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CONSTITUTIONAL LAW—FREE PRESS/FAIR TRIAL—THE PUBLIC HAS A FIRST AMENDMENT RIGHT OF ACCESS TO PRETRIAL SUPPRESSION, DUE PROCESS, AND ENTRAPMENT HEARINGS

United States v. Criden (1982)

On July 18, 1980, a newspaper reporter observed witnesses entering judicial chambers and, upon inquiry, was informed that testimony in connection with the government's "ABSCAM" prosecution[1] was being taken *in camera*.[2] The reporter requested access to the hearing in chambers but his request was denied due to the confidential nature of the subject matter.[3] On July 21, Philadelphia Newspapers, Inc. (PN), a major newspaper publisher in the Philadelphia area, filed a motion for immediate access to the transcript of the July 18 hearing.[4] The District Court for the Eastern District of Pennsylvania denied PN's motion, stating that the hearing involved "matters, the pretrial disclosure of which would inevitably impair or destroy the rights of both the Government and the defendant to a fair trial before an

1. United States v. Criden, 675 F.2d 550, 552 (3d Cir. 1982). The government operation known as "ABSCAM" was conceived by the FBI in order "to create opportunities for illicit conduct by public officials predisposed to political corruption." United States v. Jannotti, 673 F.2d 578, 581 (3d Cir.), *cert. denied*, 102 S. Ct. 2906 (1982). Philadelphia City Councilmen Harry P. Jannotti and George X. Schwartz along with Louis Johanson, and Howard Criden, a Philadelphia attorney, were indicted by a federal grand jury as a result of the FBI's ABSCAM undercover operations. *Id.* "ABSCAM" is derived from the first two letters of "Abdul Enterprises Ltd.", the fictitious business the FBI used to implement their plan, and the word "SCAM." United States v. Myers, 635 F.2d 932, 934 (2d Cir.), *cert. denied*, 101 S. Ct. 364 (1980). The FBI videotaped the defendants accepting money from FBI agents posing as employees of a fictious international corporation whose principal, a fictitious Arab Sheik, was interested in building a hotel in Philadelphia. *See* 673 F.2d at 598. The government alleged that the payments accepted were bribes given in exchange for the defendants' future exercise of influence over matters that might arise before the City Council. *Id.* at 596 n.100.

2. 675 F.2d at 552. Three of the ABSCAM defendants had filed motions to suppress statements they made to FBI agents. *Id.* Accompanying defendant Criden's motion was a letter requesting that the district court seal and impound his motion and consider it entirely *in camera*. *Id.* The Government responded by proposing the document be sealed pursuant to local court rule 4(c), which provides for the sealing of information provided to the court relating to matters or proceedings before the grand jury. Neither the motion to suppress, nor the *Criden* correspondence, were noted on the docket until August 1981. *Id.* The closed evidentiary hearing had not been announced in open court, and no prior notice had been given to the public. *Id.*

3. *Id.*

4. *Id.* PN is a conglomerate of Philadelphia area newspapers, including the Philadelphia Inquirer and the Daily News, owned by Knight-Ridder Newspapers, Inc. PN was granted intervenor status with respect to the issues relating to the closure of the hearings. *Id.* at 552 & n.2.

impartial tribunal."[5]

On September 24, 1980, hearings were held involving the "ABSCAM" defendants' pretrial motions for dismissal of indictments on the grounds of government overreaching and entrapment.[6] At the conclusion of a sidebar conference,[7] the district court announced that "defendants who have not yet been tried or who await further trial are entitled to be heard in chambers regarding the substance of the case, and therefore this hearing will be closed to the public and the press."[8] Upon receiving a request to open the evidentiary hearing, the court invited argument from any interested person.[9] Counsel for PN opposed closure,[10] but the court denied the motion for access and filed a written order closing the proceeding.[11]

PN appealed[12] to the United States Court of Appeals for the Third Circuit contending that the district court's closure orders abridged the public's first amendment right of access to pretrial proceedings in criminal cases.[13] The Third Circuit vacated the district court's orders of July 22 and

5. *Id.* at 552.

6. *Id.* Although the trials of defendants Schwartz and Jannotti were severed from those of Criden and Johanson, the district court did not hear the motions to dismiss until after the trial of Schwartz and Jannotti. *Id.* At the time of the hearing on the motions, defendants Criden and Johanson had not been tried. The defendants proposed to call Criden as a witness, together with ABSCAM defendant Angelo Erichetti who was awaiting trial in another federal district court. *Id.* at 553.

7. *Id.* at 553. During the side-bar conference, counsel for Criden moved that Criden's testimony be taken *in camera*. *Id.*

8. *Id.*

9. *Id.* Criden argued that the hearing was in the nature of a pretrial hearing and that the information obtained, if publicized, would impair Criden's right to fair trial. *Id.* The court found that this argument established a prima facie case for closing the hearing. *Id.*

10. *Id.* Counsel for PN argued that the hearings to be conducted were no longer simple pretrial proceedings, and incorporated by reference the argument made in support of PN's July 21 motion to intervene. *Id.*

11. *Id.*

12. *Id.* at 553 n.4. At the time of the appeal, defendants Criden, Jannotti, and Schwartz no longer opposed the release of the sealed materials. *Id.* Although defendant Johanson did not participate in the appeal, he maintained his position that the materials should remain sealed. *Id.* Because informed decisionmaking mandates that the position adverse to that of PN be fully and vigorously advanced, the Third Circuit appointed amici curiae to brief and argue a response to PN's position. *Id.*

13. *Id.* at 554. Specifically, PN argued that the public's first amendment right of access to pretrial criminal proceedings must be enforced absent "clear and convincing evidence that shows a substantial probability" that the defendant's right to a fair trial will be irreparably damaged by a public proceeding, that closure would be effective in protecting that right, and that alternatives to closure would be ineffective. *Id.* PN contended that the district court erred in failing to take evidence on these issues prior to closure and in failing to articulate the reasons for closure in writing. *Id.* PN further contended that the district court erred in closing the hearing without providing the public with notice and an opportunity to be heard on the issue of closure. *Id.*

Conversely, amici curiae argued that the district court properly exercised its discretion in closing the pretrial hearing and satisfied all of the procedural requirements for such an order. *Id.* Amici curiae contended that there was a reasonable likelihood

September 24, 1980,[14] *holding*[15] that the public has a first amendment right of access to pretrial suppression, due process, and entrapment hearings; that motions for closure of such hearings must be posted on the docket to give notice to the public; and that a district court, before closing a pretrial hearing, must consider alternatives to closure and state on the record its reason for rejecting them. *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982).

Criminal trials in the United States have historically been open to the public.[16] Allowing public access to trials serves to protect strong societal interests in the proper functioning of the judicial system.[17] Although the American system is premised upon the proposition that the adversarial liti-

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that dissemination of information disclosed at the pretrial hearing would impair the defendant's right to a fair trial and that reasonable alternatives to closure would not adequately protect that right. Amici curiae also argued that the limitations imposed by the district court were narrowly tailored to protect that right. *Id.* Amici curiae further asserted that the procedural requirements for closure were met by the court in (1) assuring that a complete record was made of proceedings leading to the decision to close the hearings; (2) articulating for the record the reasons for closure; and (3) assuring that a complete record was made of evidentiary proceedings conducted outside the presence of the public. *Id.*

14. Transcripts of both the July 18 and September 24 hearings were made available to the public and press when counsel for the government included them in its appendix on appeal from an order granting Jannotti and Schwartz due process motions to dismiss the indictments. Raising, *sua sponte*, that the cases were moot, the Third Circuit accepted jurisdiction under the "capable of repetition, yet evading review" standard. *Id.* at 553 (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). Under that standard, the *Criden* court concluded that the order closing a pretrial hearing was too short in duration to permit full review, and that it was reasonable to expect that PN would be subjected to similar closure orders entered by the district courts in the Third Circuit.

15. The case was heard by Judge Van Dusen, Chief Judge Seitz and Judge Gibbons. Chief Judge Seitz wrote the opinion for an unanimous panel.

16. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 419 (1979) (Blackmun, J., concurring in part and dissenting in part). A study of the English common law heritage reveals that the tradition of public proceedings evolved as an "inescapable concomitant of trial by jury . . . and that the practice at common law was to conduct all criminal proceedings in public." *Id.* Early Anglo-Saxon criminal proceedings, the forerunners to the modern jury trials, required attendance by freemen. *Id.* Despite the subsequent relaxation of the attendance requirement, English trials remained open to all those who chose to attend. *Id.* at 423. The English tradition of public trials was adopted by the American Colonists and has remained the prevalant practice throughout American history. *Id.* at 424-25.

The accessibility of trials has been implicitly and explicitly acknowledged by the Supreme Court. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941). In *Bridges*, editorial publishers were held in contempt of court for publishing editorials calling for jail sentences, rather than probation, for convicted union enforcers awaiting sentencing. *Id.* at 271-72. The Court noted that "the very word 'trial' connotes decisions on the evidence and arguments properly advanced in *open* court." *Id.* at 271 (emphasis added). *See also* Pennekamp v. Florida, 328 U.S. 331 (1946). In *Pennekamp*, editorial publishers were held in contempt of court for publishing editorials and cartoons which unfairly ridiculed and attacked the integrity of judges, and commented on pending litigation. *Id.* at 336-40. In a concurring opinion, Justice Frankfurter stated that "trials must be public and the public have a deep interest in trials." *Id.* at 361 (Frankfurter, J., concurring).

17. *See, e.g.*, Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979).

gants will protect this public interest,[18] it is also thought that public proceedings improve the overall quality of the process and thus serve to promote the proper administration of justice.[19] However, public access to criminal trials may conflict with the established constitutional right of a defendant to be tried by an impartial jury[20] and the public's strong interest in preserving impartial jury trials.[21] It is well-recognized that publicity has the potential to bias a jury and thus violate a defendant's sixth amendment right to a fair trial.[22] For example, in *Irvin v. Dowd*,[23] the United States Supreme Court, recognizing the defendant's right to an impartial jury as one of constitutional stature,[24] found that a murder conviction violated due process where widespread inflammatory publicity had saturated the county, making it impossible to assemble an impartial jury.[25]

Subsequently, in *Sheppard v. Maxwell*,[26] the Supreme Court reversed a criminal conviction on the ground that extensive publicity and a "carnival

18. *Id.*

19. *Id.* "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system." *Id.* (citing Estes v. Texas, 381 U.S. 532, 583 (1965)).

20. The sixth amendment provides in pertinent part: "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 . . . ." U.S. CONST. amend. VI. The sixth amendment has been held applicable to the states through the fourteenth amendment. *See In re* Murchison, 349 U.S. 133, 136 (1955). *See also* Irvin v. Dowd, 366 U.S. 717, 722 (1961). (The accused's right to a jury trial guarantees a fair trial by a panel of impartial, "indifferent" jurors).

21. Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979). "Similarly, the public has an interest in having a criminal case heard by a jury, an interest distinct from the defendant's interest in being tried by a jury of his peers." *Id.* (citing Patton v. United States, 281 U.S. 276, 312 (1930)).

22. *See id.*; Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Marshall v. United States, 360 U.S. 310 (1959). *See also* Thompson v. City of Louisville, 362 U.S. 199, 206 (1960) (A juror's verdict must be based upon the evidence developed at trial); Patterson v. Colorado, 205 U.S. 454, 462 (1907) ("the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.") (Holmes, J.).

23. 366 U.S. 717 (1961). In *Irvin*, the Supreme Court vacated a death penalty conviction stating that the defendant's right to a fair trial was violated as a result of widespread and inflammatory publicity. *Id.* at 728.

24. *Id.* The *Irvin* Court granted the defendant a new trial. Prior to *Irvin*, the Supreme Court had relied on its supervisory power to grant new trials where the accused's right to an impartial jury was violated through dissemination of prejudicial publicity. *See, e.g.*, Marshall v. United States, 360 U.S. 310, 313 (1959).

25. 366 U.S. at 725-28. From a panel of 430 prospective jurors, 268 were excused for having fixed opinions on defendant's guilt; 102 had formed some opinion. Of the 12 ultimately selected, eight thought the defendant was guilty before his trial. *Id.* at 727.

26. 384 U.S. 333 (1966). In *Sheppard*, the Court held that a petition for *habeas corpus* should be granted due to the prejudicial effects of pretrial publicity and a sensationalized trial. *Id.* at 363.

atmosphere" in the courtroom eliminated any possibility of a fair trial.[27] The Court found that a trial judge has an affirmative duty to protect the accused and the fairness of the trial from "prejudicial outside interferences."[28] Accordingly, the Court suggested several remedial measures, including regulating the presence and conduct of the press in the courtroom, insulating witnesses, and jury sequestration.[29] While acknowledging the importance of open proceedings,[30] the *Sheppard* Court emphasized a preference for preventing prejudice at its inception as opposed to invoking remedial measures such as retrials and reversals.[31]

Recently, in *Richmond Newspapers, Inc. v. Virginia*,[32] the Supreme Court, in a plurality decision, held that the social interest in open trials is protected by the first amendment guarantees of freedom of speech and of the press and stated that "[a]bsent an overriding interest articulated in [the] findings, the

27. *Id.* at 358. The defendant's murder trial received an excessive amount of publicity. During the trial and pretrial period inflammatory publicity made the case notorious. The Court found that much of the published information was false and never presented at trial; defendant was examined for over five hours without counsel during a three-day inquest conducted before hundreds of spectators and broadcast live; the media flooded the courtroom and twenty reporters, seated within the bar in close proximity to the jury and counsel, frequently caused disruptions; and jurors were not sequestered and were allowed to make inadequately supervised phone calls. *Id.* at 335-49.

28. *Id.* at 362-63.

29. *Id.* at 358-59, 363.

30. *Id.* at 350. The Court summarized the vital role of the press in open proceedings:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial process to extensive public scrutiny and criticism.

Id.

31. *Id.* at 363. As a result of *Sheppard*, trial judges became sensitive to the criminal defendant's vulnerability to prejudicial impact, and issued a flood of restrictive orders in an effort to avoid reversals. *See* Landau, *Fair Trial and Free Press: A Due Process Proposal—The Challenge of the Communications Media*, 62 A.B.A.J. 55, 57 (1976) (Landau noted 174 restrictive orders issued between 1967 and 1975, 61 of which involved closure of court proceedings or records). *See also* Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972) (closure of a criminal trial resulted in reversal on appeal). *See generally* Fenner & Koley, *The Rights of the Press and the Closed Court Criminal Proceeding*, 57 NEB. L. REV. 442 (1978); Stephenson, *Fair Trial-Free Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39 (1979); Comment, *Gagging the Press in Criminal Trials*, 10 HARV. C.R.—C.L. L. REV. 608, 618-51 (1975).

32. 448 U.S. 555 (1980). In *Richmond Newspapers*, the defendant's conviction of second-degree murder was reversed due to improperly admitted evidence. The second trial ended in a mistrial when a juror asked to be excused and no alternate was available. The third trial also resulted in a mistrial when a prospective juror who had read about the previous trials told other prospective jurors about the case. The Virginia Supreme Court closed the fourth trial on motion of defendant's counsel. *Id.* at 559-62. For a discussion of *Richmond Newspapers*, see Note, *The Public and Press Have a Right of Access to Criminal Trials Absent an Overriding Interest Articulated in Findings*, 26 VILL. L. REV. 183 (1980).

trial of a criminal case must be open to the public."[33] Writing for the plurality, Chief Justice Burger noted that the first amendment "assur[ed] freedom of communication on matters relating to the functioning of the government,"[34] and that the explicit guarantees to publish and speak on trial matters would lose their meaning if access to trials could be arbitrarily denied.[35] Justice Brennan, in a concurring opinion, noted that open trials serve as "bulwarks of our free and democratic government,"[36] and that the first amendment guarantees of free speech and press, as augmented by the right of assembly, require public access to trials.[37]

While virtually all the states and the federal government guarantee the right to a public trial,[38] there is some doubt, both historically[39] and constitutionally, whether the traditional openness of trials extends to pretrial pro-

33. 448 U.S. at 581. The Court acknowledged that the Constitution did not expressly guarantee a right of public access to criminal trials, but asserted that unarticulated rights may be implicit in enumerated guarantees. The Court noted that the rights to privacy and travel, the right of association, and the rights to be presumed innocent until proven guilty and to be judged by a standard of proof beyond a reasonable doubt in criminal trials are all unarticulated rights which share constitutional protection with express guarantees. *Id.* at 579-80 & n.16. *See generally* Goodpastor, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

34. 448 U.S. at 575-76. The *Richmond* Court stated that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." *Id.* at 575.

35. *Id.* at 576-77. The Court noted that the first amendment guarantee of freedom of the press entails protecting to a certain degree the freedom to listen and receive information, and the right to gather information. *Id.* at 576. The Court found that without these protections, freedom of the press could be rendered useless. *Id.* The *Richmond Newspapers* Court relied heavily on the history of open trials and concluded that the presumption of openness is inherent in the nature of our criminal justice system. *Id.* at 569-73.

36. *Id.* at 592 (Brennan, J., concurring). Justice Brennan traced the practice of open trials to early English common law. *Id.* at 589-90 (Brennan, J., concurring). He found that the first amendment serves a "structural role . . . in securing and fostering our republican system of government." *Id.* at 587 (Brennan, J., concurring). Justice Brennan found the right of access to trials implicit in this structural role since the structural role involved informed and uninhibited debate on public issues. *Id.*

37. *Id.*

38. Although all states had recognized the right to a public trial prior to *Richmond Newspapers*, not all states constitutionally required that criminal trials be open. Some states relied upon statutory provisions which implicitly or explicitly recognize the right, while others adopted the right as it developed at common law. For a discussion of the various state court derivations of the right to a public trial, see BeVier, *Like Mackerel In The Moonlight: Some Reflections On* Richmond Newspapers, 10 HOFSTRA L. REV. 311 (1982); Note, *The Right To A Public Trial in Criminal Cases*, 41 N.Y.U.L. REV. 1138, 1140 (1966). *See also In re* Oliver, 333 U.S. 257, 267-68 (1948).

39. *See* Gannet Co. v. DePasquale, 443 U.S. 368, 387-91 (1979). *See also* United States v. Criden, 675 F.2d 550, 555 (1982). The *Criden* court noted that "[w]e do not think that historical analysis is relevant in determining whether there is a first amendment right of access to pretrial criminal proceedings. We recognize that, at common law, the public apparently had no right to attend pretrial criminal proceedings." However, the *Criden* court went on to note that "there was no counterpart at common law to the modern suppression hearing." *Id.* at 555 (citing Gannett Co. v.

ceedings.[40] Historically, most states continued the English tradition of closed pretrial proceedings.[41] However, recently some courts have ignored tradition and recognized a constitutional right of the public and press to attend such hearings, but have differed on whether the right is founded upon the first or sixth amendment.[42]

For example, in *United States v. Cianfrani*[43] the Third Circuit held that the sixth amendment right to a speedy and public trial guaranteed the press and the public the right to attend pretrial hearings.[44] The *Cianfrani* court

DePasquale, 443 U.S. at 437 (Blackmun, J., concurring in part and dissenting in part)).

40. *See* Commonwealth v. Harmon, 469 Pa. 490, 366 A.2d 895 (1976) (trials and pretrial proceedings are by definition two distinguishable events). *See also* Note, *Constitutional Law—Free Press/Fair Trial—Pretrial Suppression Hearing May Not Be Closed to Public When Other Available Procedures Will Adequately Protect Defendant's Right to a Fair Trial*, 86 DICK. L. REV. 177 (1981); Note, *The Right To Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 (1978); Note, *The* Richmond Newspaper *Case: Creation of a First Amendment Right of Access*, 14 U.C.D. L. REV. 1081 (1981); Comment, *Access To Judicial Proceedings: After* Gannett *and* Richmond, 12 TEX. TECH L. REV. 663 (1981).

41. Gannett Co. v. DePasquale, 443 U.S. 368, 389 (1979). "It must, of course, be remembered, that the principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefatory stages of the proceedings." *Id.* (quoting E. JENKS, THE BOOK OF ENGLISH LAW 75 (6th ed. 1967)); The "preliminary examination of accused persons has gradually assumed a very judicial form. . . . The place in which it is held is indeed no 'open court,' the public can be excluded if the magistrate thinks that the ends of justice will thus best be answered. . . ." *Id.* (quoting F. Maitland, JUSTICE AND POLICE 129 (1885)). The *Gannett* Court also noted that "Under English common law, the public had no right to attend pretrial proceedings." *Id.* at 390. The original Field Code "provided that pretrial hearings should be closed to the public 'upon the request of a defendant.' " *Id.* (quoting the Commissioners on Practice and Pleadings, Code of Criminal Procedure, § 202 (Final Report 1850)). All eight states that continue to use all or part of the Field Code have retained the provision regarding closed pretrial hearings. *Id.* at 390-91.

42. *See, e.g.*, United States v. Cianfrani, 573 F.2d 835 (3d Cir. 1978) (recognizing a sixth amendment right of access to preliminary hearings); United States v. Edwards, 430 A.2d 1321 (D.C. 1981) (recognizing a first amendment right of access to pretrial detention hearings); State *ex rel.* Dayton Newspaper, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976) (recognizing a limited first amendment right of access to pretrial suppression hearings); State v. McIntosh, 450 So. 2d 904 (Fla. 1975) (recognizing a first amendment right of access to all judicial proceedings).

43. 573 F.2d 835 (3d Cir. 1978). In *Cianfrani*, the Third Circuit reviewed the constitutionality of a closure order entered by the trial court which excluded the public and press from a pretrial suppression hearing and sealed the transcript of that proceeding. *Id.* at 843. In this prosecution for political corruption, the defendant filed a motion to suppress tape-recorded evidence allegedly obtained through entrapment. *Id.* at 842. The defendant also requested that all proceedings pertaining to the recordings be held *in camera* and that the resultant record be sealed. *Id.* at 843. The district court notified members of the press of the motion for closure and afforded them the opportunity to oppose defendant's motion. *Id.* After hearing full arguments the district court closed the proceeding and record, relying on the perceived strong congressional intent to protect the privacy of communications underlying Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *Id.* (citing 18 U.S.C. §§ 2510-2520 (1976)).

44. *Id.* at 853-54. The *Cianfrani* court stated that "the public trial provision of

reasoned that the public,[45] as well as the accused, had a compelling interest in keeping judicial proceedings[46] open in order to ensure the fair and efficient administration of justice.[47] Although deciding the issue on sixth

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the sixth amendment serves 'not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake.' " *Id.* (quoting Lewis v. Peyton, 352 F.2d 791, 792 (4th Cir. 1965)). The Third Circuit, recognizing that the public's right of access was limited, held that portions of proceedings could be closed, but only after full and fair consideration of the important public interest the sixth amendment seeks to protect. *Id.* at 854. For a discussion of the public policies the *Cianfrani* court found to be served by open proceedings, see note 47 *infra*.

45. 573 F.2d at 847-54. The Third Circuit noted that the issue of whether the sixth amendment affords a right of access to the press and public was being hotly contested. *Id.* at 851-54. Concluding that the public trial clause is for the protection of the public as well as of the accused, the court stated,

> [W]e believe that any deviation from the constitutionally established norm of open proceedings implicates important societal interests. The policies identified by the courts and commentators as underlying the public trial provisions of the sixth amendment serve important societal interests that are often separate from—and in some cases antagonistic to—the interests of a defendant in a particular criminal case. Because these larger interests underlying the sixth amendment are "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business" . . . the decision to exclude the public from court should not be made without consideration of those interests.

Id. at 852 (citations omitted).

For decisions holding that the sixth amendment right belongs to the public, in addition to the defendant, see United States v. Clark, 475 F.2d 240 (2d Cir. 1973); Lewis v. Peyton, 352 F.2d 791 (4th Cir. 1965); United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971); United States *ex rel.* Mayberry v. Yeager, 321 F. Supp. 199 (D.N.J. 1971); United States v. American Radiator & Standard Sanitary Corp., 274 F. Supp. 790 (W.D. Pa.), *rev'd on other grounds*, 388 F.2d 201 (3d Cir. 1967), *cert. denied*, 390 U.S. 922 (1968). *But see* Estes v. Texas, 381 U.S. 532 (1965) (the right to a public trial belongs to the accused and not the public); United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949), *cert. denied*, 338 U.S. 868 (1949) (the right to a public trial was intended to protect the accused and the public has no cognizable interest when the accused waives his right).

46. 573 F.2d at 848. The Third Circuit noted that "the sixth amendment itself guarantees only an open 'trial,' " and that the issue of whether "trial" includes suppression hearings for sixth amendment purposes had not been decided by the Supreme Court. *Id.* Recognizing that there were conflicting views in the lower courts, the Third Circuit concluded that the pretrial suppression hearing at issue was subject to the public trial guarantee of the sixth amendment. *Id.* at 848-50. *See also* United States v. Clark, 475 F.2d 240 (2d Cir. 1973) (the public trial guarantee should extend to pretrial suppression hearings); United States *ex rel.* Bennett v. Rundle, 419 F.2d 599 (3d Cir. 1969) (hearings to determine admissibility of evidence are sufficiently similar to a trial that the public should not be excluded from the courtroom); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) (the public trial guarantee should attach to pretrial suppression hearings since they are often the critical and only stage of the criminal process).

47. 573 F.2d 850-53. The Third Circuit identified four societal interests to justify granting the public and press a sixth amendment right of access to preliminary hearings. *Id.* First, open proceedings protect against perjury and afford unknown witnesses the opportunity to come forward and testify. *Id.* at 852-53. Second, open proceedings help our judicial system preserve its "appearance of justice" by revealing the basis upon which judicial determinations are made. *Id.* at 853. Third, public

amendment grounds, the Third Circuit briefly addressed the first amendment argument, stating that confined, temporary, and strictly regulated limits on access to pretrial hearings do not violate the first amendment.[48]

Subsequently, in *Gannett Co. v. DePasquale*,[49] the Supreme Court considered the constitutionality of an order closing a pretrial suppression hearing.[50] The *Gannett* Court implicitly overruled *Cianfrani*,[51] in holding that the sixth amendment guarantee of a public trial[52] is personal to the accused and does not guarantee any right of access in the press or the public.[53] The *Gannett* majority expressly reserved the question of whether the first amendment guarantees any right of access to pretrial hearings.[54]

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proceedings provide for a check on judicial abuse by subjecting the judiciary to public scrutiny. *Id.* Fourth, public proceedings foster public awareness by educating citizens to police misconduct and thus increase the probability that ccercive tactics and infringements on constitutional rights will be recognized and reported. *Id.*

48. *Id.* at 861.

49. 443 U.S. 368 (1979).

50. In *Gannett*, the defendant in a highly publicized murder trial moved to exclude the press from a pretrial suppression hearing. *Id.* at 375. The Court held that the sixth amendment right to a public trial is personal to the accused and does not afford a right of access to the press or public. *Id.* at 379-80, 391. For a discussion of *Gannett*, see Comment, *Public Access to Pretrial Criminal Hearings: The Use of Closure Orders After* Gannett v. DePasquale, 44 ALB. L. REV. 455 (1980).

51. *Id.* at 382 n.9. *See also* United States v. Criden, 675 F.2d 550 (1982).

52. The *Gannett* decision resulted in a considerable amount of confusion. The opinion was delivered by Justice Stewart who seemed to use the words "trial" and "pre-trial" interchangeably. *Id.* at 370-94. Justice Rehnquist, in a separate concurrence, stated that the decision covered trials as well as pretrial hearings. *Id.* at 404. On the other hand, Chief Justice Burger emphatically stressed that *Gannett* applied solely to pretrial hearings. *Id.* at 394. Newspaper articles assailed the decision as granting judges "nearly unlimited discretion to close their courtrooms whenever the defense and prosecution agree." N.Y. Times, July 4, 1979, at A8, col. 4. An editorial criticized the Court for "endors[ing] secrecy in language broad enough to justify its use not only in a pretrial context but even at a formal trial." N.Y. Times, July 5, 1979, at A16, col. 1. One commentator accused the court of "cavalier" treatment of the closure issue. Goodale, Gannett *Means What It Says: But Who Know What It Says?*, NAT'L LAW J., October 15, 1979, at 20.

Several justices made public statements in response to the mounting criticism of *Gannett*. Justice Stevens, speaking at the University of Arizona College of Law, declared that no reason existed for exclusion of the public from proceedings attended by a jury. N.Y. Times, Sept. 9, 1979, at A41, col. 1. Justice Blackmun, who wrote the *Gannett* dissent, addressed a group of federal judges and categorized the decision as "outrageous," stating that the opinion had to be read as sanctioning the closure of trials. NEWS MEDIA AND THE LAW, Nov.-Dec. 1979, at 6. Chief Justice Burger stressed that *Gannett* applied only to pretrial hearings and that trial judges using it as authority for closing trials were misreading the decision. N.Y. Times, Aug. 18, 1979, at A18, col. 1. Several commentators noted the novelty of the widespread public comment and questioned its implication. *See The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 65 n.32 (1979) (classifying the public comments as "wholly unprecedented").

53. 443 U.S. at 379-80. The *Gannett* Court stated that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused." *Id.* (citing Faretta v. California, 422 U.S. 806, 848 (1975)).

54. *Id.* at 392. The Court stated that it need not decide "in the abstract"

Although the Supreme Court has not yet decided whether a first amendment right of access to pretrial hearings exists, in *Nebraska Press Association v. Stuart*,[55] the Court held that the first amendment protects the press from prior restraints on publishing information gathered at open pretrial proceedings.[56] The *Nebraska Press* Court reemphasized the vital role of the press of providing a check on the proper functioning and integrity of judicial proceedings[57] and reversed a "gag order" which prohibited the press from publishing information obtained at an open pretrial hearing.[58] The Court observed that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights,"[59] but cautioned that the first amendment did not grant the press absolute rights.[60] It

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whether there was a first amendment right of access to pretrial suppression hearings. *Id.* The Court went on to say that assuming, *arguendo*, that such a right did exist, it had not been violated by the trial judge. *Id.* It has been suggested that the Court gave far too little attention to the first amendment issue. Keefe, *The Boner Called* Gannett, 66 A.B.A. J. 227, 228 (1980). Justice Powell, in his concurring opinion, asserted that he would find a qualified first amendment right of access to protect the public's interest in attending court proceedings. 443 U.S. at 400 (Powell, J., concurring). He contended that members of the press have a right of access guaranteed by the first and fourteenth amendments. *Id.* at 397-98 (Powell, J., concurring) (citing Saxbe v. Washington Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting)). Justice Powell argued that the press is afforded constitutional protection because they are the eyes and ears of the public and seek out news on the public's behalf, not because of their status as members of the press. *Id.* Justice Rehnquist explicitly rejected Justice Powell's contention stating that there has never been a first amendment right of access in the public or the press to judicial proceedings. *Id.* at 404. (Rehnquist, J., concurring). Justice Rehnquist stated "it is clear that this Court repeatedly has held that there is no first amendment right of access in the public or the press to judicial or other governmental proceedings." *Id.* at 404-05 (Rehnquist, J., concurring) (citations omitted). Justice Rehnquist asserted that it would be "in the best tradition of our federal system," to permit the states to determine if closure is appropriate. *Id.* at 405 (Rehnquist, J., concurring).

55. 427 U.S. 539 (1976).

56. *Id.* at 570.

57. *Id.* at 559-60. Justice Brennan, noting that "Commentary and reporting on the criminal justice system is at the core of First Amendment values," stated:

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

Id. at 587 (Brennan, J., concurring).

58. *Id.* at 570.

59. *Id.* at 559. The Court has interpreted the first amendment freedom of the press provision, and the fourteenth amendment due process clause as guarantees affording special protection against prior restraint orders that prohibit the publication or broadcast of particular information or commentary. *Id.* at 557. For a discussion on the use of prior restraints, see Rendleman, *Free Press—Fair Trial: Restrictive Orders After* Nebraska Press, 67 KY. L.J. 867 (1979).

60. 427 U.S. at 570. The Court noted that before a prior restraint order can be issued, it must be determined that: (a) the nature and extent of pretrial publicity

expressly declined, however, to resolve whether closure orders barring the press and public from judicial proceedings would pass constitutional muster.[61]

Several lower courts have addressed the issue of whether the Constitution permits the entry of such closure orders. In *United States v. Edwards*,[62] the District of Columbia Court of Appeals combined the reasoning of the *Richmond Newspapers*[63] and *Gannett*[64] decisions and concluded that the first amendment provided the public with a right of access to pretrial proceedings as well as to trials.[65] The court adopted the view that "the principles that support a right of access to trials apply with equal force to pretrial proceedings."[66] The court recognized that the possibility for prejudicial publicity is heightened and that the alternatives to closure are more restricted in pretrial situations.[67] It asserted that "these concerns are addressed by balancing the

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could impair the defendant's right to a fair trial; (b) other measures short of a prior restraint would not protect adequately the defendant's rights; and (c) a prior restraint would be effective in guarding against the perceived harm. *Id.* at 562-67.

61. *Id.* at 564 n.8. Justice Brennan also expressly refused to comment on the closure issue since both parties agreed that the question was not before the Court. *Id.* at 576 n. 3 (Brennan, J., concurring). *But see* Ocala Star Banner Corp. v. Sturgis, 388 So. 2d 1367, 1371 (Fla. Dist. Ct. App. 1980) (prior restraints and closure orders constitute "a distinction without difference;" limitations on access are forms of censorship because they have the same practical effect of preventing information from being printed); State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977) (closure of a pretrial hearing is tantamount to the imposition of a prior restraint). *See also* Fenner & Koley, *supra* note 31, at 468-69 (1976) (the true reason for closure is to restrain the press—"a novel form of censorship").

62. 430 A.2d 1321 (D.C. 1981). In *Edwards*, the appellant was arrested and charged with armed rape. At the time of his arrest, appellant confessed to the rape, a forcible sodomy on another individual, as well as seventeen robberies. Based upon this information and appellant's extensive juvenile record, the government moved for appellant's pretrial detention. Without offering any evidence that prejudice existed from articles already published or that future publicity was likely, appellant moved that the scheduled pretrial detention hearing be closed to protect his fair trial right. The court ordered the courtroom closed without making any specific findings that closure was necessary to preserve appellant's right to a fair trial. *Id.* at 1324.

63. For a discussion of *Richmond Newspapers*, see notes 32-37 and accompanying text *supra*.

64. For a discussion of *Gannett*, see notes 49-54 and accompanying text *supra*.

65. 430 A.2d at 1344.

66. *Id.* The court went on to enunciate the functions public access serves in judicial proceedings which are as applicable to critical pretrial hearings as to trials. *Id.* Specifically, the court noted that open proceedings protect the integrity of the judicial process by deterring perjury; promote the search for truth by inducing unknown witnesses to come forward; guard against police and prosecutorial misconduct; inform and educate the public by enabling it to observe the operation of the criminal justice system; and advance the appearance of justice and promote confidence in the administration of justice. *Id.* at 1344-45.

67. *Id.* at 1344. The *Edwards* court noted that pretrial detention hearings, like other pretrial hearings, may result in the disclosure of potentially inadmissible evidence, such as physical evidence illegally seized by the government or statements made by the accused, which would ultimately be suppressed. Moreover, past and present conduct of the accused, as well as past arrests and convictions, are relevant at pretrial detention hearings to support a finding that the accused is dangerous to the

need for closure against the right of access, not by refusing to recognize such a right."[68] Based on the foregoing analysis, the *Edwards* court held that it was error for the lower court to order closure of a pretrial detention hearing absent a factual showing that pretrial publicity would jeopardize the defendant's right to a fair trial and that less burdensome alternatives to closure did not exist.[69]

Against the foregoing, the Third Circuit considered the issue of whether a first amendment right of access to pretrial suppression, due process, and entrapment hearings exists.[70] Noting that although neither *Gannett*[71] nor *Richmond Newspapers*[72] controlled the issue, the *Criden* court found the Supreme Court's first amendment analysis in *Richmond Newspapers* nevertheless relevant.[73] The Third Circuit reasoned that the proper approach required an identification of the societal interests to be served by maintaining open pretrial hearings, and then determining whether those interests fall within the penumbra of the first amendment protections.[74] The *Criden* court identified six societal interests discussed in the various *Richmond Newspapers*

community. However, none of this information would be admissible at trial and would result in reversible error if considered. *Id.* at 1345.

In considering the possibility of invoking alternatives to closure the court acknowledged the appellant's argument that many of the alternatives used in the trial setting were less desirable in pretrial circumstances. Specifically, the *Edwards* court noted that jury sequestration is not an available alternative with respect to hearings held in advance of trial, change of venue is not available in the District of Columbia, and a continuance is a costly alternative entailing the waiver of the statutory requirement that a person ordered detained be tried within 60 days. *Id.* at 1345.

68. *Id.* at 1344.

69. *Id.* at 1346.

70. 675 F.2d 550. The district court, over the opposition of PN, granted defendant Howard Criden's motion to conduct a pretrial hearing *in camera*, and denied PN's motion for immediate access to the transcript of a previous pretrial hearing held *in camera*. *Id.* at 552-53.

71. *Id.* at 554. The *Criden* court emphasized that the *Gannett* holding was limited to deciding that the public had no sixth amendment right to attend pretrial proceedings. *Id.* For a discussion of *Gannett*, see Comment, *supra* note 50; notes 49-54 and accompanying text *supra*.

72. 675 F.2d at 554-55. The Third Circuit emphasized that the *Richmond Newspapers* case was limited to granting the public a first amendment right of access to attend criminal trials. *Id.* For a discussion of *Richmond Newspapers*, see BeVier, *supra* note 38 and notes 32-37 and accompanying text *supra*.

73. 675 F.2d at 555. Chief Judge Seitz stated that the *Richmond Newspapers* historical analysis of the deeply rooted common law tradition of open trials was not relevant in determing whether a first amendment right of access to pretrial criminal proceedings existed. He reasoned that while the public had no historical right to attend pretrial proceedings, there did not exist a common law counterpart to the modern suppression hearing and over the past two hundred years, the pretrial procedure has been assuming an increasingly significant role in relation to that of the trial. *Id.* For a discussion of the first amendment analysis of *Richmond Newspapers* as it pertains to trials and pretrial proceedings, see notes 38-42 and accompanying text *supra*.

74. 675 F.2d at 555-56. The court conceded that the Constitution did not explicitly provide a right of access to trials, but pointed out that "the concept of penumbral guarantees and the ninth amendment support the existence of rights not

opinions: (1) promoting informed discussion of governmental affairs by maintaining public awareness;[75] (2) promoting the "public perception of fairness" and providing assurance that judicial proceedings were conducted fairly;[76] (3) providing a therapeutic remedy by maintaining an outlet for community reaction; (4) providing a check on corruption, bias, or partiality by subjecting proceedings to public scrutiny; (5) enhancing the performance of all involved by placing them in the public spotlight; and (6) discouraging perjury.[77] The *Criden* court believed that the interests identified in *Richmond Newspapers* were equally applicable to pretrial criminal hearings,[78] emphasizing that pretrial hearings can be the most critical stage of a criminal procedure[79] and are often the only opportunity of the accused to raise, in an adversarial context, matters critical to his case.[80] Accordingly, the court concluded that the public has a first amendment right of access to pretrial suppression, due process, and entrapment hearings.[81]

The Third Circuit proceeded to observe that this first amendment right was not absolute, and that closure would be permitted in certain circumstances provided that certain procedural prerequisites were fulfilled.[82] The *Criden* court explained that due process depends upon the right of the indi-

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explicitly mentioned in the Constitution." *Id.* at 556. For a discussion of the scope of the first amendment protections, see notes 34 & 35 and accompanying text *supra*.

75. 675 F.2d at 556 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 572). The *Criden* court found that the knowledge gained by the public served "an important 'educative' interest." *Id.*

76. *Id.* The court noted, "Public confidence in and respect for the judicial system can be achieved only by permitting full public view of the proceedings." *Id.* (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 595).

77. *Id.*

78. *Id.*

79. *Id.* (citing Gannett Co. v. DePasquale, 443 U.S. at 397 n.1 (Powell, J., concurring); *id.* at 434-39 (Blackmun, J., concurring in part and dissenting in part); United States v. Cianfrani, 573 F.2d at 850).

80. *Id.* at 557 (citing Gannett Co. v. DePasquale, 443 U.S. at 433-36 (Blackmun, J., concurring in part and dissenting in part); *id.* at 397 (Burger, C.J., concurring); *id.* at 397 n.1 (Powell, J., concurring)). The *Criden* court noted that pretrial hearings often involve claims of police misconduct and may be the only point in the judicial proceeding at which police conduct is at issue. Because such conduct often occurs in a private environment created and controlled by the police themselves, it is essential for public scrutiny to occur at the hearing if it is to occur at all. *Id.* at 557.

81. *Id.* at 557. The Third Circuit emphasized that its holding was limited to the particular hearings involved and that it was not deciding the application of the first amendment right to other pretrial criminal proceedings. *Id.* (citing San Jose Mercury-News v. Municipal Court, 30 Cal. 3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982) (holding no right of access to preliminary hearings, as distinguished from pretrial suppression hearings, arises under the federal Constitution)).

82. *Id.* The *Criden* court reasoned "that there is a first amendment right of access to pretrial criminal proceedings is not determinative of whether PN had a right of access to the closed proceedings in this case." *Id.* The court then noted that "a procedural right of notice prior to any infringement of first amendment rights has been established in some circumstances." *Id.* (citing Freedman v. Maryland, 380 U.S. 51, 58-59 (1965); United States v. Schiavo, 504 F.2d 1, 7-8 (3d Cir.), *cert. denied*, 419 U.S. 1096 (1974)).

vidual involved, and the competing governmental interests implicated.[83] The court went on to state that the importance of the individual right is heightened by the "uniquely irretrievable loss that would be incurred by the public through the denial of the right to attend the hearing."[84] Noting that the first amendment interest of the public would not necessarily be adequately represented by the parties to the litigation, the press, or the trial judge,[85] the Third Circuit concluded that due process required that the public receive some notice before closure of a criminal proceeding was effected.[86] Because the *Richmond Newspapers* plurality decision did not set forth any standards for determining the applicable procedure, the court turned to the *Gannett* opinions for guidance.[87] Rejecting PN's contentions that the Constitution requires individual notice of closure,[88] the *Criden* court found that notice reasonably calculated to inform the public that its constitutional rights may be implicated in a particular criminal proceeding would suffice.[89] The court held that, pursuant to its supervisory powers, it would require advance docketing of closure motions to satisfy the constitutional notice requirements.[90] The Third Circuit concluded that because the district court had failed to docket in advance the defendant's letters requesting closure of the July 18 hearing the notice requirement was not satisfied and thus a reversal was warranted.[91]

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83. *Id.* The Court stated that:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 557-58 (quoting Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976)).

84. *Id.* at 558 (citing Gannett v. DePasquale, 443 U.S. 368, 442 n.17 (Blackmun, J., concurring in part and dissenting in part)).

85. *Id.* The *Criden* court noted that the first amendment interests of the public were separate and sometimes adverse to the interests of the litigants and press. *Id.*

86. *Id.*

87. *Id.* at 558-59. The Third Circuit quoted language from Justice Blackmun's concurrence and dissent, and Justice Powell's concurrence in *Gannett*. *Id.* The *Criden* court concluded that both Justices in *Gannett* seemed to assume that closure motions would be made in open court and hence notice would be given to those individuals present. *Id.*

88. *Id.* at 559. *See* notes 82-87 *supra*.

89. 675 F.2d at 559. The Court reasoned that the case dockets are public records in which a motion for closure will at some point be entered. *Id.* Advance docketing would afford interested members an opportunity to intervene provided the court made entries within a reasonable time before the closure motion was acted on. *Id.* at 559-60.

90. *Id.* For a critical discussion of the Third Circuit's use of its supervisory powers, see Schwartz, *The Exercise of the Supervisory Power by the Third Circuit Court of Appeals*, 27 Vill. L. Rev. 506 (1982).

91. 675 F.2d at 560.

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The court then stated that "there is a fairly broad consensus that before a court closes a pretrial criminal hearing, it must at least consider alternatives to closure and explicitly state its reasons on the record for rejecting such alternatives."[92] Noting that it need not decide the issue of alternatives on constitutional grounds, the Third Circuit held, pursuant to its supervisory powers,[93] that prior to closing a criminal proceeding, the district court must make a timely statement on the record of its reasons for rejecting alternatives to closure.[94] The court went on to require the district court to articulate specific findings to support its conclusion that alternatives could not adequately protect defendant's rights and that closure would effectively safeguard against the perceived harm.[95] The Third Circuit concluded that because the district court made no findings concerning alternatives it had therefore improperly closed the July 18 and September 24 hearings.[96]

In analyzing the *Criden* opinion, it is submitted that the Third Circuit correctly decided the issue of whether the first amendment grants the public a right of access to pretrial suppression, due process, and entrapment hearings.[97] The Third Circuit's decision is the logical extension of the Supreme Court's analysis in *Richmond Newspapers*.[98] It is suggested that the court properly reasoned that the six societal interests identified in *Richmond Newspapers* as being furthered by requiring public trials, would also be promoted by

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92. *Id.* at 560-61 (citations omitted). The court refrained from deciding whether the constitution required rejecting alternatives on the record and held it to be necessary under its supervisory powers. *Id.* at 561.

93. *Id.* at 561. *See* Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 980 (3d Cir. 1981) (requiring pursuant to supervisory powers that district courts set forth the legal basis and findings in support of their decision); United States v. Schiavo, 540 F.2d 1, 7-8 (3d Cir.) (*en banc*), *cert. denied*, 419 U.S. 1096 (1974) (using supervisory power to adopt the procedural requirement that any order pertaining to an infringement upon the first amendment rights of the press "be reduced to written form, stating specifically the term of the order and the reasons therefore, and entered on the district court docket.")

94. 675 F.2d at 561 (citing United States v. Schiavo, 504 F.2d 1, 7 (3d Cir.) (*en banc*), *cert. denied*, 419 U.S. 1096 (1974); United States v. Edwards, 430 A.2d 1321, 1346 (D.C. 1981)). While the Supreme Court has not held that the Constitution requires that alternatives be considered, Chief Judge Seitz noted that a majority of the Justices stressed the importance of a consideration of alternatives. *Id.*

95. *Id.* at 561-62. The *Criden* court found the articulation requirement to be essential for meaningful appellate review. *Id.* at 562. Recognizing that jury sequestration is unavailable until trial, the Third Circuit noted that various other means are available for protecting the defendant's fair trial right. Specifically, the court mentioned holding the hearing immediately before jury sequestration, using voir dire examination to ascertain the perceived effect of those matters of concern disclosed at the pretrial hearing, ordering continuance, severance, change of venue, and additional peremptory challenges, and delivering admonitory jury instructions to reduce any potential prejudice as possible alternatives. *Id.*

96. *Id.* at 562. The Third Circuit determined that it was unnecessary to consider whether the trial court abused its discretion since there was no evidence that the district court considered any alternatives to closure. *Id.*

97. *Id.* at 554.

98. For a discussion of *Richmond Newspapers*, see notes 36-42 and accompanying text *supra*.

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open pretrial proceedings.[99] Moreover, the nature of a pretrial hearing is such that the result arrived at during the hearing may preclude the public from obtaining knowledge about a case.

The *Criden* case in particular involved considerable allegations of corruption by public officials in addition to charges of prosecutorial misconduct by the nation's highest law enforcement agency.[100] Under such circumstances, suppression hearings are of great public interest since they may present the only occasion for subjecting the conduct of elected public officials, as well as law enforcement conduct, to public scrutiny.[101] Closed evidentiary hearings in such cases would only compound the public's skepticism concerning the fairness and propriety of the proceedings and thus serve to undermine the integrity of our judicial system.[102]

While the *Criden* opinion thoroughly explained the societal interests which would be impaired by closing the pretrial hearings and the procedural mechanism for the public to assert its right of access, it did not address the countervailing rights of a criminal defendant to a fair trial which may be impaired by adverse publicity, nor did it explain the proper procedure for balancing these conflicting rights.[103] Indeed, suppression hearings, in partic-

99. For a discussion of the societal interest identified in *Richmond Newspapers*, see notes 75-77 and accompanying text *supra*.

100. The *Criden* case involved federal public officials of considerable notoriety. In addition, there were allegations by the legislative branch of government that the FBI employed improper prosecutorial procedures which constituted overreaching and hence jeopardized the country's essential system of checks and balances.

The notoriety of the case coupled with the imported underlying constitutional concerns placed the entire "ABSCAM" controversy in the public eye. It was noted in *Cianfrani* that the public has a first amendment right of access "to information about how one of the three great branches of our government conducts its business." 573 F.2d at 862 (Gibbons, J., concurring).

101. *See* Gannett Co. v. DePasquale, 443 U.S. at 434-39. In *Gannett*, Justice Blackmun noted that access to suppression hearings may be more important than access to trials because: (1) the suppression hearing is a trial-like proceeding; (2) the suppression hearing is often the only judicial proceeding of consequence to occur during a criminal prosecution; (3) the result of the suppression hearing is often critical in, if not decisive of, the outcome of the prosecution; and (4) the issues raised during suppression hearings are of great social importance because they frequently involve questions regarding the propriety of the conduct of law enforcement officers and prosecutors. *Id. See also id.* at 397 n.1 (Powell, J., concurring) ("In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself."); United States v. Clark, 475 F.2d 240, 247 (2d Cir. 1973) (the pre-trial hearing is a critical stage and may be the only proceeding in the trial process at which the conduct of the police is at issue); United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 606 (3d Cir. 1969) ("It is especially important to have public knowledge of claims of police coercion or disregard of the constitutional right to silence and to the assistance of counsel. It is equally important that the testimony of police officers regarding police conduct . . . should not be given in secret.")

102. *See* notes 56 & 77 and accompanying text *supra*.

103. It is submitted that a more thorough approach which explicitly addresses the countervailing interests is warranted when such important concerns as the defendant's right to a fair trial are at stake.

ular, may present substantial policy reasons for qualifying the right to access.[104] Publication of inculpatory evidence may result in skewing public opinion against the defendant, thereby impairing his right to an impartial jury.[105] This is especially true where involuntary confessions are successfully excluded from evidence, yet taken into consideration by jurors who are informed through widespread publicity.[106] The loss is irretrievable in cases of particular notoriety, where alternative means for reducing the effects of prejudicial publicity, such as changing venue, are not available. Nonetheless, these same situations also present compelling policy reasons for allowing access.[107] Unfortunately, the *Criden* case offers very little guidance for those future courts that will be confronted with the difficult task of balancing these concerns.

The requisite procedures the Third Circuit established pursuant to its supervisory powers, and the requirement of advance docketing of closure motions are laudable. The effect of these practices will be to provide interested parties with sufficient notice to enable them to prepare arguments against closure without unduly burdening the judicial system.[108] The resultant adversarial argument on the closure issue, as applied to the particular circumstances, will promote informed judicial decisionmaking.[109]

Requiring the courts to consider alternatives to closure that will accomodate the rights of all parties involved is also commendable. In many cases, ordering a continuance, severance, change of venue or *voir dire* examination will adequately protect the defendant's right to a fair trial without infringing on the public's rights to the same degree as a closure order.[110] Nevertheless, it is submitted that in some situations, these alternative procedures will not effectively protect the defendant's right to a fair trial. In cases

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104. See Note, *Free Press/Fair Trial—Pretrial Suppression Hearing May be Closed in Order to Preserve Defendant's Right to a Fair Trial*, 24 VILL. L. REV. 107 (1978). This commentator argues that

> there are strong policy reasons for denying the press access to pretrial suppression hearings. For example, a defendant may feel compelled to forego his right to challenge illegally obtained evidence out of fear that premature disclosure of inculpatory evidence will reduce his chances of receiving a fair trial. Further, in cases of particular notoriety, alternative measures usually available to reduce the effects of prejudicial publicity, such as changing venue, may be largely ineffective. Finally, knowledge by the jury of information disclosed at pretrial suppression hearings frequently leads to the reversal of criminal convictions, which result in costly retrials at a time when the evidence may have become stale. The probability of a correct determination of guilt or innocence is thereby reduced while the costs of administering justice rise.

Id. at 119-20 (footnotes omitted). *See also* note 101 and accompanying text *supra*.

105. *See* Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308, 1311 (1978).

106. *See* notes 27 & 28 and accompanying text *supra*.

107. *See* notes 30 & 101 and accompanying text *supra*.

108. *See* notes 17-19 and accompanying text *supra*.

109. *See* note 37 and accompanying text *supra*.

110. *See* note 95 and accompanying text *supra*.

of great notoriety, where the public's interest is heightened and there is a possibility of incriminating evidence being suppressed on fourth amendment, due process or entrapment grounds, the defendant may encounter extreme difficulty in obtaining an unbiased jury.[111] Indeed, the *Criden* case itself seems to present such a situation. While the Third Circuit does not offer an absolute solution to this predicament, it does propose a balancing approach which considers the countervailing interests.[112]

Although the *Criden* opinion is explicitly limited to pretrial suppression, due process and entrapment hearings, its analysis seems equally applicable to other pretrial hearings including preliminary hearings, equal protection hearings, and competency and insanity hearings. The result of such application would seem to dictate that notice of closure through advance docketing, and a consideration of alternatives to closure would be the minimum procedural requirements for effecting a constitutional closure order. However, because the *Criden* court reserved discussion on the applicability of its analysis to other preliminary hearings, this conclusion is, at best, speculative.

The immediate impact of the *Criden* opinion will be to require courts in the Third Circuit to follow the procedures set forth with respect to docketing and consideration of alternatives. It is likely that these procedures will resolve all but a few cases, leaving the effect of *Criden* uncertain only in extreme situations.

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111. *See* note 22 and accompanying text *supra*.

112. It is submitted that the approach adopted by the Third Circuit for determining the propriety of closure strikes an appropriate balance between the public's first amendment right to attend criminal proceedings and the defendant's sixth amendment right to a fair trial. The Third Circuit's standard is virtually identical to the test developed by the *Richmond Newspapers* plurality requiring an "overriding interest articulated in the findings." 675 F.2d at 558. This approach protects the public's first amendment right of access by creating a presumption of openness. *Id.* at 558-60.