

# THE CONFLUENCE OF SENSATIONALISM AND NEWS: MEDIA ACCESS TO CRIMINAL INVESTIGATIONS AND THE PUBLIC'S RIGHT TO 'KNOW'

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A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.<sup>1</sup>

This quote, by Associate Justice Tom C. Clark of the United States Supreme Court, describes the role enjoyed by the media in a society hungry for and driven by information. Most would agree that the media's interpretation of daily events, especially in the field of criminal justice has had a profound effect on society and its perceptions of crime. One only has to turn on the evening news to see the crime scene from a gruesome murder or read the daily newspaper to catch up on the latest rumor about a suspected criminal to recognize that a majority of news reporting revolves around crimes and ongoing criminal trials. A report released by the Center for Media and Public Affairs found that even though the homicide rate in the United States dropped by 20 percent from 1993 through 1996, major network<sup>2</sup> news coverage of murders increased on an average of 721 percent within the same time period.<sup>3</sup> The First Amendment of the United States Constitution<sup>4</sup>

grants the press the freedom to serve as the eyes and ears of the masses by closely monitoring the criminal justice system and prohibiting the government from restricting freedom of speech and the press.<sup>5</sup>

The Supreme Court, however, has determined that an offspring of the freedoms of speech and press is the public's right of access to particular government proceedings and information.<sup>6</sup> The Court established a two prong test in *Globe Newspaper Co. v. Superior Court*,<sup>7</sup> to determine when the public right of access attaches to a proceeding or information.<sup>8</sup> First, a court must determine whether a right of access adheres to a particular process and thus whether the process is presumptively open to the public.<sup>9</sup> Two factors relevant for consideration in this inquiry are whether there is a historical tradition of public access to the proceeding or information; and second, whether there is a functional value associated with opening that proceeding or making the requested information available to the public.<sup>10</sup> The second prong of the test is whether the government has asserted an interest sufficiently compelling to warrant closure.<sup>11</sup>

The media's role as the "handmaiden of effec-

<sup>1</sup> Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

<sup>2</sup> See Howard Kurtz, *The Crime Spree on Network News: While Homicides Fell, Murder Coverage Swelled, A Survey Finds. Is It All O.J.'s Fault?*, WASH. POST, Aug. 12, 1997 at D1. "Major networks" are defined in this paper as inclusive of the American Broadcasting Company ("ABC"), the Columbia Broadcasting System ("CBS"), and the National Broadcasting Company ("NBC").

<sup>3</sup> See *id.* The study also found that one out of every 20 network news stories over a 4 year period ending in 1996 was about a murder. *Id.* Crime coverage on major networks ranked sixth from 1990 to 1992, but jumped to first with 7,448 stories over four years, with 1,449 involving O.J. Simpson.

<sup>4</sup> See generally U.S.CONST. amend. I.

<sup>5</sup> See *id.* The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."

<sup>6</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

<sup>7</sup> See generally 457 U.S. 596 (1982).

<sup>8</sup> See *id.* at 607.

<sup>9</sup> See *id.* at 605.

<sup>10</sup> See *id.* at 605-06.

<sup>11</sup> See *id.* at 606-07.

tive judicial administration"<sup>12</sup> has come under fire, especially of late. The press, because it is driven to attract viewers and readers, can be less than responsible in covering criminal investigations. By printing and televising rumors and presenting one-sided coverage, the press can be as guilty of miscarriages of justice as any element of the criminal justice system. The media's sensationalistic reporting of ongoing investigations in the death of Diana, Princess of Wales,<sup>13</sup> the Michael Irvin-Erik Williams alleged rape case,<sup>14</sup> the JonBenet Ramsey murder case,<sup>15</sup> and the media's handling of the Centennial Park bombing in Atlanta,<sup>16</sup> all exemplify the lengths the media will go to sell newspapers and increase ratings without regard to the effect on the criminal investigative process. Critics argue that, if the media cannot responsibly and honestly report on ongoing criminal investigations, statutory provisions should restrict its access to all ongoing criminal investigative material, including police reports, witness statements, forensic tests and subsequent results, and any evidentiary material.<sup>17</sup> The primary ob-

stacle to such a remedy is the public's First Amendment right of access to governmental proceedings and information. The Supreme Court has yet to consider whether the public, and therefore the media, has a First Amendment right of access to ongoing criminal investigative material.

This Comment argues that irresponsibility in media coverage of ongoing criminal investigations makes institutional restrictions on the constitutional right of public access to information during an ongoing criminal investigation not only justifiable, but a legal necessity. This Comment specifically deals with the question of whether ongoing criminal investigative material should be legally made available to the public, but does not address the issue of such material attained through illegal means. Part I of this Comment examines the three leading cases which form the basis for the press' constitutional right of access and the reasons for which the right may be curtailed. Part II suggests that when the right of access test is applied to ongoing criminal investigative material, the test will not be satisfied and therefore,

<sup>12</sup> Sheppard, 384 U.S. at 350.

<sup>13</sup> See Charles Trueheart, *Diana's Guard Can't Recall Paris Crash; French Investigation Secretive, Methodical*, WASH. POST, Sept. 20, 1997 at A1. On August 31, 1997, Princess Diana died of injuries sustained in a car accident in Paris, France. See *id.* Also killed in the crash were her companion Dodi Al-Fayed, and his driver, Henri Paul; a second bodyguard was the only survivor of the accident. See *id.* Within hours of their death, rumors in the media swirled about evidence and suspects, namely, several photographers allegedly chasing the Princess' Mercedes through the streets of Paris. See *id.* Within a few days, the media buzz began to focus on newly released evidence and deemed the driver, who allegedly had three times the legal alcohol blood level, to be culprit for the death of the Princess. See *id.*

<sup>14</sup> *Accuser Charged in Cowboys Case: Woman Cited for Filing False Report of Sexual Misconduct*, WASH. POST, Jan. 15, 1997, at C1. On December 30, 1996, Nina Shahravan, a Dallas-area woman, implicated Michael Irvin and Erik Williams, both members of the Dallas Cowboys football organization, and a third unnamed suspect in her rape. See *id.* She claimed that Williams and the unnamed suspect raped her, while Irvin held her at gunpoint and videotaped the crime. See *id.* The media maligned the two players for their suspected involvement and also closely monitored the investigation by the Dallas Police Department. See *id.* Many elements of the investigation were made public, while repeated assertions of innocence by the two men were virtually ignored by the media. See *id.* On January 10, 1997, despite the negative media both men had received, Nina Shahravan admitted to police authorities that she committed perjury and had consensual intercourse with Erik Williams and that Michael Irvin was not present at Williams' home. See *id.*

<sup>15</sup> See Tom Kenworthy, *Focus of Colorado Probe Turns to Parents of JonBenet Ramsey*, WASH. POST, April 20, 1997, at A3. JonBenet Ramsey, a six year old from Boulder, Colorado, was

found on December 26, 1996 in the basement of her parent's home. See *id.* She had been found eight hours after her mother discovered a ransom note demanding \$118,000. See *id.* The media has become fascinated with the murder of JonBenet Ramsey and has focused its attention on JonBenet's parent's as the main suspects. See *id.* Every step of the investigation has been scrutinized by the press. See *id.* Sensitive information such as the autopsy report, forensic tests, and other evidence, all allegedly pointing to the guilt of the Ramseys'. See *id.* Despite the media's accusations of guilt against the Ramseys', the Boulder Police only recently have named them suspects and have yet to formally file any charges against the Ramseys'. See *id.*

<sup>16</sup> See Jerry Seper, *Reno 'Very Sorry' for Leaks in Jewell Case*, WASH. TIMES, Aug. 1, 1997, at A3. On July 27, 1996, a 40-pound pipe bomb exploded in Atlanta's Centennial Olympic Park. See *id.* Richard Jewell, a late-night security guard at the park, cleared the area before the bomb exploded. See *id.* He was first celebrated as a hero by the media and then was later considered a suspect. See *id.* The media hounded Mr. Jewell and labeled him the culprit mastermind behind the bombing. The constant media attention and blame ran contrary to the evidence. See *id.* Even though the press branded Mr. Jewell guilty, the Federal Bureau of Investigations eventually cleared him of any wrongdoing and have yet to name any formal suspects or file any charges. See *id.*

<sup>17</sup> "Ongoing criminal investigative material" for the purposes of this article means any document deemed to be relevant to a criminal investigation that has yet to be resolved or closed by the controlling police authority. For a discussion on criticisms of the media and the way it handles criminal investigative material, see *Current Issues in Media and Telecommunications Law, Panel I: Accountability of the Media in Investigations*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401 (1997); see also Gerald F. Uelman, *Leaks, Gags, and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943 (1997).

the public's access to such material should be restricted. Finally, this Comment concludes that if the Supreme Court should find the public has a right of access under the First Amendment to ongoing criminal investigative material, the Court will inevitably be faced with answering the question of which rights are more important, the defendant's right to a fair trial or the First Amendment freedoms of speech and press. This Comment posits that the Court would ultimately protect a defendant's due process right over the public's access to information.

## I. THE EVOLUTION OF THE FIRST AMENDMENT RIGHT OF ACCESS

The First Amendment to the United States Constitution expressly forbids the government from abridging the freedom of speech or of the press.<sup>18</sup> Implicit in the First Amendment is the right of the public to have access to particular government proceedings or pieces of information.<sup>19</sup> The Supreme Court in *Globe Newspaper v. Superior Court* held that the government can curtail these freedoms only when there is a narrowly tailored, compelling government interest.<sup>20</sup> The Court enunciated that courts should use the *Globe Newspaper* test to determine whether the public's right of access attaches to government proceedings or information.<sup>21</sup>

### A. Expanding the Public's Right to Access Government Proceedings and Information

The foundation for determining the public's constitutional right of access was laid in *Richmond*

*Newspapers, Inc. v. Virginia*.<sup>22</sup> The case involved the criminal trial of a murder defendant.<sup>23</sup> The defendant was originally convicted of murder, but the conviction was overturned and two subsequent trials ended in mistrial.<sup>24</sup> The trial judge, applying a Virginia statute giving the judge discretion to exclude any person from the trial who would effect the defendant's ability to obtain a fair trial, ordered the courtroom cleared except for witnesses.<sup>25</sup> The appellants, publishers of a local newspaper, argued that constitutionally, before the court could order closure, it had to consider whether the rights of the defendant could be protected in any other way.<sup>26</sup> The Commonwealth of Virginia argued that neither the Constitution nor the Bill of Rights provides the public the right to attend criminal trials.<sup>27</sup> The Supreme Court agreed with the appellants holding that even though the Constitution contains no express terms guaranteeing the public a right to attend criminal trials, the right is implicit in the guarantees of the First Amendment.<sup>28</sup> Chief Justice Burger, joined by Justices White and Stevens, opined that an "unbroken, uncontradicted history" led to the conclusion that a presumption of openness in criminal trials was inherent in our system of criminal justice.<sup>29</sup> The Court also ruled that without an overriding governmental interest supported by the findings of the trial court, criminal trials must be made open to the public.<sup>30</sup>

The Supreme Court further refined this principle in *Globe Newspaper Co. v. Superior Court*.<sup>31</sup> The issue in *Globe Newspaper* centered around the criminal trial of a suspect who allegedly raped three minor girls.<sup>32</sup> The trial court, applying a Massachusetts statute<sup>33</sup> providing for the exclusion of

<sup>18</sup> See U.S.CONST. amend. I

<sup>19</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

<sup>20</sup> See *Globe Newspaper*, 457 U.S. at 606-07.

<sup>21</sup> See *id.* at 609.

<sup>22</sup> See *Richmond Newspapers*, 448 U.S. at 555.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* at 559. In July, 1976, Stevenson, the defendant, was convicted of second degree murder. See *id.* The Virginia Supreme Court reversed the conviction in October, 1977, on evidentiary error. See *id.* The defendant was retried in the same court and a mistrial was declared on May 30, 1978, when a juror asked to be excused and no alternate was available to serve. See *id.* The third trial commenced soon after and a mistrial was declared on June 6, 1978, because a prospective juror read about the retrial of the defendant and had informed other prospective jurors about the defendant's retrial. See *Richmond Newspapers*, 448 U.S. at 555.

<sup>25</sup> See *id.* at 560.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 575.

<sup>28</sup> See *id.* at 580. (explaining that "[w]e hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." (Burger, C.J.)).

<sup>29</sup> *Richmond Newspapers*, 448 U.S. at 581. (holding that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." (Burger, C.J.)).

<sup>30</sup> See *id.* at 581.

<sup>31</sup> See generally *Globe Newspaper*, 457 U.S. at 596.

<sup>32</sup> See *id.* at 598

<sup>33</sup> See *id.* See also MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981) (providing: "At the trial of a complainant or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the

the public from trials of specified sexual offenses involving a victim under the age of 18, ordered the exclusion of the public and the press from the courtroom.<sup>34</sup> The Massachusetts Supreme Judicial Court upheld the decision of the trial judge,<sup>35</sup> however the United States Supreme Court reversed.<sup>36</sup> The Court, however, expanding upon its prior decision in *Richmond Newspapers*, invalidated the Massachusetts statute, ruling the public right of access should be broadly construed because it supports the "free discussion of governmental affairs."<sup>37</sup> The Court noted that the public's First Amendment right of access is not absolute and established a two-prong test to determine when the right of access attaches to a government proceeding or information.<sup>38</sup> The first prong of the test, whether the right of access adheres to a particular process and is presumptively open to the public, consists of two relevant factors: whether there is historical tradition of public access to the proceeding or information and whether there is probative value associated with opening the proceeding or information to the public.<sup>39</sup> The second prong addresses whether the government has presented a compelling enough interest to warrant restricting access to the proceeding or information.<sup>40</sup>

The holding in *Globe Newspaper* was tested in *Press-Enterprise Company v. Superior Court*.<sup>41</sup> In *Press-Enterprise*, a defendant on trial for murder moved to exclude the public from the preliminary hearing.<sup>42</sup> The Magistrate granted the defendant's motion under a California statute<sup>43</sup> requiring preliminary hearings to be open unless "exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial."<sup>44</sup> At the conclusion of the preliminary hearing, the Magistrate refused petitioner's request to release the transcript of the proceeding.<sup>45</sup> The Supreme Court struck down the California statute as viola-

tive of the First Amendment.<sup>46</sup> In delivering the opinion of the Court, Chief Justice Burger, applying the test established in *Globe Newspaper*, announced that a tradition of open preliminary hearings existed in California and that public access to such preliminary hearings was "essential to the proper functioning of the criminal justice system."<sup>47</sup>

## II. APPLYING THE *GLOBE* TEST TO ONGOING CRIMINAL INVESTIGATIVE MATERIALS

The Supreme Court has yet to provide the limits, if any, of the public's right of access to ongoing criminal investigative material. When applying the *Globe Newspaper* test to ongoing criminal investigative materials, it becomes clear that the public should not have a right of access to such data. The following sections elucidate that the right of access will not apply to criminal investigative material because there is no historical tradition of public access, there is little social probative value of making such information available, and the government has compelling interests in restricting the access of the public to ongoing investigative material.

### A. Applying the First Prong of *Globe*: Is the Process Presumptively Open?

The first element of the *Globe Newspaper* test is whether the process is presumptively open to the public.<sup>48</sup> When determining the openness of the governmental process, a court must inquire into the historical tradition of public access to the proceeding and decide whether there is a societal value to opening the process.<sup>49</sup>

While the press' historical access to ongoing criminal investigative material is neither long, nor

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person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.").

<sup>34</sup> See *Globe Newspaper*, 457 U.S. at 599.

<sup>35</sup> See *id.* at 600.

<sup>36</sup> See *id.* at 611.

<sup>37</sup> *Globe Newspaper*, 457 U.S. at 604.

<sup>38</sup> See *id.* at 606-07.

<sup>39</sup> See *id.* at 605-07.

<sup>40</sup> See *id.* at 606-07.

<sup>41</sup> See generally 478 U.S. 1 (1986).

<sup>42</sup> See *id.* at 3. The defendant in the criminal trial, Robert Diaz, was charged with allegedly murdering 12 patients by ad-

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ministering massive doses of a heart drug. The preliminary hearing took place on July 6, 1982, when the defendant moved to exclude the public from the proceedings under CAL. PENAL CODE § 868 (West 1985).

<sup>43</sup> See *Press-Enterprise*, 478 U.S. at 4.

<sup>44</sup> CAL. PENAL CODE § 868 (West 1985). The statute requires open hearings unless "exclusion of the public necessary in order to protect the defendant's right to a fair and impartial trial."

<sup>45</sup> See *Press-Enterprise*, 478 U.S. at 4-5.

<sup>46</sup> See *id.* at 15.

<sup>47</sup> *Id.* at 11-12.

<sup>48</sup> See *Globe Newspaper*, 457 U.S. at 605.

<sup>49</sup> See *id.* at 605-06.

impressive, the public's access to judicial proceedings has a long history.<sup>50</sup> In *Richmond Newspapers*, Chief Justice Burger traced the historical tradition of open, public trials as far back as the Norman Conquest of England.<sup>51</sup> Justice Brennan, writing for the majority in *Globe Newspaper*, used the long history of open, public access to trials as a foundation for the Court's decision.<sup>52</sup> In *Press-Enterprise*, the Court was able to trace the roots of preliminary hearings at least back to the trial of Aaron Burr for treason in 1807.<sup>53</sup>

The media's involvement with ongoing criminal investigative material has had a mixed past.<sup>54</sup> For example, the St. Louis Post-Dispatch, through access to ongoing investigative material, helped expose the ongoing criminality of the Ku Klux Klan,<sup>55</sup> governmental corruption,<sup>56</sup> and even helped solve a murder.<sup>57</sup> Other newspapers, such as the *San Francisco Bulletin* and the *Chicago Daily News* were also integrally involved in using ongoing criminal investigative material.<sup>58</sup>

The press has also used criminal investigative material negligently. For example, a San Francisco newspaper uncovered and publicized evidence which it wrongly thought linked a suspect to the commission of a crime.<sup>59</sup> The *Detroit Free Press*, *Denver Post*, *New York Tribune* and others have used their access to criminal investigative material to help create hysteria among readers, cover up government corruption and entangle innocent people in the criminal justice system.<sup>60</sup>

The press does not have a lengthy tradition of

access to ongoing investigative material. The history of the press' access, as traced through landmark cases, although implying a truly *public* right of access, in fact established a more developed, deeply rooted tradition of involvement with open trials and preliminary hearings.<sup>61</sup> Those historical traditions of access have become fundamental to the actual function of the criminal justice system.<sup>62</sup>

In our current system of criminal justice, denying public access to ongoing criminal investigative material will not forestall the system from functioning. If the public did not have access to such information, the police could still conduct their investigation by interviewing witnesses, gathering evidence, administering forensic tests and other investigative processes, all leading to an eventual resolution of a committed crime.<sup>63</sup> However, because the trial process has been historically open, it would be virtually impossible to exclude members of the public from those processes.<sup>64</sup> Therefore, while the public's right to freely access the judicial system cannot be denied, the press has no established historical tradition of access to ongoing criminal investigative material.<sup>65</sup> Consequently, the first factor in determining whether public access attaches to governmental proceedings or information fails.

A second factor that must be examined is whether there is social value in making the governmental proceeding or information available to the public.<sup>66</sup> A critical quote from *Crime and Pub-*

<sup>50</sup> See *Richmond Newspapers*, 448 U.S. at 565-69.

<sup>51</sup> See *id.* at 565.

<sup>52</sup> See *Globe Newspaper*, 457 U.S. at 605.

<sup>53</sup> See *Press-Enterprise*, 478 U.S. at 10.

<sup>54</sup> See generally JOHN LOFTON, *JUSTICE AND THE PRESS* 139-142 (1966).

<sup>55</sup> See *id.* at 140-41.

<sup>56</sup> See *id.* at 141-42.

<sup>57</sup> See *id.* at 141.

<sup>58</sup> See *id.* at 142.

<sup>59</sup> See *id.*

<sup>60</sup> See LOFTON, *supra* note 54, at 141-42. The *Detroit Free Press* ran a story about recent race riots and about a gathering which drew 10,000 people. See *id.* At the gathering, one of the speakers advocated for an ordinance requiring that Negroes only live in certain sections of Detroit. See *id.* at 140. The story also announced a meeting to be held across the street from the newly purchased home of a Negro doctor, with the story urging people to meet in "self-defense." *Id.* The *New York Times* and *New York Tribune* both attempted to smother the United States Senate inquiry into the Teapot Dome Scandal. See *id.* at 142. The *Denver Post*, the first newspaper to uncover the Teapot Dome Scandal, stopped covering the scandal when its publisher was paid off. See *id.* The

four San Francisco newspapers, the *Chronicle*, *Examiner*, *Dealer* and *News*, all barraged the citizens with stories of a suspected rapist. See *id.* at 142-43. The stories continued, all but convicting the suspect; who was eventually exonerated of all charges. See LOFTON, *supra* note 54, at 142-43.

<sup>61</sup> See *Richmond Newspapers*, 448 U.S. at 565-69; see also *Press-Enterprise*, 478 U.S. at 10-11.

<sup>62</sup> See *Richmond Newspapers*, 448 U.S. at 565-69. The Court recounted the history of jury trials from before the Norman Conquest. For instance, the Court pointed out that after the Norman Conquest, it became the duty of all freedmen to attend trials to render judgment. The Court further traced the tradition through the 18th, 19th and 20th century. See *id.*

<sup>63</sup> In this instance, the criminal justice system would not cease to function if the public did not have access to this information. As stated, the system would continue along its normal course of business because the public has typically only gained access to such information illegally, namely, leaks.

<sup>64</sup> See generally *Richmond Newspapers*, 448 U.S. 555; *Globe Newspaper*, 457 U.S. 596; *Press-Enterprise* 478 U.S. 1.

<sup>65</sup> See *supra* text accompanying notes 48-62.

<sup>66</sup> See *Globe Newspaper*, 457 U.S. at 606.

licity<sup>67</sup> best summarizes the probative value of such information to the average American:

"Why publish all the news about crime anyway? It serves no social purpose; indeed, it is, if anything, injurious to the morals and behavior of the citizenry. Its publication merely breeds more crime and perversion. You publish it because it means more circulation, more money to you . . . and for no other reason."<sup>68</sup>

There is little appreciable probative value in allowing the public access to such results because the press is not interested in a just outcome, but rather an interesting story.<sup>69</sup> As Friendly & Goldfarb suggest, it has become a source of circulation and ratings for the media. Prior history tells us that over-the-top reporting of ongoing criminal investigations has negative effects on the administration of the criminal justice system. A prime example appears in *Sheppard v. Maxwell*.<sup>70</sup> In 1954, the pregnant wife of wealthy socialite Doctor Sam Sheppard was found murdered in her bed.<sup>71</sup> The two major newspapers in Cleveland, the *Cleveland Press* and the *Cleveland Plain Dealer*, used the case and the public frenzy surrounding it to compete for subscribers.<sup>72</sup> Both papers ran an excessive amount of coverage on the case.<sup>73</sup> In the days after the murder, both papers printed large amounts of biased information, which could have only been revealed by the investigating police authorities.<sup>74</sup> Coverage of information favorable to the prime suspect, Doctor Sheppard, was purposely not printed.<sup>75</sup> Pressure on the murder in-

vestigation by the Cleveland media forced authorities to arrest and try Doctor Sheppard.<sup>76</sup> In all the excitement fostered by the media in the case, the media ultimately failed to do its job. Upon closer examination and eventual reversal of the defendant's murder conviction by the United States Supreme Court, there were many unreported miscarriages of justice.<sup>77</sup>

The events surrounding the Sheppard Case are indicative of what the media can become in its most invasive and destructive manifestation, with sensationalist story after sensationalist story, developed purely to sell newspapers and increase ratings and not as a service designed to properly inform the public.<sup>78</sup> The publication of ongoing criminal investigative material has served to misinform and mislead the public.<sup>79</sup> Accordingly, there is little probative value to the public by allowing the public a right to access ongoing criminal investigative material.

#### B. The Second Prong of *Globe*: Does the government have compelling interests?

The second element of the *Globe Newspaper* test is whether the government has a narrowly tailored, compelling interest for denying public access to proceedings or information.<sup>80</sup> The government has two compelling reasons for restricting access to ongoing criminal investigative

<sup>67</sup> See generally ALFRED FRIENDLY & RONALD L. GOLDFARB, *CRIME AND PUBLICITY* 34-35 (1968).

<sup>68</sup> *Id.*

<sup>69</sup> A quote from *Justice and the Press*, by John Lofton, is apropos:

"Among those papers devoting the highest portion of their news columns to crimes of violence, this type of law breaking is certainly accorded exaggerated significance; and the resulting demands of their reading public for a violent crackdown may be expected to rise correspondingly. This kind of pressure on authorities is not necessarily conducive to justice".

See LOFTON, *supra* note 54, at 180.

<sup>70</sup> See generally 384 U.S. 333 (1966).

<sup>71</sup> See FRIENDLY & GOLDFARB, *supra* note 67, at 13-15.

<sup>72</sup> See *id.* at 14.

<sup>73</sup> See *id.* at 13-15. The *Cleveland Press* was the largest paper in Ohio, with a circulation of 310,000. See *id.* Circulation increased throughout the pretrial and trial period, culminating with a newsstand sellout of 30,000 extra copies the day the verdict announced. See *id.* The Sheppard Case was the lead page-one story twenty three days during the prearrest period. See *id.* Most stories had eight-column banner headlines and at least three times the case covered nearly all of page one and several inside pages. See FRIENDLY & GOLDFARB, *supra* note 67, at 13-15. The *Cleveland Plain Dealer* was the first to publish after the crime was committed. See *id.* That

story was given an eight-column banner headline on page one. See *id.* The *Plain Dealer* accorded the case a page-one banner headline on twelve out of twenty-six days. See *id.* On nine days, the murder was the lead page-one story, without a banner. See *id.* On four days, it was a page-one story, but not a lead story. See *id.* On one day of the twenty-six, no story of the case appeared in the *Plain Dealer*. See FRIENDLY & GOLDFARB, *supra* note 67, at 13-15.

<sup>74</sup> See *id.* at 15. This information included information by the coroner, who supplied most of the evidence, and his opinion on the investigation, to the *Cleveland Press*. See *id.* at 16. A long story was run about a detailed twelve-hour interrogation of Dr. Sheppard, which could only have been written from accounts by the police. See *id.* at 17.

<sup>75</sup> See *id.* at 15-17.

<sup>76</sup> See *id.* at 16.

<sup>77</sup> See LOFTON, *supra* note 54, at 142.

<sup>78</sup> See *supra* text accompanying notes 12-15.

<sup>79</sup> See *supra* text accompanying notes 12-15.

<sup>80</sup> See *Globe Newspaper*, 457 U.S. at 606-07. The Court ruled that if the government intended to deny public access to a criminal proceeding to which the First Amendment right of access applied, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* This must be also be supported by specific findings that the compelling interest would be jeopardized by public disclosure. See *id.* at 609.

material: the right of the defendant to a fair trial and the protection of victims of crime.<sup>81</sup>

### 1. *Right of the Defendant to a Fair Trial*

The most compelling interest the government has in restricting public access to ongoing criminal investigative material is ensuring a defendant's right to a fair trial. The Supreme Court has determined that the states are charged with management of the criminal justice system,<sup>82</sup> and the Due Process Clause of the Fourteenth Amendment requires that a defendant receive a fair trial.<sup>83</sup> The Court has interpreted the Due Process Clause as the right to a fair opportunity to defend against the accusations of the State.<sup>84</sup> Excessive media attention affects the ability of a defendant to adequately respond to the State's accusations in court.<sup>85</sup>

One way in which the media can inadvertently contribute to denying a defendant a fair trial is by tainting the jury pool. During the course of a criminal investigation, police authorities discover various types of evidence. Not all evidence gathered by the police is necessarily relevant to the crime,<sup>86</sup> nor is it always admissible in determining

the guilt of a defendant.<sup>87</sup> Examples of such evidence include character evidence<sup>88</sup> or previous crimes or acts.<sup>89</sup> This is information that the jury might never see in the courtroom. If the press were allowed to publicize this information, though, any well-informed person would be exposed to prejudicial evidence. Those who are exposed to this information could be potential jurors and therefore, come into a trial with preconceived, often negative impressions of the defendant.<sup>90</sup> The Supreme Court has found that pre-trial publicity can create bias and prejudice in jury pools. In *Irvin v. Dowd*,<sup>91</sup> the Court, for the first time, reversed a state conviction because of prejudicial pre-trial publicity.<sup>92</sup> In that case, a murder trial was held in a small community overrun with negative publicity about the defendant prior to the trial about.<sup>93</sup> The defendant, charged with murder, sought two changes of venue because of the negative publicity, one of which was granted and the second of which was denied.<sup>94</sup> It was discovered that eight of the twelve jurors, as well as ninety percent of those community members brought in as potential jurors, admitted to having formed opinions based on the pre-trial publicity.<sup>95</sup> The defendant was

<sup>81</sup> See *infra* text accompanying notes 77-120.

<sup>82</sup> See *Irvin v. California*, 347 U.S. 128, 134 (1954).

<sup>83</sup> U.S. CONST. amend. XIV. "No State shall make or enforce any law which shall abridge the privileges or immunities; nor shall any State deprive any person of life, liberty or property, without due process of law . . ." *Id.*

<sup>84</sup> See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

<sup>85</sup> See *infra* text accompanying notes 73-80.

<sup>86</sup> See FED. R. EVID. 401. Rule 401 of the Federal Rules of Evidence states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

<sup>87</sup> FED. R. EVID. 403. Rule 403 of the Federal Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

<sup>88</sup> See FED. R. EVID. 404(a). Rule 404(a) of the Federal Rules of Evidence states:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: 1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; 2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

*Id.*

<sup>89</sup> See FED. R. EVID. 404(b). Rule 404(b) of the Federal Rules of Evidence states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

*Id.*

<sup>90</sup> See *Irvin v. Dowd*, 366 U.S. 717 (1961).

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> See *id.* at 726. The negative publicity against the defendant included information about prior criminal convictions, confessions to 24 burglaries and six murders and an unaccepted offer to plead guilty so as to avoid the death penalty. See *id.*

<sup>94</sup> See *Irvin*, 366 U.S. at 717-18. The second change of venue motion was apparently denied because the controlling Indiana statute allowed for only one change. See *id.* During voir dire, the defendant filed two additional change of venue motions and eight motions for continuance, all of which were denied by the court. See *id.*

<sup>95</sup> See *id.* at 727.

subsequently convicted of murder and sentenced to death.<sup>96</sup> The Supreme Court reversed the conviction, holding that the pre-trial publicity violated the constitutional right of the defendant to a fair trial.<sup>97</sup> The Court opined that "the pattern of deep and bitter prejudice" was shown by the defendant to be present throughout the community and was clearly reflected in the information submitted by the eventual jurors.<sup>98</sup>

In order to protect a defendant's right to a fair trial, the press' access to any such information should be restricted. If the media were allowed to publicize investigative information, it could inadvertently publish evidentiary material that would otherwise be inadmissible against a defendant.<sup>99</sup> Potential jurors may be exposed to this published material and thus develop preconceived, negative impressions of the defendant.<sup>100</sup> This would affect the ability of jurors to fairly, and in an unbiased manner, sit in judgment of the defendant. This would prejudice the defense's case and may lead to a loss of life or liberty of an innocent person.<sup>101</sup> Therefore, the government has a compelling interest in restricting the access of ongoing criminal investigative material to public.

The second factor that must be examined is whether denying the public its First Amendment right of access to criminal investigative material is narrowly tailored to serve the compelling governmental interest of preserving a defendant's right to a fair trial.<sup>102</sup> Although "narrowly tailored" has not been formally defined by the Supreme Court, it has determined that a First Amendment restriction is not narrowly tailored when "a substantial portion of the burden [it places] on speech does not serve to advance the [State's] content-neutral goals,"<sup>103</sup> or when the regulation at issue has a less restrictive alternative.<sup>104</sup>

The burden placed on the public, limiting the right of access to ongoing criminal investigative material, directly serves to advance the State's goal of preserving a defendant's right to a fair trial. As discussed earlier, allowing ongoing crimi-

nal investigative material to be publicized may expose potential jurors to prejudicial or irrelevant exculpatory evidence against the defendant.<sup>105</sup> This prejudicial or irrelevant exculpatory evidence may cloud the ability of potential jurors to fairly assess a case against the defendant, thus placing his life or liberty in justice and directly violating the Constitution.<sup>106</sup> Restricting public access would therefore legally protect the potential jury pool from contamination. Accordingly, restricting public access to ongoing criminal investigative material serves to advance the State's goal of insuring a defendant's right to a fair trial.

Next, a court must consider whether the regulation at issue is the least restrictive alternative.<sup>107</sup> Four hypothetical options available to the government in restricting public access to ongoing criminal investigative material include: delaying release of investigative material; making the material available to the press, but limiting the way in which it is publicized; forbidding the press from reporting on any crime until after the case has been made public in a court of law or if not, when the trial is finished; or restricting access of such information until a criminal case is no longer in its investigative stage.

Delaying the release of investigative material is not a feasible option. Merely delaying release of ongoing criminal investigative material still leaves the possibility of potential jurors being exposed and prejudiced by evidence within the case. To further complicate the issue, there is no feasible timetable by which delaying this information could be measured. For example, the investigation of the JonBenet Ramsey murder case has continued for almost a year,<sup>108</sup> while the investigation of the Michael Irvin-Erik Williams alleged rape case was concluded in under a week.<sup>109</sup> Delayed release of information in the Ramsey case could still complicate and possibly injure the investigation. As for a short investigation like that of the Irvin-Williams alleged rape case, delayed release can often only fuel rumor and innuendo, an

<sup>96</sup> See *id.* at 718.

<sup>97</sup> See *id.* at 717.

<sup>98</sup> Irvin, 366 U.S. at 727.

<sup>99</sup> See *supra* text accompanying notes 86-89.

<sup>100</sup> See, e.g., Irvin, 366 U.S. 717; Sheppard v. Maxwell, 384 U.S. 333 (1965).

<sup>101</sup> See *supra* text accompanying notes 70-77.

<sup>102</sup> See *Globe Newspaper*, 457 U.S. at 606-06.

<sup>103</sup> *Simon & Schuster, Inc. v. New York State Crime Vic-*

*tims Bd.*, 502 U.S. 105, 122 (1991).

<sup>104</sup> See *Boos v. Barry*, 485 U.S. 312, 321 (1988).

<sup>105</sup> See *supra* text accompanying notes 79-94.

<sup>106</sup> See U.S. CONST. amend. XIV.

<sup>107</sup> See generally *Press-Enterprise*, 478 U.S. 1.

<sup>108</sup> See *Truehart*, *supra* note 14, at A3.

<sup>109</sup> See *Accuser Charged in Cowboys Case*, *supra* note 13, at C1.



especially grievous result given that both men involved were vindicated. Therefore, delaying the release of ongoing criminal investigative material is not a feasible option that will still protect the investigative process.

The second stated alternative was to make ongoing criminal investigative material available to the press, but limit the way in which the press may utilize the information. This option is not feasible because it directly conflicts with prior Supreme Court case law.<sup>110</sup> In *Landmark Communications, Inc. v. Virginia*,<sup>111</sup> the Supreme Court held that a Virginia statute,<sup>112</sup> making it a crime to divulge information regarding proceedings before a state judicial review commission authorized to hear complaints about judges's disability or misconduct, was unconstitutional because where the press lawfully obtains information the court cannot thereafter prohibit the press from publishing it.<sup>113</sup> For that reason, limiting the way in which the press may utilize ongoing criminal investigative material is not practicable.

The third alternative course of action would be to completely disallow the press to print on a criminal case until the information is made public in a court of law or until the case has been completed in its entirety. Proponents of this option point to the British system as a model to be followed with regard to limiting public access in this fashion.<sup>114</sup> The British system, though tempting, is not a workable alternative in America. The British legal system functions differently than does its American counterpart,<sup>115</sup> and to implement such

a change would mean changing some of the societal norms of the American judicial system.<sup>116</sup> It would also go counter to the press's full access to trial participation.<sup>117</sup>

Finally, that leaves the most viable alternative, restricting access to ongoing criminal investigative material until the investigation is concluded. This alternative, unlike the first, ensures that the investigation will not be jeopardized because it is completed, nor will it violate the First Amendment or any other constitutional provisions, as does the second option.<sup>118</sup> This plan is more viable than the third option because it would not serve to fundamentally change the way our criminal justice works nor would it radically affect the press.<sup>119</sup> Accordingly, the fourth course of action is the most viable and least restrictive means of the four hypothetical options by which to protect the State's interest of ensuring a defendant's right to a fair trial. Thus, restricting access to ongoing criminal investigative material to preserve a defendant's right to a fair trial is narrowly tailored.

## 2. *Protecting Victims of Crime*

A second compelling governmental interest is protecting the victims of crime from needless exposure and embarrassment, as well as creating an atmosphere in which victims are not afraid to report crimes. Protecting victims of rape<sup>120</sup> is a prime example of this compelling governmental interest. Rape is such an emotionally draining, physically degrading crime that exposure of the

<sup>110</sup> See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

<sup>111</sup> See *id.*

<sup>112</sup> See VA. CODE ANN. § 2.1-37.13 (Michie 1973). The statute provided in relevant part:

"All papers filed with and proceedings before the [State Judicial Review] Commission, and under the two proceeding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character." *Id.*  
"Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor." *Id.*

<sup>113</sup> The case involved a publisher, who in his newspaper, printed an article accurately reporting on a pending inquiry by the Commission and identifying the judge whose conduct was being investigated, appellant was convicted under the above mentioned statute. See *id.* at 831-32.

<sup>114</sup> See FRIENDLY & GOLDFARB, *supra* note 67, at 141-42. "At the heart of almost all the proposed remedies for prejudicial publicity discussed in the previous chapter is the concept of postponement-postponement of publication of certain news until it is made public at trial or, if it is not, until after the trial is completed." *Id.* at 141.

<sup>115</sup> See *id.* at 143-47.

<sup>116</sup> See *id.* The authors list four fundamental differences between American and British culture with regard to the criminal justice system: the complete quarantine of British justice from politics; the speed of the criminal process in the United States; the varying criminal climates in the two countries; the press' special role of monitoring the justice system in the United States. See *id.* at 142-43.

<sup>117</sup> See generally *Richmond Newspapers*, 448 U.S. at 565-69.

<sup>118</sup> See *supra* text accompanying notes 103-106.

<sup>119</sup> See *supra* text accompanying notes 112-115.

<sup>120</sup> Black's Law Dictionary defines rape as the unlawful sexual intercourse with a person against his or her consent. See BLACK'S LAW DICTIONARY 1260 (6th ed. 1990).

victim's identity can be embarrassing and make it even more difficult for the victim to recover.<sup>121</sup> Victims in notorious sex crimes often have their lifestyles, sexual tastes and the opinions of others printed about them.<sup>122</sup> Helen Benedict, a panel member of a symposium entitled, "The Privacy Rights of Rape Victims in the Media and the Law" stated:

"Above all, it is not a crime to go the police and say, 'I've been attacked.' Yet, the media assumes that, by digging into the victim's past and personality, it will uncover something about the crime, just as it might when it digs into the accused's past and personality, it will uncover something about the crime . . . Every profile of a victim, every account of what that victim does or has done, is by implication, an assumption of the victim's complicity in the crime: the very act of profiling the victim treats her as if she is guilty until proven innocent."<sup>123</sup>

This unwanted and unflattering attention provokes many rape victims into not even reporting the crime.<sup>124</sup> Why deal with the unwanted exposure and the shame of having your sexual conduct questioned? Why have your personality questioned? Many women, knowing the possibility of this negative attention, decline to report these crimes all together. By refusing to allow the press access to the identity of victims, especially with crimes such as rape, it raises the possibility that the investigation can move forward without being sidetracked by irrelevant considerations and gives the victim the privacy and dignity that they deserve in such a situation.

Though all crimes are not as serious as rape, it is equally as important to conceal the identities of the victims in connection with other crimes. Many crimes go unreported because of fear of reprisal. If victims knew that information surrounding a criminal investigation would be publicized, it would make them even more wary of reporting these crimes. A second issue faced by all crime victims is their treatment in the media. Many times, whether the treatment is positive or negative, the victim's personal life is constantly flashed before the eyes of the public. If nothing else, it is more difficult to cope with the crime because of

the constant attention that is now focused on the victim. A person who is a victim of crime does not by virtue of their status as a victim invite public scrutiny into their lives. Hence, the government has a strong interest in protecting the identities of victims of crime.

Next, this governmental interest must be examined as to whether it is narrowly tailored.<sup>125</sup> The government's goal of protecting the identity of crime victims is directly advanced by restricting the public's access to ongoing criminal investigative material. If the identities of crime victims were released publicly, it may expose the victim to unwanted and unnecessary scrutiny. Other victims of crime will see this and may not seek help from the authorities for fear of receiving the same treatment in the media. Victims of crime may also be wary of reporting crimes for fear of reprisal by the perpetrator. To publicize information surrounding a criminal investigation may jeopardize not only the investigation, but the health and welfare of the victim. By restricting the public's access to such information, it will directly remove the fears of public scrutiny and reprisal. The press would not have access to the material and thus would not crucify the victim. The restricted access to such material will benefit those frightened of reprisal by concealing the identities of victims and information surrounding the investigation. Hence, these restrictions will advance the State's goal of protecting victims of crime.

Finally, a court would inquire as to whether the regulations are the least restrictive means of addressing the State's interest. The alternatives available to the government almost mirror those options available to the government in discussing a defendant's right to fair trial. Those options are delaying the release of the victim's identity; release the victim's identity, but place limits on the way the press utilizes that information; or restrict the access to such material until the investigative phase of the criminal case is over.

Delaying the release of a victim's identity does

<sup>121</sup> See generally Susan Estrich, *Press Should Zip its Lip in Rape Cases-Identifying Victim Serves No Purpose and Discourages Them From Coming Forward*, St. Louis Dispatch, Apr. 22, 1991, at 3B.

<sup>122</sup> See Helen Benedict, *The Privacy Rights of Rape Victims in the Media and the Law*, 61 *FORDHAM L. REV.* 1141 (1993). The author used as two examples the media coverage of Jennifer Levin, the murder victim in the 1986 "Preppie Murder"; and the *New York Times* and their treatment of Patricia Bow-

man, the woman who accused William Kennedy Smith of rape.

<sup>123</sup> *Id.* at 1143.

<sup>124</sup> See Shawn J. Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 *N.Y.L. SCH. J. HUM. RTS.* 485, 489 (1997).

<sup>125</sup> See Simon and Schuster, *supra* note 103 at 122; Boos, *supra* note 104, at 321.

not alleviate the problem of how they are treated in the media. Victims will still have their past scrutinized and publicized as if they were the defendants. Releasing this information, even if delayed, only reinforces the problem that many victims face now with the endless dissection of a victim's personal life by the media.

Additionally, the delayed release of a victim's identity does not solve the problem of reprisal. If the identity is released a month after the crime or a year, it is possible that the victim could still be in some form of danger. Ergo, the delayed release of ongoing criminal investigative material is not viable.

As discussed earlier, the second option is not available because it conflicts with prior case law.<sup>126</sup> That leaves the third option which is restricting access to ongoing criminal investigative material. This is the least intrusive way of dealing with the issue because it will allow victims the privacy they deserve, and in some cases need, while an investigation is in progress; it allows the police authorities to fully conduct and complete its criminal investigations without being unfairly scrutinized in the media; and will benefit the media because it is not a complete bar to them receiving the information they crave. Therefore, restricting access to ongoing criminal investigative material to protect victims of crimes is narrowly tailored.

### III. CONCLUSION

When the public's First Amendment right of access test is applied to ongoing criminal investigative material, the test is not satisfied and the public's access to such material should be restricted. The test fails because the press does not enjoy a historical tradition of access to such material, there is no probative value to society to release such information, and the government has compelling interests in restricting access to such data. The Supreme Court has yet to consider whether the public has a First Amendment right of access to ongoing criminal investigative material. If the Court is faced with such an issue, it will be faced with making a difficult choice: whether the First Amendment and the public's right to know is lesser or greater than the defendant's right to a fair trial and protection of the victim. It would be in the best interest of democracy that the Court rule against the public's right of access because the criminal justice system is founded on the principle of equity and fairness. The stakes are high when dealing with the criminal justice system: loss of life or liberty. That should outweigh any interest the public, much less the press, may have in monitoring the system.

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<sup>126</sup> See generally *Landmark Communications*, 435 U.S. at 829.

