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NOTES

THE EXPANDING RIGHT OF ACCESS: DOES IT EXTEND TO SEARCH WARRANT AFFIDAVITS?

INTRODUCTION

The need for a check on judicial proceedings through an informed public has been recognized as far back as the fourteenth century B.C., in Egypt.[1] Anglo-American law is characterized by a long tradition of open judicial proceedings designed to encourage free discussion and criticism of the government and its processes.[2]

In the United States, the right of access to judicial proceedings has been found under the Constitution[3] and the common law.[4] Lower courts have gradually expanded the constitutional right of access beyond criminal trials to include voir dire proceedings, suppression hearings,[5] due process and entrapment hearings,[6] bail hearings,[7] and plea and sentencing hearing documents.[8] Courts have also expanded the right of access under the common law to encompass pre-sentence probation reports,[9] judicial records,[10] and videotapes offered as evidence at trial.[11]

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1. *See* Special Committee on Free Press and Fair Trial, American Newspaper Publishers Association, Free Press and Fair Trial at vii (1967). "Lo, whenever an administrator hears cases let there be publicity . . . report[ing] all that he may do. Lo, then his conduct is by no means unperceived." *Id.* (quoting from the tomb of Rekhmire, Vizer to Tuthmosis III, King of Egypt, XVIII dynasty (1580-1321 B.C.)).

2. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982). *See generally* Note, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 Emory L.J. 619, 628-34 (1983) (long-standing tradition of open trials in Anglo-American law). Historically, outsiders have viewed this practice as unusual. "Nothing is more apt to surprise a foreigner, than the extreme liberty, which we enjoy in this country, of communicating whatever we please to the public, and of openly censuring every measure, entered into by the king or his ministers." D. Hume, *Of the Liberty of the Press*, in 1 Essays Moral, Political and Literary 94 (T. Green & T. Grose eds. 1907), *quoted in* Kurland, *The Original Understanding of the Freedom of the Press Provision of the First Amendment*, 55 Miss. L.J. 225, 232 (1985).

3. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7 (1986) [hereinafter Press-Enterprise II]; Press-Enterprise v. Superior Court, 464 U.S. 501, 505-10 (1984) [hereinafter Press-Enterprise I]; *In re* Oliver, 333 U.S. 257, 267 (1948).

4. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-73 (1980) (plurality opinion).

5. *See* United States v. Brooklier, 685 F.2d 1162, 1172-73 (9th Cir. 1982).

6. *See* United States v. Criden, 675 F.2d 550, 554-55 (3d Cir. 1982).

7. *See* United States v. Chagra, 701 F.2d 354, 363-64 (5th Cir. 1983).

8. *See In re* Washington Post Co., 807 F.2d 383 (4th Cir. 1986); *see also* United States v. Peters, 754 F.2d 753, 763 (7th Cir. 1985) (access to all documents submitted in connection to any judicial proceedings); Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (access to pretrial documents in general); Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983) (access to certain civil proceedings).

9. *See* United States v. Schlette, 842 F.2d 1574, 1584 (9th Cir.), *modified*, 854 F.2d 359 (1988).

10. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978); Banks v. Manchester, 128 U.S. 244, 253 (1888).

Recently, four circuit courts have examined whether the right of access[12] should be extended to search warrant affidavits[13] that the government has filed under seal.[14] The Eighth Circuit found a constitutional right of access to search warrant documents while not reaching the common-law issue;[15] the Fourth Circuit a common-law right of access while rejecting the constitutional argument;[16] the Second Circuit a common-law right while not reaching the constitutional issue;[17] and the Ninth Circuit no right of access at all.[18]

Part I of this Note discusses the history and development of the right of access under the Constitution and the common law, examining how that right has been applied to various proceedings and documents. Part II asserts that the first amendment right of access encompasses search warrant affidavits, analyzing the arguments for and against such an ex-

11. *See* United States v. Myers, 635 F.2d 942, 945 (2d Cir. 1980).

12. The standards and procedures that must be followed by the court in sealing documents depends on whether the right of access is found under the first amendment or the common law. Under the first amendment, there are strict safeguards to prevent unconstitutional infringements on the right of access. *See infra* notes 85-88 and accompanying text. Under the common law, the district court may seal documents with few or no limitations. *See infra* notes 199-202 and accompanying text.

13. The fourth amendment guarantees people the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A warrant is necessary for most searches and seizures. A search warrant, however, is not required in a search incident to a lawful arrest, *see* United States v. Robinson, 414 U.S. 218, 235 (1973); United States v. Queen, 847 F.2d 346, 352 (7th Cir. 1988); United States v. Johnson, 846 F.2d 279, 281-82 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 562 (1988), a search conducted while in hot pursuit, *see* United States v. Santana, 427 U.S. 38, 42-43 (1976); Warden v. Hayden, 387 U.S. 294, 298-99 (1967), or a search pursuant to a need to preserve evidence. *See* United States v. Sangineto-Miranda, 859 F.2d 1501, 1511 (6th Cir. 1988); United States v. Socey, 846 F.2d 1439, 1448 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 152 (1988). *See generally* W. LaFave & J. Israel, Criminal Procedure § 3.4, at 126-27 (1985) (police authorized to search without warrant under certain circumstances).

The fourth amendment further provides that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The facts in an affidavit submitted in support of a search warrant application must establish probable cause, as determined by a magistrate, subject to judicial review during a suppression hearing. *See* W. LaFave & J. Israel, *supra*, § 3.3, at 109. On appeal, the issue is whether the magistrate acted properly in issuing the warrant, not whether the police acted properly in executing the search. *See* Jones v. United States, 362 U.S. 257, 270-71 (1960), *overruled by* United States v. Salvucci, 448 U.S. 84 (1979) (overruling holding on standing to challenge search warrant issuance, but not affecting standards of appeal).

The police must establish two elements to support the issuance of a search warrant: first, that the items sought are connected with criminal activity, and second, that the items listed in the warrant will be found at the place specified in the warrant. *See* W. LaFave & J. Israel, *supra*, § 3.3, at 110.

14. *See infra* notes 75-121 and accompanying text.

15. *See In re* Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 572-74 (8th Cir. 1988).

16. *See* Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989).

17. *See In re* Newsday, 895 F.2d 74 (2d Cir. 1990).

18. *See* Times Mirror Co. v. United States, 873 F.2d 1210, 1221 (9th Cir. 1989).

tension. It further contends that a right of access to search warrant affidavits exists under the common law.

I. THE DEVELOPMENT OF THE RIGHT OF ACCESS

A. *The First Amendment Right of Access*

The first amendment[19] does not explicitly grant a right of access to judicial proceedings,[20] but the Supreme Court has interpreted it as implicitly guaranteeing such a right.[21] The Supreme Court first alluded to the existence of a right of access to judicial proceedings in *Branzburg v. Hayes*,[22] noting in dictum that the first amendment protected the press in its news gathering capacity.[23] In subsequent cases, the Court continued to allude to a constitutionally granted right of access.[24]

Only recently, however, has the Court explicitly recognized the constitutional right of the press and the public to attend criminal trials.[25] In *Richmond Newspapers, Inc. v. Virginia*,[26] the Court found this right implicit in the first and fourteenth amendments, stating that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[27] Among the reasons enumerated for allowing open-

19. The Supreme Court has also examined the right of access of the press and the public under the sixth amendment. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the Court decided that the sixth amendment right to a public trial could be exercised only by the criminal defendant and could not be invoked by the press to secure access to criminal proceedings. *See id.* at 379-80.

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

21. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-76 (1980) (plurality opinion). Some courts refer to the qualified right of access as a presumption of access. *See In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984). The principles and procedures implicated are identical, however, regardless of terminology.

22. 408 U.S. 665 (1972).

23. *See id.* at 681. "[N]ews gathering does . . . qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.*

24. In 1974, the Court examined the press' right of access to federal and state prisons and determined that reporters had no greater right than the public at large. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 834 (1974).

In 1976, the Court held that information that the media acquired from an open hearing should not be withheld from the public, limiting the trial court's authority and discretion in imposing prior restraints upon the press. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976). In order to justifiably impose a prior restraint, *see supra* note 158, a trial court must establish that the pretrial publicity would threaten the defendant's right to a fair trial, that other preventative measures, *see supra* notes 168-170 and accompanying text, are unlikely to protect this right and that prior restraints would likely protect this right. *See Nebraska Press*, 427 U.S. at 562-69.

25. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion).

26. *Id.*

27. *Id.* at 573.

ness were preventing official misconduct, deterring vigilantism, encouraging testimony and discouraging perjury, increasing public confidence in the judicial system, and promoting the appearance of fairness.[28] The Court stipulated that the right of access was not absolute, but could be restricted by the trial judge upon a showing of "overriding interests."[29]

In his concurrence, Justice Brennan proposed a two-prong approach for analyzing whether a first amendment right of access exists.[30] First, the proceeding must have been traditionally open to the public.[31] Second, access must further self-government.[32] Once a court finds that a right of access exists, that right may be restricted only by a compelling government interest.[33]

In later cases, the Supreme Court explicitly endorsed the analysis set out by Justice Brennan in *Richmond Newspapers*.[34] The Court used this two-prong approach in *Globe Newspaper Co. v. Superior Court*[35] to invalidate a Massachusetts statute that required certain trials to be closed to the public.[36] In *Press-Enterprise Co. v. Superior Court*[37] ("*Press-Enterprise I*"), the Supreme Court again used Justice Brennan's *Richmond Newspapers* approach, this time extending the first amendment right of

28. *See id.* at 569-73; *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (openness promotes quality and integrity of judicial proceedings and increases public respect for judicial process); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 722 (1931) (first amendment important to system of representative self-government).

29. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980). This phrase was not defined in the decision.

30. *See id.* at 588-89 (Brennan, J., concurring).

31. *See id.* at 589. A requirement of historical openness, referred to as the historical or experience test, is an aspect of both the first amendment right of access and the common-law right of access. The tradition of openness, however, has been subject to different interpretations. *Compare* Press-Enterprise II, 478 U.S. 1, 6-10 (1986) (historical openness based on tradition of state court) *with* Press-Enterprise I, 464 U.S. 501, 506-08 (1984) (determining openness by examining evolution of proceeding under English law). In his concurrence in *Richmond Newspapers*, Justice Brennan stated that "[t]radition, contemporaneous state practice, and th[e] Court's own decisions" all determine whether a proceeding is traditionally open to the public. *Richmond Newspapers*, 448 U.S. at 593.

32. *See id.* at 589 (Brennan, J., concurring). Courts refer to this second step as either the functional, structural or logic test.

Under a "republican system of self-government," *id.* at 587 (Brennan, J., concurring), it is necessary to have an informed citizenry capable of conducting meaningful debate on public issues. The first amendment guarantees access to information necessary to have meaningful, informed discussion on public issues, enabling the citizenry to make intelligent decisions concerning their system of government. *See id.* at 587-589.

33. *See id.* at 598. Justice Brennan declined to elaborate on "[w]hat countervailing interests might be sufficiently compelling to reverse th[e] presumption of openness," but stated national security concerns as a possible example. *See id.* at 598 n.24.

34. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-06 (1982); Press-Enterprise I, 464 U.S. 501 (1984).

35. 457 U.S. 596 (1982).

36. *See id.* at 598, 610-11. The statute in question required that whenever a minor was the alleged victim of a sexual offense, the trial would have to be closed. *See id.* at 598 n.1.

37. 464 U.S. 501 (1984).

access to encompass proceedings other than criminal trials.[38] The Court determined that there is a right of access to voir dire proceedings,[39] stating that historically these proceedings had been open as part of the trial process.[40] The Court then considered the benefits of open proceedings and determined that a public right of access to voir dire proceedings served the interests of self-government.[41]

In a later case, also entitled *Press-Enterprise Co. v. Superior Court*[42] (*"Press-Enterprise II"*), the Court held that a qualified right of access under the first amendment could extend to other preliminary criminal hearings.[43] The Court focused on whether the proceedings were traditionally accessible in federal and state courts, rather than concentrating on the English common-law tradition, as was done in *Press-Enterprise I*, and determined that preliminary hearings satisfied the historical aspect of the two-prong test.[44] The Court next considered the functional aspect of the proceeding and asserted that preliminary hearings may be the most important part of a criminal proceeding, and thus openness would be beneficial for the same reasons supporting open criminal trials.[45]

In addition to trials and certain preliminary criminal hearings, several

38. *See id.* at 511. Previously, in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), the Court had stated that even if a sixth amendment right of access to trials did exist, see *supra* note 19, it would not necessarily apply to pretrial proceedings. *See Gannett*, 443 U.S. at 387. The Court also found no persuasive evidence of a common-law tradition of public access to such proceedings. *See id.*

Before *Press-Enterprise I*, however, several lower courts already had determined that the constitutional right of access did extend to various pretrial proceedings. In United States v. Brooklier, 685 F.2d 1162, 1167-71 (9th Cir. 1982), the court granted the press and public access to voir dire proceedings and suppression hearings. In so doing, the court relied primarily on the functional prong of Justice Brennan's test rather than the historical test. Additionally, the court devised a two-step process that a judge must follow before sealing or closing a proceeding. First, the court must give any person excluded a reasonable opportunity to state any objections. Second, the trial court must explain its reasons for ordering the closure. *See id.* at 1167-68. Only when these criteria are satisfied can the court close a particular proceeding.

Other pretrial proceedings have also been recognized as being within the scope of the first amendment right of access. Courts have recognized a first amendment right of access to suppression hearings, *see* United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982); United States v. Dorfman, 550 F. Supp. 877, 880 (N.D. Ill.), *aff'd*, 690 F.2d 1217 (1982); United States v. Pageau, 526 F. Supp. 1221, 1223 (N.D.N.Y. 1981), due process and entrapment hearings, *see Criden*, 675 F.2d at 557, hearings setting or reducing bail, *see* United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983), and pretrial proceedings in civil trials that involve "the release or incarceration of prisoners and the conditions of their confinement." Newman v. Graddick, 696 F.2d 796, 801 (11th Cir. 1983).

39. *See Press-Enterprise I*, 464 U.S. at 505-10.

40. *See id.* at 505-08.

41. *See id.* at 508-10. That same year, the Court extended the defendant's sixth amendment right to a public trial to include a right to a public pretrial suppression hearing, noting that such hearings were often as important as the trial itself. *See* Waller v. Georgia, 467 U.S. 39, 46 (1984).

42. 478 U.S. 1 (1986).

43. *See id.* at 10-13.

44. *See id.* at 10-11.

45. *See id.* at 11-12. "[P]ublic access to criminal trials . . . is essential to the proper

courts have determined that the right of access applies to judicial documents, particularly, but not exclusively those related to open proceedings.[46] In 1983, the Ninth Circuit observed that "[t]here is no reason to distinguish between pretrial proceedings and the documents filed in regard to them" because they serve the same interests and goals.[47] Consequently, the court held that the first amendment right of access extended to pretrial documents in general,[48] noting that they "are often important to a full understanding of the way in which the 'judicial process and the government as a whole' are functioning."[49]

While the constitutional right of access has been applied to certain documents by certain courts, the Supreme Court has not yet addressed

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functioning of the criminal justice system. California preliminary hearings are sufficiently like a trial to justify the same conclusion." *Id.* at 12.

The Court specified that the holding applied only to preliminary hearings as conducted in California.

> In California, to bring a felon to trial, the prosecutor has a choice of securing a grand jury indictment or a finding of probable cause following a preliminary hearing. Even when the accused has been indicted by a grand jury, however, he has an absolute right to an elaborate preliminary hearing before a neutral magistrate. The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. If the magistrate determines that probable cause exists, the accused is bound over for trial; such a finding leads to a guilty plea in the majority of cases.

Id. (citation omitted).

46. *See, e.g.*, Seattle Times Co. v. United States Dist. Court, 845 F.2d 1513, 1517 (9th Cir. 1988) (documents filed in connection with pretrial detention proceedings); United States v. Haller, 837 F.2d 84, 86 (2d Cir. 1988) (plea hearings and plea agreements); *In re* New York Times Co., 828 F.2d 110, 114 (2d Cir. 1987) (documents filed in connection with suppression motions), *cert. denied*, 108 S. Ct. 1272 (1988); *In re* Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986) (affidavits submitted in connection with plea and sentencing hearings); United States v. Smith, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (bills of particular); CBS v. United States Dist. Court, 765 F.2d 823, 825 (9th Cir. 1985) (first amendment provides public with a right of access to criminal proceedings and documents filed therein); Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (pretrial documents generally accessible).

47. *Associated Press*, 705 F.2d at 1145.

48. *See id.* Press-Enterprise II, 478 U.S. 1 (1986), stated that the public has a first amendment right of access to transcripts of preliminary hearings in criminal prosecutions. *See id.* at 13. The media has also been granted a first amendment "right of access to information concerning crime in the community, and to information relating to activities of law enforcement agencies," including arrest sheets, police blotters and the first pages of the offense reports. *See* Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 186-88 (Tex. Civ. App. 1975). The first amendment right of access has been extended to include plea and sentencing hearings as well as any documents connected to these proceedings. *See In re* Washington Post Co., 807 F.2d 383, 389-90 (4th Cir. 1986). In 1976, the Ohio Supreme Court held that city jail logs, which listed the arrest numbers, names of prisoners, dates, times and dispositions of charges and the charges themselves, were public records and could be disclosed to a newspaper. *See* Dayton Newspapers, Inc. v. City of Dayton, 45 Ohio St. 2d 107, 109-10, 341 N.E.2d 576, 578 (1976).

49. *Associated Press*, 705 F.2d at 1145 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)).

the documents issue. As a result, the public availability of particular documents, such as search warrant affidavits, is in dispute.

B. *The Common-Law Right of Access*

Open trials are a long-standing tradition in Anglo-American common law.[50] Before the Norman Conquest, England had a court system with mandatory attendance by freemen.[51] This early form of the jury system was the basis of the Anglo-American tradition of open trials which has continued since.[52] "[T]here is little record, if any, of secret proceedings . . . in known English history."[53] The colonists in America incorporated this openness into many colonial charters and state constitutions.[54]

Judicial records also have a long tradition of openness. In fourteenth-century England, a right of access to judicial records was established that mandated public access regardless of proprietary interest in or intended use of the documents.[55] Under the English common law, the courts distinguished judicial records that had been publicly introduced into evidence from those which had not and granted public access more readily to the former.[56]

The United States Supreme Court, in an early copyright case,[57] implicitly recognized an inherent common-law right of access to court records under the American common law, ruling that no court reporter could obtain a copyright in judicial opinions.[58] In a later case, the Supreme

50. *See* F. Pollock, The Expansion of the Common Law 31-32 (1974); *see, e.g.*, Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504, 506 (D. Colo. 1902) ("[S]trangers to the suit . . . ought to be at liberty to inquire how the controversy is carried on."); United States v. Burka, 289 A.2d 376, 379 (D.C. 1972) ("[I]f a judge's comment should not be recorded and reported it should not have been said in the first place."); *Ex parte* Drawbaugh, 2 App. D.C. 404, 407-08 (1894) (patent registration litigation cannot be conducted in secrecy).

There are two reasons why there is little case law dealing explicitly with pretrial access under the common law. First, many pretrial procedures are of relatively recent origin. *See* Note, *supra* note 2, at 629. Second, those pretrial procedures having a long history have attained significance only in the past few centuries. *Id.* at 633-34.

51. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565 (1980).

52. *See id.* at 565-69.

53. Gannett Co. v. DePasquale, 443 U.S. 368, 420 (1979) (Blackmun, J., concurring in part and dissenting in part).

54. *See Richmond Newspapers*, 448 U.S. at 590-91 (Brennan, J., concurring).

55. *See* Note, *The Common Law Right to Inspect and Copy Judicial Records:* In Camera *or On Camera*, 16 Georgia L. Rev. 659, 661 (1982). Originally, the King's adversaries were denied access to any documents which could be harmful to him. In 1372, Parliament passed an ordinance opening court records to all, including those with interests adverse to the King. *See id.* (citing 46 Edw. 3 (1372); 2 Eng. Statutes at Large 191, 196-97 (1341-1411)). The courts, however, did not interpret this statute broadly, construing it to grant access only where the person seeking access had a proprietary or evidentiary interest in the document. *See id.* at 662-63 & n.20 (*citing* King v. Shelley, 100 Eng. Rep. 498 (K.B. 1789); Folkard v. Hemet, 96 Eng. Rep. 624 (C.P. 1776); Rex v. Midlam, 97 Eng. Rep. 1064 (K.B. 1765); Roe v. Aylmar, 94 Eng. Rep. 893 (C.P. 1732-1756)).

56. *See* Note, *supra* note 55, at 665-66.

57. *See, e.g.*, Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

58. *See id.* at 624. Several lower courts had also extended the common-law right of

Court reasoned that judicial opinions are legal interpretations binding on all citizens and therefore must be open.[59]

Courts have noted that these same inherent values and policies mandate a common-law right of access to court records.[60] These policies include maintaining "the confidence of the community in the honesty of its institutions, in the competence of its public officers, in the impartiality of its judges, and in the capacity of its criminal law to do justice."[61]

The Supreme Court has recently reaffirmed a common-law right of access to judicial records. In a case involving access to the Watergate tapes,[62] the Supreme Court again[63] recognized a general common-law right of public access regardless of proprietary or evidentiary interests in the records.[64]

Lower courts have continued to recognize the common-law right of access to judicial records. In 1980, the Second Circuit recognized a strong presumption in favor of a common-law right of access to any items entered into the judicial records;[65] only the most compelling cir-

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access to judicial documents to all citizens because such access served as a check on government officials and others in the public service. *See, e.g.*, O'Hara v. King, 52 Ill. 303, 305 (1869) ("motives of curiosity merely" are sufficient grounds for granting common-law access to documents); State *ex rel.* Colescott v. King, 154 Ind. 621, 627, 57 N.E. 535, 538 (1900) (citizens have right to copy and inspect all county records and papers); State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 336-39 (1879) (person entitled to inspect public documents even where no suit is pending or forthcoming).

59. *See* Banks v. Manchester, 128 U.S. 244, 253 (1888); *see also* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) ("American decisions generally do not condition enforcement of th[e right of access] on a proprietary interest in the document . . . ."); Banks & Bros. v. West Publishing Co., 27 F. 50, 57 (C.C.D. Minn. 1886) (common-law right of public access should be liberally interpreted and enforced because court records are binding legal authority upon all citizens); Nowack v. Auditor Gen., 243 Mich. 200, 203, 219 N.W. 749, 750 (1928) (any rule denying common-law right of access to public records is "repugnant to the spirit of our democratic institutions"); State *ex rel.* Youmans v. Owens, 28 Wis. 2d 672, 682, 137 N.W.2d 470, 475 (Wis. 1965) (per curiam) (public officer must specifically justify refusal of request to inspect public records).

60. *See* United States v. Burka, 289 A.2d 376, 377-79 (D.C. 1972).

61. *Id.* at 379 (quoting Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83, 91 (Cal. Ct. App. 1968)).

62. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

63. *See supra* note 58 and accompanying text.

64. *See Nixon*, 435 U.S. at 597; *see also In re* Mosher, 248 F.2d 956, 958-59 (C.C.P.A. 1957) (person does not need special interest in judicial proceeding to have right of access to related judicial records); *In re* Sackett, 136 F.2d 248, 249 (C.C.P.A. 1943) (patent application must be accessible).

The *Nixon* Court, while finding a presumption strongly favoring public access, denied access on the basis of a congressional act that limited public access to private presidential documents. *See Nixon*, 435 U.S. at 603-08.

The lower court in this case stressed the public's historical privilege of access to judicial documents, noting that this right was "fundamental to a democratic state. . . . [and] serves to produce 'an informed and enlightened public opinion.'" United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (quoting Grosjean v. American Press Co., 297 U.S. 233, 247 (1936)), *rev'd on other grounds*, 435 U.S. 589 (1978).

65. *See* United States v. Myers, 635 F.2d 945, 952 (2d Cir. 1980).

cumstances would suffice to limit such access.[66] The Third Circuit noted that the Supreme Court's decision in *Richmond Newspapers* strongly supported the common-law basis for a right of access to trial materials and trials.[67] Such a right would allow "broader dissemination [which] would serve the same values of 'community catharsis,' observation of the criminal trial process, and public awareness served by the open trial guarantee."[68] In *United States v. Schlette*,[69] the Ninth Circuit extended the common-law right of access to encompass pre-sentence probation reports.[70] The Seventh Circuit also extended the common-law right of access to judicial records, while emphasizing the court's discretion in allowing or denying the release of such documents.[71] It noted that courts should consider the likelihood that the records, if released, would be used for "improper purposes."[72]

Courts have recognized that the common-law right of access to documents connected to a judicial proceeding exists apart from any right of access to the actual proceeding.[73] However, access to such documents is not unlimited,[74] and controversy exists as to whether specific types of documents fall within the common-law right of access.

C. *The Current Controversy*

The Eighth Circuit, in *In re Search Warrant for Secretarial Area-Gunn*,[75] considered whether the first amendment right of access to court proceedings included a right of access to documents submitted in support of an application for a search warrant. The court applied the established two-prong test and determined that such a constitutional right, albeit qualified, did exist,[76] but did not address whether a common-law right of access to search warrant affidavits also existed.

Search warrant affidavits satisfied the historical requirement of the test because they are commonly filed with the clerk of the court without be-

66. *See id.*

67. *See* United States v. Criden, 648 F.2d 814, 820-22 (3d Cir. 1981).

68. *Id.* at 822.

69. 842 F.2d 1574 (9th Cir.), *modified*, 854 F.2d 359 (1988).

70. *See id.* at 1583.

71. *See* United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982).

72. *See id.* at 1293, (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978)). *But see supra* note 59 and accompanying text (granting right of access regardless of use).

73. *See, e.g.*, United States v. Corbitt, 879 F.2d 224, 228-29 (7th Cir. 1989); United States v. Smith, 776 F.2d 1104, 1111-12 (3d Cir. 1985); United States v. Dorfman, 690 F.2d 1230, 1234 (7th Cir. 1982).

74. Courts have denied access to records under the common law for a variety of reasons. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 318 (1979) (access denied to protect valid trade secret information); Park v. Detroit Free Press Co., 72 Mich. 560, 568, 40 N.W. 731, 734-35 (1888) (access denied to ensure files would not be source of libelous statements used by press).

75. 855 F.2d 569 (8th Cir. 1988).

76. *See id.* at 572-74.

ing placed under seal.[77] Judicial records and documents filed in support of search warrants therefore historically have been open to public inspection.[78]

Next, the court determined that public access to these documents would serve a positive role in the public's perception of the criminal justice system.[79] Such access would enable the public to better understand the function and operation of the criminal justice system, of which search warrants are an integral part, and would broaden the public's comprehension of the judicial process.[80] Public access would also keep prosecutorial and judicial behavior in check.[81]

Search warrants are often the center of pretrial suppression hearings, which are open to the public under the first amendment.[82] This first amendment right of access has been found to include access not only to pretrial proceedings, but also to the documents related to those proceedings.[83] In consideration of these factors, a first amendment right of access to search warrant affidavits exists.[84] This first amendment right of access is qualified by a constitutional strict scrutiny inquiry.[85] The party seeking to restrict access must prove a compelling government interest,[86] indicating that closing the proceedings or sealing the documents is "essential to preserve higher values."[87] Furthermore, any closure or sealing procedure must be strictly tailored to protect that interest.[88]

In the instant case, disclosing the information in the search warrant affidavits would have severely compromised the ongoing investigation, thereby amounting to a compelling government interest. Further, sealing the documents was not an overly broad measure for protecting this interest.[89] Therefore, access to the search warrant affidavits was denied.[90]

In *Times Mirror Co. v. United States*,[91] the Ninth Circuit held that at

77. *See id.* at 573.
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *See id.*
83. *See supra* notes 47-49 and accompanying text.
84. *See In re* Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 575 (8th Cir. 1988).
85. *See id.* at 574.
86. *See id.* The phrase, compelling government interest, is taken from Press-Enterprise I, 464 U.S. 501, 510 (1984) (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (citing Brown v. Hartlage, 456 U.S. 45, 53-54 (1982))). The actual definition of compelling government interest is not discussed in any of these cases.
87. United States v. Biaggi, 828 F.2d 110, 116 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1272 (1988) (quoting Press-Enterprise II, 478 U.S. 1, 13 (1986) (quoting Press-Enterprise I, 464 U.S. 501, 510 (1984))).
88. *See In re* Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 574 (8th Cir. 1988).
89. *See id.* at 574-75.
90. *See id.*
91. 873 F.2d 1210 (9th Cir. 1989).

least while the pre-indictment investigation is ongoing, no right of access exists for search warrant affidavits under either the first amendment or the common law,[92] stating that "complete openness [of judicial proceedings and documents] would undermine important values that are served by keeping some proceedings closed to the public."[93] Additionally, no tradition of open warrant proceedings existed to support access; rather, warrant proceedings were traditionally carried out in secret.[94]

In determining "whether public access would play a 'significant positive role in the functioning' of the proceeding[s],"[95] the Ninth Circuit weighed the various interests that would be served by free access to search warrant affidavits against the damage to the ongoing criminal investigations that could result from such access.[96] It also considered the privacy interests of the individuals identified in the warrants and supporting affidavits[97] and decided that the social utility of open warrant proceedings and documents was outweighed by the substantial burden such a practice would impose on the criminal investigative process.[98]

Times Mirror also determined that no right of access to search warrant affidavits existed under the common law.[99] It stated that the threshold test for recognition of such a common-law right was a showing that disclosure would serve the ends of justice.[100] Because this requirement was not satisfied and a history of access was absent, the court held that a common-law right of access did not exist.[101] Thus, despite the position of the Eighth Circuit,[102] no public right of access to search warrant affidavits existed.[103]

In *Baltimore Sun Co. v. Goetz*,[104] the Fourth Circuit, employing the standard two-prong test, declared that search warrant affidavits lacked a tradition of openness and thus were not encompassed by the first amendment right of access.[105] However, the court found that the common-law right of access to judicial records[106] did encompass search warrant affida-

92. *See id.* at 1212-19.
93. *Id.* at 1213.
94. *See id.* at 1213-14. *But see In re* Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (search warrant affidavits fulfill historical requirement). Disagreement may result from different interpretations of the historical requirement. *See supra* note 31.
95. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1214-15 (9th Cir. 1989) (quoting Press-Enterprise II, 478 U.S. 1, 13-14 (1986)).
96. *See id.* at 1215.
97. *See id.* at 1216.
98. *See id.* at 1215.
99. *See id.* at 1219.
100. *See id.*
101. *See id.*
102. *See id.* at 1217.
103. *See id.* at 1221.
104. 886 F.2d 60 (4th Cir. 1989).
105. *See id.* at 64.
106. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

vits.[107] The court noted that Rule 41(g) of the Federal Rules of Criminal Procedure[108] requires that all papers supporting a warrant, along with the warrant, be filed with the clerk of the district court.[109] Therefore, search warrant affidavits should be classified as judicial records and thus fall under the common-law right of access.[110]

Under the common-law right, a judicial officer may seal and deny access to documents when such measures are "essential to preserve higher values and [are] narrowly tailored to serve that interest."[111] The *Baltimore Sun* court delineated the procedure that a judicial officer must follow in sealing such documents in order to preserve the public's common-law right to the greatest extent possible.[112]

Most recently, in *In re Newsday*,[113] the Second Circuit addressed the issue of access to search warrant affidavits. The court found that a right of access existed under the common law,[114] but declined to decide the issue of a constitutional right of access to these documents.[115] Like the Fourth Circuit in *Baltimore Sun*, the Second Circuit based its recognition of the common-law right of access on the filing procedures required by Rule 41(g)[116] for search warrant applications and supporting materials. The court reasoned that such filing gives these applications "status as a public document subject to a common law right of access."[117]

It noted that the common-law right of access is a qualified one,[118] and that it is within the power of a district court to "redact a document to the point of rendering it meaningless, or not to release it at all."[119] The court further found that the district court must weigh the right of access

107. *See Baltimore Sun*, 886 F.2d at 65 ("[T]he common law qualified right of access to [search] warrant papers is committed to the sound discretion of the judicial officer who issued the warrant.").

108. Rule 41(g) provides: "The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized." Fed. R. Crim. P. 41(g).

109. *See* Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989).

110. *See id.*

111. Press-Enterprise I, 464 U.S. 501, 510 (1984); *see also* New York Times Co. v. United States, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring) (only proof that publication will result in "untoward consequences" will justify denying access). It should be noted that there is some "cross-pollination" between the constitutional and common-law rights of access in the standards applied and terminology employed.

112. *See Baltimore Sun*, 886 F.2d at 65-66. The court prescribed the following procedures: There must be notice by the court so as to alert any interested parties to the impending sealing of the documents, anybody desiring access must have the chance to voice his objections to the sealing, alternatives to sealing the documents must be considered and the court must articulate its reasons for sealing the documents. *See id.*

113. 895 F.2d 74 (2d Cir. 1990).

114. *See id.* at 78.

115. *See id.* at 75.

116. *See* Fed. R. Crim. P. 41(g).

117. *In re* Newsday, 895 F.2d 74, 79 (2d Cir. 1990).

118. *See id.*

119. *Id.* at 80.

against privacy interests,[120] but that "drastic restrictions on the common-law right of access are not always appropriate."[121]

II. THE RIGHT OF ACCESS TO SEARCH WARRANT AFFIDAVITS

A. *The Constitutional Right of Access*

Since the Supreme Court first recognized a first amendment right of access in *Richmond Newspapers*,[122] courts have gradually expanded this right. A constitutional right of access has been found for various non-trial judicial proceedings[123] as well as documents related to judicial proceedings.[124] Search warrant affidavits can satisfy both the historical[125] and functional[126] portions of the two-prong test. Thus, the right of access should include search warrant affidavits.

The two-prong "experience and logic" approach should be revised, however, to eliminate or at least minimize the importance of the historical consideration. Many pretrial proceedings either developed recently or traditionally have been closed, and therefore do not meet the historical component, but the lack of a strong tradition of access should not foreclose the existence of a first amendment right of access in the pretrial context.[127] "[H]istory alone cannot provide a logical basis for limiting the access right to trials, given the First Amendment's structural role."[128] A strict application of the historical approach in the pretrial context would be unfair as it would automatically foreclose access.

Since the two-prong approach was established, courts have increasingly emphasized the structural aspect of the test;[129] the historical treat-

120. *See id.* at 79-80.

121. *Id.* at 80.

122. 448 U.S. 555 (1980).

123. *See, e.g., In re* Washington Post Co., 807 F.2d 383 (4th Cir. 1986) (first amendment right of access to documents concerning plea and sentencing hearings); Associated Press v. United States Dist. Court, 705 F.2d 1143 (9th Cir. 1983) (public and press have first amendment right of access to pretrial documents). Advocates of liberal access insist that "all information relevant to an arrest should be publicly available." Bureau of Justice Statistics, U.S. Dep't of Justice, Privacy and Security of Criminal History Information 33 (1979).

124. *See* United States v. Peters, 754 F.2d 753, 759 (7th Cir. 1985) (right of access to voir dire examination of potential jurors in criminal trials); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (policy reasons behind right of access to criminal proceedings apply equally to civil proceedings).

125. Although the courts that have addressed this issue have disagreed about whether the historical prong of the test is met, *see supra* notes 75-117 and accompanying text, arguably, sufficient authority supports a finding of a tradition of access. *See infra* notes 77-78 and accompanying text.

126. There are sufficient benefits that would result from a constitutional right of access to satisfy the structural aspect of the analysis. *See supra* notes 79-81 and accompanying text; *infra* 143-163 and accompanying text.

127. *See* Iowa Freedom of Information Council v. Wifvat, 328 N.W.2d 920, 923 (Iowa 1983); Minneapolis Star & Tribune Co. v. Kammeyer, 341 N.W.2d 550, 555-56 (Minn. 1983); Note, *supra* note 2, at 626.

128. Note, *supra* note 2, at 626.

129. *See* Seattle Times Co. v. United States Dist. Court, 845 F.2d 1513 (9th Cir. 1988).

ment of the proceeding currently is a secondary factor in many courts.[130] The Supreme Court, while adopting the two-prong approach, appears to emphasize the functional analysis over the historical analysis.[131] Eliminating or minimizing the significance of the historical consideration would naturally increase the likelihood that a constitutional right of access would be found, because many types of judicial proceedings would meet the standard of "promoting self-government."[132]

Not all courts, however, maintain that the historical aspect is relatively unimportant. Citing *Richmond Newspapers*, the Supreme Court in *Globe Newspaper Co. v. Superior Court*[133] justified the use of a historical requirement by noting that "the Constitution carries the gloss of history,"[134] and that "a tradition of accessibility implies the favorable judgment of experience."[135] The Seventh Circuit recently reaffirmed its approval of the traditional test when it held that there is no right of access to pre-sentencing reports.[136] Furthermore, although the Supreme Court has apparently shifted its emphasis to the structural aspect, subsequent decisions make clear that it has not renounced the two-prong

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Here, the Ninth Circuit found a qualified first amendment right of access to pretrial proceedings, despite the absence of a tradition of public access. The criminal defendant was accused of lacing Excedrin capsules with cyanide and was indicted for product tampering. The Seattle Times sought access to the pretrial detention hearings and its related documents. *See id.* at 1514.

The court decided that the lack of historical access to these proceedings should not automatically bar a right of access. *See id.* at 1516. The court stressed the growing importance of pretrial detention hearings in the modern judicial system and decided that the proceedings would not be closed unless it was shown that less intrusive alternatives would not adequately protect the defendant's right to a fair trial. *See id.* at 1518.

130. *See* Note, *The Supreme Court's Development of the First Amendment Right of Access to Criminal Proceedings and the Ninth Circuit's Expansion of that Right*, 25 Willamette L. Rev. 379, 400 (1989) [hereinafter Note, *Right of Access*]. Such an approach is especially appropriate in considering access to pretrial procedures and the related documents, as many of these procedures lack a long tradition of either access or closure. *See* Note, *Confusion in the Courthouse: The Legacy of the* Gannett *and* Richmond Newspapers *Public Right of Access Cases*, 59 S. Cal. L. Rev. 603, 626 (1986) [hereinafter Note, *Confusion in the Courthouse*].

131. *See* Note, *Right of Access*, *supra* note 130, at 401; *see also* Note, *Confusion in the Courthouse*, *supra* note 130, at 626 (Court has "recently emphasized the importance of functional considerations rather than historical precedence and endorsed an approach that makes it easy to characterize access to any type of pretrial proceeding as promoting first amendment interests.").

132. *See* Note, *supra* note 130, at 401; Note, *Confusion in the Courthouse*, *supra* note 130, at 626.

133. 457 U.S. 596 (1982).

134. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

135. *Id.*; *cf.* Times Mirror Co. v. United States, 873 F.2d 1210, 1214 (9th Cir. 1989) ("Historical experience . . . counsels in favor of finding a First Amendment right of access to the criminal trial.").

136. *See* United States v. Corbitt, 879 F.2d 224, 229 (7th Cir. 1989). The court based its decision on the usual two-prong "experience and logic" test, stating that there was no history of access to such documents, and that public disclosure of the contents of these reports would hinder the effective functioning of the judicial process. *See id.* at 228-29.

standard.[137]

Even under the historical analysis, however, it is still possible to bring warrant affidavits within the first amendment scope. Although search warrant *proceedings* have historically been closed, the constitutional right of access to documents involved in a hearing must be determined apart from the press' right of access to the actual hearing.[138] "[T]he press and the public have historically had a common law right of access to most pretrial documents."[139] As discussed in *In re Search Warrant-Gunn*,[140] a right of access to search warrant applications and the affidavits filed in support of them has traditionally existed.[141] Therefore, search warrant affidavits have a sufficient tradition of openness to satisfy the "experience" standard of Justice Brennan's two-prong test.

Search warrant affidavits also satisfy the structural prong of Justice Brennan's analysis, providing substantial benefits including the furtherance of self-government. It has been recommended that "[u]nless otherwise provided by law, all preliminary criminal proceedings, including preliminary examinations and hearings on pretrial motions sh[ould] be held in open court and sh[ould] be available for attendance and observation by the public" unless closure is justified to protect the defendant's right to a fair trial.[142]

Many of the benefits derived from public trials also apply to pretrial proceedings[143] and to judicial documents such as search warrant affidavits.[144] The first amendment safeguards the public's right to be informed of interesting or noteworthy events.[145] Such knowledge is necessary for

137. *See supra* notes 34-45 and accompanying text.

138. *See supra* note 73 and accompanying text.

139. Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983).

140. 855 F.2d 569 (8th Cir. 1988).

141. *See supra* notes 75-78 and accompanying text.

142. Judicial Conference of the United States, 1980 Amendments to Fair Trial-Free Press Guidelines Sect. C(4), *reprinted in* Y. Kamisar, W. LaFave and J. Israel, Modern Criminal Procedure, Basic Criminal Procedure, app. A & C (5th ed. 1982 & supp. 1985).

143. *See* Note, *supra* note 2, at 626; *see also* Press-Enterprise I, 464 U.S. 501, 516 (Stevens, J., concurring) (1984) ("[T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues."). Courts have held that pretrial suppression hearings and other kinds of non-trial proceedings in criminal and civil cases are subject to the first amendment right of access. *See, e.g., In re* New York Times Co., 828 F.2d 110, 113-14 (2d Cir. 1987) (right of access extends to certain pretrial proceedings), *cert. denied*, 485 U.S. 977 (1988); *In re* Application of Herald Co., 734 F.2d 93, 98 (2d Cir. 1984) (first amendment extends some degree of public access to a pre-trial suppression hearing); United States v. Brooklier, 685 F.2d 1162, 1169-71 (9th Cir. 1982) (right of access extends to hearings on motions to suppress evidence); United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982) (societal interests mandating right of access to criminal trials also apply equally to pretrial procedures).

144. *See* Note, *Access Deferred Is Access Denied*, 15 Wm. Mitchell L. Rev. 739, 751-52 (1989).

145. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764-65 (1976).

the open discussions and debates that are essential to self-government.[146] The first amendment's free speech and free press clauses are designed to promote public discourse by making available information that is necessary for intelligent and meaningful debate, which in turn helps to maintain an effective system of self-government.[147]

These goals are also implicated in pretrial suppression hearings, which are designed to ensure that any illegally obtained evidence is not presented to the jury.[148] At the heart of many suppression hearings are search warrant affidavits submitted in support of the issuance of a warrant. Public access to pretrial suppression hearings allows informed public debate on investigatory techniques and search warrant proceedings and serves to educate the public on the proper procedures for conducting searches.[149] To reap the benefits of open suppression hearings, the documents involved must also be accessible.[150]

In *Globe Newspapers*, the Court granted access to criminal trials because it believed that access ensured active participation by the individual citizen in the self-government of the United States.[151] Access also served as a check upon possible abuse of judicial power while enhancing "the integrity of the factfinding process."[152] In an earlier case,[153] the Supreme Court noted that "[t]he law . . . favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned."[154] Similarly, access to search warrant affidavits serves to promote self-government.[155]

Access acts as a deterrent to misconduct. There must be some process by which society can monitor law enforcement officials' decisions to search and seize persons and property rather than relying solely on the judgment of the neutral magistrate.[156] There is also a need for public review of judicial performance.[157] Only by allowing access to all records prior to a final decision can the public adequately assess the judge's decisions.[158]

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146. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring).

147. *See* Note, *First Amendment Right of Access*, *supra* note 2, at 634.

148. *See id.* at 648.

149. *See id.*

150. *See* Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983).

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

152. *Id.* at 606.

153. Estes v. Texas, 381 U.S. 532 (1965).

154. *Id.* at 542 (quoting 2 Cooley's Constitutional Limitations 931-32 (Carrington ed. 1927)).

155. *See infra* notes 143-164 and accompanying text.

156. *See* Franks v. Delaware, 438 U.S. 154, 169 (1978) ("the hearing before the magistrate not always will suffice to discourage lawless or reckless misconduct").

157. *See* Brown & Williamson Tobacco v. F.T.C., 710 F.2d 1165, 1178 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

158. *See id.* at 1181 (public has interest in records court relied on in reaching decision); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (access serves

A right of access to search warrant affidavits would also promote good will and public confidence in the judicial process.[159] Suppression hearings may be the only judicial proceeding in a particular case. If the evidence is allowed, the defendant may choose to plea bargain and not pursue a trial. If the evidence is disallowed, however, the prosecution may decide to drop the charges against the defendant.[160] If such a significant procedure is conducted out of the public's view, confidence in the judicial process may be eroded.[161] Allowing access to the affidavits would reassure the public of the propriety of the suppression proceedings and the original issuance of the search warrant, which of necessity cannot be open to the public. Further, the "community therapeutic value"[162] of seeing justice served in criminal trials also arises from the proper execution of criminal investigations.[163]

The right of access would also promote testimonial integrity.[164] If affidavits are made public, the people swearing them out would be more conscientious about being absolutely truthful, knowing that the public can scrutinize the affidavits.

Against these strong policy justifications, a formal argument that search warrant proceedings are "prior to the indictment of the accused

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as a check upon possible abuse of judicial power as well as enhancing "the quality and safeguard[ing] the integrity of the factfinding process"); *In re* Petroleum Prod. Antitrust Litig., 101 F.R.D. 34, 43 (1984) ("rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision").

Denying access to records might be an unconstitutional prior restraint. Commentators have asserted that closed criminal proceedings are unconstitutional prior restraint on first amendment rights. *See* Fenner and Koley, *The Rights of the Press and the Closed Court Criminal Proceedings*, 57 Neb. L. Rev. 442, 460-75 (1978). The first amendment prohibits imposing prior restraints on publication except when it poses a clear and present danger to the country. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931). Any order of prior restraint of expression bears a heavy presumption of constitutional invalidity. *See* Southeastern Promotions v. Conrad, 420 U.S. 546, 558 (1975) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 181 (1968); *see also Near*, 283 U.S. at 716 (chief purpose of first amendment is to prevent previous restraints). Thus, the government carries the burden of justifying the imposition of such a restraint. *See Near*, 283 U.S. at 718-19; Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). It is "a theory deeply etched in our law [that] a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions*, 420 U.S. at 559. Even when publication may subsequently result in punishment, prior restraint is rarely granted, so strong is the presumption against such infringement of first amendment rights. *See New York Times Co.*, 403 U.S. at 714. If such an analysis is correct, the presumption against prior restraint should also apply to search warrant affidavits, allowing access unless the government can meet the heavy burden of justifying closure.

159. *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (access to public trials promotes good will and public confidence in the justice system).

160. *See* Note, *supra* note 2, at 648.

161. *See id.* at 648-49.

162. Press-Enterprise I, 464 U.S. 501, 508 (1984).

163. *See* Note, *supra* note 2, at 652.

164. *See id.*

and arguably are not a part of the criminal trial itself"[165] carries no weight at all.

There is, of course, a real danger that open pretrial proceedings and documents may jeopardize an individual's sixth amendment right to a fair trial because potential jurors may be exposed to prejudicial pretrial publicity.[166] Nonetheless, an individual's right to a fair trial can be safeguarded by measures that are less intrusive on first amendment rights than a complete denial of access.[167] In appropriate cases, change of venue, change of venire, continuance, severance and voir dire are effective to avoid the prejudicial effects of pretrial publicity.[168] Perhaps most significantly, redaction[169] and selective sealing[170] of search warrant affidavits can be used to protect a criminal defendant's sixth amendment rights. Therefore, it is possible to allow access to the documents while protecting a potential defendant's sixth amendment right to a fair trial.

Publicizing a search warrant affidavit may infringe privacy interests of the defendant, the defendant's family and the crime victim.[171] The public may assume prematurely that certain individuals are guilty of criminal conduct,[172] thus unjustly damaging the reputation of victims, witnesses or other third persons who may never have a chance to establish their innocence.[173] Furthermore, disclosure may endanger innocent third persons by revealing their identities. Disclosure may also make witnesses less likely to cooperate, further hampering the government's

165. *See id.* at 659. Although the issuance of a search warrant may not be considered part of the actual criminal trial, courts have not limited the application of the right of access to trials. *See supra* notes 37-49 and accompanying text.

166. *See* Note, *supra* note 144, at 754-56. *See generally*, Note, *Public's First Amendment Right of Access to Pretrial Bail Hearings Limited by Defendant's Sixth Amendment Fair Trial Guarantee*, 19 Suffolk U.L. Rev. 129, 131 (1985) (discussing tension between first amendment and sixth amendment guarantee to fair trial). It has been suggested that " '[t]he public interest is paramount in any consideration of these two constitutional guarantees—a free press under the First Amendment and a fair trial under the Sixth Amendment.' " Special Committee on Free Press & Fair Trial, *supra* note 1, at ix.

167. *See In re* Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 574 (8th Cir. 1988) (court must explain why less restrictive alternatives were not appropriate if documents are sealed).

168. *See* Special Committee on Free Press & Fair Trial, *supra* note 1, at 38-39.

169. *See, e.g., In re* Newsday, 895 F.2d 74, 76 (2d Cir. 1990) (redacting portions of search warrant affidavits sufficient to protect defendant's privacy interests). Through redaction, it is possible to preserve the individual's right to a fair trial by blocking out the portions of the affidavits without completely denying access. *See id.* This process might avoid a misinterpretation by the juror that may result in prejudice. *See id.* at 79.

170. *See In re* Sealed Affidavit(s) to Search Warrants, 600 F.2d 1256, 1257 (9th Cir. 1979). District courts have an inherent power to seal search warrant affidavits although this right can only be exercised within the limits of the Constitution. *See infra* note 180.

171. *See* United States v. Corbitt, 879 F.2d 224, 230-32 (7th Cir. 1989).

172. *See* United States v. Smith, 776 F.2d 1104, 1113-14 (3d Cir. 1985). These third parties will not have the opportunity to prove their innocence in court because they are not suspects, and therefore will not be indicted. *See id.*

173. *See id.*

investigation.[174] It is possible, however, to protect the privacy interests of innocent third parties with less restrictive measures;[175] for example, the names of the third parties could sometimesimply be redacted without significantly impairing the public's ability to assess the proceedings.[176] Thus, these privacy interests need not bar the extension of the right of access to search warrant affidavits.

The need for secrecy in issuing search warrants, grand jury proceedings and government investigations in order to protect informants, investigations, and other sensitive material is another factor which could weigh against access to affidavits.[177] Clearly the criminal justice system would not be more effective if these proceedings were made public.[178] The issue is not access to the proceedings, however, but to the documents connected to them that are filed after a search warrant is issued. While access to the proceeding would include the related documents, the absence of a right of access to a proceeding does not preclude a right of access to the related documents.[179] Affidavits may describe ongoing investigations, divulge investigative techniques, and reveal the identities of informers whose lives might be endangered.[180] Procedures such as redacting and selectively sealing confidential documents,[181] however, are available to protect the needs of the government when there is an ongoing investigation that requires confidentiality.[182]

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174. *See* Bureau of Justice Statistics, United States Dep't of Justice, Privacy and Security of Criminal History Information: Privacy and the Media 31-32 (1979).

175. *See supra* notes 164-169 and accompanying text.

176. *See In re* Newsday, 895 F.2d 74, 79-80 (2d Cir. 1990).

177. *See* Note, *supra* note 144, at 756; *see also* Times Mirror Co. v. United States, 873 F.2d 1210, 1215 (9th Cir. 1989) (warrant proceedings and grand jury proceedings are "the type of 'government operation[] that would be totally frustrated if conducted openly' ").

178. *See Times Mirror*, 873 F.2d at 1215.

179. *See supra* note 138 and accompanying text.

180. *See* Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64 (4th Cir. 1989).

181. There is a two-fold standard for sealing documents that are constitutionally protected. *See supra* notes 85-87 and accompanying text.

Furthermore, a case-by-case evaluation is necessary before any documents or procedures are closed to the press and public. Mandatory closure statutes, such as the one in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), unduly infringe on the constitutional right of access. Before a proceeding or document is removed from public access, a hearing that allows those who are denied access to object to the closure must be held. *See* Press-Enterprise I, 464 U.S. 501, 509-10 (1984); Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989). Notice is also required so that those members of the press and public who would be interested in obtaining access, but who are not present when the closure motion is made, are aware of the impending infringement of their rights. *See Baltimore Sun*, 886 F.2d at 65. The district judge must articulate the reasons for closing or sealing the proceeding or documents so that they may be reviewed by the appellate court. If necessary, the findings themselves may be placed under seal to protect the interests that necessitated the underlying closure. *See In re* Search Warrant for Secretarial Area-Gunn, 855 F.2d 569, 574 (8th Cir. 1988).

182. *See* Wagner v. Williford, 804 F.2d 1012, 1018 (7th Cir. 1986); Burke v. New York City Police Dep't, 115 F.R.D. 220, 227 (S.D.N.Y. 1987); Wilkinson v. F.B.I., 633 F. Supp. 336, 347 (C.D. Cal. 1986); Donovan v. F.B.I., 625 F. Supp. 808, 812-13 (S.D.N.Y. 1986).

B. *The Common-Law Right of Access*

The Supreme Court has recognized that the public has a right, founded in the common law, "to inspect and copy public records and documents, including judicial records and documents."[183] This right of access should encompass search warrant affidavits.[184]

Rule 41(g) of the Federal Rules of Criminal Procedure recognizes this common-law right.[185] "[I]mplicit in the rule is the direction that they be filed within a reasonable time after the warrant is executed,"[186] thus providing the public and the press with timely access to the documents.

Opponents of access to various documents often point out that some judicial documents, for example documents relating to grand jury proceedings, have historically been closed and require secrecy to be effective.[187] However, grand jury proceedings and search warrant affidavits are not analogous. It is explicitly stated in Rule 6(e) of the Federal Rules of Criminal Procedure that grand jury matters are to be secret.[188] No such rule is stated about search warrant affidavits. "[T]he press and public have historically had a common law right of access to most pretrial documents . . . ."[189] Rule 6(e) explicitly excludes grand jury documents from this general presumption of openness. No such exception has explicitly been made for search warrant affidavits.[190]

The common-law right of access to search warrant affidavits is not universally recognized. For example, there are conflicting interpretations over whether openness exists. "Under English common law, the public had no right to attend pretrial proceedings."[191] Today, the public has a common-law right of access to most pretrial proceedings and documents, but this does not indicate that the right of access extends to all

183. *Id.*

184. *See* Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989); *In re* Newsday, 895 F.2d 74, 79 (2d Cir. 1990).

185. *See* Fed. R. Crim. P. 41(g); *supra* notes 108-109 and accompanying text.

186. *Baltimore Sun*, 886 F.2d at 65.

187. *See In re* Special Grand Jury (for Anchorage, Alaska), 674 F.2d 778, 780-81 (9th Cir. 1982).

188. *See* Fed. R. Crim. P. 6(e).

189. Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983). There is a strong presumption in favor of access under the common law. *See* United States v. Guzzino, 766 F.2d 302, 304 (7th Cir. 1985); *In re* National Broadcasting Co., 653 F.2d 609, 612-13 (D.C. Cir. 1981). *But see* United States v. Webbe, 791 F.2d 103, 106 (8th Cir. 1986) (no strong presumption in favor of common-law right of access to judicial records); United States v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989) (strong presumption favoring public access to documents does not apply to materials properly submitted under seal).

190. It has also been noted that there has never been recognized a general right of access to grand jury documents, while search warrants are generally filed without seal and therefore are classified as public documents. *See In re* Newsday, 895 F.2d 74, 78-79 (2d Cir. 1990).

191. Gannett Co. v. DePasquale, 443 U.S. 368, 389 (1979).

pretrial documents.[192] The court, in *Times Mirror Co. v. United States*,[193] found that historically no right of access existed because search warrant affidavits traditionally were closed to the press and public.[194]

While a common-law right of access to judicial records generally requires a history of access, an important public need may justify access under the common law.[195] Courts have also found a common-law right of access to particular documents which traditionally have been kept confidential by the courts where the party seeking access was able to make a "threshold showing that disclosure will serve the ends of justice."[196] Several important public benefits justify access, including curbing judicial misconduct and furthering self-government. Open search warrant affidavits would serve the ends of justice, justifying a common-law right of access even if a tradition of openness is lacking.

Nonetheless, some courts have argued that under the public need or ends of justice standard, there is still no right of access to search warrant affidavits because the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials.[197] These concerns, however, should not prevent access to all search warrant affidavits; sufficient safeguards exist to protect any interests which would otherwise be frustrated by open access to affidavits without excessive closure.[198]

The common-law right of access to public records and documents is qualified.[199] Under the common law, it is within the discretion of the judicial officer issuing the warrant to grant or deny access. All or some of the papers may be filed under seal.[200] However, "the public's right to inspect judicial documents may not be evaded by the wholesale sealing of court papers. Instead, the district court must be sensitive to the rights of the public in determining whether any particular document, or class of documents, is appropriately filed under seal,"[201] and proper procedures must be followed.[202] These measures would be sufficient to protect any interests while still allowing the press and public access under the common law.

192. *See* Associated Press v. United States Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983).

193. 873 F.2d 1210 (9th Cir. 1989).

194. *See id.* at 1214.

195. *See id.* at 1219.

196. United States v. Schlette, 842 F.2d 1574, 1581 (9th Cir.), *modified*, 854 F.2d 359 (1988); *see also Times Mirror*, 873 F.2d at 1219 (common-law access where important public need justifies access).

197. *See Times Mirror*, 873 F.2d at 1219; *supra* notes 165-178 and accompanying text. However, either selective sealing or redaction could sufficiently protect any interests which would be harmed by access without denying access to all search warrant affidavits.

198. *See* supra notes 168-170 and accompanying text.

199. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978).

200. *See In re* Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65 (4th Cir. 1989).

201. United States v. Corbitt, 879 F.2d 224, 228 (7th Cir. 1989).

202. *See supra* note 180.

CONCLUSION

A right of access to search warrant affidavits is supported by many of the same policy considerations that the Supreme Court has discussed in developing the constitutional and common-law rights of access to criminal trials. The constitutional right of access clearly encompasses more than a right of access to criminal trials. Courts have found civil trials, pretrial criminal proceedings and a variety of records and documents involved in the criminal process to be included in this right. Therefore, the right of access under the first amendment should be recognized to encompass a right of access to search warrant affidavits. Similarly, the common-law right of access includes access to judicial documents as well as trials. Therefore, the right of access to search warrant affidavits under the common law should also be recognized.

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