



1987

Media Access to Tape-Recorded Evidence in Criminal Trials

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Recommended Citation

Lisa K. Starczewski, *Media Access to Tape-Recorded Evidence in Criminal Trials*, 32 Vill. L. Rev. 183 (1987).

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1987]

Notes

MEDIA ACCESS TO TAPE-RECORDED EVIDENCE IN CRIMINAL TRIALS

I. INTRODUCTION

Courts in this country have long recognized the public's common-law right of access to judicial records and proceedings.¹ The exact parameters of this right are in dispute with regard to media access to taped evidence used in criminal trials.² In *Nixon v. Warner Communications*,³ the

1. See, e.g., *Fayette County v. Martin*, 279 Ky. 387, 395-96, 130 S.W.2d 838, 843 (1939) (acknowledging common-law right of public to inspect records in which interest is shown); *Nowack v. Auditor General*, 243 Mich. 200, 203-05, 219 N.W. 749, 750 (1928) (allowing newspaper editor access to public records in possession of auditor general); *Egan v. Board of Water Supply*, 205 N.Y. 147, 154-55, 98 N.E. 467, 469 (1912) (permitting access to engineering reports concerning public contract); *State ex rel. Nevada Title Guaranty & Trust Co. v. Grimes*, 29 Nev. 50, 82-88, 84 P. 1061, 1072-74 (1906) (acknowledging common-law right but finding it inapplicable to private realtor's request to copy all private property records in order to compile set of abstract books); see also Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1164 (1975) (noting that right of citizens to inspect public records has its roots in English common law).

Many states have codified this common-law right by enacting statutes governing access. See, e.g., MASS. GEN. LAWS ANN. ch. 66, § 10 (West Supp. 1986); ILL. REV. STAT. ch. 116, §§ 43.6-43.7 (Supp. 1986); 1957 N.D. SESS. LAWS 305. However, state courts often exclude court records from coverage when there is a statute governing access. See, e.g., *New Bedford Standard-Times Pub. Co. v. Clerk of Third Dist. Ct. of Bristol*, 377 Mass. 404, 405, 387 N.E.2d 110, 112 (1979) (statute providing for public access to "public records" does not apply to court records); *Grand Forks Herald, Inc. v. Lyons*, 101 N.W.2d 543, 545 (N.D. 1960) (statute providing for public access to records of public or governmental bodies, bureaus or agencies of the state does not apply to county court records).

The landmark federal case recognizing the right of access and extending it to judicial records is *Ex Parte Drawbaugh*, 2 App. D.C. 404 (1894). *Drawbaugh* was a patent case in which the court rejected an appellant's attempt to seal the records in his appeal. *Id.* The court stated that "[a]ny attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access." *Id.* at 407. The Supreme Court recognized the extension of the common-law right of access to judicial records in *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978). For a discussion of *Warner Communications*, see *infra* notes 51-58 and accompanying text.

2. For a discussion of recent cases which have considered the common-law right of the media to access to taped evidence used in criminal trials, see *infra* notes 64-157 and accompanying text.

The issue dealt with in this Note—the media's common-law right of access to tapes admitted into evidence at criminal trials—is a small part of a large controversy. The related issue of "openness" in criminal trials has long been the subject of debate. The questions which arise are whether the public has a right

United States Supreme Court refused to grant the media the right to copy and broadcast the Watergate tapes.⁴ Although the Court decided

to attend criminal trials, whether the public enjoys a right of access to pretrial and post-trial proceedings and whether the trials can be broadcast live without violating the Constitution. In *Richmond Newspapers v. Virginia*, the Supreme Court held that absent an overriding interest, public attendance at criminal trials is guaranteed by the first and fourteenth amendments to the Constitution. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580-81 (1980). Two years later in *Globe Newspaper Co. v. Superior Ct.*, the Court held that the right of access to criminal trials secured by *Richmond* mandated the invalidation of a state statute that required judges to exclude the public and the press from the courtroom during the testimony of victims of specified sexual offenses who are under the age of eighteen. *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 610-11 (1982). These two cases expanded the constitutional protections afforded the right of access. For further discussion of these cases in the context of a disputed constitutional right of access to videotape evidence, see *infra* notes 59-63 and accompanying text.

In terms of access to pretrial proceedings, the Supreme Court has recently held that there is a constitutional right of access to adversarial preliminary hearings. *Press-Enterprise Co. v. Superior Ct.*, 106 S. Ct. 2735 (1986); *cf.* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (prohibiting dissemination of material obtained in advance of trial through discovery process); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984) (recognizing constitutional right of access to voir dire proceedings for examination of potential jurors); *In re Gannett News Serv.*, 772 F.2d 113 (5th Cir. 1985) (restricting pretrial disclosure of matters considered in connection with motion *in limine*).

Courts have also dealt with the extension of the presumption in favor of access to post-trial proceedings. See *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (applying *Richmond* principle to post-trial proceedings and allowing press access to prisoner lists submitted to court pursuant to request for injunctive relief); *In re Application of CBS*, 540 F. Supp. 769 (N.D. Ill. 1982) (allowing access to sentencing hearing); *United States v. Carpentier*, 526 F. Supp. 292 (E.D.N.Y. 1981) (allowing access to sentencing hearing).

Another related question is the constitutionality of the live broadcast of criminal trials. See *Chandler v. Florida*, 449 U.S. 560 (1981) (broadcast of criminal trials is not, in and of itself, unconstitutional); see also Barber, *Televised Trials: Weighing Advantages Against Disadvantages*, JUST. SYS. J., Winter, 1985, at 279; Note, *Television Coverage of Trials: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Interest*, 30 VILL. L. REV. 1267 (1985); Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475 (1985).

3. 435 U.S. 589 (1978). For a discussion of the facts of *Warner Communications*, see *infra* note 4.

4. 435 U.S. at 591. The "Watergate tapes" refer to some twenty-two hours of taped conversations recorded in the White House Oval Office and in former President Nixon's private office in the Executive Office Building. *Id.* at 594. The *Warner Communications* Court overruled the decision of the United States Court of Appeals for the District of Columbia to allow access to these tapes. *Id.* at 591. In *United States v. Mitchell*, the D.C. Circuit had held that the party opposing access has the "burden of demonstrating that justice require[s] denying access." *United States v. Mitchell*, 551 F.2d 1252, 1261 (D.C. Cir. 1976), *rev'd sub nom.* *Nixon v. Warner Communications*, 435 U.S. 589 (1978). The *Mitchell* court went on to state that, in terms of the Watergate tapes, the risk in allowing access amounted to nothing more than a possibility of prejudice at a hypothetical second trial. 551 F.2d at 1261. Thus, the burden was not met and the court allowed access. *Id.*

the case on statutory grounds,⁵ it recognized the existence of the common-law presumption in favor of access.⁶ The Court, however, failed to enunciate a standard by which the presumption is to be gauged.⁷

The *Warner Communications* decision left open several issues. Specifically, the Court did not definitively determine the scope of the media's right of access to taped evidence. Since the *Warner Communications* decision, several federal courts of appeals⁸ have addressed the issue of the

The Supreme Court, in *Warner Communications*, did not explicitly or implicitly overrule the standards for determining the right of access set forth by the D.C. Circuit. *Warner Communications*, 435 U.S. at 603. The judgment of the *Mitchell* court was reversed on statutory grounds. *Id.* For further discussion of the *Warner Communications* Court's analysis of the common-law right of access, see *infra* notes 51-58 and accompanying text. For further discussion of the *Warner Communications* Court's statutory analysis, see *infra* note 5. For a general discussion of the *Warner Communications* decision, see Young, *Supreme Court Report*, 64 A.B.A. J. 891-92 (1978); Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings*, 52 TEMP. L.Q. 311, 340-42 (1979).

5. See *Warner Communications*, 435 U.S. at 603-06. The *Warner Communications* Court held that the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (1970) (the Presidential Recordings Act), governed access to the Watergate tapes. See *id.* The Court further held that the Act authorized the Administrator of General Services to take custody of the tapes and documents and have them screened by government archivists. *Id.* at 603. At that point, tapes that were private in nature were to be returned to the President and those of historical value were to be made available to the public. *Id.* The Court stated that the existence of this administrative procedure created by Congress for processing and releasing the tapes weighed in favor of denying access. *Id.* at 605-06.

6. *Id.* at 602. The *Warner Communications* Court stated that "on respondents' side is the presumption—however gauged—in favor of public access to judicial records." *Id.* The *Warner Communications* Court, as well as the courts of appeals that have analyzed its decision, used the phrases "presumption . . . in favor of access" and "common-law right of access" interchangeably. See Note, *Media Access to Videotape Evidence in Criminal Trials*, 4 COMMENT 445, 446 n.6 (1982). The phrases are, arguably, not synonymous. *Id.* A presumption carries with it the possibility of rebuttal, while a right generally does not. However, this Note will follow the courts' practice of not distinguishing the phrases.

7. See 435 U.S. at 599. The Supreme Court stated: "we need not undertake to delineate precisely the contours of the common law right, as we assume, *arguendo*, that it applies to the tapes at issue here." *Id.* The existence of the Presidential Recordings Act made it unnecessary for the Court to formulate a standard concerning the common-law right of access. See *id.* at 603-06.

8. To date, seven courts of appeals have dealt with the issue presented in this Note. See *United States v. Webbe*, 791 F.2d 103 (8th Cir. 1986) (denying access to videotape evidence in criminal prosecution); *United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986) (same); *United States v. Guzzino*, 766 F.2d 302 (7th Cir. 1985) (allowing access to videotape evidence in criminal prosecution); *United States v. Martin*, 746 F.2d 964 (3d Cir. 1984) (same); *United States v. Edwards*, 672 F.2d 1289 (7th Cir. 1982) (denying access to videotape evidence in criminal prosecution); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981) (same); *In re National Broadcasting Co. (Jenrette)*, 653 F.2d 609 (D.C. Cir. 1981) (allowing access to videotape evidence in "Abscam" trial); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981) (same); *In re National Broadcasting Co. (Myers)*, 635 F.2d 945 (2d Cir. 1980) (same); *United States v. Mitchell*, 551

media's right to copy tapes that have been admitted into evidence⁹ at criminal trials.¹⁰ In *In re National Broadcasting Co. (Myers)*,¹¹ the United

F.2d 1252 (D.C. Cir. 1976) (allowing access to Watergate tapes in criminal prosecution), *rev'd sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978).

9. There is currently disagreement among the courts of appeals as to whether evidence must be admitted at trial in order to be considered a public record. Compare *United States v. Beckham*, 789 F.2d 401, 411 (6th Cir. 1986) with *United States v. Criden*, 648 F.2d 814, 828 (3d Cir. 1981). Some courts require admission into evidence before access will be allowed. See, e.g., *Beckham*, 789 F.2d at 411 ("The transcripts here were not public records. They were not admitted into evidence, as were the tapes."); *In re The Reporter's Committee for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985) (court stated that Supreme Court, in *Seattle Times Co. v. Rhinehart*, considered admission into evidence to be determinative factor with regard to common-law right of access) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 (1984)); *United States v. Guzzino*, 766 F.2d 302, 304 (7th Cir. 1985) ("[The] right of access includes the right of the media to copy . . . tapes . . . admitted into evidence . . ."); *United States v. Dorfman*, 690 F.2d 1230, 1233 (7th Cir. 1982) (only lawful way exhibits in case could be made public was by admission into evidence in criminal trial or some other public proceeding).

Other courts consider admission into evidence to be less relevant to the question of access. See, e.g., *United States v. Martin*, 746 F.2d 964, 968-69 (3d Cir. 1984) (admission into evidence may be relevant factor but it is not dispositive); see also *United States v. Criden*, 648 F.2d 814, 828 (3d Cir. 1981) ("It would unduly narrow the right of access were it to be confined to evidence properly admitted, since the right is based on the public's interests in seeing and knowing the events which actually transpired."); Comment, *supra* note 4, at 337 (author defined right of access as extending to "transcripts, evidence, pleadings and other materials submitted by litigants to the court"); cf. *In re National Broadcasting Co. (Jenrette)*, 653 F.2d 609, 614 (D.C. Cir. 1981) (fact that tapes were admitted into evidence and played to jury "weighed heavily" in favor of plaintiff's application).

The admission of evidence as a factor in determining access arises most frequently in the context of whether transcripts of admitted videotape evidence should be given to the media when the transcripts themselves have not been admitted. In *Beckham*, the court denied access to the transcripts. 789 F.2d at 411. However, in *Martin*, the court allowed access to the transcripts. 746 F.2d at 968-69.

There is also a question whether the fact that the media have already gained access to transcripts obviates the need for access to the tapes themselves. See, e.g., *In re National Broadcasting Co. (Myers)*, 635 F.2d 945, 952 (2d Cir. 1980) ("Though the transcripts of the videotapes have already provided the public with an opportunity to know what words were spoken, there remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence . . ."). *Contra Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 432 (5th Cir. 1981) (stating that access to transcripts is indeed factor to be considered when determining right of physical access to tapes).

10. Several courts have stated that the factors underlying access in criminal trials apply equally to civil trials. See, e.g., *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (allowing access to prisoner lists introduced pursuant to injunction, based on public interest in release and incarceration of prisoners); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 896 (E.D. Pa. 1981) (stating that *Richmond* principle of public access to criminal trials applies equally to civil trials). For a discussion of the issue of access in a civil setting, see Note, *Constitutional Law—First Amendment—Rights of Access to Civil Trials*, 23 Duq. L. Rev. 1227 (1985).

States Court of Appeals for the Second Circuit held that there is a "strong" presumption in favor of access and that only the most "compelling circumstances" justify denial.¹² Three other courts of appeals have accepted the *Myers* standard or have followed it in whole or in part.¹³ However, the United States Courts of Appeals for the Fifth, Sixth and Eighth Circuits have explicitly refused to embrace the *Myers* view.¹⁴ To date, the Supreme Court and the remaining courts of appeals have not yet adopted a standard.¹⁵

This Note will examine the split among the courts of appeals concerning the strength to be afforded the common-law presumption in the context of media access to tapes used in criminal trials.¹⁶ Part II reviews the development of the common-law right¹⁷ and its constitutional un-

11. 635 F.2d 945 (2d Cir. 1980).

12. *Id.* at 952. The Second Circuit stated that "it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence" and that "only the most compelling circumstances should prevent contemporaneous access to it." *Id.*

13. *See* *United States v. Guzzino*, 766 F.2d 302, 304 (7th Cir. 1985) (accepting existence of "strong" presumption but refusing to require "compelling circumstances" in order to deny access); *United States v. Martin*, 746 F.2d 964, 967-68 (3d Cir. 1984) (expressing approval of *Myers* approach and recognizing strong presumption); *United States v. Edwards*, 672 F.2d 1289, 1293-94 (7th Cir. 1982) (recognizing "strong" presumption but refusing to require "compelling circumstances" to deny access); *In re National Broadcasting Co.* (Jenrette), 653 F.2d 609, 613-14 (D.C. Cir. 1981) (stating that access should be denied only if "justice so requires") (quoting *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976)); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) (expressing approval of *Myers* approach and recognizing strong presumption in favor of access). For a further discussion of the cases extending the common-law right of access to evidence used in criminal trials, see *infra* notes 64-122 and accompanying text.

14. *See* *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (common law requires access to information about judicial proceedings and all evidence of record, but right does not necessarily include copying tapes); *United States v. Beckham*, 789 F.2d 401, 414 (6th Cir. 1986) (agreeing that common-law right extends to tape recordings, but disagreeing that only the most extraordinary reasons justify restriction on this right); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 433-34 (5th Cir. 1981) (expressing "fundamental difference" with *Myers* and noting that number of factors may militate against public access). For a further discussion of the cases denying a right of access to evidence used in criminal trials, see *infra* notes 123-51 and accompanying text.

15. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 434 (5th Cir. 1981) (noting that Supreme Court in *Warner Communications* did not draft explicit limits or assign specific weight to common-law right of access); *see also* Note, *supra* note 6, at 449 ("Although the presumption in favor of access has long been recognized, its strength has not yet been clearly determined.").

16. For a discussion of the split among the courts of appeals concerning the strength to be afforded the common-law presumption in the context of media access to tapes used in criminal trials, see *infra* notes 64-151 and accompanying text.

17. For a discussion of the development of his common-law right, see *infra* notes 21-27 and accompanying text. *See also* H. CROSS, THE PEOPLE'S RIGHT TO

derpinnings.¹⁸ Part III highlights the courts' conflicting analyses of the factors considered determinative in decisions concerning access.¹⁹ Part IV concludes that the courts of appeals should follow the decision in *Myers* and recognize a strong presumption in favor of access, thereby allowing media access in the absence of substantial justification for denial.²⁰

II. EVOLUTION OF THE RIGHT OF ACCESS

A. *The Common-Law Right*

The citizenry's right of access to public records is rooted in early common law.²¹ The right originated in England where the courts allowed access if citizens were able to show some legal "interest" in the records.²² This right of access eventually became an essential part of the judicial process in colonial America.²³ The Supreme Court has consistently recognized the right.²⁴ In *Warner Communications*, the Court noted that "courts in this country recognize a general right to inspect

KNOW; LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 135-36 (1953) (concluding that American public has long enjoyed right of access which developed in early common law).

18. There is a question whether the right of access is grounded in the first amendment. For a discussion of this issue, see *infra* notes 48-63 & 154-74 and accompanying text.

19. For a discussion of the courts of appeals' conflicting analyses in this regard, see *infra* notes 64-151 and accompanying text.

20. For a discussion of the conclusion that the courts of appeals should recognize a strong presumption in favor of access, and should, absent substantial justifications for denial, allow media access, see *infra* notes 175-222 and accompanying text.

21. See H. CROSS, *supra* note 17, at 135-36.

22. See, e.g., *Browne v. Cumming*, 109 Eng. Rep. 377, 378 (K.B. 1829) (law concerning access "applies to all records where copies or exemplifications are required for the purpose of being used as evidence"); see also Barrett, *Freedom of the Press, American Style*, in LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 214, 238-39 (A.B.A. 1977). The interest test is not used in American decisions. Rather, all citizens are deemed to have the same right of access. See H. CROSS, *supra* note 17, at 137-52; 20 AM. JUR. 2D COURTS § 61 (1965) ("Court records are open to inspection not only by the parties directly involved, but also by other persons who have a legitimate interest in such inspection. . .").

23. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 567 (1980) ("We have found nothing to suggest that the presumptive openness of the trial [in England] . . . was not also an attribute of the judicial systems of colonial America."). The *Richmond* Court referred to the openness of judicial proceedings as an "indispensable" element of the American trial. *Id.* at 569.

24. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966) ("The principle that justice cannot survive behind the walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" (quoting *In re Oliver*, 333 U.S. 257, 268 (1948)); *In re Oliver*, 333 U.S. 257, 266 (1948) ("This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage."); *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."); *Penne-*

and copy public records and documents, including judicial records and documents.”²⁵ The rationale behind the recognition of the right of access is the belief that open trials enhance public understanding of and alleviate public suspicion about the judicial process.²⁶ In addition, openness promotes the fair conduct of the trial itself.²⁷

The right of access has been labelled as “fundamental,”²⁸ although there is disagreement whether the right rises to that level.²⁹ In *United States v. Beckham*, the United States Court of Appeals for the Sixth Circuit recognized a fundamental right to know what transpires during judicial proceedings.³⁰ The *Beckham* opinion was written in the context of media access to videotape evidence.³¹ According to the court, the fundamental right to know is satisfied if videotape or audiotape evidence is played

kamp v. Florida, 328 U.S. 331, 361 (1946) (“Of course trials must be public and the public have a deep interest in trials.”).

25. *Warner Communications*, 435 U.S. at 597 (footnotes omitted). For a discussion of the facts and opinion of *Warner Communications*, see *infra* notes 51-58 and accompanying text.

26. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980). The *Richmond* court stated:

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.

Id.; see also 6 J. WIGMORE, EVIDENCE § 1834, at 438 (J. Chadbourn rev. 1976) (“[T]he educative effect of public attendance is a material advantage . . . a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.”).

27. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569 (1980) (openness “gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”). The Supreme Court commented on the role of the right of access in the judicial process in *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982). The Court stated:

Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And, in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our system of self-government.

Id. (footnotes omitted).

28. See *United States v. Mitchell*, 551 F.2d 1252, 1261 (D.C. Cir. 1976), *rev'd sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978). The *Mitchell* court stated that those requesting access “seek to vindicate a precious common law right, one that predates the Constitution itself.” *Id.* at 1260.

29. See *United States v. Beckham*, 789 F.2d 401, 414-15 (6th Cir. 1986).

30. *United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986).

31. *Id.* at 403. For a discussion of the facts of *Beckham* and an analysis of the court’s discussion of the right of access, see *infra* notes 136-45 and accompanying text.

in court and reporters are free to publish what they have heard.³² Thus, according to the Sixth Circuit, there is no fundamental right of physical access to the tapes themselves.³³ This distinction is significant in that the labelling of a right as fundamental implies first amendment protection and demands greater deference and stricter review by an appellate court than a mere common-law right.³⁴

While the right of access initially applied only to written records, courts have extended the right to include access to mechanical recordings.³⁵ Additionally, advances in technology have given new meaning to the word "access." The availability of photocopying equipment prompted courts to adjust the common-law right to include both the right to inspect and the right to copy.³⁶ The use of mechanical recording equipment has further expanded the notion and effect of copying

32. 789 F.2d at 415 ("We do not believe a fundamental right is implicated so long as there is full access to the information and full freedom to publish.")

33. *Id.*

34. *Id.* at 414-15. The *Beckham* court stated:

We find that, when the right to inspect and copy judicial records is equivalent to the right to learn the facts on record, the fundamental right to know is at stake, and consequently, the trial court's *discretion must be narrowly restricted*. However, when the right to make copies of tapes played in open court is essentially a request for a duplicate of information already made available to the public and the media, then the district court has *far more discretion in balancing the factors*.

Id. (emphasis added).

35. *See, e.g.,* *Menge v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973) (court recognized right to copy magnetic computer tape); *Ortiz v. Jaramillo*, 82 N.M. 445, 483 P.2d 500 (1971) (same); 28 U.S.C. § 753(b) (1970) (right to inspect court stenographer's notes or mechanical recordings as well as transcript); Note, *supra* note 6, at 448 (right has not been limited to written documents, but includes computer tapes and audio tapes).

The question whether mechanical recordings (videotape and audiotape evidence) introduced as exhibits should be considered part of the public record and thus included within the common-law right of access is answered in the Federal Rules of Appellate Procedure. Rule 10(a) provides that: "[t]he original papers and exhibits filed in the district court . . . shall constitute the record on appeal." FED. R. APP. P. 10(a) (emphasis added). The rules also specifically recognize nondocumentary exhibits as part of the public record. FED. R. APP. P. 11. Rule 11(a) provides that the record, "including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals," and Rule 11(b) provides that "*physical exhibits other than documents shall not be transmitted*." *Id.* (emphasis added). Thus, the judicial record includes videotape and audiotape evidence and the common-law right of access applies to this type of evidence as well as documented testimony. *See, e.g.,* *United States v. Mitchell*, 551 F.2d 1252, 1259-60 (D.C. Cir. 1976) ("We therefore hold that the common law right to inspect and copy judicial records extends to exhibits.").

36. *See, e.g.,* *Moore v. Board of Freeholders*, 76 N.J. Super. 396, 408, 184 A.2d 748, 754 ("To ignore the efficacy and practical worth of [photocopying] equipment . . . would substantially impair [the] right to inspect and copy."), *modified*, 39 N.J. 26, 186 A.2d 676 (N.J. Super. Ct. App. Div. 1962); *see also* *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) ("[G]enerally the right to copy has been considered to be correlative of the right to inspect."); *Myers*, 635

and raises a question as to the extent of "access" which should be allowed.³⁷ The impact on the public of a live videotape broadcast is far greater than the impact of the printed word.³⁸ Consequently, some courts have concluded that videotapes have a greater prejudicial impact upon the criminal defendant than printed words.³⁹ Other courts, however, have reasoned that the broadcast of tapes is a tool that enhances public understanding of the judicial process and the proceedings of the trial at hand.⁴⁰

While courts disagree as to the effect of the rebroadcast of videotapes, they generally agree that the common-law right of access is not absolute.⁴¹ There are situations in which the motive behind the request for access or the sensitive nature of the recorded material mandates that access be denied.⁴² This decision is left to the discretion of the trial

F.2d at 950 ("[T]he nondocumentary nature of the evidence sought to be copied does not remove the common law right.").

37. Some courts hold that presence in the courtroom coupled with the ability to report what is seen and heard constitutes sufficient "access." See *Beckham*, 789 F.2d at 415; see also *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) ("We think the common law requires access to information on judicial proceedings and all evidence of record . . . but this right does not necessarily embrace copying of tapes."). Other courts argue that the right of access should incorporate the public's ability to hear the tapes and thus includes the right to rebroadcast. See *United States v. Mitchell*, 551 F.2d 1252, 1254-55 (D.C. Cir. 1976); see also *Myers*, 635 F.2d at 952 ("[T]here is a presumption in favor of public inspection and copying of any item entered into evidence at a public session of a trial.").

38. See, e.g., *United States v. Criden*, 648 F.2d 814, 824 (3d Cir. 1981) ("There can be no question that actual observation of testimony or exhibits contributes a dimension which cannot be fully provided by second-hand reports.").

39. See *United States v. Criden*, 501 F. Supp. 854, 859-60 (E.D. Pa. 1980) (trial court refused access to videotape evidence), *rev'd*, 648 F.2d 814 (3d Cir. 1981).

40. *United States v. Criden*, 648 F.2d 814, 824 (3d Cir. 1981). The United States Court of Appeals for the Third Circuit did not dispute the trial court's finding that the rebroadcast of videotape evidence has a greater impact than the written word. *Id.* at 823. However, according to the court, this impact serves to enhance the public's understanding of judicial proceedings. *Id.* at 824. Thus, the form of the evidence militates in favor of access. *Id.*; see also *United States v. Mitchell*, 551 F.2d 1252, 1254-55 (D.C. Cir. 1976) ("It is conceded that one who listens to the tapes—the inflections, pauses, emphasis and the like—will be better able to understand the conversations than one who only reads the written transcripts.").

41. See, e.g., *Warner Communications*, 435 U.S. at 598 ("It is uncontested . . . that the right to inspect and copy judicial records is not absolute."); *Beckham*, 789 F.2d at 409 ("[T]his right [to access] is not absolute and . . . a court may exercise supervisory powers over the materials in its custody."); *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976) ("The right to access to judicial records has never been considered absolute.").

42. See, e.g., *Warner Communications*, 435 U.S. at 598. The *Warner Communications* Court provided examples of situations in which access would be improper. *Id.* According to the Court, the common-law right should not be "used to gratify private spite or promote public scandal." *Id.* (quoting *In re Caswell*, 18 R.I. 835, 836, 29 A. 259, 259 (1893) (disallowing publication of "the painful and

court.⁴³ Although the standard of review in cases involving a trial judge's discretion is generally referred to as "abuse of discretion," the scope of review will vary with the circumstances of the decision.⁴⁴ The scope of review in decisions concerning accessibility is not settled.⁴⁵ However, most courts agree that it is not the narrow standard by which decisions that rest primarily on the observations of the trial judge are reviewed.⁴⁶ Thus, while a decision of a trial court based on the judge's interaction with a party or witness may be reversed only if the decision was arbitrary or capricious, a decision concerning access will be given less deference.⁴⁷

sometimes disgusting details of a divorce case"). Nor should court files "serve as reservoirs of libelous statements for press consumption" or "sources of business information that might harm a litigant's competitive standing." *Id.*; see, e.g., *Munzer v. Blaisdell*, 268 App. Div. 9, 11, 48 N.Y.S.2d 355, 356 (1944) (plaintiff may move to have papers sealed by court if they contain libelous words too shocking to allow publicity); *Flexmir, Inc. v. Herman*, 40 A.2d 799, 800 (N.J. Ch. 1945) (ordering removal from court records of photographs entered into evidence in suit involving disclosure of trade secrets).

43. See *Warner Communications*, 435 U.S. at 598 (every court has supervisory power over its own records and files); *United States v. Criden*, 648 F.2d 814, 817-18 (3d Cir. 1981) (trial judge has discretion because of first-hand observation or direct contact with litigants and other pragmatic considerations).

44. See *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981) ("[T]he scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.").

45. For a brief discussion of the lack of a definitive standard as to access, see *supra* note 15 and accompanying text.

46. See *United States v. Criden*, 648 F.2d 814, 817-18 (3d Cir. 1981) (decision whether to release tapes not dependent in main on particular observations of trial court, as other factors may control). The United States Court of Appeals for the Sixth Circuit in *United States v. Beckham* expressly agreed with the *Criden* court's analysis of the standard of review. 789 F.2d at 412-13. The *Beckham* court stated:

On appeal, the Third Circuit first analyzed the different degrees of discretion exercised by a trial court, finding that a decision regarding the common-law right to copy records should not be given the same deference as a decision on an award of attorneys' fees or a sentence within statutory bounds. The court stated that the task of the appellate court when reviewing a request to copy tapes is to determine whether the relevant factors were considered and given appropriate weight. We agree with this analysis. A mere articulation of rational justification will not suffice in this context.

Id. (citations omitted); see also *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982) ("[I]t is vital for a court clearly to state the basis of its ruling, so as to permit appellate review of whether relevant factors were considered and given appropriate weight."); *In re National Broadcasting Co. (Jenrette)*, 653 F.2d 609, 613 (D.C. Cir. 1981) ("This discretion [of the trial court], however, is not open-ended.").

47. See *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981). The *Criden* court stated: "The justifications for committing decisions to the discretion of the court are not uniform, and may vary with the specific type of decisions." *Id.* For a further discussion and justification of the scope of review in decisions concerning access, see *supra* note 46 and accompanying text.

B. *Constitutional Underpinnings*

It is generally recognized and accepted that, once access is granted to the media, the first amendment protects against restrictions on dissemination.⁴⁸ However, the role of the Constitution in the initial decision concerning access has not been conclusively defined. The question presented is whether there is a constitutional right of physical access to tapes admitted into evidence, grounded in either the first or sixth amendments.⁴⁹

48. The first amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press . . ." U.S. CONST. amend. I. The first amendment applies to the states through the fourteenth amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). The first amendment prohibits restrictions on the freedoms of speech and press by federal or state action. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (state statute may not permit enjoining publications merely because of content of articles without violating first amendment); see also *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (dismissing a restraining order against publication of study on United States' foreign policy in Vietnam because of violation of first amendment). For a full discussion of the *Near* and *New York Times* opinions, see J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, ch. 16, § 16.17, at 869-73 (3d ed. 1986). Such a prohibition extends to both prior restraints and subsequent punishment. *Id.* For a discussion of the distinction between these two causes of action, see *id.* § 16.16, at 865-69. In the context of media publication of evidence from a criminal trial, the first amendment prohibits restrictions on the dissemination of such evidence after media access is granted. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (state may not punish newspaper for publishing name of alleged juvenile delinquent without violating first amendment); *Landmark Communications v. Virginia*, 435 U.S. 829 (1978) (state cannot punish newspaper for publishing truthful information about confidential investigation which is in progress without violating first amendment); *Oklahoma Publishing Co. v. District Ct.*, 430 U.S. 308 (1977) (per curiam) (state cannot prohibit republication of information obtained in court proceedings without violating first amendment); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (court cannot issue restraining order prohibiting publication of confessions of accused in murder trial without violating first amendment); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (press cannot be restrained from printing information lawfully obtained from open court hearing without violating first amendment); see also *Columbia Broadcasting Sys. v. United States Dist. Ct.*, 729 F.2d 1174, 1183 (9th Cir. 1983) ("[U]nder our constitutional system prior restraints, if permissible at all, are permissible only in the most extraordinary of circumstances."). For a discussion of these cases as well as other relevant opinions, see J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW*, ch. 18, § VIII, at 910-23 (2d ed. 1983). See generally Monk, *Media Access to Court Proceedings*, 50 J.B.A. KAN. 212 (1981); O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1, 32-48 (1980). For a further discussion of a first amendment-based right of access, see *infra* notes 154-74 and accompanying text.

49. See, e.g., *Warner Communications*, 435 U.S. at 608 (broadcasters argued that right to rebroadcast videotape evidence is guaranteed by both first and sixth amendments). A right of access has been suggested based upon both the first amendment's guarantee of free speech and the sixth amendment's guarantee of a public trial. *Id.* The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impar-

In attempting to gain access to evidence at trials, the media have argued that the sixth amendment requirement of a public trial includes a requirement that all evidence, including videotape evidence, be made available to the public through rebroadcast.⁵⁰ The Supreme Court in *Warner Communications*, in response to such an argument, held that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."⁵¹ Thus, according to the Court, once a trial has been held open to both the public and the press, the sixth amendment requirement of a public trial is satisfied and there is no further requirement that the press be allowed physical access to recorded evidence.⁵²

The Supreme Court also dismissed the argument that the first amendment guarantee of free speech and free press requires access.⁵³ The *Warner Communications* Court distinguished its decision in *Cox Broadcasting Corp. v. Cohn*,⁵⁴ in which it held that the press cannot be prohibited from publishing the name of a rape victim when that information is

tial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. The sixth amendment applies to the states through the fourteenth amendment. See *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). For a further discussion of the support which the sixth amendment provides for a right of access, see *infra* notes 50-51 and accompanying text. For a further discussion of the sixth amendment issue in the context of media access, see *infra* notes 178-79 & 188-201 and accompanying text.

50. See *Warner Communications*, 435 U.S. at 610. The media argued that, although the Watergate trial was widely publicized, "public understanding of it remain[ed] incomplete in the absence of the ability to listen to the tapes and form judgments as to their meaning based on inflection and emphasis." *Id.* Thus, according to the media, the sixth amendment requirement of a public trial had not been satisfied. *Id.*

51. *Warner Communications*, 435 U.S. at 610. In reaching this decision, the Court noted that the sixth amendment confers no special benefit on the press. *Id.* (citing *Estes v. Texas*, 381 U.S. 532, 583 (1965) (Warren, J., concurring)). The main purpose of the sixth amendment is, instead, to "safeguard against any attempt to employ our courts as instruments of persecution." *Id.* (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

52. *Id.* The Court reasoned that the media's sixth amendment argument requiring physical access to taped evidence could be extended to mandate the live broadcast of a witness' testimony or the entire trial itself. *Id.* The Court stated that no constitutional right to such broadcast has ever been recognized. *Id.* Thus, according to the Court, no sixth amendment constitutional right to physical access should be recognized. *Id.*

53. *Id.* at 608. The media argued that the Court's prior decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), established a first amendment right to rebroadcast the tapes. For a discussion of the facts of *Cox*, see *infra* note 54.

54. 420 U.S. 469 (1975). In *Cox*, the press learned the name of a rape victim and attempted to publish this information. *Id.* at 472-74. The victim's father brought a suit for damages claiming invasion of privacy. *Id.* at 474. The trial court granted summary judgment against the broadcasters. *Id.* The Supreme Court reversed, holding that the publication was constitutionally protected. *Id.* at 497.

part of the public record.⁵⁵ In *Cox*, the issue was whether the press could be denied access to records otherwise in the public domain.⁵⁶ In contrast, the Court in *Warner Communications* addressed the issue of whether the press has a right of physical access which the public itself does not enjoy.⁵⁷ The Court held that the "First Amendment generally grants the press no right to information about a trial superior to that of the general public."⁵⁸

In *Richmond Newspapers v. Virginia*⁵⁹ and *Globe Newspaper Co. v. Superior Court*,⁶⁰ the Supreme Court expanded the first amendment protections afforded the right of access. The *Richmond* Court held that the right of the public and the press to attend criminal trials is constitutionally guaranteed.⁶¹ Although there was no majority opinion in the case, seven Justices agreed that the right of access to trials is grounded in the

55. *Id.* at 495.

56. *Id.* at 471. The Court framed the issue as "whether consistently with the First and Fourteenth Amendments, a State may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime." *Id.*

57. *Warner Communications*, 435 U.S. at 609. In so stating the issue, the Court concluded that the holding in *Cox Broadcasting* was not applicable to the facts at hand. *Id.*

58. *Id.* The Court quoted its previous decisions in *Estes v. Texas* as support for this proposition. *Id.* (citing 381 U.S. 532, 589 (1965)). In *Estes*, the pretrial hearings of a Texan accused of swindling were broadcast live on television and radio. *Estes v. Texas*, 381 U.S. 532, 536 (1965). The microphones and broadcasting paraphernalia created "considerable disruption" in the courtroom. *Id.* There was widespread publicity surrounding the hearing. *Id.* Both the witnesses and the jury panel were aware of the publicity. *Id.* at 536-37. At the trial, live broadcast of certain segments of the case was allowed. *Id.* at 537. At one point, a television station rebroadcast the trial instead of the "late movie." *Id.* at 538. The Supreme Court held that this activity violated the accused's constitutional rights to due process. *Id.* at 534-35. Justice Harlan stated: "The line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public." *Id.* at 589 (Harlan, J., concurring).

59. 448 U.S. 555 (1980).

60. 457 U.S. 596 (1982). In *Globe Newspaper*, the trial judge, upon preliminary motion, ordered that the courtroom be closed during the trial of a defendant accused of the rape of three minors. *Id.* at 598. *Globe Newspaper Co.* made motions for access but was denied. *Id.* at 599. The trial judge based his denial on a Massachusetts law that required judges to exclude the press from courtroom testimony of any victim under the age of 18 at trials for specified sexual offenses. *Id.* at 598 n.1. The Supreme Court struck down this statute as violative of the first amendment right of "access" to criminal trials. *Id.* at 610-11.

61. *Richmond Newspapers*, 448 U.S. at 580-81. In *Richmond Newspapers*, the trial court, upon motion by the defense counsel, ordered that a murder trial be closed to the public. *Id.* at 560. The judge based his decision on a Virginia law that gave judges discretion to close the courtroom whenever necessary. *Id.* at 560 n.2. The Supreme Court reversed the judge's ruling, holding that the right of access is constitutionally guaranteed. *Id.* at 580.

first amendment.⁶² The *Globe Newspaper* Court reaffirmed *Richmond*, holding that “the press and general public have a constitutional right of access to criminal trials.”⁶³

III. THE CIRCUITS’ ANALYSES

A. *The Myers Approach*

In *In re National Broadcasting Co. (Myers)*,⁶⁴ the United States Court of Appeals for the Second Circuit established its approach to the issue of media access to videotape evidence in criminal prosecutions. The case was one of the “Abscam”⁶⁵ cases which involved the prosecution of several members of Congress and other public officials for bribery and related charges.⁶⁶ The tapes at issue were recordings of some of the dealings between undercover Federal Bureau of Investigation (FBI) agents and the defendants.⁶⁷ The trial court allowed the press into the courtroom and gave transcripts of the recorded evidence to members of the media.⁶⁸ The trial judge granted the application of three major television networks to copy and televise the tapes.⁶⁹ The Second Circuit

62. *Id.* at 558-81 (plurality opinion); *id.* at 584-98 (Brennan, J., concurring); *id.* at 598-601 (Stewart, J., concurring); *id.* at 601-04 (Blackmun, J., concurring). Justice Powell took no part in the decision of this case. *Id.* at 581. However, in *Gannett Co. v. DePasquale*, he expressed his opinion that the right of access to criminal trials is protected by the first amendment. *Gannett Co. v. DePasquale*, 443 U.S. 368, 397-98 (1979) (Powell, J., concurring) (“Because of the importance of the public’s having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner’s reporter had an interest protected by the first and fourteenth amendments.”).

63. *Globe Newspaper*, 457 U.S. at 603 (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980)).

64. 635 F.2d 945 (2d Cir. 1980). For an analysis of *Myers* and the controversy surrounding the right of access, see Note, *Common Law Right of Access to Judicial Records—Criminal Defendant’s Right to a Fair Trial*, 1981 ARIZ. ST. L.J. 843, 843-51.

65. *Myers*, 635 F.2d at 947. “Abscam” refers to a “sting” operation conducted by the FBI in order to uncover corruption in government activity. *Id.* Agents of the FBI used the fictitious name of Abdul Enterprises Ltd. as a cover. *Id.* The agents posed as businessmen for this fictitious Middle Eastern business and offered bribes to various public officials in order to secure their help with certain immigration problems. *Id.* The term “Abscam” was coined from the first two letters of Abdul Enterprises and the word “scam.” *Id.*

66. *Id.* The four appellants in *Myers* were Congressman Michael O. Myers, Angelo J. Errichetti (Mayor of Camden), Louis C. Johnson (member of Philadelphia City Council) and Howard L. Criden (Philadelphia attorney). *Id.* at 948.

67. *Id.* Agents for the FBI surreptitiously recorded their conversations with these public officials. *Id.* at 947. In the *Myers* case, the most significant tape at issue was one containing Congressman Myers’ acceptance of \$50,000 and his demand for an additional \$35,000. *Id.*

68. *Id.* at 948. In addition to the transcripts, sketch artists from the media were allowed to sketch scenes from the tapes as they were played to the jury. *Id.* Portions of these sketches were published by the media throughout the trial. *Id.*

69. *Id.* at 948-49. The trial judge stated that “the tapes themselves are evi-

affirmed this decision.⁷⁰ The *Myers* court expressed its approval of the United States Court of Appeals for the District of Columbia's handling of this issue in *United States v. Mitchell*.⁷¹ The court in *Myers* noted that although *Mitchell* was reversed on statutory grounds, it remains "strong authority" for the common-law right to copy and telecast tapes admitted into evidence.⁷² The *Myers* court recognized the presumption in favor of access and stated that "it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction" and that "only the most compelling circumstances should prevent contemporaneous public access to [the tapes]."⁷³

According to the *Myers* court, the involvement of public officials in a criminal case adds to the strength of the presumption in favor of access.⁷⁴ The court dismissed the argument that the risk to the fair-trial rights of the defendants on trial and those awaiting trial mandate denial of access.⁷⁵ The court relied most heavily on the availability of cautionary instructions and voir dire examination⁷⁶ to eliminate any prejudice created by pretrial publicity.⁷⁷

dence [and] they are, under common law principles, available to the public and the press." *Id.* at 949.

70. *Id.* at 954.

71. *Id.* at 952. For a discussion of *Mitchell*, see *supra* note 4.

72. 635 F.2d at 951. The *Myers* court qualified this statement by noting that *Mitchell* remains strong authority, at least in relation to those tapes containing evidence of activities of defendants not facing a likelihood of subsequent trials. *Id.* This qualification relates to the risk of infringement of a defendant's fair-trial rights due to widespread prejudicial publicity. For a discussion of the *Myers* court's analysis of a defendant's fair-trial rights in the context of media access, see *infra* notes 75-77 and accompanying text.

73. 635 F.2d at 952. The court noted that the opportunity for copying need not necessarily occur simultaneously with the presentation of the evidence to the jury. *Id.* n.7. It deemed the trial judge's procedure for an opportunity to copy the tapes at the end of court sessions to be an appropriate accommodation of the right of public access to judicial records with the orderly conduct of the trial. *Id.*

74. *Id.* at 952. The court noted that, although the transcripts have already provided an opportunity to know, there is a "legitimate and important interest" in allowing the public to see evidence concerning members of Congress and local officials. *Id.*

75. *Id.* at 953. The court acknowledged that televising the tapes does increase the number of people aware of the contents of the evidence. *Id.* However, the court did not translate this into a prejudicial impact on the defendants' sixth amendment rights. *Id.* The court stated that the use of curative devices, especially voir dire examination, can quell the impact of the increased publicity. *Id.*

76. *Id.* For further discussion of the use of these curative devices, see *infra* notes 180-213 and accompanying text.

77. 635 F.2d at 953. In so concluding, the court stated that it did not believe that the public at large had to be sanitized "as if they would become jurors in the remaining Abscam trials." *Id.* at 953-54. "The alleged risk to a fair trial

B. *Circuits' Reactions to Myers*1. *Courts Recognizing a Strong Presumption*

In *United States v. Criden*,⁷⁸ the United States Court of Appeals for the Third Circuit addressed the issue of media access to tape-recorded evidence in criminal trials.⁷⁹ The case involved the trial of two members of the Philadelphia City Council based on their alleged Abscam involvement.⁸⁰ The trial court denied the media the opportunity to copy and broadcast the taped evidence.⁸¹ This decision was based primarily on the fact that the trials of two other Abscam defendants were pending.⁸² According to the trial judge, the pendency of these trials mandated denial of access because of the potential prejudicial impact which access would have on those two defendants' sixth amendment rights.⁸³ The Third Circuit reversed,⁸⁴ holding that there exists a strong presumption in favor of access.⁸⁵

for the Abscam defendants yet to be tried is too speculative," according to the court, "to justify denial of the public's right to inspect and copy evidence presented in open court." *Id.* at 954.

78. 648 F.2d 814 (3d Cir. 1981).

79. *Id.* at 815.

80. *Id.* The defendants in this case were George Schwartz, a former president of the Philadelphia City Council, and Harry P. Jannotti, a former member of the Council. *Id.* Their trial was severed from those of two co-defendants, Louis C. Johanson, another Council member, and Howard L. Criden, a Philadelphia attorney. *Id.* The *Criden* case represents the second case in a long string of Abscam prosecutions, beginning with the *Myers* case. *Id.* For a further discussion of *Myers*, see *supra* notes 64-77 and accompanying text.

81. 648 F.2d at 816.

82. *Id.* Among the reasons given by the trial court to justify its denial were the pendency of a similar appeal before the United States Court of Appeals for the Second Circuit in an Abscam case in which the district court had ordered that the tapes be released to the press, the pendency of the Johanson-Criden trial, the outstanding indictments and possibility of a retrial of defendants Schwartz and Janotti and the existence of substantial due process challenges to the indictments. *Id.*

83. *Id.* The trial of two co-defendants, Johanson, a member of the City Council, and Criden, a Philadelphia attorney, had been severed. *Id.* at 815. The trial judge stated that the pendency of their trial mandated denial of access because of the possible prejudicial impact of access on their sixth amendment rights. *Id.* at 816. The trial judge also expressed concern over the possibility of prejudicial impact on Schwartz and Jannotti, the two co-defendants whose trial had been completed. *Id.* at 826. This concern stemmed from the possibility of a retrial and the difficulty in obtaining an impartial jury should such a trial occur. *Id.*

84. *Id.* at 815. The *Criden* case was argued before Chief Judge Seitz and Circuit Judges Weis and Sloviter. *Id.* Judge Sloviter wrote the majority opinion. *Id.*

85. *Id.* at 823. The Third Circuit held "that there is a strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination." *Id.* The court stated that the strength of the presumption must be weighed in terms of

The *Criden* opinion was based in large part on the Third Circuit's perception of the importance of "openness" in criminal trials.⁸⁶ According to the court, there is a legitimate public interest in knowing and understanding what transpires in the courtroom—an interest which is enhanced when a public official is involved.⁸⁷ However, as the Third

any factors present justifying denial of the application for access. *Id.* The *Criden* court acknowledged that the most significant factor weighing against access is the risk of jeopardizing the fair-trial rights of the defendants in the case before it as well as those defendants awaiting trial. *Id.* at 826. If rebroadcast of the videotape evidence would render an impartial verdict an impossibility in either the present trial or any future trial, then denial of access is justified. *Id.* However, the *Criden* court went on to establish that prejudice of this sort could not be shown in the present case. *Id.* at 827.

Chief Judge Seitz and Judge Sloviter both joined in the Third Circuit's reversal of the trial court's decision to deny access. *Id.* at 815. Judge Weis wrote a concurring and dissenting opinion. *Id.* at 830 (Weis, J., concurring and dissenting). Although the majority recognized a strong presumption in favor of access, it did not consider whether this presumption is protected by the first amendment. *Id.* at 820. However, the majority did state that "some of the same policy considerations identified as supporting open trials may be considered when the issue involves the common law right of access to trial materials." *Id.* at 820. The majority went on to discuss at length the *Richmond Newspapers* Court's analysis of the policy considerations underlying the first amendment right to attend trials. *Id.* at 819-23 (citing *Richmond Newspapers*, 448 U.S. 555 (1980)). It was this part of the majority opinion that prompted Judge Weis' dissent. *Id.* at 830 (Weis, J., concurring and dissenting). Judge Weis stated that "[t]he extended discussion of *Richmond Newspapers*, . . . in the majority opinion, albeit accompanied by disclaimers, has an unfortunate tendency to conjure up constitutional confusion about the right of access at issue here." *Id.* at 830 (Weis, J., concurring and dissenting) (citation omitted). Judge Weis reiterated the opinion that "the right to copy court exhibits is not of constitutional derivation but springs from a common law tradition." *Id.* Judge Weis further argued that because the majority labelled the presumption as "strong," it afforded it protections similar to those afforded constitutional rights. *Id.* at 831 (Weis, J., concurring and dissenting). For this reason, Judge Weis stated that no label should be given the presumption. *Id.* It should instead, he argued, be one factor in considering the question of access. *Id.* In spite of Judge Weis' disagreement with the language of the majority, he did concur in the result. *Id.* at 833 (Weis, J., concurring and dissenting).

86. 648 F.2d at 820-21. The court stated: "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' . . . and the appearance of justice can best be provided by allowing people to observe it." *Id.* at 821 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

87. *Id.* at 822. According to the court, the fact that the performances of public officials are involved contributes to the creation of a "legitimate public interest in the proceedings far beyond the usual criminal case." *Id.* The first amendment rights of free speech and free press have been recognized as a check on government and government officials. See *Richmond Newspapers*, 448 U.S. at 575 ("These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."). The common-law right of access plays this same role by allowing citizens to view the judicial process. *Id.* at 569. This viewing serves as a public check on the government and its officials. *Id.* The *Richmond* court quoted Jeremy Bentham to stress the role of access as a public tool to oversee the fairness of government:

Circuit noted, practical limitations of the courtroom render it impossible for the public as a whole to observe the proceedings.⁸⁸ Thus, according to the court, the right to broadcast the evidence is a necessary extension of the right to observe.⁸⁹ The *Criden* court rejected the argument that rebroadcast would impose “enhanced punishment.”⁹⁰ According to the court, publicity, which is further enhanced by the involvement of public officials, is an unavoidable aspect of criminal trials.⁹¹ The court also rejected the related argument that rebroadcast would infringe upon the defendants’ rights to a fair trial.⁹² Although the court conceded that this was the most serious consideration because the defendants’ sixth amendment rights were at issue, the court stressed the use of voir dire as a curative device.⁹³ The court saw no reason to deny the application based on “hypothetical prejudice” to the defendants whose trials were pending.⁹⁴

Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

Id. (quoting 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

88. *Id.* The right to attend criminal trials secured by the Supreme Court in *Richmond Newspapers* is subject to realistic limitations. *Id.* Only those who have the time and means to attend can benefit from this right. *Id.*

89. *Id.* The court stated that in order to secure the values stressed by the *Richmond Newspapers* Court, the tapes must be rebroadcast. *Id.*

90. *Id.* at 824-25. In denying access, the district court had placed great emphasis on the effect which rebroadcast would have on the fair-trial rights of the defendants in the completed trial in light of retrial possibilities and on the defendants awaiting trial on similar charges. *Id.* at 824.

91. *Id.* The Third Circuit distinguished the facts before it from situations in which rebroadcast would inflict additional pain on the victim in a criminal case or on other innocent third parties. *Id.* at 825. The court used the example of videotape evidence showing conversation and conduct prior to the commission of a rape. *Id.*; see *In re* Application of KSTP Television, 504 F. Supp. 360 (D. Minn. 1980) (denying application to copy videotape of conduct preliminary to and in anticipation of rape of kidnapping victim). The *Criden* court noted that “when the defendants themselves were public figures and their conduct was already the subject of national publicity and comment, we find the district court’s concerns about the incremental effect of rebroadcast publicity to be unconvincing.” *Criden*, 648 F.2d at 825. The *Criden* court concluded that, without any evidence to the contrary, such rebroadcast could not appropriately be considered enhanced punishment of defendants. *Id.* The court also stressed that there was no suggestion that the broadcasters were motivated by any improper purpose. *Id.* at 826.

92. *Id.* at 826-28.

93. *Id.* at 827-28. The *Criden* court interpreted the Supreme Court’s decision in *Chandler v. Florida* as standing for the proposition that, when there is a possibility of prejudicial impact due to publicity, the court should rely primarily on the availability of voir dire examination. *Id.* (citing *Chandler v. Florida*, 449 U.S. 560, 574-75 (1981)).

94. 648 F.2d at 827. The court noted that because there is a certain amount of publicity expected in any criminal proceeding, “we must distinguish between those situations where there is hypothetical prejudice and those where

In *In re National Broadcasting Co. (Jenrette)*,⁹⁵ the United States Court of Appeals for the District of Columbia followed the *Myers* approach in recognizing a strong presumption in favor of access.⁹⁶ This case was another in the string of Abscam prosecutions.⁹⁷ The D.C. Circuit reversed the trial court's decision to deny access,⁹⁸ relying most heavily on its previous decision in *Mitchell* which had delineated the contours of the common-law right.⁹⁹ According to the court, "access may be denied only if the district court . . . concludes that 'justice so requires.'"¹⁰⁰ The *Jenrette* court discussed several factors which weigh in favor of access.¹⁰¹ The most significant were: the involvement of public officials in the case, the availability of curative devices and the "hypothetical" nature of the prejudicial impact on the defendants.¹⁰²

it can be demonstrated that there has been actual prejudice caused by publicity." *Id.* Compare *Chandler v. Florida*, 449 U.S. 560 (1981) with *Estes v. Texas*, 381 U.S. 532 (1965). In terms of the defendants already before the court and the possibility of a retrial, the *Criden* court stressed the fact that the trial judge had no previous difficulty selecting a jury notwithstanding the widespread publicity surrounding the Abscam scandal. *Criden*, 648 F.2d at 827. At the trial level, the judge stated that "while virtually all of the prospective jurors called in the Schwartz and Jannotti case had heard or read about the case, most were able to state, truthfully in my view, . . . that they had formed no lasting conclusions." *Id.* (quoting *United States v. Criden*, 501 F. Supp. 854, 861 (E.D. Pa. 1980)). The Third Circuit relied on this language to point out that publicity does not necessarily lead to an infringement of a defendant's sixth amendment right to a fair trial by an impartial jury. *Id.* The court stated that "the appropriate course to follow when the spectre of prejudicial publicity is raised is not automatically to deny access but to rely primarily on the curative device of voir dire examination." *Id.* For a further discussion of sixth amendment implications, see *infra* notes 178-79 & 188-201 and accompanying text.

95. 653 F.2d 609 (1981).

96. *Id.* at 613.

97. *Id.* at 611. The case involved the prosecution of John Jenrette, a congressman from the Sixth District of South Carolina, and John Stowe, a private citizen. *Id.* Both were accused of accepting bribes in return for governmental favors. *Id.* Video and audiotape evidence of conversations between FBI agents and the defendants constituted a principal portion of the government's case. *Id.* Several broadcasters applied for post-trial permission to copy and rebroadcast these tapes. *Id.* at 610. These requests were denied by the trial court. *Id.*

98. *Id.* The trial court allowed the press and public to listen to the tapes as they were played for the jury. *Id.* at 611. In addition, transcripts of the audiotapes were given to the media. *Id.* However, transcripts of the videotapes were not distributed, and the trial court denied an application to copy and broadcast the evidence. *Id.* at 611-12.

99. See *id.* at 613-21 (citing *United States v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976)). For a discussion of *Mitchell*, see *supra* note 4 and accompanying text.

100. 653 F.2d at 613 (quoting *United States v. Mitchell*, 551 F.2d 1252, 1260 (D.C. Cir. 1976)).

101. *Id.* at 613-18.

102. *Id.* at 614-19. The *Jenrette* court listed five factors that favored release of the disputed tapes: 1) the tapes were admitted into evidence and played to the jury; 2) the tapes had been seen and heard by those members of the press and public who attended the trial; 3) the tapes contained only admissible evidence, were introduced for the purpose of proving the guilt of the defendants

The United States Court of Appeals for the Seventh Circuit also discussed some of these factors in *United States v. Edwards*.¹⁰³ Although the outcome in *Edwards* differs from the outcome in the cases previously discussed,¹⁰⁴ the discussion of the right of access and the analysis of the relevant factors is similar.¹⁰⁵ The case involved the trial of an Indiana state senator and an Indiana businessman who were charged with accepting unlawful payments in exchange for influencing legislation.¹⁰⁶ During the trial, the court admitted an audio recording of a telephone call into evidence.¹⁰⁷ The recording was played for the jury and transcripts were published in local newspapers.¹⁰⁸ Certain broadcasting stations requested permission to broadcast the tapes.¹⁰⁹ The trial court denied this request.¹¹⁰

and were obviously relied upon by the jury in finding the defendants guilty; 4) the nature of the trial itself, which involved an issue of major public importance and 5) the tapes sought were fully within the presumption in favor of access. *Id.* at 614.

103. 672 F.2d 1289, 1291-96 (7th Cir. 1982). For additional analyses of this case, see Comment, *The Right of Access to Judicial Records: When May the Electronic Media Copy Audio and Videotape Evidence?*, 60 CHL.-KENT L. REV. 755, 755-73 (1984) (concluding that access should be denied only when threat to sixth amendment rights is actual); Note, *Media Access to Evidentiary Materials: United States v. Edwards*, 1983 WIS. L. REV. 1455, 1455-72 (concluding that public's right to access will be afforded substantial deference in future Seventh Circuit cases).

104. Unlike the previous cases, *Edwards* involved an appeals court's affirmation of the trial court's denial of access to taped evidence. 672 F.2d at 1290.

105. See 672 F.2d at 1290.

106. *Id.* at 1290. The defendants in this case were Martin K. Edwards, a state senator and president *pro tempore* of the Indiana Senate, and Francis B. Kendall, a private businessman. *Id.*

107. *Id.* at 1290-91. The recording was a conversation between Edwards and John L. Cline, who was initially indicted along with the other defendants, but against whom charges were subsequently dropped. *Id.* at 1290-91 & n.2.

108. *Id.* at 1291. It was not clear in the records how the broadcasters received transcripts of the evidence. *Id.* However, a day before the tapes were played in court, the transcripts did appear in *The Indianapolis News* and *The Indianapolis Star*. *Id.*

109. *Id.* The requests were made both informally and by written application. *Id.* The court heard oral argument on the requests. *Id.*

110. *Id.* The trial court's denial was based on three factors. *Id.* First, the court expressed concern that access to the tapes might be interpreted as placing a judicial imprimatur on the evidence which might be rebutted by subsequent testimony. *Id.* Second, one of the defendants, Edwards, had a trial pending on charges of tax evasion and the trial court concluded that finding an impartial jury for this future trial could prove difficult. *Id.* Finally, according to the trial court, the resolution of the Judicial Conference of the United States banning the live broadcast of trials was a relevant consideration. *Id.*; see CODE OF JUDICIAL CONDUCT CANON 3A(7) (as amended 1982) (for United States Judges). This Judicial Conference resolution was based on the fear that the live broadcast of trials would have an impact on the conduct of the trial itself. See *Criden*, 648 F.2d at 829. The United States Supreme Court upheld the constitutionality of the live broadcast of trials in *Chandler v. Florida*, 449 U.S. 560, 582-83 (1981). Thus, the concerns underlying the Judicial Conference were alleviated on a constitu-

The Seventh Circuit affirmed the trial court's decision.¹¹¹ In doing so, however, the court did recognize a strong presumption in favor of access.¹¹² The court did not go so far as to require compelling circumstances in order to deny access,¹¹³ but it did state that access can be denied only when a detrimental effect on a defendant's sixth amendment fair trial right is proved through "articulable facts."¹¹⁴ The *Edwards* court suggested that, in terms of the case before it, jury instructions might have served to eliminate any prejudice.¹¹⁵ The court

tional level. *Criden*, 648 F.2d at 829. However, a trial judge may still consider the impact of the live broadcast of evidence as a factor in deciding the question of access. *Id.* The Judicial Conference, in and of itself, however, is not a relevant consideration because it is based on concerns different from those underlying a decision concerning physical access to tape-recorded evidence. *Id.* The *Criden* court stated:

The Judicial Conference resolution is based on apprehension about the effect that contemporaneous broadcast of trial proceedings might have on the conduct of the trial itself. This cannot be a relevant factor when the material sought for copying is merely . . . [a tape recording] of a preexisting event, since the participants on the tape cannot posture or otherwise change their behavior to play before a television audience.

Id. The United States Court of Appeals for the Seventh Circuit agreed with the Third Circuit's analysis of the Judicial Conference resolution. *See Edwards*, 672 F.2d at 1295.

111. 672 F.2d at 1290.

112. *Id.* The court stated: "For guidance in future cases, however, we make clear that there is a strong presumption in favor of the common law right of access to judicial records and that permission to inspect, copy, and disseminate should be denied only where actual, as opposed to hypothetical, factors demonstrate that justice so requires." *Id.* Although the *Edwards* court spoke of a strong presumption in favor of access, access was denied. The most compelling reason for this denial was the infringement on the defendant's sixth amendment right to a fair trial. Martin Edwards faced an already scheduled future trial for tax evasion. In this case, there was more than a mere possibility of a future trial. Thus, despite the Seventh Circuit's strong articulation in favor of access, the trial court's denial of access was affirmed. However, in a more recent Seventh Circuit case the language in *Edwards* was used to allow access to videotape evidence in a factual setting involving a more hypothetical possibility of prejudice to the defendant's constitutional rights. *See United States v. Guzzino*, 766 F.2d 302, 304 (7th Cir. 1985). For a further discussion of *Guzzino*, see *infra* notes 119-22 and accompanying text. *See also* Note, *supra* note 103, at 1472 ("Access was denied [in *Edwards*] . . . but the unique factual and legal context of the district court case, . . . indicates that the public's right to know will be given substantial weight by the Seventh Circuit in the future.").

113. 672 F.2d at 1294. The court stated that it was "unwilling to go so far as the Second Circuit's statement that only exceptional circumstances will justify non-access." *Id.* The *Edwards* court was referring to the *Myers* opinion, which stated that "it would take the most extraordinary circumstances to justify restrictions [on the right of access]." *See Myers*, 635 F.2d at 952.

114. 672 F.2d at 1294. In so concluding, the *Edwards* court distinguished between "articulable facts known to the court" and "unsupported hypothesis or conjecture." *Id.* Further, the court stressed the importance of a trial court's stating the basis of its ruling "so as to permit appellate review of whether relevant factors were considered and given appropriate weight." *Id.*

115. *Id.* at 1295-96. The court noted that the danger of a jury misinter-

also noted that the use of voir dire may be a sufficient curative device to prevent prejudice at future trials.¹¹⁶ The trial judge himself acknowledged that this would most likely overcome the problem.¹¹⁷ However, the Seventh Circuit held that the judge did not abuse his discretion in denying access.¹¹⁸

In *United States v. Guzzino*,¹¹⁹ the United States Court of Appeals for the Seventh Circuit once again confronted the issue of access by the media to audio or video tapes that have been admitted into evidence in a criminal trial.¹²⁰ The *Guzzino* court noted the strong presumption in favor of access previously acknowledged in *Edwards* and allowed the media access to tapes that had been admitted into evidence.¹²¹ In a short opinion, the Seventh Circuit stated that, absent definitive evidence of an infringement of defendant's constitutional rights, access must be allowed.¹²²

2. Courts Rejecting the Myers Approach

Three circuit courts of appeal have explicitly rejected the Second Circuit's approach in *Myers* and have refused to recognize a strong presumption in favor of access.¹²³ The first court to articulate this view was

preparing the significance of a grant of access may normally be mitigated "by firmly instructing the jury that the court expresses no opinion on the merits of particular testimony or exhibits and by cautioning them to avoid news reports of the trial." *Id.* at 1296.

116. *Id.* In noting this potential curative device, the *Edwards* court observed that, generally, those courts that find the presumption of access to be strong tend to discount the risk of harm to the proceedings. *Id.* Conversely, courts which minimize the importance of the presumption accentuate potential jeopardy to other cases. *Id.*

117. *Id.*

118. *Id.* According to the court, the "acknowledgement [sic] . . . that the difficulty could be overcome makes the case closer, but does not . . . demonstrate an abuse of discretion." *Id.* For a further discussion of the reasons for the Seventh Circuit's denial of access, see *supra* note 112.

119. 766 F.2d 302 (7th Cir. 1985).

120. *Id.*

121. *Id.* at 304. *Guzzino* involved the criminal trial of defendants Richard Guzzino and Robert Ciarrocchi. *Id.* at 303. At the criminal trial of the two defendants, the government introduced into evidence and played to the jury two audio tapes of telephone conversations between Guzzino and a government witness. *Id.* CBS, Inc. (CBS) requested access to the tapes so that they could be copied. *Id.* The district court denied CBS's motion, but allowed access to a transcript of the tapes. *Id.* The district judge based his decision on the poor quality of the tapes and his concern that release of the tapes could result in a misunderstanding of what was actually said on the tapes. *Id.*

122. *Id.* at 304. In reaching its conclusion in favor of access, the *Guzzino* court held that it was improper for the trial judge to consider the factor of potential inaccurate reporting. *Id.* The court stated that the trial judge's sole concern should have been with the constitutional rights of the defendants before it. *Id.*

123. See *Beckham*, 789 F.2d 401; *United States v. Webbe*, 791 F.2d 103 (8th

the United States Court of Appeals for the Fifth Circuit in *Belo Broadcasting Corp. v. Clark*.¹²⁴ *Belo* involved the prosecution of several public officials based on FBI findings during the "Brilab"¹²⁵ investigation. The trial court denied the media access to the audiotape evidence.¹²⁶ The Fifth Circuit affirmed this decision.¹²⁷ The *Belo* court's opinion was based primarily on the conclusion that the right of access is not of constitutional proportion.¹²⁸ After so concluding, the court stated that the balance to be drawn in deciding a request for media access is one between the defendant's constitutional right to a fair trial and the nonconstitutional right of access asserted by the media.¹²⁹

It was on this premise that the court based its explicit rejection of the *Myers* approach.¹³⁰ According to the *Belo* court, the strength of the presumption in favor of access recognized in *Myers* is not appropriate when a mere common-law right is being asserted.¹³¹ The court acknowledged a presumption in favor of access but stated that it is subordinate to any prejudicial impact on the sixth amendment rights of the defendant involved.¹³² In terms of whether the prejudice is too

Cir. 1986); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981). For a discussion of these cases, see *infra* notes 124-51 and accompanying text.

124. 654 F.2d 423 (5th Cir. 1981).

125. *Id.* at 425. "Brilab" refers to an FBI "sting" operation that exposed alleged bribery in the awarding of state employee insurance contracts. *Id.* The Speaker of the Texas House of Representatives and two Texas attorneys were tried and acquitted. *Id.* However, at the time of the request for access, the trial of a fourth party, a labor official, was still pending. *Id.*

126. *Id.* The trial court's decision was based primarily on concern for the sixth amendment rights of the defendant whose trial was pending. *Id.* The judge held that rebroadcast would severely infringe on the selection of an impartial jury. *Id.*

127. *Id.*

128. *Id.* at 426-29. The *Belo* court stressed the Supreme Court's holding in *Warner Communications* that there is no first amendment right of physical access to courtroom exhibits. *Id.* at 428. The court interpreted *Richmond Newspapers* as supporting that decision. *Id.* According to the *Belo* court, *Richmond Newspapers* established only a constitutional right to attend certain criminal trials, rather than a constitutional right of access to trial evidence. *Id.* at 427-28. The *Belo* court argued that the *Richmond Newspapers* holding was a narrow one and did not disturb or derogate from the *Warner Communications* decision. *Id.* at 428.

129. *Id.* at 432. The *Belo* court stated: "The district court was not at all required to balance fair trial with free press concerns. The choice was rather between an undeniably important but nonconstitutional right of physical access . . . and a defendant's due process right to a fair trial . . ." *Id.*

130. *Id.* at 433-34.

131. *Id.* The *Belo* court stated that "[i]n erecting such stout barriers against those opposing access and in limiting the exercise of the trial court's discretion, our fellow circuits have created standards more appropriate for protection of constitutional than of common law rights." *Id.* at 434.

132. *Id.* at 432. The court referred to the right of access as "undeniably important but nonconstitutional" while the sixth amendment right to a fair trial was labelled "the linchpin of our criminal justice system." *Id.* (quoting *Criden*, 648 F.2d at 827).

speculative to warrant protection, the *Belo* court agreed that the purported prejudice to a defendant's sixth amendment rights must be more than merely hypothetical; the court, however, stated that the trial judge's opinion as to possible harm is sufficient.¹³³ The court refused to question the trial judge's evaluation of the availability of voir dire and other curative devices.¹³⁴ Thus, according to the Fifth Circuit, the trial judge's prediction of problems in selecting an impartial jury serves as an adequate basis for denying access.¹³⁵

Similarly, in *United States v. Beckham*,¹³⁶ the United States Court of Appeals for the Sixth Circuit decided the issue of media access and articulated a rationale similar to that presented by the Fifth Circuit in *Belo*.¹³⁷ The trial court denied access to tapes that were admitted into evidence at the trial of a Detroit public official and other defendants.¹³⁸ The Sixth Circuit affirmed this decision.¹³⁹ The *Beckham* court held that not only is there no first amendment right of access, but, further, that the policy considerations behind the first amendment right to attend trials established by the Supreme Court in *Richmond Newspapers*¹⁴⁰ and the

133. *Id.* at 431. In the words of the court: "Speculative dismissal by an appellate court of a trial judge's admittedly uncertain but quite reasonable prognostication only compounds the problem. The informed and considered judgment of the trial judge should prevail in any choice between such equally speculative results." *Id.*

134. *Id.* at 432. The court stated that questioning the trial judge's opinion as to this would "require us to direct the trial judge in the practical management and operation of his courtroom, a course we are loath to take in any but the most extreme circumstances. We cannot assume trial court ignorance of those familiar devices, and we will not assume inattention to their availability." *Id.*

135. *Id.*

136. 789 F.2d 401 (6th Cir. 1986). *Beckham* involved the prosecution of several defendants, one of whom was a Detroit city official. *Id.* at 403. The defendants were accused of defrauding the city. *Id.* The government presented several audio and video tapes at trial. *Id.* These tapes were broadcast over a loudspeaker and transcripts were given to the jurors. *Id.* However, the court denied media access to both the transcripts and the tapes. *Id.* at 404-05.

137. *Id.* at 403-15. For a discussion of the standard of access articulated by the Fifth Circuit in *Belo*, see *infra* notes 124-35 and accompanying text.

138. 789 F.2d at 403. The media in *Beckham* originally sought to obtain copies of tapes and other exhibits. *Id.* at 404. They subsequently filed an application for contemporaneous access to all tapes, transcripts and documentary exhibits admitted into evidence or used at trial. *Id.* The court defined contemporaneous access as "access at the time the evidence is presented in court or at the end of the day in which the evidence is introduced." *Id.* The requests were denied. *Id.* Several subsequent attempts by the media to gain access, including a petition for a writ of mandamus, also failed. *Id.*

139. *Id.* at 415. Although it noted that the trial judge's decision may have been overly cautious, the Sixth Circuit acknowledged that the primary responsibility for the "orderly administration of a criminal trial" rested on his shoulders. *Id.* Given the media's access to the courtroom, the court of appeals refused to say that the district court abused its discretion. *Id.*

140. See *Richmond Newspapers*, 448 U.S. at 569-73. For a discussion of the Supreme Court's decision in *Richmond Newspapers*, see *supra* notes 159-62 and accompanying text.

common-law right of access are not similar.¹⁴¹ The court agreed with other courts of appeals that the involvement of public officials militates in favor of access.¹⁴² However, the *Beckham* court did not accept the *Myers* standard that only the most extraordinary circumstances justify denial of access.¹⁴³ According to the Sixth Circuit, access must be denied whenever a defendant's sixth amendment rights may be infringed by a grant of access to the media.¹⁴⁴ The court accepted the trial judge's findings concerning the likelihood of sixth amendment infringements and thus denied access.¹⁴⁵

In *United States v. Webbe*,¹⁴⁶ the United States Court of Appeals for the Eighth Circuit reached a conclusion analogous to that of the Sixth Circuit in *Beckham*.¹⁴⁷ The Eighth Circuit specifically refused to recognize a strong presumption in favor of access.¹⁴⁸ As in previous cases

141. 789 F.2d at 413. The Sixth Circuit agreed with Judge Weis' concurring and dissenting opinion in *Criden*. *Id.* (citing *Criden*, 648 F.2d 814, 830-33 (3d Cir. 1981) (Weis, J., concurring and dissenting)). Weis argued that the legal underpinnings of the rights in question are dissimilar. *See Criden*, 648 F.2d 814, 830-33 (3d Cir. 1981) (Weis, J., concurring and dissenting). For a discussion of Weis' opinion, see *supra* note 85.

142. 789 F.2d at 413. For a discussion of other decisions that emphasize the importance of a public official in this context, see *supra* notes 74, 87 & 102.

143. 789 F.2d at 414. The court stated: "We agree with the Second Circuit that the common-law right extends to tape-recordings, but respectfully disagree that only the most extraordinary reasons justify a restriction on the common-law right . . ." *Id.* For a further discussion of the *Beckham* court's analysis of *Myers*, see *infra* note 144. For a further discussion of *Myers*, see *supra* notes 64-77 and accompanying text.

144. 789 F.2d at 415. In so concluding, the court distinguished the aforementioned "Abscam" cases (e.g., *Myers*) by finding that the danger to the defendants' right to a fair trial in the case before it was more grave than in those previous cases. *Id.* The court stated that "there was more than city government and possible political corruption involved in this case; there were extremely sensitive issues of racial prejudice in Detroit." *Id.* According to the court, the sensitive nature of the case "increased the likelihood of an infringement of the defendants' sixth amendment right to a fair trial." *Id.* For a further discussion of the sixth amendment in the context of media access, see *infra* notes 188-201 and accompanying text.

145. 789 F.2d at 415. The trial judge found that the available curative devices were insufficient. *Id.* According to the judge, jurors willing to be sequestered are few. *Id.* In addition, the rebroadcast would affect a high percentage of potential jurors, creating difficulty in impanelling an impartial jury. *Id.* The judge also indicated concern over the "furor in the community" caused by racial disputes which could affect the "orderly, fair administration of criminal justice." *Id.*

146. 791 F.2d 103 (8th Cir. 1986). *Webbe* involved a prosecution based on voting fraud and obstruction of justice. *Id.* at 104. *Webbe*, the defendant, a public figure, had served as alderman for the seventh ward in St. Louis and had also served on the Democratic Party Committee. *Id.* The trial court admitted several audiotapes into evidence. *Id.* The media was furnished with transcripts of tapes. *Id.* CBS applied for access to rebroadcast the tapes and was denied. *Id.*

147. *See id.* at 106-07.

148. *Id.* at 106.

denying access,¹⁴⁹ a great deal of deference was given to the trial judge's articulation of the factors weighing against access.¹⁵⁰ The court held that, since the defendant in this case had other charges pending and the trial judge had had difficulty in the previous case selecting a jury, prejudice at the defendant's subsequent trial was not merely hypothetical and, thus, the trial court had discretion to deny access.¹⁵¹

IV. ANALYSIS

As the case law analyzed in this Note suggests, there is currently a conflict among the courts of appeals as to whether the courts should recognize a presumption in favor of media access to tape-recorded evidence admitted at criminal trials and which factors should be determinative in a decision concerning media access to such evidence.¹⁵² The two most significant aspects of the courts' opinions are the constitutional analyses upon which such decisions have been based and the examinations by the courts of the availability of curative devices to preserve defendants' fair-trial rights when access has been granted.¹⁵³

A. A Constitutional Perspective

Although the Supreme Court refused to recognize a first amendment right of access in *Warner Communications*,¹⁵⁴ the existence of such a right remains plausible following the Court's decisions in *Richmond Newspapers* and *Globe Newspaper*.¹⁵⁵ In *Warner Communications*, the Court

149. For a discussion of cases rejecting a strong presumption in favor of access, see *supra* notes 124-45 and accompanying text.

150. 791 F.2d at 106-07. The *Webbe* court stated that "the decision as to access is properly handled on an ad hoc basis by the district judge, who is in the best position to recognize and weigh the appropriate factors . . . We are ill-equipped to second-guess his determination." *Id.* at 107.

151. *Id.* at 107. In discussing the trial court's opinion, the Eighth Circuit stated: "The court noted that not only was the vote fraud case currently underway, but *Webbe* had two other charges pending against him in the district in which the tapes admitted in the vote fraud trial might also be used." *Id.* at 106. The court also noted that the trial judge had experienced difficulty in selecting a jury. *Id.*

152. For a discussion of the current conflict among the circuits in this regard, see *supra* notes 64-151 and accompanying text.

153. For an analysis of the constitutional perspective in media access cases, see *infra* notes 154-74 and accompanying text. For a discussion of the use of curative devices in the same cases, see *infra* notes 180-213 and accompanying text.

154. 435 U.S. 589, 608-09 (1978). For an analysis of this opinion, see *supra* notes 51-58 and accompanying text.

155. See Note, *supra* note 103, at 1469-71 (noting that *Globe Newspaper* strengthens argument that right of access to judicial records is grounded in first amendment); Note, *supra* note 6, at 452 n.44 ("There is a speculative possibility, noted in *Criden*, . . . that *Richmond Newspapers* heralds a more expansive view of the First Amendment's application to court records than was followed in *Warner Communications*."). For further discussion of the *Richmond Newspapers* and *Globe*

rejected the existence of a constitutional right of access for the media.¹⁵⁶ The Court reasoned that the media possess no right superior to that of the general public and, therefore, that media access is limited to attendance at trials.¹⁵⁷ At the time of the *Warner Communications* decision, the Court had recognized only a presumption of openness in criminal trials.¹⁵⁸ However, in *Richmond Newspapers*, the Court raised the presumption to the level of a constitutional right,¹⁵⁹ thereby recognizing a constitutional basis for the right of the general public to have access to criminal trials.¹⁶⁰ Since the rights of the press are generally considered equal to those of the public,¹⁶¹ it can be argued that *Richmond Newspapers* grants the press a constitutional right of access as a me-

Newspaper opinions, see *infra* notes 159-67 and accompanying text. See also Comment, *Constitutional Law: Right of Access to Criminal Trials is Protected by the First Amendment*, 22 WASHBURN L.J. 380 (1983) (analyzing recent Supreme Court decisions balancing first amendment with sixth amendment concerns).

156. See *Warner Communications*, 435 U.S. at 608-09.

157. *Id.* (citing *Estes v. Texas*, 381 U.S. 532, 589 (1965)).

158. See *id.* at 602 (“[o]n respondents’ side is the presumption—however gauged—in favor of public access to judicial records.”); see also *In re Oliver*, 333 U.S. 257, 266 (1948) (“This nation’s accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage.”); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property.”); *Pennekamp v. Florida*, 328 U.S. 331, 361 (1946) (Frankfurter, J., concurring) (“Of course trials must be public and the public have a deep interest in trials.”).

159. See *Richmond Newspapers*, 448 U.S. at 580 (“We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . .”).

160. See also *Globe Newspaper*, 457 U.S. 596 (“The Court’s recent decision in *Richmond Newspapers* established for the first time that the press and the general public have a constitutional right of access to criminal trials.”). For a discussion of the *Globe Newspaper* and *Richmond Newspapers* decisions, see *supra* note 159 and *infra* notes 161-67 and accompanying text.

161. See *Cox*, 420 U.S. at 491-92. The press serves as a medium through which the public’s right to know is facilitated. *Id.* Because of limited time and resources, the public is unable to gather all the information available to it and, therefore, needs the press to publicize what it is entitled to know. *Id.*; see also *Warner Communications*, 435 U.S. at 609 (“Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know.”).

As a result of the nature of the medium of the press, the exercise of its right to access, it is submitted, has a broader impact because of wide publication. However, within the courtroom itself, the right of access granted to the press is no greater than that of the public, and only information available to the public should be available to the press. See *Estes v. Texas*, 381 U.S. 532, 589 (1965). The *Estes* Court stated:

Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter’s constitutional rights are no greater than those of any other member of the public.

Id.

dium for the public.¹⁶² The *Warner Communications* Court's reasoning is held intact because the press, through its exercise of access, is merely facilitating a public right recognized in *Richmond Newspapers*.¹⁶³

The Supreme Court's decision in *Globe Newspaper* lends credence to the first amendment basis of the media's claimed right of access.¹⁶⁴ In that case, the Court reiterated the existence of the public's constitutional right of access to criminal trials and specifically included the press as enjoying that same right.¹⁶⁵ The *Globe Newspaper* Court stated that "the press and general public have a constitutional right of access to criminal trials."¹⁶⁶ The right of access recognized in both *Richmond Newspapers* and *Globe Newspaper* is, in terms of attendance, naturally limited by the size of the courtroom and the inability of a large portion of the population to attend.¹⁶⁷ Thus, it is suggested that the media's constitutional right of access as a medium for the public logically follows from the *Richmond Newspaper* decision, as indicated by the *Globe Newspaper* decision.

162. See *Criden*, 648 F.2d at 821 n.6 ("Arguably, the *Richmond Newspapers* case could be viewed as supporting a right of the public to access to the tapes through the medium of the broadcasters."). In *Richmond Newspapers*, Chief Justice Burger discussed the role of the media as "surrogates" for the general public: "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." *Richmond Newspapers*, 448 U.S. at 572-73; see also *Cox*, 420 U.S. at 491-92.

163. See *Richmond Newspapers*, 448 U.S. at 580 (right to attend criminal trials is implicit in guarantees of first amendment).

164. See *Globe Newspaper*, 457 U.S. at 603-11. The *Globe Newspaper* Court stated:

The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and the general public have a constitutional right of access to criminal trials. Although there was no majority opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment.

Id. at 603; see also Note, *supra* note 103, at 1471 ("*Globe* buttresses the argument for a strong presumption of access grounded in the first amendment, and undercuts previous authority to the contrary.").

165. *Globe Newspaper*, 457 U.S. at 603.

166. *Id.*

167. See *Criden*, 648 F.2d at 822. The *Criden* court stated:

The public's opportunity to observe the trial proceeding, secured by *Richmond Newspapers*, is subject to certain practical limitations, and can be taken advantage of only by those persons who have the available time and means to be present. Thus, the public forum values emphasized in that case can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person.

Id. Prior to the *Richmond* decision, the court in *United States v. Mitchell* spoke of the problem of the "cramped courtroom": "the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to . . . [the] courtroom the same opportunity to hear the White House tapes." *Mitchell*, 551 F.2d at 1258.

The courts that have dealt with the issue of the media's right of access to tape recordings have analyzed the first amendment issue in conflicting ways. Some courts have explicitly recognized a first amendment right of physical access to the tapes in question.¹⁶⁸ Others have specifically refused to recognize such a right.¹⁶⁹ Between these two extremes are those courts that decline to rule on the constitutional question but acknowledge that the policies behind the first amendment protections apply to the issue of physical access to tape-recorded evidence.¹⁷⁰

It is submitted that whether or not an explicit constitutional right of access in the media to tape-recorded evidence is recognized on the authority of *Richmond Newspapers* and *Globe Newspaper*, the policy considerations articulated within the Supreme Court's recent decisions also support a right of access.¹⁷¹ The most significant policy behind the constitutional right to attend trials is the importance of "openness" in criminal proceedings.¹⁷² Chief Justice Burger, in his plurality opinion in *Richmond Newspapers*, recognized the "significant community therapeutic

168. See, e.g., *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) ("we recognized that this presumption [in favor of access] is of constitutional magnitude"); *Associated Press v. United States Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("[T]he first amendment right of access to criminal trials also applies to pretrial proceedings."); *United States v. Dorfman*, 690 F.2d 1230, 1233-34 (7th Cir. 1982) ("The 'right of access' is now part of the First Amendment.").

169. See *Webbe*, 791 F.2d at 105 (relying on *Warner Communications* holding that first amendment does not guarantee access to tapes); *Beckham*, 789 F.2d at 408-09, 413 (agreeing that right to copy court exhibits is not of constitutional derivation but springs from common-law tradition); *Belo*, 654 F.2d at 426, 428, 432, 434 (there exists no first amendment right of access to tapes).

170. See *Edwards*, 672 F.2d at 1294 (recognizing that right of access is of non-constitutional origin but acknowledging strength of common-law presumption); *Criden*, 648 F.2d at 820, 821 n.6 (disposing of case on non-constitutional grounds but noting importance of public's right to open trial); *Mitchell*, 551 F.2d at 1258 (stating that constitutional provisions support but do not mandate common-law right of access).

171. For a discussion of the policy considerations within the Supreme Court's recent decisions that support a right of access, see *infra* notes 172-74 and accompanying text.

172. See *Criden*, 648 F.2d at 820-22 (openness of proceedings in interest of both defendant and public). See generally 6 J. WIGMORE, EVIDENCE § 1834, 435-41 (1976) ("The publicity of a judicial proceeding . . . plays an important part as a security for testimonial trustworthiness . . ."). The Supreme Court has long recognized the importance of "openness" in the criminal setting. See *Globe Newspaper*, 457 U.S. at 606 ("the institutional value of the open criminal trial is recognized in both logic and experience"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("[openness] contribute[s] to public understanding of the . . . entire criminal justice system"); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari) ("One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there . . .").

value" imparted by open trials.¹⁷³ This openness is especially valued in the criminal setting in light of its deterrent effect on criminals and its prophylactic effect on members of the community exposed to crime.¹⁷⁴

It is submitted that this concern for openness calls for a strong presumption in favor of access which should be denied only in the most compelling circumstances.¹⁷⁵ In determining when these circumstances exist, a court should consider the probability of infringement on the defendant's sixth amendment rights which might result from a grant of access to taped evidence.¹⁷⁶ However, in doing so, the courts should follow the *Myers* and *Criden* courts' analyses of the availability and effect of curative devices.¹⁷⁷

B. *The Use of Curative Devices*

The chief obstacle to access, uniformly acknowledged by the courts that have considered the issue, is the defendant's sixth amendment right to an impartial trial.¹⁷⁸ The concern over prejudicial impact relates to

173. 448 U.S. at 570. Chief Justice Burger noted that openness has "long been recognized as an indispensable attribute of an Anglo-American trial." *Id.* at 569. He explained that the open judicial process serves an important "prophylactic purpose," providing an outlet for "community concern, hostility and emotion." *Id.* at 571. Openness also serves an important educative function in that it contributes to public understanding of the law and the criminal justice system. *Id.* at 572-73.

174. *Id.* at 570-72. Chief Justice Burger, writing for the plurality in *Richmond Newspapers*, noted that when a shocking crime occurs there is a reaction of outrage by the affected community. *Id.* at 571. The interaction between the public trial and the community's reaction was referred to as a "community catharsis." *Id.* Chief Justice Burger stressed the fact that this catharsis could not occur "in the dark." *Id.*

175. See *Myers*, 635 F.2d at 952. The *Myers* court suggested that, if it can be shown that broadcast of the videotape evidence will lead to an infringement of a defendant's sixth amendment right to a fair trial, denial of access is justified. *Id.* at 953. However, the court stated that this infringement must not be speculative and that the use of curative devices can be heavily relied on to minimize the possibility of prejudice. *Id.* at 953-54.

176. See, e.g., *Criden*, 648 F.2d at 826-28 (reversing district court order that denied application for access based primarily on fair-trial concerns). The *Criden* court referred to a defendant's right to a fair trial as the "most serious factor" in deciding the question of access to videotape evidence. *Id.* at 826. For further discussion of the sixth amendment in the context of media access, see *infra* notes 188-201 and accompanying text. For a discussion of the *Criden* opinion, see *supra* notes 78-94 and accompanying text.

177. See *Criden*, 648 F.2d at 827-28; *Myers*, 635 F.2d at 953-54. For a discussion of the approaches of the *Myers* and *Criden* courts, see *supra* notes 64-94 and accompanying text.

178. See, e.g., *Edwards*, 672 F.2d at 1295 ("Clearly it is appropriate—indeed necessary—for a court to consider how the granting of an application for access to evidence . . . will affect the defendant's right to a fair proceeding."); *Belo*, 654 F.2d at 431 ("It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury."); *Criden*, 648 F.2d at 827 ("defendants' due process right to a fair trial is the linchpin of our criminal justice system."); *Myers*, 635 F.2d at 953 ("of greater concern is the

unfairness to the defendant during both the ongoing trial at which the request for access is made and at any imminent trials.¹⁷⁹

During a trial in which access to evidence is sought, a judge has at his disposal the use of cautionary instructions and sequestration of the jury as tools to eliminate potential prejudice to the defendant which might result from such access.¹⁸⁰ The use of cautionary instructions has long been considered a useful and indispensable instrument of jury control.¹⁸¹ Such instructions enable a judge to clarify to the jury its role in the proceedings and to eliminate any misconceptions caused by publicity about the case.¹⁸² While the possibility remains that jurors, despite

risk to a fair trial of the three *Myers* defendants and others facing trial on other Abscam indictments.”).

The importance of fair-trial rights has long been recognized by the Supreme Court. See *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984) (“No right ranks higher than the right of the accused to a fair trial.”); *Patterson v. Colorado ex rel. Att’y Gen.*, 205 U.S. 454, 462 (1907) (jury’s decision must be “induced only by evidence and argument in open court, and not by any outside influence whether of private talk or public print”).

179. See Note, *supra* note 6, at 459. The Note’s author states: “Possibly the greatest concern in the decision whether to permit rebroadcast of video evidence is the risk of infringing upon the right to a fair trial of present or prospective defendants.” *Id.*

180. See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 563-64 (1976). The *Nebraska Press* Court expressed approval of the use of “emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court.” *Id.* at 564. The Court also noted the availability and use of sequestration as an alternative to restraining the publication of evidence. *Id.*; see also *Myers*, 635 F.2d at 953 (“The . . . Judge . . . was entitled to rely on the jury’s observance of his admonition to avoid exposure to reports of the trial in the news media.”). For a general discussion of the use of cautionary instructions, see Comment, *The Impartial Jury—Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 CORNELL L.Q. 306, 316 (1966) [hereinafter Comment, *The Impartial Jury*] (“The judge fulfills [his] duty by giving cautionary instructions.”). For a detailed commentary on the use of sequestration as a curative device, see Comment, *Sequestration: A Possible Solution to the Free Press—Fair Trial Dilemma*, 23 AM. U.L. REV. 923, 955 (1974) [hereinafter Comment, *Sequestration*] (“[I]n those cases which can be said to be ‘sensational,’ sequestration, despite its weaknesses, does provide, in concert with other remedies, the best method available to protect the conflicting rights of freedom of press and fair trial.”).

181. See Note, *Fair Trial/Free Press: The Court’s Dilemma*, 17 WASHBURN L.J. 125, 138 (1977) (“In most instances, the trial court will be able to deal effectively with the problem of adverse publicity by cautioning the jurors to avoid exposure to such publicity.” (citation omitted)). It is generally considered part of the judge’s duty to give cautionary instructions regularly to jurors whenever the case is such that the jury separates before reaching a verdict. See Comment, *Sequestration*, *supra* note 180, at 932 (“If the court allows the jury to separate once impanelled, the trial judge will regularly admonish it not to read about, listen to conversations concerning, or discuss the case during the trial until its discharge.” (footnotes omitted)). For a transcript of a model cautionary instruction, see *Standards Relating to the Administration of Criminal Justice* Standard 8-3.6(e) (Approved Draft 1978) [hereinafter *Standards*].

182. See generally Comment, *The Impartial Jury*, *supra* note 180, at 316.

the court's admonition, would be unduly prejudiced because of publicity resulting from the inspection and copying of admitted evidence, this possibility, it is submitted, is sufficiently remote as to pose no significant risk to a defendant's fair trial.¹⁸³

Should cautionary instructions to the jury be deemed ineffectual, sequestration of the jury exists as a viable alternative. Sequestration is generally considered to be reserved for the exceptional cases,¹⁸⁴ those in which mere admonition to the jury will not suffice.¹⁸⁵ Thus, absent a showing of exceptional circumstances creating a "circus atmosphere" in the courtroom, a cautionary instruction to the jury should be considered sufficient to dispel any discriminatory impact on the jurors caused by the release of evidence to the media.¹⁸⁶ Should the circumstances be shown to justify sequestration, it can be employed to ensure insulation of the jury from the negative effects of publicity of the evidence, thus preserving an impartial jury for the defendant.¹⁸⁷

183. See *Edwards*, 672 F.2d at 1296 (citing *Myers*, 635 F.2d at 953). The *Edwards* court stated:

[A] court would ordinarily conclude that the possibility that the jurors, despite the admonition, would be unduly prejudiced because of publicity resulting from the inspection and copying of evidence which has already been held admissible is sufficiently remote as to pose no significant risk to a fair trial.

Id. Other courts have noted that there is no reason to believe that cautionary instructions will be ignored by jurors. See *Myers*, 635 F.2d at 953 (possibility that jurors, despite admonition, might see tapes of excerpts unflattering to appellants again on television did not pose significant risk to fair trial); *United States v. Mouzin*, 559 F. Supp. 463, 467 (C.D. Cal. 1983) (confidence that jurors will obey instructions of court is underpinning of our criminal justice system); *United States v. Pageau*, 535 F. Supp. 1031, 1033-34 (N.D.N.Y. 1982) ("it cannot be assumed that jurors will ignore the Court's instructions to render a verdict solely upon the evidence presented in the courtroom").

184. See *Standards*, *supra* note 181, at Standard 8-3.6(b) (sequestration used only if "there is a substantial likelihood that highly prejudicial matters will come to the attention of the jurors"). Although sequestration insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564 (1976). The Supreme Court in *Richmond Newspapers* expressed its approval of the use of sequestration as an alternative to the denial of access. *Richmond Newspapers*, 448 U.S. at 581.

185. See *Standards*, *supra* note 181, at Standard 8-3.6(b).

186. See *Sheppard v. Maxwell*, 384 U.S. 333, 349-63 (1966) (extremely high level of publicity made it extraordinarily difficult to impanel a jury and created a "circus atmosphere" in courtroom). There are, concededly, a few extreme situations in which cautionary instructions are not effective. See, e.g., *United States v. Murray*, 784 F.2d 188, 189 (6th Cir. 1986) (in some circumstances, a cautionary instruction is "close to an instruction to unring a bell"); *United States v. Schiff*, 612 F.2d 73, 83 (2d Cir. 1979) (instruction may, at times, be insufficient).

187. See *supra* notes 184-86 and accompanying text. For an example of a situation in which cautionary instructions were insufficient and sequestration should have been employed as a device to protect the defendant's fair-trial rights, see *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In *Sheppard*, there was an extraordinary amount of publicity surrounding the prosecution of the defendant for the second-degree murder of his pregnant wife. *Id.* at 335. The trial judge

Apart from prejudice to the defendant during an ongoing trial, concern for the defendant's fair-trial rights is greatest in situations where future trials related to the initial proceedings are either scheduled or anticipated.¹⁸⁸ Frequently, a denial of access at the trial level is predicated on the judge's prediction of difficulty in impanelling an impartial jury.¹⁸⁹ An impartial juror is defined as one who is "indifferent as he stands unsworne [sic]."¹⁹⁰ Knowledge of the facts and issues of a case does not necessarily prove bias.¹⁹¹ Instead, a biased person must have a preconceived opinion as to the issues in the case.¹⁹² While it is true that the impact of a television broadcast increases the number of people exposed to pretrial publicity,¹⁹³ as the Second Circuit in *Myers* pointed

allowed the media to sit within the bar and lost his ability to adequately oversee the proceedings. *Id.* at 355. The jury was allowed to witness several radio, newspaper and television broadcasts of coverage of the case. *Id.* at 353. The jurors were further exposed to telephone calls from the public due to the publication of their names and addresses. *Id.* The jury was not sequestered. *Id.* Essentially, "the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers." *Id.* As a result of these circumstances, Sheppard's fair-trial rights were violated and the Supreme Court granted his petition for habeas corpus. *Id.* at 363.

188. See *Myers*, 635 F.2d at 953; see also Note, *supra* note 6, at 461 ("Of far greater concern is the effect which broadcast may have upon trials of implicated defendants, or upon retrials."). The problem at this point goes beyond the prejudicial impact on the existing impanelled jury to the difficulty of impanelling a new jury for the subsequent trial. See *id.* The *Myers* court stressed the fact that in the trial at hand, the jurors had already seen the evidence within the proceedings themselves and are admonished to avoid rebroadcasts. *Myers*, 635 F.2d at 953. In contrast, when dealing with the fair-trial rights of a defendant awaiting trial, the issue becomes whether an impartial jury can be impanelled after extensive broadcast of evidence. *Id.*

189. See, e.g., *United States v. Criden*, 501 F. Supp. 854, 861 (E.D. Pa. 1980) ("Notwithstanding the vast amount of publicity which has already been accorded this case, there remains a possibility that an untainted jury may yet be obtainable.").

190. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citing E. COKE, COMMENTARY UPON LITTLETON 155(b) (19th ed. 1853)).

191. *Id.* at 722-23. In discussing the qualifications of an impartial juror, the Supreme Court stated that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723 (citations omitted). For an in-depth analysis of the difference between knowledge and prejudice, see Hassett, *A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction Between Pre-Trial Information and "Prejudicial" Publicity*, 43 LAW & CONTEMP. PROBS. 155, 155-68 (1980).

192. See *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961). The Supreme Court distinguished between a juror who may have some knowledge of the facts and issues in a case from one with a preconceived opinion or "strong and deep impressions." *Id.* at 722. The latter, the Court found, clearly cannot be impartial. *Id.*

193. See *Myers*, 635 F.2d at 953. The *Myers* court stated: "We do not doubt the premise of this claim that televising the tapes will greatly increase the number of people with knowledge of their content beyond those already aware of the videotaped events through reading press accounts and viewing television newscasts." *Id.*; see also *Jenrette*, 653 F.2d at 616. The *Jenrette* court stated: "We

out, the public's awareness of news is frequently overestimated.¹⁹⁴ In the *Myers* case, the publicity surrounding the Abscam prosecutions did not result in a large percentage of biased potential jurors.¹⁹⁵ Instead, approximately half of those summoned for jury selection had knowledge of the events and "only a handful had more than cursory knowledge."¹⁹⁶

In addition, courts have recognized that publicity is germane to a criminal trial and is necessarily a part of it.¹⁹⁷ In light of the amount of publicity that naturally flows from a sensational criminal trial, the enhanced effect of video rebroadcast has been termed "incremental."¹⁹⁸ In fact, the Supreme Court has held that the live broadcast of criminal trials themselves is not inherently unconstitutional.¹⁹⁹ Rather, the Court suggested that trial courts rely primarily on the use of voir dire examination²⁰⁰ to eliminate potential prejudicial impact on defend-

agree that broadcasting the video and audio tapes might increase the percentage of the potential venire which possesses some knowledge of the facts and issues, and even the evidence, involved in the case." *Id.*

194. 635 F.2d at 953 ("Defendants, as well as the news media, frequently overestimate the extent of the public's awareness of news."); *see also Jenrette*, 653 F.2d at 616 ("a significant percentage of the potential jury pool will not see or hear the tapes, or if they do, will quickly forget much of what they saw").

195. 635 F.2d at 953.

196. *Id.* The *Myers* court went on to state that "[e]ven the intensive publicity surrounding the events of Watergate, very likely the most widely reported crime of the past decade, did not prevent the selection of jurors without such knowledge of the events as would prevent them from serving impartially." *Id.* (citing *United States v. Haldeman*, 559 F.2d 31, 61-63 & n.37 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977)). In the Watergate trial, a poll conducted by the defendants revealed that 93% of the venire was aware of the indictments. *United States v. Haldeman*, 559 F.2d 31, 144 (D.C. Cir. 1976). Yet the *Haldeman* court, after reviewing the voir dire record, found that the jurors were not in fact biased and the convictions were upheld. *Id.* at 140; *see also Note, supra* note 103, at 1466. For a further discussion of the often scant knowledge of jurors, *see United States v. Liddy*, 509 F.2d 428, 436-37 (D.C. Cir. 1974) (en banc) (the "individual questioning [of the veniremen] indicated that most knew little about the case, few remembered even a single detail, and none had formed an opinion as to the guilt or innocence of the defendants"), *cert. denied*, 420 U.S. 911 (1975); *United States v. Kahaner*, 204 F. Supp. 921, 924 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.) ("[F]requently . . . prospective jurors show little recall of past widely publicized matters; fears that jurors have formed opinions often prove groundless."), *cert. denied*, 375 U.S. 836 (1963).

197. *See Criden*, 648 F.2d at 824. The court noted that publicity, rather than favoring rejection of the application for access, may in fact support its grant, absent compelling reasons to the contrary. *Id.*

198. *Id.* at 825. In *Criden*, the Third Circuit found the trial court's concerns about the incremental effect of rebroadcast publicity to be unconvincing, given that defendants were themselves public figures and their conduct was already the subject of national publicity and comment. *Id.*

199. *Chandler v. Florida*, 449 U.S. 560, 571-74 (1981).

200. *See Note, supra* note 181, at 135-38. Voir dire examination refers to a procedure whereby potential jurors are questioned in order, *inter alia*, to eliminate those who have been prejudiced by pre-trial publicity. *Id.*

ants.²⁰¹ It is submitted that there is a greater potential for prejudice in the rebroadcast of an entire trial than in the broadcast of a piece of videotape evidence. Thus, if voir dire has been recognized as sufficient to control prejudice with live broadcast, it can certainly be relied upon to prevent prejudice to a defendant resulting from the rebroadcast of evidence.

With the Supreme Court consistently advocating the use of voir dire as a significant curative device,²⁰² the *Myers*, *Criden* and *Jenrette* courts concluded that there is no compelling reason to believe that this device will be ineffective in the context of evidentiary access.²⁰³ In fact, all three courts used the Supreme Court's approval of the use of voir dire to support the proposition that voir dire serves as a mechanism to use in balancing a defendant's fair-trial rights against the public's right to know and, from there, the media's right of access to evidence.²⁰⁴

201. 449 U.S. at 574-75. The Supreme Court in *Chandler* stated that the possibility of prejudice due to the jury's exposure to publicity is not sufficient to justify banning the live broadcast of trials. *Id.* Instead, the Court found that courts have developed curative devices to prevent the tainting of jury deliberations. *Id.* at 574.

202. See *United States v. Burr*, 25 Fed. Cas. 49, 51 (Cas. No. 14,692) (1807) (written by Marshall, C.J.). Justice Marshall's use of voir dire in *Burr* was noted with approval by the Court in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 548 (1976). The *Nebraska Press* court pointed out that since the time of the *Burr* decision, modern means of communication have added to the impact of publicity on a defendant's right to a fair trial. *Id.* However, the Court stated that "publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Id.* at 554. The Court suggested four ways of preventing prejudice as alternatives to restraining publication. *Id.* at 563. One of the significant methods stated was "searching questioning of prospective jurors." *Id.* at 564; see also *Chandler v. Florida*, 449 U.S. 560 (1981). The Supreme Court once again gave its approval to voir dire in *Chandler*, stating:

The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of this case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly.

Id. at 575.

203. See *Jenrette*, 653 F.2d at 617 ("to the extent that some members of the potential jury pool are so affected by the broadcasting of the tapes . . . voir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner" (footnotes omitted)). For a further discussion of *Jenrette*, see *supra* notes 95-102 and accompanying text. See also *Criden*, 648 F.2d at 827 ("the appropriate course to follow when the spectre of prejudicial publicity is raised is not automatically to deny access but to rely primarily on the curative device of voir dire examination"); *Myers*, 635 F.2d at 953 ("[V]oir dire examination still remains a sufficient device to eliminate from jury service those so affected by exposure to pre-trial publicity that they cannot fairly decide issues of guilt or innocence."). For a further discussion of *Criden*, see *supra* notes 78-94 and accompanying text. For a further discussion of *Myers*, see *supra* notes 64-77 and accompanying text.

204. See *Jenrette*, 653 F.2d at 617, n.46 (citing *Nebraska Press*); *Criden*, 648 F.2d at 827-28 (quoting *Chandler*); *Myers*, 635 F.2d at 953 (citing *Nebraska Press*).

The courts of appeals in *Belo* and *Edwards*, however, rejected the asserted effectiveness of voir dire. The Fifth Circuit in *Belo* assumed that this remedy had been judged ineffective at the trial level.²⁰⁵ The Seventh Circuit in *Edwards* stated that the device merely made the case "closer,"²⁰⁶ and denied access in spite of the trial judge's finding that an impartial jury could be impanelled.²⁰⁷ The courts of appeals in *Beckham* and *Webbe* simply accepted the trial judge's determination that the use of voir dire would be ineffective.²⁰⁸ These courts, following the lead of *Belo*, expressed a reluctance to review the judge's findings as to the effectiveness of voir dire.²⁰⁹ It is submitted, however, that the *Belo* court's deference to the trial court is misplaced. The Third Circuit in *Criden* emphasized the difference between appellate review of a decision dependent wholly on first-hand trial observation and review of a decision based on the relevance and weight of the factors determining access.²¹⁰ Although the first is afforded very deferential review, the latter is not.²¹¹

It is submitted that, even in highly publicized cases, it does not take an extraordinary amount of time to identify through voir dire examination the potentially biased jurors. In the Watergate case, after a year of widespread publicity, voir dire was completed in eight days.²¹² More-

205. *Belo*, 654 F.2d at 432. The court stated: "We cannot assume trial court ignorance of these familiar devices, and we will not assume inattention to their availability." *Id.* For a further discussion of *Belo*, see *supra* notes 124-35 and accompanying text.

206. *Edwards*, 672 F.2d at 1296. Although the availability of voir dire made the case "closer," the court nevertheless found the problem of the "tainting" of the current and expected trial through the grant of access to the media persuasive. *Id.*

207. *Id.*

208. *Webbe*, 791 F.2d at 107 ("The district court also properly could have considered whether the administrative difficulties in providing access to the tapes . . . would have adversely affected the progress of the trial."); *Beckham*, 789 F.2d at 415 ("The district court found that the curative powers . . . [of] voir dire . . . would be insufficient. . . . His decision may appear overly cautious, but the primary responsibility for the orderly administration of a criminal trial rested on his shoulders."). For a further discussion of *Webbe*, see *supra* notes 146-51 and accompanying text. For a further discussion of *Beckham*, see *supra* notes 136-45 and accompanying text.

209. *Beckham*, 789 F.2d at 415 ("We cannot ignore that the trial judge has primary responsibility to provide the fair trial."); *Webbe*, 791 F.2d at 107 ("We are ill-equipped to second-guess [the trial judge's] determination as how to best accommodate the interests of the parties involved . . ."); *Belo*, 654 F.2d at 432 ("we remain in a poor position from which to second guess the trial judge").

210. *Criden*, 648 F.2d at 818. The court stated that "[w]here the basis for commitment of a decision to a trial court's discretion is not dependent on its observation or familiarity with the course of the litigation, there are less compelling reasons for limited appellate review." *Id.*

211. *Id.*

212. *United States v. Haldeman*, 559 F.2d 31, 65 (D.C. Cir. 1976) (en banc). In addition, in the case of John Hinckley, Jr., a jury was impanelled in five days despite the film of the shooting being broadcast repeatedly on television. See *N.Y. Times*, May 4, 1982, at A22, col. 1.

over, in cases where compelling reasons to assume an ineffective voir dire exist, change of venue and continuance are available as additional measures of protection.²¹³

V. CONCLUSION

The question whether the media has a right of physical access to tape-recorded evidence and the nature of this right is in dispute.²¹⁴ The issue presents constitutional questions involving both the first and the sixth amendments.²¹⁵ Several federal courts of appeals have addressed the issue and reached conflicting results.²¹⁶ Although some courts apply a strong presumption in favor of access,²¹⁷ others rely more strongly on the trial court's determination and afford the right of access less significance.²¹⁸

It is submitted that the long-recognized and highly effective curative devices, such as cautionary instructions,²¹⁹ sequestration of the jury²²⁰ and voir dire examination,²²¹ should be explored by the trial judge, who should make every effort to avoid denial of access. It is further submitted that the courts of appeals, absent an articulation by the trial judge of

213. *Jenrette*, 653 F.2d at 617 n.45. The *Jenrette* court stated: "In the event voir dire reveals insurmountable prejudice, of course, additional measures exist, such as the granting of a continuance or a change in venue." *Id.*; see also *Myers*, 635 F.2d at 953 n.9. The *Myers* court stated:

If voir dire examination should reveal that at a particular time and location there is genuine difficulty assembling an impartial jury, or even that the effort to do so risks unduly narrowing the cross-section from which the trial jury will be selected, trial courts can take additional measures through the granting of a continuance or change of venue.

Id. The Supreme Court expressed its approval of the use of continuance and change of venue as protections of a defendant's fair-trial rights in *Sheppard v. Maxwell*. 384 U.S. 333 (1966). The *Sheppard* court stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Id.* at 363.

214. For a discussion of the background of the media's right of access and the dispute surrounding this right, see *supra* notes 1-15 and accompanying text.

215. For a discussion of the role of the first amendment in the context of media access to tape-recorded evidence, see *supra* notes 154-74 and accompanying text.

216. For a list of the courts of appeals that have addressed this issue, see *supra* note 8.

217. For a discussion of the courts in favor of access, see *supra* notes 64-122 and accompanying text.

218. For a discussion of the courts refusing to apply a strong presumption in favor of access, see *supra* notes 124-51 and accompanying text.

219. For a discussion of the use of cautionary instructions, see *supra* notes 180-213 and accompanying text.

220. For a discussion of the use of sequestration of the jury, see *supra* notes 184-87 and accompanying text.

221. For a discussion of the use of voir dire, see *supra* notes 200-09 and accompanying text.

compelling reasons to believe that neither voir dire nor any alternative will eliminate prejudicial impact, should allow media access to taped evidence in criminal trials. Rebroadcast of videotape and audiotape evidence greatly enhances the public's right to know through the medium of the press. Therefore, unless extremely inappropriate,²²² tapes should be disseminated to those broadcasters who request them and wish to make them public. The significance of the public's right to know and the value of "openness" in the criminal setting justify a strong presumption in favor of access.

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222. See, e.g., *In re Application of KSTP Television*, 504 F. Supp. 360 (D. Minn. 1980) (court denied television station's request to copy and broadcast videotapes which portrayed conduct of defendant prior to rape of kidnap victim). Tapes of this nature fall within the proscription enunciated in *Warner Communications*, 435 U.S. at 598.