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Peering into the Courtroom: An Analysis of the Public Interest

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NOTES

PEERING INTO THE COURTROOM: AN ANALYSIS OF THE PUBLIC INTEREST

INTRODUCTION

Defining the public interest in open judicial proceedings is an uncertain task. Various rationales have been offered, each having some merit in its own right.[1] The extent of this public interest has arisen in a broad spectrum of cases. Recently decided issues have included questions of access to court records[2] and prior restraints on publication.[3] While access rights to pretrial suppression hearings have been denied,[4] the Court has recognized a public right of access to trials.[5] These cases help to illustrate the conflict between the constitutional guarantees of free press and fair trial in the guise of access to court proceedings.

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1. *See, e.g.*, notes 19, 34-40, 48-50, 63-79 *infra* and accompanying text.

2. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In *Cox*, an action was brought against a broadcasting company for the publication of a deceased rape victim's name. The Supreme Court reversed the conviction, finding that the first amendment protects the press when information appearing in public records is published accurately.

3. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). In *Landmark*, a state statute prohibited the divulgence of information concerning the state judicial review commission proceedings. Upon publishing truthful information regarding one such proceeding, a newspaper was convicted of violating the statute. In reversing the conviction, the Court found that the first amendment barred penalties against strangers to the proceedings who published truthful accounts. *Nebraska Press* dealt with the imposition of a "gag" order by the trial court, which had found that the fair trial of the defendant might be jeopardized by unrestricted reporting of the pretrial proceedings. This order was invalidated by the Court as an unconstitutional prior restraint on the freedom of the press.

4. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979). In *Gannett*, Judge DePasquale ruled in favor of a defense motion to close a pretrial suppression hearing, on the grounds that an open hearing would damage the defendants' fair trial rights. The Court affirmed the order, finding no independent right of access for the public.

5. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. 2814 (1980). At the fourth trial of the defendant, a defense motion to close the trial was granted by the trial court, without any definitive findings as to the risk to the defendant's fair trial. Reversing the Virginia court, the Supreme Court found a first amendment right of the public to open trials, absent an overriding interest specified in findings by the court.

This note addresses the public interest in judicial proceedings, especially the pretrial suppression hearing. Fulfilling this interest requires access to the courts, so that the public can acquire the information it needs regarding judicial proceedings.[6] Two possible constitutional routes can arguably provide the public with an access right. First, the public trial guarantee of the sixth amendment might apply to furnish a right of access.[7] Second, the involvement of first amendment rights could mandate a public right of access to judicial proceedings.[8] Additionally, there are public interests which arise from the operation of the Exclusionary Rule[9] in suppression hearings that intimate a right of access for public and press.[10]

In discussing the public interest in judicial proceedings, an initial review of the public right of access to trials is in order. This review will consider both the first and sixth amendment approaches in support of such a right. The analysis then turns to the basic operation and underlying premises of the Exclusionary Rule. Finally, the inquiry looks into the public interest in access to pretrial proceedings, including the suppression hearing.

THE PUBLIC RIGHT OF ACCESS TO TRIALS

In analyzing public access rights to Exclusionary Rule hearings, a threshold question is whether the public has *any* right of access to judicial proceedings. There are two ways in which this question can be approached. Applying the sixth amendment public trial right provides one basis for public access.[11] The second approach is based upon the first amendment concept of public participation.[12] Before the Supreme Court, the latter argument has been more persuasive,[13]

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6. *See* notes 63-82 *infra* and accompanying text.

7. *See* notes 15-32 *infra* and accompanying text.

8. *See* notes 33-92 *infra* and accompanying text.

9. *See* notes 93-120 *infra* and accompanying text. Basically the Exclusionary Rule requires the courts to find evidence that is seized by public officials in violation of a defendant's constitutional rights inadmissible in a criminal trial.

10. *See* notes 215-25 *infra* and accompanying text.

11. *See* notes 15-32 *infra* and accompanying text.

12. *See* notes 33-92 *infra* and accompanying text.

13. In Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2830, the Court held that a criminal trial must be open to the public under the first amendment. On the other hand, the Court rejected a public right to attend pretrial and trial proceedings under the sixth amendment in Gannett Co., Inc. v. DePasquale, 443 U.S. at 384-91. However, the discussion in *Gannett*, although rejecting such a right to attend trials, should be read narrowly in terms of the issue presented, namely the closure of a pretrial suppression hearing. *Id.* at 394-97 (Burger, C.J., concurring).

and also affords the better foundation for public access rights to pretrial proceedings.[14]

Public Access Under the Public Trial Guarantee

Although the sixth amendment guarantee of a public trial literally applies only to the accused,[15] there is some support for an underlying public interest in keeping court proceedings presumptively open to the public.[16] This is implicit in the determination by the Court that although a defendant may waive his right to a public trial, he may not compel a private trial.[17] The preferences of the individual defendant are not necessarily controlling on the trial court when a motion for closure is made.[18] Thus, societal interests appear to exist which require open trials, and are distinct from the interests of a defendant.[19]

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14. *See* notes 176-205 *infra* and accompanying text.

15. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

16. *See* Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 (1978). *See generally* Note, *The 'Right' to Observe Trials—Its Source and Vindication*, 31 IND. L.J. 377 (1956). As well as the more general societal interest in justice, the public interests which underlie the sixth amendment are personal to all members of society insofar as they might be subjected to the criminal process.

17. Gannett Co., Inc. v. DePasquale, 443 U.S. at 382. "While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial." The dissenters in *Gannett* were even more emphatic in rejecting any possibility that a defendant could compel a closure. Interpreting the common-law history of the public trial guarantee, the dissenters would have required a full hearing prior to any closure to protect the public interests in maintaining open judicial proceedings. *Id.* at 415-33. *Cf.* Singer v. United States, 380 U.S. 24, 34-36 (1965) (interpreting the right to an impartial trial by jury).

18. Gannett Co., Inc. v. DePasquale, 443 U.S. at 382-83 & nn. 11 & 12. The Court clearly indicated that if either the prosecutor or the trial judge objected to a closure motion the hearing would remain open. But a member of society could not similarly object, since an independent right to open proceedings did not extend to the public. The participants were deemed sufficient representatives of the public interest.

19. Some of these interests include: protecting trial integrity; guarding against partiality for either side; deciding criminal prosecutions on complete and truthful records; scrutinizing police and prosecutor; maintaining confidence in the courts; and developing the educational role of the courts. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. at 427-29 (dissenting opinion). Open trials also provide unknown witnesses the chance to come forward, and discourage perjury by witnesses by making them testify before the community. *Id.* at 383 (majority opinion).

Other sixth amendment rights have similar dual natures, where a defendant has a guaranteed right but may not compel the converse of that right.[20] For example, the societal interest in swift and speedy trials may conflict with the interests of a particular defendant,[21] but the defendant may not delay his trial indefinitely.[22] Furthermore, the defendant does not have an unqualified right to demand a bench trial because of the traditional importance of the jury and its role as a fact-finder.[23] The failure to permit a waiver by a defendant of his rights does not deprive him of those rights, but his ability to compel a waiver could be adverse to social interests embodied in the sixth amendment.[24]

Contrary to the concept of societal interests implicit in the sixth amendment is the viewpoint that the sixth amendment guarantees are personal to the accused.[25] Any societal interests involved in open trials do not rise to the level of a public right of access.[26] Instead, the public trial right is for the benefit of the defendant for his own protection.[27] A traditional distrust of secret pro-

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20. "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." Singer v. United States, 380 U.S. at 34-35, *quoted in* Gannett Co., Inc. v. DePasquale, 443 U.S. at 382 (majority opinion); *id.* at 417 (dissenting opinion). *Cf.* Faretta v. California, 422 U.S. 806, 836 (1975) (right not to have counsel). In *Faretta*, the Court found a right *not* to have counsel based on an accepted and well-established right of self-representation. Assistance of counsel was a procedural right to further the personal right of self-representation. Still, the right to counsel can only be waived with the consent of the court.

21. *Cf.* Barker v. Wingo, 407 U.S. 514, 519 (1971) (the Court recognized that the speedy trial right was "generically different from" any other Constitutional right protecting the accused).

22. *See* Speedy Trial Act of 1974, § 101, 18 U.S.C. § 3161 (1977). Paragraph 9(A) provides for continuances only if the ends of justice outweigh the best interests of the public and defendant, and the judge must specify what ends are found.

23. Singer v. United States, 380 U.S. 24, at 26, 34 (1965); Patton v. United States, 281 U.S. 276, 312 (1929); 3 BLACKSTONE, COMMENTARIES* 380 (jurors are the "best investigators of truth, and surest guardians of public justice").

24. *See* Singer v. United States, 380 U.S. at 36. *See, e.g.*, note 19 *supra*.

25. *E.g.*, Gannett Co., Inc. v. DePasquale, 443 U.S. at 368; *cf.* Faretta v. California, 422 U.S. at 819 (the accused has a personal right to make his defense under the sixth amendment).

26. Gannett Co., Inc. v. DePasquale, 443 U.S. at 382-90. But the dissent, in reviewing the history of public trials, found that the sixth amendment prohibited a closure without a full hearing on the public right to an open proceeding. *Id.* at 419-33 (dissenting opinion).

27. Gannett Co., Inc. v. DePasquale, 443 U.S. at 380-81; In re Oliver, 333 U.S. 257, 270 (1948). "[The public trial] guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."

ceedings formed the basis for this guarantee,[28] and the presence of a public watchdog is intended to prevent any abuses of the judicial system. An additional obstacle to any public access right under the sixth amendment is the jury, which protects any societal interests in judicial proceedings as well as furthering the right of the defendant to a fair trial.

Originally, the community itself was obligated to discover the truth. As a governmental system developed to discover and prosecute crimes, the jury preserved this public participation in the criminal process.[29] Appeals to the public, as represented by the jurors, enable a defendant to protect himself from persecution.[30] In fact, Justice Brennan preferred the protection of the jury because "the Constitution, in the context of adult criminal trials, has rejected the notion that public trial is an adequate substitution for trial by jury in serious cases."[31] Selection procedures aid in impanelling an impartial jury, and that jury is then subject to court control and certain rules which operate to insure a verdict based solely on the trial proceedings.[32] Thus, a jury is better suited to protect a defendant and render an impartial verdict than a courtroom of potentially biased or vindictive spectators.

Although there is support for the recognition of societal interests under the sixth amendment which indicate a need for public access, prevailing authority denies the existence of such a right. But even if the public trial guarantee does not provide a public access

28. *See* In re Oliver, 333 U.S. 257 (1948). "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of [certain secret proceedings]." *Id.* at 268. "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public," *id.* at 273, fourteenth amendment due process requires respect for a defendant's public trial right. *Cf.* Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. 2814 (1980) (recognizing the public character of judicial proceedings on first amendment grounds).

29. *See* Note, 31 IND. L.J., *supra* note 16, at 379.

30. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 554 (1971) (Brennan, J., concurring in part, dissenting in part). *McKeiver* dealt with the issue of requiring juries in juvenile proceedings. Brennan argued that either a jury or a public trial had to be provided in juvenile cases, which suggests that the two rights are nearly synonymous. Thus, an appeal to the community which arouses public indignation, offers a protection similar to a jury trial.

31. *Id.* at 555.

32. Some common controls include: *voir dire*, the oath taken by the jurors, the setting apart of the jury from other spectators and participants, orders for jurors not to discuss the case with others, jury instructions and private deliberations at the conclusion of the trial.

right, the societal interests under the sixth amendment are more forcefully cognizable under the first amendment as reasons for a public right of access. Public interests arise under that amendment beyond those implicit in the sixth amendment, and independent of the interests of a defendant. To define a public right of access under the auspices of the first amendment, some of those interests and their treatment by the Court will be explored.

The First Amendment Right of Access

In defining a public right of access under the first amendment,[33] several matters must be discussed. The constitutional bar on prior restraints must be examined since it protects the press' role as an agent distributing information to the public. But this role necessarily involves a need to gather information, raising the issue of denied access to information. Furthermore, the functions which access would fulfill must be ascertained to support a public right of access. Initially, an exploration of a public right of access brings forward the underlying concept of the public right to know.

An important concept underlying a right of access is the public right to know what transpires in the governmental processes; this enables the intelligent exercise of the right of participation in government.[34] Public participation is best served by the exchange of ideas forming the basis for intelligent and informed decision-making, thus "there is practically universal agreement that a major premise of [the First] Amendment was to protect the free discussion of governmental affairs."[35] Public decision-making should not be limited to information filtered through governmental agents who might benefit from "decisions" based on that information. Instead, the "profound national commitment that debate on public issues should be uninhibited, robust, and wide-open"[36] must be protected under

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33. 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.

34. *See* Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2833 (Brennan & Marshall, JJ., concurring). *See generally* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Comment, *The Right of the Press to Gather Information After* Branzburg *and* Pell, 124 U. PA. L. REV. 166 (1975).

35. Mills v. Alabama, 384 U.S. 214, 218 (1966). *Mills* dealt with a newspaper's right to publish an editorial favoring a particular candidate on election day, without being penalized by a state statute. *Accord*, Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2826-27.

36. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

the first amendment to perpetuate the "uninhibited marketplace of ideas in which truth will ultimately prevail."[37]

The freedom of speech and debate also mandates a right to receive information, for without the right to hear what others are allowed to say, there can be no meaningful debate or discussion.[38] However, this right to know and discuss depends upon means of distributing information. Reliance on the press to distribute information is necessary for intelligent and informed participation in government because the individual has neither the time nor the resources to observe the government and bring the information obtained before the public.[39] Freedom of the press is not measured by the printing of words in a pamphlet, but by the public rights which a free press serves and represents. By acting as an agent of the public, the press preserves the "free flow of information" crucial to knowledgeable public participation.[40] Publication of information is essential for the public to receive information, and therefore the public relies on the press as its agent to communicate its discoveries.

Because the public relies on the press for information, the law abhors prior restraints on publication of knowledge held by the press as unconstitutional abridgements of the freedom of the press.[41] However, the prior restraint doctrine also ordinarily presumes that the information was within the public domain when gathered by the press for publication.[42] State sanctions on the accurate publication of a rape victim's name have been rejected where the information was available through judicial records open to public inspection.[43] A pretrial order restraining press publications to protect the defendant's fair trial rights failed to overcome the barriers to prior restraints, and was found invalid by the Supreme Court in *Nebraska Press Association v. Stuart.*[44] Not only was the press attending an

37. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

38. *See* Kleindienst v. Mandel, 408 U.S. 753, 774 (1972) (Marshall, J., dissenting). The majority did not disagree with Marshall's assertion that the "freedom to speak and freedom to hear are inseparable; they are two sides of the same coin." *Id.* at 775. In fact, the Court did not reach the first amendment issue in making its decision.

39. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

40. Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

41. Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 570 (1976); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Near v. Minnesota, 283 U.S. 697, 713 (1931); Patterson v. Colorado, 205 U.S. 454, 462 (1907).

42. *See, e.g.*, notes 43-45 *infra* and accompanying text.

43. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

44. 427 U.S. 539, 570 (1976). The Court applied Judge Learned Hand's "clear and present danger test": whether "the gravity of the 'evil', discounted by its im-

open proceeding, but the order failed to distinguish between the sources of the information which could easily have included the public record. Another pretrial order enjoining the publication of a juvenile's name or picture was rejected by the Court when the press had obtained the information at a pretrial detention hearing without objections from the judge or attorneys.[45] Furthermore, when a newspaper published reports concerning a judicial commission's inquiry about a judge, the Supreme Court reversed its conviction for violating the statute for secrecy of commission proceedings because the media was a stranger to the inquiry and beyond the justifiable reach of the statute.[46] This expands the "public domain" concept to include all information held by the press which the government seeks to suppress. But, as Justice Stewart observed, while publication of information may not be punishable, the government could deny access to the commission proceedings.[47]

Denial of access to information raises the spectre of a right to gather information.[48] "A corollary of the right to publish must be the right to gather information,"[49] since the former is useless without the latter, and the free flow of information is even more effectively impaired when access is completely denied than when a prior

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probability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 562 (quoting United States v. Dennis, 183 F.2d 201, 217 (2d Cir. 1950), *aff'd* 341 U.S. 494 (1951)). Several factors considered by the Court included the nature and extent of pretrial news coverage, alternative measures to mitigate the effects of pretrial publicity, and the effectiveness of a restraining order in preventing the danger to the defendant's fair trial. *See also* Craig v. Harney, 331 U.S. 367 (1947).

45. Oklahoma Publishing Co. v. District Court, 480 U.S. 308 (1977) (per curiam).

46. Landmark Communications, Inc. v. Virginia, 435 U.S. at 837-38. The statute could penalize parties to the inquiry who divulged information from the proceedings, but the state's interests were insufficient to justify encroachment on the first amendment. *See* New York Times Co. v. United States, 403 U.S. 713 (1971). Even though the "Pentagon Papers" had been illegally obtained, but not by the newspaper company, the Court rejected the prohibition on publication because the government failed to demonstrate sufficient justification to overcome the presumption against prior restraints.

47. Landmark Communications, Inc. v. Virginia, 435 U.S. at 848-49 (Stewart, J., concurring).

48. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. 2814. "This is a watershed case. . . . [Today the Court has] squarely held that the acquisition of newsworthy matter is entitled to . . . constitutional protection." *Id.* at ___, 100 S. Ct. at 2830 (Stevens, J., concurring). *See* Note, *The Right of the Press to Gather Information Under the First Amendment*, 12 LOY. L.A.L. REV. 357 (1978). *See also* Note, 71 COLUM. L. REV. 838, note 34 *supra*.

49. Branzburg v. Hayes, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting).

restraint is imposed on publication. Therefore, newsgathering should be accorded some first amendment protection, for "without some protection for seeking out the news, freedom of the press could be eviscerated."[50]

But this right to attend does not qualify the press for special consideration.[51] The right to speak and publish does not include an unrestrained right to gather information, since the press has no special rights of access greater than those of the general public.[52] Therefore, the right of access for the press can be defined in terms of the rights of the general public.

Comparing the access permitted to members of the public with that of the press, the Court upheld prison rules prohibiting interviews with designated inmates.[53] Prison officials had allowed general press access to the prison exceeding the general access rights of the public. The court found these restrictions valid since the press did not have a special right to conduct the interviews.[54] Nor were the prisoners' challenges on first amendment grounds sufficient to overcome the prison regulations when considered in light of the legiti-

50. *Id.* at 681 (majority opinion). *Accord,* Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2829 (citation omitted). "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, . . . important aspects of freedom of speech and 'of the press could be eviscerated.'" *See* Pell v. Procunier, 417 U.S. 817, 830 (1974). *See also* Comment, 124 U. PA. L. REV. 166, note 24 *supra.*

51. *E.g.,* Zurcher v. Stanford Daily, 436 U.S. 547 (1978). In *Zurcher,* the Court upheld the search of a student newspaper pursuant to a valid warrant obtained after showing probable cause for the search, specificity, and reasonableness. The press has no special procedures or exceptions extended to it, but is treated the same as the public. *Id.* at 568-70 (Powell, J., concurring). However, the dissenters argued for reversal because the constitutional function of informing the public would be impaired. *Id.* at 571-72 (Stewart & Marshall, JJ., dissenting).

52. Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978). In *Nixon,* the Court upheld the denial of physical access to the tapes used as evidence at the trial of the Watergate defendants, since the public never had a right of access to the tapes themselves. Transcripts and open proceedings provided sufficient access to fulfill the public right to know. Zemel v. Rusk, 381 U.S. 1 (1965). The government's refusal to validate Zemel's passport was upheld by the Court as an inhibition only of action and not of first amendment rights. *But see id.* at 23 (Douglas, J., dissenting). Douglas' perspective found first amendment rights coupled with conduct, and he argued that the freedom of ideas must not be abridged by restrictions on conduct.

53. Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

54. Pell v. Procunier, 417 U.S. at 831; Saxbe v. Washington Post Co., 417 U.S. at 847. *But see* Pell v. Procunier, 417 U.S. at 841 (Douglas, J., dissenting); Saxbe v. Washington Post Co., 817 U.S. at 864 (Powell, J., dissenting). The dissents would have rejected the restrictions on interviews as contrary to the public right to know.

mate objectives of the penal system.[55] The restrictions on access were imposed for security considerations and did not deny access to sources available to the general public.[56] However, the Court did imply that its finding neither attempts to conceal prison conditions nor obstructions to press investigating and reporting of conditions was a factor in upholding the restrictions, and thus suggested a public right to know about the prisons.[57]

This public right to know about the management of the prisons involves a right of access. The Court, however, denied a constitutional right of access to prisons based on public importance and the media's role to provide information in *Houchins v. KQED, Inc.*[58] Sheriff Houchins had allowed public tours of the prison with the press included as members of the public, but some areas remained off-limits and cameras were not permitted inside the prison. While reaffirming the equal access rights of press and public, the Court extended its earlier prison decisions[59] from case-by-case limitations on interviews to general prohibitions on access to prisons and communications with prisoners.[60] Prison officials were under no constitutional duty to disclose information within their control, and even if such a duty did exist the Court found standards for disclosure to be deficient.[61]

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55. Pell v. Procunier, 417 U.S. at 822-23. These objectives include: deterring crime by isolating offenders from society, protecting society from offenders, rehabilitation so prisoners may return to society, and institutional considerations of security.

56. *Id.* at 834-35. *See generally* Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2832-33 (Brennan & Marshall, JJ., concurring). "Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality."

57. Pell v. Procunier, 417 U.S. at 830. *See* Saxbe v. Washington Post Co., 417 U.S. at 848.

58. 438 U.S. 1, 9 (1978). However, *Houchins* was only a four-three decision with Justices Blackmun and Marshall not participating. Additionally, Justice Stewart would have permitted cameras in those areas open to public tours to better effectuate the press role to inform the public. Thus, Stewart sought greater flexibility in defining equal access in accordance with the press' role. *Id.* at 16-19.

59. Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

60. *See* Houchins v. KQED, Inc., 438 U.S. at 27-30 (Stevens, J., dissenting).

61. *Id.* at 14. The Court apparently considered access a means to avail oneself of the duty to disclose, and rejected the demands for access to the prison. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. at 383 (majority opinion); Landmark Communications, Inc. v. Virginia, 435 U.S. at 839. *See also* Note, *Statutory and Judicial Responses to the Problem of Access to Government Information*, 1971 DET. C.L. REV. 51 (1979). Finding that the courts are not allowing access under the Constitution, this note reviews

If access to judicial proceedings is similarly dependent on a duty of the courts to disclose information, then the source of that duty must be considered. *Houchins* rejected a right of access which rested on the public right to know about the prisons, since there was no constitutional duty to disclose information within government control. However, this approach goes too far towards negating the public right to know, since the duty to disclose is based on that constitutional right[62] rather than vice versa. Thus the existence of a right of access to judicial proceedings should depend on the public right to know.

In determining the public right to know what transpires within the judicial system, the substantive grounds favoring open trials must be defined. Interests in public scrutiny of governmental affairs are protected by the first amendment. The performance of the courtroom participants certainly should be no exception.[63] Many, if not most, judges and prosecutors are elected officials, whose actions should be assessed by the public.[64] Thus the public needs access for observation and first-hand knowledge which accompanies their right to remove incompetent judges and prosecutors. Information on the criminal system "appears 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."[65] Without the means to observe the pro-

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the legislative responses setting forth standards on disclosure and access in the Freedom of Information Act and the Privacy Act of 1974.

62. *See* notes 33-40 *supra* and accompanying text.

63. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. 2814. "These expressly guaranteed freedoms [of the first amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at ___, 100 S. Ct. at 2826-27. "Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*. . . . Thus, so far as the trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding." *Id.* at ___, 100 S. Ct. at 2838 (Brennan & Marshall, JJ., concurring). "The operations of the courts and the judicial conduct of judges are matters of utmost public concern." Landmark Communications, Inc. v. Virginia, 435 U.S. at 839. *See also* notes 33-35 *supra* and accompanying text.

64. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2836-38 (Brennan & Marshall, JJ., concurring). Open judicial proceedings are necessary for public control over government, and "public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government." *Id.* at ___, 100 S. Ct. at 2838. *See* Note, 31 IND. L.J. 377, note 16 *supra*. *See also* BLACKSTONE, note 48 *supra*. Blackstone suggested that the jury system provided some control over the officials by preserving some administration of justice in the hands of the people.

65. Cox Broadcasting Corp. v. Cohn, 420 U.S. at 495. *See generally* Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899 (1978); Note, 12 LOY. L.A.L. REV. 357, note 48 *supra*.

cess and make its own analysis, the public cannot offer constructive criticism or formulate any basis for its judgments.

In addition to the public participation aspect, there is a general societal interest in unbiased criminal prosecutions decided on complete and truthful records.[66] Open trials assure that procedural rights are preserved, and that justice is dispensed equally without partiality.[67] Also, open proceedings aid factfinding by improving the quality of testimony and inducing witnesses to come forward.[68] Therefore the public right to know is manifested by the need for information not only to enable effective public participation, but also to secure the disclosure of the complete truth in judicial proceedings.

Besides these substantive benefits of open courts, various sociological or ritual functions are also fulfilled by allowing public access.[69] One such function is to demonstrate the fairness of the system.[70] Public confidence in the judicial system requires openness so that the public can appreciate how the system serves the ends of justice. "Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice."[71] Closed proceedings hinder the public perception of the trial process' performance by denying access to observe and arrive at a conclusion on its acceptability, and propagate the "traditional Anglo-American distrust for secret pro-

66. Gannett Co., Inc. v. DePasquale, 443 U.S. at 427-28 (dissenting opinion). *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) (press helps guarantee fairness of trials).

67. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2823-24. "Open trials play a fundamental role in our judicial system to assure the criminal defendant a fair and accurate adjudication. . . ." *Id.* at ___, 100 S. Ct. at 2837 (Brennen & Marshall, JJ., concurring).

68. "Publicizing trial proceedings aids accurate factfinding. . . . And experience has borne out these assertions about the truth-finding role of publicity." *Id.* at ___, 100 S. Ct. at 2838-39 (Brennan & Marshall, JJ., concurring) (citations omitted). This fulfills Justice Brennan's principle that "the value of access must be measured in specifics." *Id.* at ___, 100 S. Ct. at 2824. Gannett Co., Inc. v. DePasquale, 443 U.S. at 383 (majority opinion).

69. *See* Note, 91 HARV. L. REV. 1899, note 65 *supra*.

70. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2823-24. The necessity that the people believe they are equitably governed "mandates a system of justice that demonstrates the fairness of the law to our citizens. . . . Open trials assure the public that procedural rights are respected, and that justice is afforded equally." *Id.* at ___, 100 S. Ct. at 2837 (Brennan & Marshall, JJ., concurring).

71. *Id.* at ___, 100 S. Ct. at 2837 (Brennan & Marshall, JJ., concurring); Gannett Co., Inc. v. DePasquale, 443 U.S. at 429 (dissenting opinion).

ceedings."[72] Thus, violations of the tradition of openness[73] for the courts can damage confidence in the judicial system.

Related to the confidence it instills in the courts, openness may also serve a "significant community therapeutic value."[74] A trial provides an outlet for the community concern following the commission of a crime.[75] Closure cuts off this outlet, and the public could conceivably turn to "self-help" in settling disputes or handing out revenge or retribution.[76] The acceptance of judicial processes for the arbitration of disputes may be a crucial social function served by open trials.

Another function of openness is the development of social values. The acceptance of the judicial processes is one such social value.[77] Without the ability to observe the system and its functioning, its inherent values cannot be passed on to the public.[78] The ritualized nature of the courts helps to promote belief in, and acceptance of, those values.[79] Access is needed to develop those values,

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72. In re Oliver, 333 U.S. at 268. "Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law." Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2837 (Brennan & Marshall, JJ., concurring).

73. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. 2814. The Court considered the historical importance of open proceedings at length. *Cf.* Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (the Court reviewed the history of open judicial proceedings under the sixth amendment).

74. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2824.

75. *Id.* at ___, 100 S. Ct. at 2823-25.

76. "Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated. . . . '[But] accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate[ ] to restore the imbalance which was created by the offense. . . .' " *Id.* at ___, 100 S. Ct. at 2824 (citation omitted). The ritual and solemnity which permeate a criminal prosecution certainly have an impact on the public, and hopefully satisfy the public demands for justice. *See* notes 74 & 75 *supra.*

77. *See* notes 74-76 *supra* and accompanying text.

78. Social values are implicit in concepts such as: equal protection of the law, fair and impartial trial on the merits, innocence until proven guilty beyond a reasonable doubt, government of laws, and stability and predictability in application of the law. *Cf.* note 221 *infra* (values inherent in the operation of the Exclusionary Rule).

79. Procedures which apply to all defendants equally, such as the formal charge and arraignment process, the court rules which are expressly set forth for all proceedings, as well as the formalities of conduct and decorum which should be observed in all judicial proceedings, better demonstrate values like fairness, equality and stability than would variable procedures. *See* FED. R. CRIM. P.; IND. R. CRIM. P. *See also* BLACKSTONE, *supra* note 23, at *379. Blackstone noted that although jurors avoided the risk of bias by judges to others of similar rank, judges were still required to apply the rules of law to prevent "wild and capricious" decisions by the jurors.

and effectuate the other functions served by open judicial proceedings.

Since not all members of the public can have access to the courts, the press role of reporting is crucial to effectuate the public rights involved in open courts. "A trial is a public event. What transpires in the courtroom is public property."[80] Therefore, press coverage is merely a means of transmitting public information. Access should not be denied. "The commission of crime, prosecution resulting from it, and judicial proceedings resulting from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[81] However, the Supreme Court has suggested that the press also bears a duty to exercise its protected first amendment rights responsibly by trying to protect the defendant's fair trial rights.[82]

Because of the jeopardy to the fair trial of a defendant, restrictions on press coverage have been recognized by the Court. Justice Douglas rejected the use of the contempt power when freedom of speech and press were involved unless the statements posed a serious hazard to the administration of justice.[83] However, the Court has recognized that the trial judge can restrict the press in his court to preserve the decorum and integrity during criminal proceedings.[84] Because of the public right to be informed of court proceedings "maximum freedom must be allowed the press in carrying on this important function in a democratic society [but] its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process."[85] The earlier decisions of the Court, however, focused on cases of egregious misconduct or distraction by the press coverage.[86] Later, the Court began to erode that view by emphasiz-

80. Craig v. Harney, 331 U.S. 367, 374 (1946).

81. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

82. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560 (1976).

83. Craig v. Harney, 331 U.S. 367 (1946). In *Craig*, a reporter had gained the information from a public court proceeding. Because the trial judge sought to determine what the reporter could communicate by use of the contempt power, the Court held the prior restraint invalid unless there was a "serious and imminent threat" to the defendant's fair trial. *Id.* at 373.

84. Sheppard v. Maxwell, 384 U.S. 333 (1965); Estes v. Texas, 381 U.S. 532 (1964).

85. Estes v. Texas, 381 U.S. 532, 539 (1964). Sheppard v. Maxwell, 384 U.S. 333 (1965). Press coverage of judicial proceedings "must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged." *Id.* at 358.

86. Sheppard v. Maxwell, 384 U.S. 333 (1965). In spite of the circus atmosphere in *Sheppard*, the Court never suggested a closed trial. The limits on the

ing the fair trial right more than the right of access. In *Branzburg v. Hayes*,[87] the Court stated that "Newsmen may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal."[88] Unlike prohibition on publication which is subject to the prior restraint doctrine,[89] closure of the trial has been declared constitutional on sixth amendment grounds to protect the defendant's fair trial rights.[90]

Closures, even to protect the defendant's fair trial, have essentially the same effect as prior restraints.[91] Closures prevent publication of information within the public domain by obstructing coverage of court proceedings. This circumvents the public right to know how the courts are performing, and hinders public participation in the judicial system. While the press has no greater right of access to the courts than the public, its role as an agent of the public requires access to fulfill the functions served by open trials. Because of this public interest in open trials, the courts must attempt to avoid closure.[92] The question remains, however, whether the public has a similar interest in open pretrial proceedings.

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press coverage were confined to that conduct disrupting the proceedings, rather than denying access and preventing coverage. Estes v. Texas, 381 U.S. 532 (1964). Television coverage of Billie Sol Estes' trial over defense objections was grounds for reversal under the Due Process Clause. In reaching its decision, the Court only rejected the use of videotaping and not access to the trial. "It is true that the public has a right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court." *Id.* at 541-42.

87. 408 U.S. 665 (1972).

88. *Id.* at 685.

89. *See* notes 41-47 *supra* and accompanying text.

90. Gannett v. DePasquale, 443 U.S. at 391. However, the facts and narrow issue presented in *Gannett* dealt only with pretrial proceedings, and the Court never reached first amendment issues in its decision. *See also* Nebraksa Press Ass'n v. Stuart, 427 U.S. 539 (1976). Although its decision rested on the prior restraint doctrine, the Court implied that closures of preliminary hearings were acceptable alternatives if permitted by state law. *Id.* at 568.

91. Technically, prior restraints deal solely with preventing publication of information from any source, while closure is only a restriction on a single source of information and not on publication.

92. Chief Justice Burger would require an overriding interest articulated in findings before permitting a criminal trial to be closed to the public. Also, the trial court must review alternatives such as sequestering witnesses or jurors. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. at 2830. *Cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. at 563-65 (regarding the use of prior restraints, or "gag" orders).

A REVIEW OF THE EXCLUSIONARY RULE AND ITS IMPLICATIONS

A careful examination of the basis and rationale of the Exclusionary Rule implicates first amendment interests which prescribe a right of access to suppression hearings. Rather than the protection of the defendant, societal values and interests are far more important in Supreme Court opinions. Restrictions on access encumber these values and interests, and only serve to heighten the potency of critics of the Rule. To understand the Rule and its role in the criminal justice system, a roadmap of its development is necessary.

History of the Exclusionary Rule

Two types of evidence form the basis for the development of the Exclusionary Rule. The two types are: first, coerced confessions, second, "hard" evidence obtained through unlawful searches and seizures.[93] Coerced confessions were originally excluded on fourteenth amendment grounds.[94] Later decisions, however, extended the fifth amendment grounds used in federal courts to exclude all coerced confessions in all courts.[95] Exclusion of "hard" evidence unlawfully seized was uniformly required in the federal courts long before being applied to state courts under the fourth and fourteenth amendments.[96] Recently, the Court has withdrawn in the search and seizure cases, reflecting some dissatisfaction with the exclusion of "hard" evidence.[97]

While recent decisions have disparaged the Rule in cases dealing with fourth amendment violations, it is still supported in cases of coerced confessions. In *Brown v. Mississippi*,[98] a murder suspect was whipped until he "confessed." The Supreme Court reversed the conviction, finding that the confession was obtained in violation of the fourteenth amendment Due Process Clause.[99] Applying the Due Process Exclusionary Rule the Court has excluded incriminating statements[100] and confessions,[101] obtained by pressuring the defendant and not following appropriate procedures. Thus the Due Pro-

93. For example, weapons or narcotics are hard evidence since they have an independent identity that cannot be denied, but can be proven by objective means.

94. *See* notes 98-101 *infra* and accompanying text.

95. *See* notes 102-05 *infra* and accompanying text.

96. *See* notes 106-15 *infra* and accompanying text.

97. *See* notes 116-20 *infra* and accompanying text.

98. 297 U.S. 278 (1936).

99. *Id.* at 287.

100. McNabb v. United States, 318 U.S. 332 (1943).

101. Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959); Watts v. Indiana, 338 U.S. 49, 55 (1949).

cess Clause was sufficient for excluding coerced confessions before the fifth amendment was made applicable to the states.

Long before applying the fifth amendment to the states, the Supreme Court excluded confessions from federal courts when obtained in violation of the privilege against self-incrimination.[102] In 1964, the Court extended the privilege to state proceedings by incorporation under the fourteenth amendment.[103] To safeguard that privilege, the Court set out procedures for officials to follow when questioning persons in official custody.[104] These "Miranda warnings" were adjudged necessary to avoid the compulsion to talk which is inherent in "custodial interrogations."[105] Thus, in all state and federal courts, coerced confessions are excluded under the fifth and fourteenth amendments.

While confessions usually fall within fifth amendment applications of the Rule, evidence obtained from unlawful searches and seizures is excluded on fourth amendment grounds.[106] Evidence seized by a United States marshall without search or arrest warrants was held inadmissible in federal court in *Weeks v. United States*.[107] Nor was evidence obtained with a "valid" warrant or subpeona admissible when the warrant or subpoena was founded on a fourth amendment violation.[108] This extension of the Exclusionary Rule beyond evidence itself seized unlawfully is commonly referred to as the "fruit of the poisonous tree," from a case where illegally obtained wiretap evidence was offered in a federal court.[109] Unlike the confes-

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102. Bram v. United States, 168 U.S. 532, 542-43 (1897). The test of voluntariness applied by the Court looked to the confession itself and its freedom from threats, promises, or improper influences, not whether the conduct of the officials was shocking. *See also* Haynes v. Washington, 373 U.S. 503 (1963).

103. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

104. Miranda v. Arizona, 384 U.S. 436 (1965). After an arrest, "Miranda warnings" must be given to the arrestee before questioning by officials. The defendant/arrestee must be informed that:

> He has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

105. *Id.* at 458.

106. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

107. Weeks v. United States, 232 U.S. 383 (1914).

108. *E.g.*, Silverthorn Lumber Co. v. United States, 251 U.S. 385 (1920).

109. Nardone v. United States, 308 U.S. 338, 341 (1939). *But see* Olmstead v. United States, 277 U.S. 438 (1928). In *Olmstead*, the Court held that wiretap evidence was not obtained by a search and seizure, ignoring the illegality of the wiretap under

sion cases, the state courts did not apply a Due Process Exclusionary Rule to unlawfully seized evidence. Incorporation of the fourth amendment through the fourteenth did not extend the Rule to the states, and the court expressly rejected such incorporation of the Rule in *Wolf v. Colorado*.[110]

After applying the Exclusionary Rule in federal courts for nearly fifty years and rejecting its application to state courts, the Court demonstrated a changing viewpoint. Two decisions are indicative of this change. In one the court applied the Exclusionary Rule under the fourteenth amendment to exclude evidence seized through shocking methods.[111] In the second the Court excluded evidence offered in federal courts when unlawfully obtained by state officials.[112] In *Mapp v. Ohio*[113] the Court finally held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[114] Even confessions, when resulting from unlawful arrests, fall under the penumbra of the Rule and are excluded on that basis. Even the use of "Miranda warnings" does not break the causal claim in cases of fourth, rather than fifth amendment violations.[115] Therefore, all evidence resulting directly or indirectly from fourth amendment violations is excluded in all judicial proceedings.

In recent decisions, however, the Supreme Court has discounted the applicability of the Exclusionary Rule to all evidence in all proceedings. Stressing the deterrent rationale for the "judicially created remedy," the Court refused to apply the Rule in grand jury

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state law. *Nardone* did not overrule *Olmstead*, but applied the Communications Act of 1934 in determining that the evidence was illegally obtained.

110. 338 U.S. 25, 33 (1949).

111. Rochin v. California, 342 U.S. 165 (1952). Pumping the defendant's stomach violated the Due Process Clause, and the evidence was excluded. However, the Court's decision construed the evidence as a coerced confession. Clearly, both the drugs seized and the methods used could be described as the fruit of an unlawful search and seizure.

112. Elkins v. United States, 364 U.S. 206 (1960). Previously, evidence seized unlawfully by state officials was admitted in federal courts. In *Elkins* the Court removed that disparity, and used the Rule to enforce the fourth amendment guarantees by excluding the evidence in federal courts.

113. 367 U.S. 643 (1961).

114. *Id.* at 655. The Exclusionary Rule thus became applicable in state courts as well as federal courts, whenever the fourth amendment was violated by officials.

115. Brown v. Illinois, 422 U.S. 590, 600-03 (1975). A statement obtained from an unlawful arrest is inadmissible even when Miranda warnings are given to the defendant. This is because the evidence is not considered a coerced confession, but the result of an unlawful seizure of the defendant.

proceedings.[116] A year later, the Court initiated the use of a subjective standard by requiring suppression of evidence "only if it can be said that the law enforcement officer had knowledge . . . that the search was unconstitutional under the Fourth Amendment."[117] This standard clearly departed from the more objective "all evidence" standard enunciated in *Mapp v. Ohio*.[118] Additionally, the Court restricted the use of the Rule in habeas corpus petitions to federal courts seeking reversal of state convictions in *Stone v. Powell*.[119] Once the state provided an equitable hearing on the defendant's claims of a fourth amendment violation, the Rule could not be used on appeal to federal courts. As a result, less supervision may be exercised by the federal courts over state applications of the Rule.[120]

With less supervision over state court applications of the Rule, greater variations between the states could result. Flagrant abuses by officials of defendants' constitutional rights will certainly continue, as will exclusion of evidence obtained by those abuses. The Rule may, however, be used less frequently in the future to effectuate fourth and fifth amendment guarantees. This can be surmised from a review of criticism of the Exclusionary Rule, which reflects a basic discontent with the Rule itself.

Criticism of the Exclusionary Rule

Discontented with the Rule, critics have attacked it from various directions. One criticism is that the Rule raises side issues which detract from the trial of a defendant.[121] Whether the Rule is constitutionally mandated or merely a judicial rule of evidence is

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116. United States v. Calandra, 414 U.S. 338, 348 (1974).

117. United States v. Peltier, 422 U.S. 531, 542 (1975).

118. *See* note 114 *supra* and accompanying text. *But see* Brown v. Illinois, 422 U.S. 590 (1975). Although in apparent contradiction with itself, just one day after directing the subjective standard in *Peltier*, the Court stated that the Exclusionary Rule was "directed at all unlawful searches and seizures." *Id.* at 603. This case can be distinguished on its facts, however, since the seizure was an unlawful arrest. Therefore, the search incident to the unlawful arrest automatically lacked probable cause and the evidence obtained thereby had to be excluded. Justice Powell distinguished the use of the Rule by the flagrant fourth amendment violations in *Brown* as opposed by the technical abuses in *Peltier*. *Id.* at 610-12 (Powell, J., concurring).

119. 428 U.S. 465 (1976).

120. *Id.* at 494. *See also* 3 W. LAFAVE, SEARCH AND SEIZURE, § 11.7(f) at 751 (1978).

121. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). *See also* United States v. Peltier, 422 U.S. 531, 561 (1975) (Brennan, J., dissenting).

also a matter of dispute between advocates and critics of its application.[122] A third critique distinguishes involuntary confessions from "real" evidence on the basis of reliability,[123] while another focuses on a lack of deterrent effect.[124] Finally, there is some question of the benefits and relief obtained by use of the Rule.[125] Although not exhaustive, this list does serve to show some criticisms of the Rule and its role in the criminal system.

The first criticism centers on the distraction a suppression hearing causes from the defendant's trial to matters unrelated to his guilt. Especially noticeable is the focus of the Rule on the question of official misconduct, which is the determinate factor in the admission or exclusion of evidence.[126] However, this is not a major concern to the Court, since it expanded the formula for the Rule from an objective determination of validity to a subjective knowledge of validity for a search by an official.[127] The use of pretrial motions and suppression hearings largely avoids this problem.[128] Even if the objection to admission of the evidence is made at trial, an *in camera* hearing minimizes any distraction. While this can result in some delay, the Rule deals with a fairly limited range of issues which the judge should be able to dispose of easily.[129] Another side effect of the Rule is the possibility of better plea agreements offered to defendants who can benefit from its application.[130] However, the distractions caused by the Exclusionary Rule should not justify much criticism, because the purposes and values behind the Rule are almost entirely separated from the individual defendant and his own guilt or innocence.[131]

Since the Rule is not designed for the defendant's benefit, detractors claim it is merely judicially created and subject to

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122. *Compare* Wolf v. Colorado, 338 U.S. at 39-40 (Black, J., concurring) *with* Mapp v. Ohio, 367 U.S. at 655.

123. *E.g.*, Stone v. Powell, 428 U.S. at 496 (Burger, C.J., concurring).

124. *See* Oaks, note 121 *supra*.

125. *Id.*; Stone v. Powell, 428 U.S. at 496 (Burger, C.J., concurring).

126. Rogers v. Richmond, 365 U.S. 534, 543-44 (1961).

127. *See* United States v. Peltier, 422 U.S. at 561 (Brennan, J., dissenting). By making the knowledge of the officer part of the determination for applying the Rule, the Court requires two findings before exclusion: illegality of the search, and the officer's awareness of that violation. This would tend to increase the potential for deflecting the inquiries in the criminal trial from the guilt of the defendant to police misconduct.

128. *See* Jones v. United States, 362 U.S. 257 (1960); FED. R. CRIM. P. 12(b)(3), 41(f).

129. *See* Oaks, *supra* note 121, at 747-48.

130. *Id.*

131. *See* notes 152-71 *infra* and accompanying text.

judicial alterations, rather than constitutionally mandated. Recently, the Supreme Court has adopted the belief that the "federal exclusionary rule is not a command of the Fourth but is a judicially created rule of evidence."[132] This is a change from earlier cases which implicitly recognized that the Rule was constitutionally necessary and that the Constitution authorized the exclusion of tainted evidence.[133] Whether judicial or constitutional, the Rule attempts to protect all persons from unreasonable searches and seizures and should be followed in the absence of a better rule.[134] The source of the Rule should not be grounds for repudiation. As Professor Kamisar pointedly observed, tainted confessions are excluded under the Due Process Clause and the fifth amendment even though neither mentions confessions of any kind.[135] This criticism of the Rule is mere puffing, evading the real issues concerning how well the Rule performs its function of effectuating constitutional rights.

While criticism aimed at the source of the Rule evades the real issues, there is some merit in the vilification of it because it excludes both coerced confessions and "hard," or "real," evidence regardless of reliability. Chief Justice Burger supports this distinction, excluding coerced confessions because of their unreliability, but seeking admission of "reliable" evidence because of its definite probative value.[136] But this seemingly logical distinction ignores the long-established reasons for the Exclusionary Rule.[137] Involuntary

132. Wolf v. Colorado, 338 U.S. at 39-40 (Black, J., concurring). *Accord,* Stone v. Powell, 428 U.S. at 482; United States v. Calandra, 414 U.S. at 348 ("judicially created remedy").

133. Note 114 *supra* and accompanying text. *Accord,* Olmstead v. United States, 277 U.S. 438 (1928). Summing up the *Weeks* rule, the Court indicated that the Rule protected fourth amendment rights by excluding evidence obtained through fourth amendment violations. *Id.* at 462-63. *Cf.* Wolf v. Colorado, 338 U.S. 25 (1949) (rejecting the Rule's application to state courts). *Wolf* implied a constitutional basis for the Rule by refusing to extend it while reasserting the position that the fourteenth amendment did not incorporate the first eight amendments. *See also* Stone v. Powell, 428 U.S. at 509 (Brennan, J., dissenting); United States v. Calandra, 414 U.S. at 360 (Brennan, J., dissenting). Brennan espouses the position that the Rule is part of the fourteenth amendment limitation on government, and thus the erroneous admission of evidence constitutes error of a constitutional dimension.

134. This protection is in the form of effectuating the constitutional guarantees by excluding the evidence in all circumstances. *See generally* Oaks, note 121 *supra.*

135. Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?,* 62 JUDICATURE 66, 75-77 (1978).

136. Stone v. Powell, 428 U.S. at 496-97 (Burger, C.J., concurring). *See* Gannett Co., Inc. v. DePasquale, 443 U.S. at 394-97 (Burger, C.J., concurring) ("excludes undoubted truth from the truth-finding processes").

137. *See* notes 152-71 *infra* and accompanying text.

confessions are excluded even when independent evidence exists to corroborate the statements and thus demonstrate their reliability.[138] Similarly, "hard" evidence is not excluded because of its lack of probative value, but because it is "inconsistent with ethical standards and destructive of personal liberty."[139] Evidence is excluded because of the unlawful methods employed. When it results from an independent source, however, free of taint, the court permits its admission.[140] Clearly, the original reasons for the Rule were in response to the unlawful methods employed in gathering the evidence, and not the truth or falsity of the evidence. Criticism of the Rule for excluding the truth is based on rationales other than the normative purposes of integrity and confidence.[141]

Besides the normative purposes for the Exclusionary Rule there is the deterrence theory,[142] which is the foundation for another real issue for skeptics of the Rule's continued vitality. Recent decisions have placed greater emphasis on the deterrence theory.[143] However, there is authority disparaging the deterrent effect of the Rule.[144] Deterrence is a factual rationale for the Rule, that is, the fact that unlawfully seized evidence will be excluded deters official misconduct by removing any incentive for violating the rights of others. Still, the strong normative purposes for the Rule implicate "constitutional policies [which] should be more than mere reflections of ideological winds."[145] A changing emphasis towards factual

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138. Rochin v. California, 342 U.S. 165 (1952).

> Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissable under the Due Process Clause even though the statements contained in them may be independantly established as true. Coerced confessions offend the community's sense of fair play and decency.

Id. at 173. *See* Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959). "The abhorrence of society to the use of involuntary confessions does not turn on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law." *Id.* at 320-21. *See also* Kamisar, *supra* note 135, at 77-78 (the court must not sanction police misconduct by admitting evidence, even if verified).

139. Nardone v. United States, 302 U.S. 379, 383 (1937).

140. *E.g.*, Nardone v. United States, 308 U.S. at 341; Silverthorn Lumber Co. v. United States, 251 U.S. at 392 (1920).

141. *See* notes 156-67 *infra* and accompanying text.

142. *See* notes 168-71 *infra* and accompanying text.

143. *See* notes 116-20 *supra* and accompanying text.

144. *See* Oaks, *supra* note 121, at 667-72. Oaks also concludes that the normative purposes for the Rule have little effect on its application.

145. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 726 (1974).

premises should not, without more, be sufficient grounds for rejecting the Rule. Empirical data is required to determine whether the deterrence rationale has any basis in fact for application of the Rule, or whether it fails to serve the deterrence function.[146] If data demonstrating a lack of deterrent value can be obtained, the Rule is likely to undergo considerable change although this would be disregarding the other normative purposes for the Rule.

Greater than the suspected lack of deterrent value, the strongest criticism of the Exclusionary Rule is concerned with the benefits and relief provided by the Rule. The Rule is applied when a court must resolve a "conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement."[147] But the Rule operates as a remedial device, implementing constitutional guarantees by excluding the evidence from judicial proceedings rather than striking to prevent the violation itself.[148] Application of the Rule appears, to some critics, to have value only for the criminal defendant and not for society because it "offers no relief whatever to victims of overzealous police work who never appear in court."[149] In addition, the Rule's purpose "is not to redress the injury to the privacy of the search victim [but to] effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[150] This reflects a preference for the deterrence rationale for the Rule. If the Rule fails to perform that function, its value to society would be illusory.[151]

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146. *See* Oaks, note 121 *supra*. *But see* Cannon, note 178 *supra*. Canon's article is a critique of Oaks' article, and he finds insufficient evidence to discredit the deterrent effect of the Rule.

147. Spano v. New York, 360 U.S. 315 (1959).

148. *See* United States v. Calandra, 414 U.S. at 348.

149. Stone v. Powell, 428 U.S. at 501 (Burger, C.J., concurring). *See id.* at 536 (Stewart, J., dissenting). Stewart urges a modification of the Rule because the public interest is shortchanged with little equity on the defendant's side for exclusion. Oaks, *supra* note 121, at 736. The victim of an illegal search that reveals nothing is not directly aided by the Rule, only the defendant is aided.

150. United States v. Calandra, 414 U.S. at 347. *Calandra* stressed that the Rule was for deterring police misconduct, and thus should not be applied to grand jury proceedings because of the lack of deterrent effect when used in those secret proceedings. *But see* McNabb v. United States, 318 U.S. 322 (1943). In *McNabb*, the Court did not rely on the idea that the Rule was for the defendant's protection except in cases of "bad" confessions. Rather, the Rule was to prevent the government from profiting from its own misdeeds. Thus society should benefit from the Rule, not just the defendant.

151. But this fails to consider the normative functions of the Exclusionary Rule and their fulfillment. Also, the quantity of searches either not made to avoid applica-

Although critics may find the Rule's value illusory, they largely overlook the normative functions of the Rule. Most of the criticism of the Rule is premised on the failure of the deterrent purpose of the Rule to adequately serve societal interests. However, this does not give credence to the sociological values reinforced through the normative functions. Basically, the Court is moving towards the factual aspects of the Rule more closely related to the Court's perception of the Rule's effectiveness in enforcing the Constitution. Because of this shifting emphasis, the rationale for the Rule should be evaluated, and the rights which are implicated.

Rationale of the Exclusionary Rule

First amendment rights of access are implicit in the rationale of the Exclusionary Rule. Three basic purposes for the Exclusionary Rule can be deduced from the Supreme Court decisions applying the Rule.[152] Two of these purposes, judicial integrity[153] and public confidence,[154] are normative functions which require uniform standards of exclusion of all tainted evidence. The third purpose for the Rule, deterrence,[155] is essentially a factual role which assumes that exclusion will deter misconduct. The public right to know warrants a right of access to observe the Rule's design. Additionally, the goals of the Rule may be furthered by a right of access. This tacit right to know is a feature of the Rule which translates into a need for open suppression proceedings.

One rationale for the Exclusionary Rule is the "imperative of judicial integrity," which mandates that the courts not become accessories to official misconduct.[156] When evidence obtained through a fourth amendment violation is offered in a criminal prosecution, the courts "cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered use of

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tion of the Rule, or made properly because of the Rule's surveillance, cannot be reliably determined.

152. *See* 1 W. LAFAVE, *supra* note 120, at § 1.1(f).

153. *See* notes 156-62 *infra* and accompanying text.

154. *See* notes 163-67 *infra* and accompanying text.

155. *See* notes 168-71 *infra* and accompanying text.

156. Elkins v. United States, 364 U.S. 206, 222 (1960). *Accord*, United States v. Peltier, 422 U.S. at 553 (Brennan, J., dissenting). Brennan interprets judicial integrity as the "core value" of the Exclusionary Rule. *Id.* at 553 n.13. McNabb v. United States, 318 U.S. 332 (1943). "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobediance of the law." *Id.* at 345.

the fruits of such invasions."[157] Similarly, if involuntary confessions were admitted as evidence in criminal cases, the courts would be violating the accusatorial processes in which the defendant is charged with a crime and the prosecution must carry the burden of proof. An inquisitorial system would result,[158] in which the "defendant" would bear the burden of convincing his examiners of his innocence. The safeguards against unreasonable searches and seizures and self-incrimination would thus be lost, because admitting the tainted evidence indirectly sanctions the objectionable methods employed.[159] "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[160]

When the defendant objects to the admission of evidence allegedly procured in violation of constitutional rights, "it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing . . . to determine whether such motion should be granted or denied."[161] If the court finds that the officials' conduct violated the defendant's constitutional rights, then the court must grant the suppression motion and thereby enhance the credibility of the constitutional guarantee in the eyes of the public.[162] Therefore, the Exclusionary Rule provides for judicial review of official conduct to protect society's constitutional rights, and preserves judicial integrity by requiring exclusion of tainted evidence rather than reinforcing the misconduct by admission of the evidence.

Closely related to the rationale of judicial integrity is the purpose of maintaining public trust in government by not allowing the government to profit in court from its unlawful behavior. A classic articulation of this rationale, exhibiting a strong sense of social values, was made by Justice Brandeis in *Olmstead v. United States*:[163]

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157. Terry v. Ohio, 392 U.S. 1, 13 (1968).

158. *See* Watts v. Indiana, 338 U.S. 49, 55 (1949).

159. *See* Kamisar, note 135 *supra*.

160. Weeks v. United States, 232 U.S. at 394.

161. McNabb v. United States, 318 U.S. at 346. *See* FED. R. CRIM. P. 12(e).

162. *See* Oaks, *supra* note 121, at 756. While a critique of the Rule, this article does recognize its value as a normative standard.

163. 277 U.S. 438 (1928).

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[164]

This doctrine, that the government is above the law, permits unlawful conduct to be rewarded unless checked by the exclusion of evidence. Exclusion denies the fruits of official misconduct.[165] Reliability of the evidence is not a factor; rather, it is the "historical function of assuring appropriate procedure before liberty is curtailed or life is taken" that requires exclusion.[166] Misconduct violates that procedure, and the evidence thereby obtained should not be used against the victim of the violation. Exclusion enhances public trust in government by demonstrating the integrity of the courts and their ability to nurture faith in the constitutional guarantees.[167]

Rather than seeking to repair the effects of misconduct, the third rationale for the Exclusionary Rule is directed at prevention of misconduct. Exclusion of unlawfully obtained evidence "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available

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164. *Id.* at 485 (Brandeis, J., dissenting). Brandeis was dissenting from the Court's admission of wiretap evidence. The Court failed to find a search and seizure, while Brandeis looked to the illegality of the wiretap itself. Also in dissent, Justice Holmes disagreed with admission of the fruits of illegal acts, since it was "less evil that some criminals should escape than that the government should play an ignoble part." *Id.* at 470 (Holmes, J., dissenting).

165. *See* Oaks, *supra* note 121, 667-72. As a normative device, the Rule provides correct standards for the law.

166. Watts v. Indiana, 338 U.S. at 55. *Watts* applied the Due Process Exclusionary Rule to exclude a coerced confession. *See* United States v. Calandra, 414 U.S. 338 (1974); Rogers v. Richmond, 365 U.S. 534 (1961).

167. *But see* Stone v. Powell, 428 U.S. 465 (1976). Reversal by federal courts after at least two state courts have rejected a defendant's fourth amendment claims could create disrespect for the law and administration of justice. *Id.* at 491.

way—by removing the incentive to disregard it."[168] Because unlawfully seized evidence will be excluded, officials will seek to observe constitutional rights in furtherance of the interest in convicting criminals. If the evidence were admitted, the anomaly would arise of exonerating police misconduct because it serves the interest in convicting criminals, contrary to the adage that two wrongs do not make a right.[169] Since the Court has found the Rule to be "the only effective deterrent to police misconduct in the criminal context,"[170] recent decisions of the Court have emphasized deterrence as the primary goal of the Exclusionary Rule.[171]

PUBLIC ACCESS TO PRETRIAL PROCEEDINGS

Public access rights to trials are now fairly well established under the law.[172] However, the issue of access rights to pretrial proceedings is not yet so clearly decided. Under the sixth amendment the Court has denied any such right.[173] The possibility of public access rights under the first amendment has yet to be considered by the Court.[174] In addition to analyzing these aspects of a pretrial access right, the unique characteristics of the suppression hearing and their impact on a public right of access to pretrial proceedings are discussed.[175]

The Public Trial Guarantee Does Not Extend to Pretrial Proceedings

In extending sixth amendment guarantees to pretrial stages, the primary concern is the protection of the fair trial of a defendant. For example, the right to counsel means that "the accused is

168. Elkins v. United States, 364 U.S. at 217. This rationale alters the Rule's focus. Instead of a remedial device employed to preserve a distinction between right and wrong in the public's eye, the Rule penalizes misconduct through exclusion. This threatened penalty hopefully will encourage observation of constitutional rights.

169. While a victim of an unlawful seizure could sue the offending officials, it is highly improbable in the case of a criminal defendant seeking to avoid additional conflicts. The prohibitive cost of a suit could also be a deterrent to civil actions.

170. Terry v. Ohio, 392 U.S. at 12.

171. Stone v. Powell, 428 U.S. 465 (1976); United States v. Peltier, 422 U.S. 531 (1975); United States v. Calandra, 414 U.S. 338 (1974); Terry v. Ohio, 392 U.S. 1 (1968). *Accord*, Brown v. Illinois, 422 U.S. at 606 (Powell, J., concurring). *But see* United States v. Calandra, 414 U.S. at 356 (Brennan, J., dissenting) (deterrence is "at best only a hoped-for effect of the exclusionary rule, not its ultimate objective").

172. Richmond Newspapers, Inc. v. Virginia, ___ U.S. ___, 100 S. Ct. 2814 (1980); *see* notes 33-92 *supra* and accompanying text.

173. Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979).

174. *See* notes 186-205 *infra* and accompanying text.

175. *See* notes 206-28 *infra* and accompanying text.

guaranteed that he does not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[176] For this reason the right has been extended to all "critical stages"[177] of a criminal prosecution, and also to custodial interrogations[178] because of the necessity for an effective representative at the trial itself.[179] However, this extension of the right to counsel is not made under the aegis of the sixth amendment. Pretrial counsel is required to further the constitutional right to counsel at trial and the fairness of a defendant's trial.[180] In the same manner, the public trial right should not apply to pretrial proceedings under the sixth amendment.

Rather than extending to pretrial stages under the sixth amendment public trial right, a right to open pretrial proceedings must benefit the fair trial right of the defendant.[181] Certainly there is a possibility of persecution in pretrial hearings which could harm a defendant's fair trial. Since there is no jury to insure against that possibility the defendant must rely on open proceedings. However, the public trial right as applied to pretrial hearings does not affect the quality of the trial itself. If the defendant perceives prejudice

176. United States v. Wade, 388 U.S. 218, 226 (1967). "The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to speedy and public trial by an impartial jury. . . ." *Id.* at 226-27.

177. Coleman v. Alabama, 399 U.S. 1, 10 (1970) (preliminary hearing).

178. Miranda v. Arizona, 384 U.S. 436 (1966); *see also* Escobedo v. Illinois, 378 U.S. 478 (1964).

179. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (dictum). "The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial. . . .but the 'trial' guarantees that have been applied to the 'pretrial' stage of the criminal process are similarly designed to protect the fairness of the trial itself." *Id.* at 238-39. Coleman v. Alabama, 399 U.S. 1 (1970). In *Coleman*, the Court offered several benefits in providing counsel before trial. Some of the means by which an attorney can assist a defendant include: exposing fatal defects in the State's case, developing impeachment tools, preserving valuable testimony, discovery of the State's case and preparing for trial, and arguing for examinations of the accused or bail.

180. *See* United States v. Wade, 388 U.S. 218 (1967). The Court did not extend the sixth amendment right to counsel *per se* to pretrial proceedings. Instead, a determination of the need for counsel depended on "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.* at 227. *But see* Coleman v. Alabama, 399 U.S. 1 (1970). Preliminary hearings are part of a criminal prosecution within the meaning of the sixth amendment. Therefore, the right of counsel should attach as a sixth amendment right. *Id.* at 11-13 (Black, J., concurring); *id.* at 14-15 (Douglas, J., concurring).

181. *See* notes 176-80 *supra* and accompanying text.

arising from open pretrial proceedings, then his motion for closure should be granted since the public pretrial "right" is not constitutionally grounded.

The Supreme Court has expressly held that the public trial guarantee provides no public right of access to pretrial suppression hearings.[182] Closure of a pretrial hearing was held an appropriate remedy to prevent adverse publicity from harming the fair trial guarantee.[183] Since the public trial guarantee is personal to the accused, closure did not violate any constitutional principles under the sixth amendment.[184] Although the Court did recognize that public interests in open proceedings exist under the sixth amendment,[185] it gave priority to the interests of the defendant in a fair trial. Since the public does not have a sixth amendment right of access, public access rights to pretrial proceedings must originate elsewhere.

A First Amendment Access Right to Pretrial Proceedings

Public interests formed the foundation for a public right of access to trials.[186] These interests included public participation[187] and a limited right to acquire information.[188] Open trials enable the public to observe the system, so that participation can be intelligently exercised[189] and disclosure of the truth be assured.[190] Finally, access preserves confidence in the courts, and promotes acceptance of the courts and the values they represent.[191] Just as these factors contribute to form a public access right to trials, a more persuasive claim for a public access right to pretrial proceedings arises from the first amendment.

The basic similarities between pretrial proceedings and trials vindicate a right of access.[192] Pretrial proceedings involve many of

182. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. at 379-81. *But see id.* at 418-33 (dissenting opinion).

183. "To safeguard the due process rights of the accused, a trial judge has an affirmative duty to minimize the effects of prejudicial pretrial publicity. . . . Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ. . . ." *Id.* at 378-79 (majority opinion).

184. *Id.* at 379-81.

185. *Id.* at 382-83.

186. *See* notes 33-92 *supra* and accompanying text.

187. *See* notes 34-40 *supra* and accompanying text.

188. *See* notes 48-61 *supra* and accompanying text.

189. *See* notes 63-65 *supra* and accompanying text.

190. *See* notes 66-73 *supra* and accompanying text.

191. *See* notes 74-79 *supra* and accompanying text; *see also* notes 215-21 *infra* and accompanying text.

192. [T]he suppression hearing resembles and relates to the full trial in almost every particular. Evidence is presented by means of live

the same public officials who are involved at the trial stage,[193] which indicates that the pretrial stage itself is a governmental process. This means that the public has a participation right. Because these proceedings may be the only judicial proceedings to take place during a criminal prosecution, the public right to know what transpires therein is especially acute.[194] Only with access can the press acquire the information necessary for effective public participation in the system.[195]

Because access to information is required for the public to intelligently participate in governmental affairs, the issue of access to pretrial proceedings is a significant concern. Denial of access to pretrial stages is a more extreme limitation on the public right to receive information than a prior restraint,[196] as no information can reach press or public. Scrutiny of public officials should certainly encompass their conduct at any "critical stage"[197] of a criminal proceeding. Moreover, how the courts resolve the legal issues raised at those stages may determine the outcome of the case. Thus, the public should be able to observe those decisions, gaining the information required for effective participation.

In addition to the participation aspect, procedural similarities in calling witnesses and presenting testimony suggest a right of access to assure a complete and truthful record.[198] Open proceedings should enhance this function even at pretrial stages by improving the quality of testimony and inducing witnesses to come forward.[199]

> testimony, witnesses are sworn, and those witnesses are subject to cross-examination. Determination of the ultimate issue depends in most cases upon the trier of fact's evaluation of the evidence, and credibility is often crucial. Each side has incentive to prevail. . . .

Gannett Co., Inc. v. DePasquale, 443 U.S. at 434 (dissenting opinion).

193. For example, the prosecutor and judge are likely to be the same persons at both stages, or some other public official will act in their stead. In either event, the public interest in scrutinizing the officials' performance is still present. *See* notes 63-65 *supra* and accompanying text.

> 194. If the defendant prevails, he will have dealt the prosecution's case a serious, perhaps fatal, blow; the proceeding often then will be dismissed or negotiated on terms favorable to the defense. If the prosecution successfully resists the motion to suppress, the defendant may have little hope of success at trial (especially where a confession is in issue), with the result that the likelihood of a guilty plea is substantially increased.

Gannett Co., Inc. v. DePasquale, 443 U.S. at 434 (dissenting opinion).

195. *See* notes 48-52, 80-82 *supra* and accompanying text.

196. *See* notes 42-47 *supra* and accompanying text.

197. Coleman v. Alabama, 399 U.S. at 10.

198. *See* note 192 *supra*.

199. *See* notes 66-68 *supra* and accompanying text (although dealing with trials, the underlying premise should apply equally to pretrial proceedings). Publicity

Ascertaining the truth is an important role for the courts, and the public interest in the truth is present throughout a criminal proceeding.[200]

Access can also fulfill sociological functions at the pretrial stages. Confidence in the courts as a means of dispensing justice can hardly be encouraged when the public is unable to observe and reach its own conclusions.[201] In fact, closure could spawn the kind of "secret proceedings" which breed distrust.[202] Furthermore, the pretrial stages of a criminal prosecution can provide an initial outlet for the community reaction following the commission of a crime.[203] Access to these proceedings generates acceptance of the courts and the values they espouse.[204]

These public interests which justify a right of access to pretrial proceedings under the first amendment may conflict with a defendant's sixth amendment fair trial right. Suppression hearings present one such situation. In resolving this conflict at suppression hearings, the Supreme Court has emphasized the fair trial right of the defendant.[205] However, the Court has not examined this issue in terms of the peculiar benefits which are reinforced by access to suppression hearings.

Public Access to Exclusionary Rule Hearings

Exclusionary Rule hearings pose a conflict between the fair trial rights of a defendant and first amendment rights of the public. An open suppression hearing increases the risk of inadmissible evidence reaching prospective jurors and affecting their perspec-

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acts as a "testimonial safeguard, as a mechanism to encourage the parties, the witnesses, and the court to a strict conscientiousness in the performance of their duties and in providing a means whereby unknown witnesses may become known, [and is] just as important for the suppression hearing as [it is] for the full trial." Gannett Co., Inc. v. DePasquale, 443 U.S. at 434 (dissenting opinion).

200. Another aspect of the truth, unrelated to the prosecution of the defendant, involves the public right to know about official misconduct. *See* notes 222-25 *infra* and accompanying text.

201. *See* notes 69-73 *supra* and accompanying text.

202. *See* note 72 *supra*.

203. *See* notes 74-76 *supra* and accompanying text. Certainly public pretrial proceedings could serve a similar therapeutic function as public trials. "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' " Richmond Newspapers, Inc. v. Virginia, ___ U.S. at ___, 100 S. Ct. at 2825, and open pretrial hearings better provide that appearance than do closed proceedings.

204. *See* note 78 *supra*.

205. *See* Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979).

tives at the trial.[206] Also, the defendant may be subjected to adverse publicity arising from the pretrial proceedings.[207] On the other hand, the rationales of preserving judicial integrity, perpetuating public confidence and deterring official misconduct[208] are more readily justified when suppression hearings are open to the public.

One risk to the fair trial of a defendant resulting from open hearings concerns the publication of inadmissible prejudicial information. In *Jackson v. Denno*,[209] the Supreme Court held that a jury should not determine the voluntariness of a confession, but the defendant should have a hearing with a judicial ruling on the question. This is necessary because a lay jury cannot realize the problems requiring exclusion of "bad" confessions when corroborating evidence of the confessions' truth is available. Thus, a judge must determine the admissibility of the evidence, although not necessarily in the absence of the jury.[210]

When pretrial hearings are employed to answer questions of admissibility, open proceedings raise the spectre of potential jurors hearing the inadmissible evidence and using that knowledge in reaching a guilty verdict at trial. However, suppression motions are directed at questions of official misconduct, and not to the guilt or innocence of a defendant.[211] Since the substance of the evidence is irrelevant to this inquiry, the court should be able to exclude it as irrelevant, or prejudicial, during the pretrial hearing. This would avert the dangers of prejudicing potential jurors, while still permitting access to the judicial proceedings.

Besides the danger of prejudicial evidence being published, there is a related concern for adverse publicity which might be amplified by pretrial hearings. The alternatives which the Court has postulated to minimize the dangers of publicity at trial may be just as applicable to pretrial proceedings.[212] Yet closure has been held an

206. *See* notes 209-11 *infra* and accompanying text.

207. *See* notes 212-14 *infra* and accompanying text.

208. *See* notes 157-71 *supra* and accompanying text.

209. 378 U.S. 368 (1964).

210. *See* Pinto v. Pierce, 389 U.S. 31 (1967) (per curiam). In *Pinto*, the hearing on the voluntariness of a confession was held in the presence of the jury. However, the defense counsel, when asked, made no objection. Justice Fortas expressed reluctance for this procedure, sensing that the jury was not likely to be independent in assessing credibility once the judge ruled for admissibility based on the evidence of voluntariness.

211. Rogers v. Richmond, 365 U.S. at 543-44.

212. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. at 563-64; Sheppard v. Maxwell, 384 U.S. at 358-61. Some of these measures include: change of venue, postpone-

acceptable alternative.[213] Deferring the publication of prejudicial information disclosed at pretrial hearings until after the disposition of the defendant's case increases the chances for impanelling an impartial jury. Nevertheless, the court should assure itself that closure will be an effective remedy before granting such a motion.[214]

Although there are risks to the fair trial of a defendant, public access does offer some positive implications for fulfilling the purposes of the Exclusionary Rule. Preservation of judicial integrity implies more than the courts' own knowledge that the moral character of the courts is intact. Rather than reinforcing misconduct, the courts can disclaim any participation in unlawful acts which secure tainted evidence by excluding the evidence from the trial.[215] Public participation requires access to determine which courts respect the constitutional prohibitions protecting the people from unauthorized official misconduct, so that those courts may be preserved.[216] If the integrity of the courts is not apparent to the public, then acceptance of the courts will be less likely.

Related to the integrity of the courts is the necessity for the public to have confidence in the system. Open proceedings enhance trust, while secrecy creates distrust.[217] Public confidence demands assurances that the government will not be permitted to profit in the courts after overstepping the bounds of the law. Access contributes to making these assurances by allowing the public to see that unlawfully obtained evidence is excluded by the courts.[218] Cer-

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ment of the trial, careful *voir dire* of jurors, emphatic use of jury instructions to confine its decision to the evidence presented, insulating witnesses, and forbidding out of court statements on prejudicial matters by witnesses and participants. Sequestration is one of the few inapplicable methods, but its use is infrequent in any event.

213. Gannett Co., Inc. v. DePasquale, 443 U.S. at 379.

214. If the information disclosed at the hearing is already known to the public, closure will have little effect. The court would also have to determine the probable impact of the information on the public. *Cf.* note 44 *supra* (determining the basis for a "gag" order).

215. *See* notes 156-62 *supra* and accompanying text.

216. On the other hand, public reaction might be adverse to "liberal" judges who allow criminals to escape punishment because of legal loopholes. Even if this is the case, the courts should still strive to preserve their integrity as a matter of self-respect.

217. *See* note 72 *supra* and accompanying text.

218. *Accord,* United States v. Calandra, 414 U.S. at 355 (Brennan, J., dissenting, Douglas and Marshall, JJ., joining).

> The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its

tainly confidence in the law, and the system, would deteriorate if officials were able to disregard the rights of the people and use the fruits of misconduct in judicial proceedings.[219]

Both judicial integrity and public confidence are basically normative rationales for the Rule.[220] Misconduct can have a disturbing effect on the public. The Rule seeks to repair that effect by demonstrating to the public that the character of the courts remains exemplary in refusing to admit unlawfully seized evidence. In excluding evidence, the courts are also stressing the importance of the constitutional rights which were violated. Knowledge of the standards applied by the courts will instill a sense of the values which the Exclusionary Rule protects.[221]

Public knowledge of misconduct also serves to advance the goal of preventing that misconduct. In *Wolf v. Colorado*,[222] the Court acknowledged public reaction as a potent force in deterring unlawful conduct. Obviously, the public cannot react to misconduct unless the means are available to discover the misconduct. Suppression hearings may be the first exposure of unlawful official acts to public scrutiny. Thus, denying access to those hearings detracts from the

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lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.

Id. at 357.

219. *See* Spano v. New York, 360 U.S. 315 (1959). There is a "deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Id.* at 320-21. The use of the Rule reflects this feeling in the courts.

220. *See* notes 156-67 *supra* and accompanying text.

221. These values include: personal security and privacy, sanctity of the home, trust in the courts as a source of protection from government abuse of power, belief in our system of laws which limits the extent of power of the government, and others not listed here. However, this notion of values protected by the Rule is more reminiscent of the rationales of judicial integrity and confidence than deterrence.

222. 338 U.S. 25 (1949).

> There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under state or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

Id. at 32-33. Although suggesting that this lack of deterrence in state courts was a reason for rejecting the Rule's extension to state proceedings, the Court did not mention the deterrence value when applying the Rule to all court proceedings in Mapp v. Ohio, 367 U.S. 643 (1961).

public right to know about those acts, and hinders public participation in preventing misconduct. Prosecutors and police officials would certainly seek to prevent that which results in exclusion of evidence, but are likely to be more responsive to the public pressures objecting to the misconduct which caused the exclusion.[223]

In addition to the public interest in preventing misconduct, the deterrence rationale also implicates the public interest in the arrest and conviction of criminals.[224] Misconduct can result in incomplete records, with truthful evidence being excluded.[225] The public has an interest in achieving a complete and truthful record at trial, and thus has a right to know if the record is deficient in any respect because of official misconduct. Only then can the public take the necessary steps to prevent misconduct and insure that prosecutions are based on all relevant evidence. Some of the exceptions which the Court has found to the application of the Rule can be rationalized by the lack of public participation in preventing the misconduct. For example, grand jury proceedings are not open to the public, so there can be no public knowledge of misconduct that could assist the deterrent rationale. The Court, in rejecting the use of the Rule in those proceedings, recognized its minimal deterrent value.[226] Delayed application of the Rule also has only marginal deterrence value.[227] Because state courts have determined that there was no misconduct, public reaction to a federal court finding of misconduct would probably be diluted. The public is less likely to object to officials' unlawful acts when the courts disagree on whether there were any unlawful acts. Finally, the public is less likely to react to misconduct when the officer did not have reasonable knowledge of the constitutional violation.[228] If the officer acted in a reasonable manner, it would be unreasonable to expect the public to chastise his conduct.

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223. "Any interest on the part of the prosecution in hiding police or prosecutorical misconduct or ineptitude may coincide with the defendant's desire to keep the proceedings private. . . ." Gannett Co., Inc. v. DePasquale, 443 U.S. at 428 (dissenting opinion). Whether the public reacts to the misconduct itself, or to a belief that the defendant has benefitted from a legal technicality, the end result will be close scrutiny of the participants by the public.

224. *See* notes 80-81 *supra* and accompanying text.

225. *See* notes 136-41 *supra* and accompanying text.

226. United States v. Calandra, 414 U.S. 338 (1974). "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 348.

227. *See* Stone v. Powell, 428 U.S. 465 (1976) (rejecting the Rule in habeas corpus petitions to federal courts after full hearings in state courts). Additionally, passage of time makes it more difficult to identify the conduct as well as the actors.

228. *See* United States v. Peltier, 422 U.S. 531 (1975); Brown v. Illinois, 422 U.S. at 610-12 (Powell, J., concurring). Powell saw greater deterrent effects when

Summarizing the need for access to Exclusionary Rule hearings, several first amendment concerns can be distinguished.[229] The right to know and participate in government is most strongly implicated by the deterrent rationale for the Rule. Prevention of misconduct demands public, as well as judicial, condemnation of that misconduct. Sociological functions of access are more closely related to the normative rationales of the Rule. Public awareness of integrity is necessary to build confidence in the system. Additionally, the constitutionally protected rights carry greater weight when the public can observe how the Rule effectuates those guarantees. Without access, the functions of the Rule would be debilitated. Judicial integrity would be largely unperceived, and confidence cannot develop in what is unknown. The public interest in participation would also be repudiated, as well as the deterrent effects which the public can provide. These interests are not directed towards the defendant, but towards the officials whose conduct creates a need for the Exclusionary Rule.

CONCLUSION

Traditionally, judicial proceedings have been open to the public. However, the Supreme Court has begun only recently to articulate a constitutional basis for that tradition. The sixth amendment public trial guarantee may suggest a public right to open courts, but it remains a constitutional safeguard for the defendant rather than an independent right of the public. A constitutional right of access to trials does arise under the first amendment. Although the public right of access is now explicit for the trial stage of a judicial proceeding, pretrial stages are not yet included.

Closure of a suppression hearing has been justified to protect the fair trial right of a defendant. In so doing, the Court relied on the sixth amendment, which is primarily for the protection of the

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abuses were flagrant rather than minor. Public reaction is more likely to arise in those cases of egregious misconduct, than those in which only the courts can determine the violation.

229. The Court briefly addressed these concerns in Gannett Co., Inc. v. DePasquale, 443 U.S. at 391-93. However, such a right of access was deemed adequately protected by the opportunity to study the transcript of the hearing. *Id.* at 393. While this may be one means to harmonize the conflicts between defendant and public, some questions must be answered. One question is whether the transcript has the same impact or informative value as would the acquisition of first-hand knowledge. Another is whether the *fact* of closure could "cause a reaction that the system at best has failed and at worst has been corrupted." Richmond Newspapers, Inc. v. Virginia, ____ U.S. at ____, 100 S. Ct. at 2825.

defendant and not conducive to independent public rights. In spite of the legitimate interests of a defendant in preserving his fair trial, the Court should still carefully consider the public interests present at pretrial stages. Unnecessary closures are essentially a denial of any public right of access to pretrial proceedings.

While the Supreme Court has not yet acknowledged a first amendment public access right, public interests in open courts demand that such a right be recognized for judicial proceedings. The public certainly has a right to know what transpires in the courts. With this knowledge, the public can more effectively exercise the right of participation in government, and insure that its interests are protected by the courts. Although suppression hearings may present potent reasons for closure to protect a defendant, public interests also exist which are opposed to closure.

Exclusionary Rule hearings inquire into the acquisition of evidence, and determine the admissibility of the evidence. Exclusion of unlawfully obtained evidence should instill public confidence in the courts as protectors of constitutional liberties, and preserve the integrity of the judiciary. Neither of these can be fulfilled without public knowledge of the proceedings. Critics of the Rule who do not perceive any societal benefit overlook these important rationales for the Rule.

Another rationale for the Exclusionary Rule, deterrence of official misconduct, implies a need for public knowledge and participation to compel respect for the constitutional rights of all people. Secret proceedings, such as grand juries, fail to expose misconduct to the public. Denying access thus serves to limit the potential for the Rule as a deterrent to constitutional violations.

In conclusion, the Supreme Court should recognize that the public right of access to trials must apply equally to all criminal proceedings. Public interests are ingrained in pretrial suppression hearings just as they are rooted in the trial itself. The effects of closures on the public right of participation and public confidence in the courts must be analyzed when restrictions on access are at issue.

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