, regardless of the way they are submitted to the Court or the names given them, unless a court order or statute provides that the records must be sealed. Thus, for example, in *Champion v. Superior Court*, 201 Cal. App. 3d 777, 788 (1988), the California Court of Appeal stated that "a party

Few disputes should arise over the general principle that the media are entitled to copies of documents filed with the court absent unusual circumstances. Most courts also will agree that the media are entitled to prompt access. But some will not. Particularly when accidents occur – such as an inadvertent release of private or confidential information – the court may attempt to withhold access entirely or insist on reviewing documents before they are released to the public. Here, too, however, the law is settled that such delays are impermissible. For example, in *Associated Press v. United States District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983), the Ninth Circuit struck down a temporary sealing order, stating that "[i]t is irrelevant that some of these pretrial documents might only be under seal, at a minimum, 48 hours." Other Circuits agree. *E.g., In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (the public's right of access is "threatened whenever immediate access . . . is denied," regardless of "whatever provision is made for later disclosure"); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay [in access to court records] impermissibly burdens the First Amendment"; invalidating statute requiring temporary sealing of some court records).

Even when the principle is well established, implementing it may be difficult. Many courts are converting to electronic records and can make court documents available over the internet as soon as they are filed. In the Scott Peterson case, for example, the Stanislaus County Superior Court – the original venue for the case – established an internet site where it posted within a few hours all documents filed. This served the dual purpose of getting the information to the media quickly without burdening court staff to distribute copies. Other courts, however, have limitations imposed by local rules – which may forbid permitting electronic access to criminal, juvenile or family court documents – or by technology. In those circumstances, a compromise is necessary. The best solution usually is for the media to assume the job of distributing copies among themselves. The court then can promptly give the public information officer a copy of all documents filed in the case, which then can be given to a designated media representative to distribute to the media. The media typically will provide the copy machine (usually leased locally) and thereby significantly reduce the copying costs.

Access to Trial Exhibits

Trial exhibits, like other court documents, are subject to a presumptive right of access, which includes the right to inspect and copy such exhibits. *E.g., Application of National Broadcasting Co., Inc. (United States v. Meyers)*, 635 F.2d 945 (2d Cir. 1980). As the *Meyers* court noted in upholding the right to inspect and copy trial exhibits in that high profile case, the United States Supreme Court has "emphasized the high public interest in the full opportunity to know whatever happens in a courtroom, except in those limited situations justifying nondisclosure of particular evidence. 'What transpires in the court room is public property.'" *Id.* at 951 (citation omitted). Thus, "there is a presumption in favor of public inspection and copying of any item entered into evidence at a public session of a trial," *id.* at 952, and a "significant public interest in affording that opportunity contemporaneously with the introduction" of the evidence in the courtroom, *id.* & n. 7 (emphasis added).[3]

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[3] seeking to lodge or file a document under seal bears a heavy burden of showing the appellate court that the interest of the party in confidentiality outweighs the public policy in favor of open court records." *Id.* The court reiterated that the courts "must be vigilant to ensure that nothing presented to the court is sealed without a strong justification." *Id.* Although the courts that have addressed this issue agree that a right of access exists, they disagree about the showing that must be made to overcome that right of access. The Second Circuit, in *Meyers*, held that "only the most compelling circumstances should prevent contemporaneous public access" to trial exhibits. *Id.* at 952. The Fifth Circuit, in contrast, adopted a balancing test that generally favors the defendant's fair trial rights. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981). The majority approach, adopted by the Seventh and Ninth Circuits, among others, holds that a "strong presumption" of access exists, which can be overcome only by "articulable facts" not "unsupported hypothesis or conjecture." *E.g., United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982); *Valley Broadcasting Co. v. United States District Court*, 798 F.2d 1289, 1294 (9th Cir. 1986).

Again, however, the difficulties frequently arise in implementing this right of access. Trial exhibits can be lengthy, cumbersome or both. Court personnel usually are not equipped to disseminate 100 copies of a videotape or photograph. Here too, the media can best serve itself by facilitating the distribution. For example, Peter Shaplen of Shaplen Productions is the pool producer for the Scott Peterson trial in San Mateo County, California, where the case was moved following a successful defense motion for change of venue. In this role, he has served as the intermediary between the court and the media, including the networks, newspapers and radio stations. He explained the process he used to disseminate trial exhibits.

First, he contacted the court soon after the case was moved to San Mateo County and offered to assume responsibility for dissemination of trial exhibits and similar documents to the media. He persuaded the court that the pool would be responsible for notifying all members of the media and for distribution, relieving the court of any obligation to handle multiple and sometimes conflicting requests for audio or video.

Second, the San Mateo Court established a system whereby Shaplen Productions receives all audio and video as soon as it has been marked as evidence. With the help of the Court Commissioner, Peggy Thompson, they established a system of "human checks" to avoid errors and ensure that no material is released prematurely. Frequently the court's IT team makes copies of material as soon as it is received from the parties and is in a position to release it to the media as soon as the court has ruled it "evidence."

Finally, Shaplen Productions distributes the material that has been prepared on CDs in various formats including .wm - windows media, MP3s, aiss files, .rm files and others. The material also has been distributed via the pool mult-box as well as sent on satellite feeds. In addition, internet clients of the pool have made digital copies in San Mateo and taken them to be streamed onto their stations. This permitted the media virtually contemporaneous access to trial exhibits and similar documents in the most user-friendly format, and significantly furthered the interests of the court and the media.

Access to Court Personnel

Occasionally – although fortunately not often – court personnel will be unwilling to deal with the media. This could effectively obliterate the media's right of access, by foreclosing any access to court documents or the ability to challenge any closure or sealing orders at the trial court level. It happened recently in a case in the high desert in California, where the trial judge's court clerk refused to acknowledge reporters from the local newspaper and frequently kept the reporters out of the courtroom for long periods of time without giving them an opportunity to question the reasons for their exclusion. Typically, as it was here, the clerk's behavior reflects the court's attitude toward the media, and it will be accompanied by denials of access to court proceedings or records.

Perhaps a refusal to communicate with media representatives alone would not justify a letter to the presiding judge or a writ petition to the court of appeal. No case that we could find holds that this alone is unconstitutional. However, a right of access to court personnel easily can be formulated by reliance on cases holding that the press is entitled to be heard on the question of their exclusion. *E.g., Gannett Newspaper Co.*, 443 U.S. at 401. Moreover, if the court's treatment of the media is accompanied by other unconstitutional closures or sealings, it is persuasive evidence of the court's refusal to comply with constitutional restraints. If the court has a Public Information Officer, a call to that person often will produce results. Otherwise, a letter to the presiding judge or a petition to the court of appeal – depending on the political structure of the courthouse – is frequently very effective in opening the communication between the court and the media.

Some Common Problems

Some problems that arise during a high profile trial are common to all members of the media – newspapers, magazines, radio and television. They typically involve access to the courtroom itself or to the information generated within the courtroom. Some of those problems – and their solutions – are discussed below.

Media Seating Arrangements

Jerrianne Hayslett, who served as Los Angeles County's public information officer during such high profile trials as the Rodney King beating trials, the Menendez brothers murder trials, the Reginald Denny beating trial and the O.J. Simpson murder trial, has stated that of all the problems she dealt with in these trials,

> [A]llocating courtroom seats for the media is far and above the thorniest. It takes more thought, deliberation, juggling and time, requires the toughest skin, causes the greatest headaches, elicits the most criticism and brings out the absolute worst in the press than any other one media-related aspect of a high-profile trial.

Jerrianne Hayslett, "The People vs. Simpson – Media Mania," California County, Journal of the California State Association of Counties, March/April 1995.[4]

Some legal principles dictate how seats should be allocated. For example, it is fairly well settled that the government may not discriminate between different media – all media representatives must be treated similarly. Thus, the Supreme Court has held that a tax assessed against the print media violated the First Amendment because it singled out small newspapers. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 590 (1983). Similarly, the White House has been ordered to drop its exclusion of the electronic media from a White House pool because any such exclusion "denies the public and the press their limited right of access, as guaranteed by the First Amendment." *Cable News Network, Inc. v. American Broadcasting Cos.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981). Numerous courts have stricken down government action singling out one media organization for disparate treatment. *See, e.g., McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951) (city official cannot grant one newspaper access to public records while denying other newspapers' requests for access to same items); *American Broadcasting Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (public official cannot selectively exclude one news organization from forum in which official will make public comments); *Telemundo v . City of Los Angeles*, 283 F. Supp. 2d 295, 303 (C.D. Cal. 2003) (invalidating the City of Los Angeles' agreement guaranteeing one television network preferential access to an official ceremony); *Westinghouse Broadcasting Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (selective exclusion of one television station from press conference violated the First Amendment).

While this is sound in principle, it says little about how 50 or 100 courtroom seats should be allocated when there are more requests for seats than there are seats. Of course, half of the seats or less will be available to the media, with the other half going to family members, interested organizations and the public. Thus, although dozens of media organizations may cover one trial, the courtroom typically will hold 20 of them or less. The media seats usually are distributed by allocating a certain number of

[4] Ms. Hayslett currently is a Court-Media Relations Consultant and can be contacted at jfarhsi@aol.com.

seats to each type of media – giving priority to the media with a more significant interest in the case – and requiring some of them to share. For the Rodney King trial, for example, Ms. Hayslett reports that:

- Wire services—AP, UPI, Copley News Service, and City News Service—each received a seat;
- Major area newspapers—*Los Angeles Times* and the *Daily News* of Los Angeles—each got one;
- The four Ventura County newspapers [the trial venue after it was moved from Los Angeles] were given two seats [to share];
- Two Pasadena newspapers got a seat, since Rodney King and his family lived in that paper's circulation area;
- The nine local television stations shared three seats;
- The two Los Angeles all-news radio stations each got a seat; and
- The remaining seat went to the Associated Press Radio.

Jerrianne Hayslett, "Managing the Notorious Trial," The Court Manager, A Publication of the National Association for Court Management, Volume 8, Number 3, Summer 1993 at 7.

In Los Angeles, the media and court eventually developed a three-person committee to allocate seats. Although the committee initially was fixed (the same three people), Los Angeles recently converted to a rotating committee, consisting of three members of the media who represent different types of organizations. They work together to propose seating arrangements for a broad representation of media organizations – usually including representatives from the national and local networks, radio stations, newspapers, boutique organizations and some book and magazine authors – which then are approved by the court. Most arrangements provide that people who do not attend daily forfeit their seats.

These arrangements may be fair under the circumstances. The inevitable result, however, is that many people simply do not make it into the courtroom. The Third Circuit acknowledged the practical obstacles that prevent full public attendance at trials, asking rhetorically, "What exists of the right of access if it extends only to those who can squeeze through the [courtroom] door?" *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994). In the past, the public interest in a high profile case was satisfied by moving it to a larger building. Thus, the probable-cause hearing in the Aaron Burr trial "was held in the Hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the crush of interested citizens." *Press-Enterprise II*, 478 U.S. at 10. That is not an option for most courts. Nonetheless, one way to significantly reduce problems associated with courtroom seating is to set up a viewing room, sometimes called a courtroom annex. As discussed below, this option frequently is used by courts to ensure that all media covering a trial have ready access to courtroom events.

Establishing a Courtroom Annex

In virtually every high profile case litigated in California and elsewhere, the court has established an overflow annex in which the media could view the courtroom proceedings. The courtroom will be set up for a video and audio feed into the annex, where the media who cannot actually be in the courtroom can nevertheless see and report on the events there. As can be expected, this

significantly reduces problems associated with limited courtroom seating and the otherwise inevitable struggles for the few available seats. Indeed, many reporters prefer the annex over the courtroom because they have greater freedom of movement and can work while they watch the trial.

When possible, the annex is established in a vacant room in the courthouse itself, which can be wired for the feed. Frequently, however, there are no vacant rooms in the courthouse. The O.J. Simpson criminal trial, for example, was housed in the busy Los Angeles Superior Court Criminal Courts Building. Because no room was available to serve as an annex, a trailer was set up adjacent to the courthouse to serve as the annex. Other courthouses may not have space for a trailer, or may have vacant office space nearby which will better serve as the annex. Any space that is reasonably close and readily accessible to the media, but that also can be rendered inaccessible by the public, will suffice.

The media almost uniformly is required to bear the expenses associated with the annex.[5] This usually entails the costs of establishing the closed-circuit television and wiring the feed to the annex, the costs of renting and servicing additional space if necessary, and the costs of security within the annex (primarily to ensure that no members of the public enter and that no video or audio tapes of the courtroom events are made from within the annex). Some difficulties may arise in dividing this expense among members of the media, but the best way to ensure that an annex is provided to the media is to guarantee that these difficulties will be resolved internally by the media, without involving court personnel. A per-organization or per-person fee can be adopted, depending on the anticipated use of the annex. In addition, a daily fee can be imposed for those organizations that cover the trial only occasionally. The media has resolved this problem many times and undoubtedly can do so again.

Some Problems Unique to the Broadcast Media

When they are not in the courtroom itself, the media usually are in or around the courthouse, generating or disseminating information to the public. The print media have fewer challenges than the broadcast media because of the nature of their medium. They do not carry cameras and the other equipment necessary for the broadcast media to cover a story. The broadcast media, therefore, frequently are faced with different problems than the print media and must work harder to reach a solution with the court and its representatives.

Access to the Courthouse and its Environs

The broadcast media want to be in the courthouse or on its steps when they broadcast. They need ready access to trial participants and witnesses and the sense of immediacy and accuracy that is conveyed by actually broadcasting from the courthouse. Unfortunately, this means that all of their equipment – the cameras, wires and other equipment necessary for broadcast – must be at or near the courthouse.

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[5] A word of warning is appropriate – be careful what you ask for. Following the change of venue in the Scott Peterson case, County and City officials moved quickly to determine what they would need to house this high profile case. They met with representatives of the media and asked the media what they wanted to help them cover the case. The media present at the meeting gave the County and City a wish list – a listening annex with workspaces including telephone and internet access, 24-hour security, among other things – and the County and City complied. Both the County and City then distributed a significant bill to the media, dividing all of the expenses they had incurred to prepare for the trial and the anticipated additional expenses they would incur during the six-month trial that was expected. After extensive negotiations, the County and City resolved the dispute, with the media significantly scaling back on its requests to the County and City, and providing as much as possible themselves. Davis Wright Tremaine LLP represented the broadcast media in their negotiations with the County and the City.

The United States Supreme Court has recognized that "'public places' historically associated with the free exercise of expressive activities," including public areas surrounding courthouses, "are considered . . . to be 'public forums.'" *United States v. Grace*, 471 U.S. 171, 178 (1983). In such places, the government's ability to restrict constitutionally protected speech, including newsreporting, is "very limited." *Id.* "An absolute prohibition on … expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Id.* (emphasis added). Any restriction on broadcasting from the courthouse steps can survive only if it (1) is "justified without reference to the content of the regulated speech"; (2) is "narrowly tailored to serve a significant governmental interest"; and (3) "leave[s] open ample alternative channels for communication of the information." *See American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1106 (9th Cir. 2003) (citation omitted); *see also Service Employee Int'l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 971 (C.D. Cal. 2000) ("secured zone" around political convention not narrowly tailored and did not provide adequate alternative means of communication).

Most court personnel recognize that they must permit the media to broadcast from areas around the courthouse, but they struggle with how to facilitate that goal. They may choose to close a street to traffic and permit the media to broadcast from there. If the courthouse plaza is large enough, they may designate certain areas for broadcast and leave the other areas for pedestrian traffic. Typically this will entail barricades to separate the media from the rest of the public and ramps to cover the many wires needed to broadcast – all at the media's expense. Court personnel also may designate areas inside the courthouse for photography and interviews, and thereby attempt to ensure that the hallways remain free for normal courthouse business. They may choose some combination of these or something completely different, depending on the courthouse and its facilities. So long as court personnel provide some reasonable options for broadcasting from the areas in or around the courthouse – in or immediately adjacent to the courthouse with adequate space to broadcast – their decisions probably will be upheld.

Truck Parking, Roof Antennae and Similar Needs

If the broadcast media are to broadcast from the courthouse, they must have their satellite trucks nearby and satellite antennas on the rooftops. Technology demands that the satellite trucks be parked within a block or two of the courthouse because it is not feasible to run the necessary wires longer distances. Technology also demands that the antennas be close to the broadcast location and above the building line so that the report can immediately be sent via satellite to the network or local station. Occasionally, there will be an unused parking lot or a vacant lot nearby that can be used for satellite trucks, and the owner of an adjacent building can be convinced to lease space on its roof for the antenna. Usually, however, the solution is not so simple. Frequently, the government will be asked to close a street to traffic to permit the media to permanently park their satellite trucks there. This will entail additional costs – the loss of parking meter revenue and the costs for additional signage – that must be borne by the media. The government also may attempt to pass along the costs of additional police officers to direct traffic and maintain security.

Clearly, the government can recover its additional costs directly attributable to facilitating the broadcast media. It cannot, however, charge the media for any pre-existing fixed costs or otherwise attempt to profit from the "services" it provides. The United States Supreme Court has declared that the "state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). As the Court noted, "[t]he power to impose a license tax on the exercise of [First Amendment] freedoms is … as potent as the power of censorship, which this Court has repeatedly struck down." *Id.* The Court thus made clear that "a government cannot profit by imposing a licensing or permit fee on the exercise of a First Amendment right." *Id.* at

113-14. Nor may the government "rais[e] revenue under the guise of defraying its administrative costs." *Gannett Satellite Info. Network v. Metropolitan Transit Authority*, 745 F.2d 767, 774 (2d Cir. 1984). A permit or license requirement is constitutionally permissible only if the discretion in issuing licenses given to the government official is reasonably narrow *and* the fees are not based on the content of the speech. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131-37 (1992) (striking down ordinance linking parade permit fee to county's anticipated costs for event security). Consequently, if the government attempts to pass along costs that are not fairly attributable to the broadcast media and their special needs, the media may have grounds to challenge that assessment.

Conclusion

No courthouse – even in Los Angeles County, which has seen more than its fair share of high profile trials – is ready for the many problems that may accompany a high profile trial. The best court personnel can hope to do is learn from those who have dealt with the situation before. The development of a strong Media Plan by court personnel, establishing reasonable and adequate guidelines for newsgathering and dissemination, is essential. In addition, the media significantly furthers its own interests when it cooperates internally (with other media organizations) and with the government in distributing information. By being proactive and assuming more responsibility itself, the media can ensure that it has the most complete and timely access to information.