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Unlocking America's Courthouse Doors: Restoring a Presumption of First Amendment Access as a Means of Reviving Public Faith in the Judiciary

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Notes & Comments

Unlocking America's Courthouse Doors: Restoring a Presumption of First Amendment Access as a Means of Reviving Public Faith in the Judiciary

[T]he only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their actions and fearless comment upon it.[1]

I. INTRODUCTION

The courthouse door was once open. Crossing the threshold allowed the public and the media to carefully scrutinize court proceedings and documents. Although the door was always left ajar, it certainly could be locked when a defendant's Sixth Amendment rights were in jeopardy or when closure was necessary to preserve "higher values." In the wake of over twenty years of court decisions interpreting *Press-Enterprises Co. v. Superior Court*, the seminal Supreme Court decision which afforded a presumption that court proceedings and documents shall be open for public review, this presumption has been swept under the doormat. The courthouse door in many cases has slammed shut. The media waits outside, begging for a key.

Fourteen simple words, carefully chosen[2] and laid out in the First Amendment to the United States Constitution, do no justice to the immense powers couched within its grant. The First

1. A.T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 398 (1956).
2. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 44-47 (1991).

Amendment provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[3] Beyond the Constitution's explicit guarantee that Congress is without power to intervene and restrict publication,[4] it is no secret that courts have continually interpreted the First Amendment as promoting the media's watchdog role and encouraging both comment on and criticism of governmental affairs.[5] Access to the judicial system is essential to enabling the press to maintain its watchdog role, allowing it to cast a careful eye on the third branch of government to ensure that the system's integrity is upheld.[6] Although the First Amendment's explicit language does not afford the public or the media a right of access to the judicial system,[7] the United States Supreme Court has consistently held that "[t]he First Amendment is . . . broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[8] Access to the judicial system, instrumental in enabling the media to enjoy its First Amendment

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3. U.S. CONST. amend. I.

4. *See* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 207-09 (1988).

5. WARREN FREEDMAN, PRESS AND MEDIA ACCESS TO THE CRIMINAL COURTROOM 11 (1988). The Supreme Court has also held that the First Amendment rights of free speech and free press are among the fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

6. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980) (plurality) (Brennan, J., concurring) ("[P]ublic access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government.").

7. Sigman L. Spichal, *The Right to Know, in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 3, 11-12 (Charles N. Davis & Sigman L. Splichal eds., 2000) ("A right of the public to know about the workings of government, as such, is not stated in the U.S. Constitution. But the framers of the Constitution did include provisions for making government accountable to the people . . . . While these requirements for government accountability seem limited by modern access standards, they nonetheless reflected the fundamental principle that government should not function in secret or withhold information without good cause.").

8. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (citing *Richmond Newspapers, Inc.*, 448 U.S. at 579-80). *See* Dan Paul & Richard J. Ovelmen, *Access*, 2 COMM. L. 7 (Practising Law Inst. 1999). *See also* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986 523 (1990) ("The right to speak is of little value if one has nothing to say.").

right to comment on and criticize government affairs, falls within the First Amendment's reach; therefore, as the United States Supreme Court has concluded, the First Amendment vests the media and the public with a qualified access right to the judicial system.[9]

Apart from a general common law right of access to criminal proceedings that has long been recognized in the United States,[10] since its 1980 landmark decision *Richmond Newspapers, Inc. v. Virginia*,[11] the United States Supreme Court has recognized a qualified First Amendment right to attend criminal trials.[12] This First Amendment access right is unique. Unlike the common law right of access, which grants the trial judge broad discretion in deciding whether access is warranted, the First Amendment access right grants a presumption that the proceeding or document will be open to public scrutiny.[13] The proceeding or document may be closed or sealed when countervailing interests are at stake, but in First Amendment access cases the party seeking closure carries the burden of demonstrating that closure is necessary.[14] Conversely, in common law access cases, the party seeking access carries the burden of demonstrating a need for the information.[15]

In recognizing a First Amendment right of access to criminal trials, the *Richmond Newspapers* plurality reasoned that the First Amendment's explicit guarantee of free speech and a free press would lose its meaning if the press was banished from the courtroom. The plurality stated that "[f]ree speech carries with it some freedom to listen . . . . What this means in the context of

9. *Richmond Newspapers, Inc.*, 448 U.S. at 580 (plurality); Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 8 (1986); *but see* POWE, *supra* note 2, at 198 ("The press's right of access to people and places has proven more difficult to establish than the right to publish . . . . ").

10. *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (recognizing that the public has a common law right "to inspect and copy public records and documents, including judicial records and documents," but that right is not absolute).

11. 448 U.S. 555 (1980) (plurality).

12. *See id.* at 580.

13. Lynn B. Oberlander, Note, *A First Amendment Right of Access to Affidavits in Support of Search Warrants*, 90 COLUM. L. REV. 2216, 2242-44 (1990).

14. *Id.* at 2243.

15. *Id.*

trials is that the First Amendment . . . prohibit[s] government from summarily closing courtroom doors which had long been open to the public at the time the Amendment was adopted."[16] Despite this pointed language, courts have been quick to note that when a First Amendment access right is recognized, it is certainly not absolute.[17] Rather, courts define this as a qualified or limited right that may be trumped by a defendant's competing Sixth Amendment[18] rights or when closure is "essential to preserve higher values" so long as the closure is narrowly tailored to meet that interest.[19]

Extending this qualified right of access to include proceedings other than criminal trials, in 1986 the Supreme Court delineated a two-part test to determine which proceedings are afforded a qualified right of access.[20] The test, derived from Justice Brennan's concurring opinion in *Richmond Newspapers*, involves "two complementary considerations."[21] The first prong, commonly referred to as the history (or experience) prong, considers whether the place and process have historically been open to the press and general public because a "'tradition of accessibility implies the favorable judgment of experience.'"[22] Meanwhile, the second prong, known as the logic (or positive functional role) prong, evaluates "whether public access plays a significant positive role in the functioning of the particular process in question."[23]

Following the Court's announcement that there is a qualified First Amendment access right to some judicial proceedings, lower federal and state courts have taken varying approaches when defining and applying this right.[24] The most frequently applied

16. *Richmond Newspapers, Inc.*, 448 U.S. at 576 (plurality).

17. *See* Press-Enter. Co. v. Superior Court (*Press-Enter. I*), 464 U.S. 501, 510 (1984).

18. U.S. CONST. amend. VI.

19. *See Press-Enter. I*, 464 U.S. at 502; *infra* Part II. *See also* MATTHEW D. BUNKER, JUSTICE AND THE MEDIA, RECONCILING FAIR TRIALS AND A FREE PRESS 1, 94-115 (1997).

20. Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 9 (1986).

21. *Id.* at 8.

22. *Id.* (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 574, 605 (1982) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (plurality) (Brennan, J., concurring)).

23. *Id.* (citing *Globe Newspaper Co.*, 475 U.S. at 606).

24. *See infra* Part III. *See also* Joseph D. Steinfield & Jeffrey J. Pyle,

approach is to define the two-prong test as a "conjunctive test," whereby a right of access is only recognized when both prongs are satisfied.[25] Indeed, once a qualified right of access is recognized, the proceeding or document at issue will remain open so long as a defendant's Sixth Amendment rights[26] are not jeopardized or other "higher values" do not warrant closure. Through this stringent approach, courts have eviscerated the Framers' original intention of affording a presumption of access as a means of promoting public discourse and media oversight of governmental affairs and have instead adopted a test that, by design, continually denies access to modern judicial devices.[27] The First Amendment, aimed at fostering careful scrutiny of the three branches to ensure the utmost integrity in the functioning of governmental processes,[28] is significantly curtailed when courts apply the conjunctive test. Ultimately these decisions reflect lower courts' recent moves away from a presumption of openness. Unfortunately, the United States Supreme Court has not yet taken up the task of allaying the courts' confusion.

The overarching need for public oversight is at its apex when courts utilize modern judicial proceedings or documents in their adjudicative or administrative roles. The public is more likely to trust judicial proceedings and documents that have a long-standing history of carrying out the duties of the third branch of government, while distrusting those without proven success. Despite the public's need and desire to monitor proceedings and documents in their infancy, the conjunctive test automatically denies access to these proceedings because it is rarely the case that a new proceeding or document will pass the courts' history prong. The public's confidence in the judiciary, concededly low, may be partially caused by a lack of access. Undoubtedly the

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Recent Developments in the Law of Access – 2003, 1 COMM. L. 16 (Practising Law Inst. 2003) ("Application of these principles isn't as easy as it looks.").

25. *See infra* Part III.A. The test, mandating that both prongs be satisfied before a qualified right of access vests, will be referred to hereinafter as the conjunctive test.

26. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

27. *See infra* Part IV.

28. KENT R. MIDDLETON, WILLIAM E. LEE & BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 28-30 (6th ed. 2004).

public grapples with trusting what is shielded from its view.[29] Reinterpreting the Supreme Court's test as disjunctive, which reflects the Framers' objectives by affording a presumption of openness to judicial proceedings and documents, both new and old, is necessary to restore public faith in the judicial system.[30]

Although less frequently applied, some courts have taken this approach and interpreted the Supreme Court's test as disjunctive, finding a presumption of access when either prong is satisfied.[31] This approach allows courts to afford access to modern proceedings and documents under the logic prong alone, thereby carrying out the Framers' intention of affording the media access to the governmental processes necessary to carry out its responsibilities to the public under the First Amendment.[32] The disjunctive test also preserves the history prong, helping the judiciary easily determine which proceedings fall within the scope of First Amendment protection and creating uniformity in court decisions.[33]

This Comment illustrates the shortcomings of the courts' history and logic prongs and adopts the disjunctive test as a workable means of determining when access should be presumed. Part II examines the original test announced in *Richmond Newspapers*, and applied in *Press-Enterprise II*, for determining when there is a qualified right of access to the judicial proceeding in question. Part III analyzes courts' varying interpretations of the test and urges that the leading interpretation defies the Framers' intentions by curbing what is otherwise a presumption of openness to court proceedings and documents. Part IV argues that the Supreme Court's test should be applied as disjunctive, whereby satisfaction of either the history or logic prong will vest the media and the public with a qualified First Amendment access right. Finally, Part V illustrates the impact of closure on the public's trust in the judiciary and perceptions of the third branch of government's fairness and integrity.

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29. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (plurality). "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." *Id.*

30. *See infra* Part II.

31. *See infra* Part III.B, Part IV.A.1.

32. *See infra* Part IV.A.2.

33. *See infra* Part IV.A.1.

II. THE TEST GENERALLY

For over twenty years courts have recognized the First Amendment as a vehicle for promoting access to court proceedings and documents.[34] In its 1980 landmark decision, *Richmond Newspapers, Inc. v. Virginia*,[35] a plurality of the United States Supreme Court stood convinced that the Constitution's Framers intended to afford a qualified First Amendment access right to criminal trials.[36] The decision marked the first time that the Supreme Court recognized that the Framers, in adopting the First Amendment, intended to afford a presumption of openness to court proceedings, because without such a right the Framers' goals of an unabridged press could never be fully implemented.

A. *Framers' intent*

A glimpse at history is instructive in understanding the Framers' goals. In the years preceding adoption of the First Amendment, debate was strong primarily in Virginia but also in neighboring colonies, over the need for a Bill of Rights.[37] From 1787-1791 Federalists and Antifederalists divided over whether a Bill of Rights was even necessary. Federalists believed it was superfluous to instruct Congress not do that which it had no power to do anyway.[38] Antifederalists, concerned with federal government overreaching and broad interpretation of the necessary and proper clause, led the fight for the Bill of Rights, specifically, the First Amendment.[39] Colonial Americans insisted that "sovereignty derived from the people's continuous assent," and continuous assent meant continuous scrutiny.[40] "The sovereign people needed information and the ability to discuss freely how their government was performing."[41] Against this backdrop the Antifederalists' persistence and persuasion paved

34. *See* CURRIE, *supra* note 8, at 525.
35. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality).
36. *Id.* at 567-69.
37. *See generally* POWE, *supra* note 2, at 22-50.
38. *Id.* at 47.
39. *Id.* at 44.
40. *Id.* at 27.
41. *Id.*

the way to the First Amendment.[42] As one commentator suggests, "[e]veryone, from Federalist to Antifederalist, had come to see that a free press was of great value to representative self-government . . . . The framers 'could only have meant to protect the press with which they were familiar and as it operated at the time. They constitutionally guaranteed the *practice* of freedom of the press.'"[43] The Supreme Court has more recently recognized that this *practice* includes not only the right to publish but also a qualified right to access the information essential to publication.[44] Allowing access to the judiciary and increasing publicity afforded to the third branch of government also carries out the Framers' intention of creating a system of checks and balances. Beyond the three branches of government, which serve as the government's internal checks and balances system, the media, in its role as the Fourth Estate,[45] provides an additional external check and balance on governmental processes. Jeremy Bentham even commented that "'[w]ithout 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.'"[46]

B. *Richmond Newspapers*

In extending this access right to criminal trials, the *Richmond Newspapers* plurality looked at history, which it said "demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long

42. *Id.* at 47-48.

43. *Id.* at 50.

44. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (plurality).

45. Supreme Court Justice Potter Stewart coined the term "Fourth Estate," referring to the media during an address to the Sesquicentennial Convocation at Yale Law School. He said that the press clause of the First Amendment is a "'*structural* provision' operating to create 'a fourth institution outside the government to check the potential excesses of the other three branches.'" POWE, *supra* note 2, at 260-61.

46. *Richmond Newspapers, Inc.*, 448 U.S. at 569 (plurality) (quoting JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

been presumptively open."[47] The plurality's walk through history took it back to the seventeenth and eighteenth centuries, where early scholars once noted "the importance of openness to the proper functioning of a trial."[48] The plurality also reasoned that conducting trials under the public's watch has a "therapeutic" effect on the community.[49] For example, media coverage of the judicial system provides an "outlet for community concern, hostility, and emotion."[50]

The State of Virginia, in *Richmond Newspapers*, argued vehemently that the Framers had never intended a right of access to judicial proceedings.[51] Ironically, the state's argument against expanding the scope of the First Amendment was made in the same courthouse where, over 200 years before, patriot Patrick Henry advocated for freedom of speech and press.[52] The state's argument centered on the simple assertion that the Framers did not intend for the public to have a right to attend trials because the Constitution does not mention such a right.[53] The plurality summarily dismissed the state's contention, explaining that the Framers anticipated this argument.[54] The plurality recalled that the Framers had even grappled with adopting a Bill of Rights altogether out of a fear that this same interpretation would be made.[55] Nevertheless, it rejected the state's argument by listing numerous examples of important rights the Court has recognized that are not enumerated in the Constitution, including the right to privacy, the right of association, the right to be presumed innocent, and the right to travel.[56] Having resolved that fundamental rights may be recognized even when they are not expressly guaranteed, the plurality concluded that without a right

47. *Id.*
48. *Id.*
49. *Id.* at 570.
50. *Id.* at 571.
51. *Id.* at 579.
52. David M. O'Brien, *The Trials and Tribulations of Courtroom Secrecy and Judicial Craftsmanship: Reflections on Gannett and Richmond Newspapers*, *in* CENSORSHIP, SECRECY, ACCESS, AND OBSCENITY 177, 195 (Theodore R. Kupferman ed., 1990); Brief of Appellants, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (No. 79-243).
53. *Richmond Newspapers, Inc.*, 448 U.S. at 579 (plurality).
54. *Id.*
55. *Id.*
56. *Id.* at 579-80.

of access, "important aspects of freedom of speech and 'of the press could be eviscerated.'"[57] The plurality found that the First Amendment prevents the government from arbitrarily closing courtroom doors in criminal trials,[58] but it also acknowledged that there certainly could be cases where an overriding interest would warrant closure; however, it clarified that the overriding interest may only be considered after a presumption of openness is recognized.[59]

Justice Brennan's concurring opinion in *Richmond Newspapers* set the stage for the Supreme Court's later interpretations of the extent of the plurality's newly recognized First Amendment access right. Brennan's opinion centered on the structural role the First Amendment plays in democracy.[60] Brennan contended that the First Amendment was meant to provide for uninhibited, *informed* debate. He wrote, "[t]he structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication."[61] Without a right of access, informed debate could not flourish, Brennan argued.[62] Having concluded that access is necessary to the enjoyment of First Amendment rights, Brennan noted that the task of determining which proceedings or documents are accessible "is as much a matter of sensitivity to practical necessities as it is of abstract reasoning."[63] To aid courts in making such a determination, Brennan offered what he deemed two helpful principles.[64] These principles later became known as the Court's two-prong test for determining if there is a qualified First Amendment access right to a judicial proceeding or document.

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57. *Id.* at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

58. *See* DOUGLAS S. CAMPBELL, FREE PRESS V. FAIR TRIAL: SUPREME COURT DECISIONS SINCE 1807 166 (1994).

59. *Richmond Newspapers, Inc.*, 448 U.S. at 581 n.18 (plurality).

60. *Id.* at 587-88 (Brennan, J., concurring).

61. *Id.*

62. *Id.* at 587 n.3 (quoting Saxbe v. Washington Post Co., 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting)).

63. *Id.* at 588.

64. *Id.* at 589.

C. *Press-Enterprise I & Press-Enterprise II*

Shortly after the Supreme Court rendered its plurality decision, three right-of-access claims appeared on the Supreme Court docket.[65] The most notable cases were *Press-Enterprise I* and *Press-Enterprise II*, where the Court recognized that a qualified First Amendment access right extends in criminal trials,[66] to the voir dire process,[67] and to preliminary hearings,[68] respectively. The Supreme Court's *Press-Enterprise II* decision applied the two-part test, derived from Justice Brennan's concurring opinion in *Richmond Newspapers*, to determine when there is a qualified First Amendment access right to a proceeding in question.[69] According to the Court, courts must engage in a two-part test involving "two complementary considerations."[70] The history prong questions whether the proceeding or process in question has historically been open to the press and the general public, while the logic prong considers whether public access plays a significant positive role in the functioning of the process.[71] In deciding that access was warranted, the Court held that both prongs were satisfied, thereby vesting the media with a qualified

65. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 610-11 (1982) (holding that a Massachusetts statute excluding the general public and the media from the courtroom in trials of specified sexual offenses during testimony of minor victims of sex crimes was unconstitutional); Press-Enter. Co. v. Superior Court (*Press-Enter. I*), 464 U.S. 501 (1984); Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1 (1986).

66. Although the United States Supreme Court has only recognized a qualified First Amendment right of access in criminal cases, because the Court has never had a civil right of access case before it, lower courts have been charged with deciding whether to apply the right in the civil context as well. Most courts recognize that *Press-Enterprise II* applies to civil cases as well. *See* Matthew D. Bunker, *Closing the Courtroom: Judicial Access and Constitutional Scrutiny After Richmond Newspapers*, *in* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 155, 167 (Charles N. Davis & Sigman L. Splichal eds., 2000).

67. *Press-Enter. I*, 464 U.S. 501.

68. *Press-Enter. II*, 478 U.S. 1.

69. *Id.* at 8. The United States Supreme Court has only considered the First Amendment right of access in the context of judicial proceedings but almost all lower courts recognize that the right applies to judicial documents as well. *See* Traciel V. Reid, *An Affirmative First Amendment Access Right*, *in* CENSORSHIP, SECRECY, ACCESS AND OBSCENITY 403, 411-14 (Theodore R. Kupferman ed., 1990).

70. *Press-Enter. II*, 478 U.S. at 8.

71. *Id.*

First Amendment access right to preliminary hearings.[72] Importantly, while the Court held that both prongs were satisfied, there is no indication in its decision that both prongs were required.

The *Press-Enterprise* decisions were the last right of access cases to appear on the Supreme Court's docket. Since then, lower state and federal courts have been charged with interpreting the scope of this newly recognized right.[73] Several lower courts have interpreted the Supreme Court's holding to include a qualified right of access to "'suppression hearings, bail hearings, sentencing hearings, change of venue hearings, plea hearings, contempt hearings, pretrial ex parte recusal hearings, post conviction proceedings, parole revocation proceedings, parole release hearings, executions, bench conferences, chambers conferences, juvenile proceedings, court martials, civil case proceedings, preliminary injunction proceedings, and closure proceedings.'"[74] Although a qualified right of access was recognized in those cases, this is not to say that courts will continue to afford absolute access in these types of proceedings, nor would continual access to these proceedings necessarily be warranted. Undoubtedly, it could not be contended that there is an absolute access right to the above enumerated proceedings and documents, because such an absolute right would likely implicate other constitutional violations.[75] Rather, these examples indicate willingness on the part of both state and federal courts to recognize an initial *presumption* of openness that may still be overcome, but only if access impedes a defendant's Sixth Amendment rights or if a compelling state interest is asserted and the closure is narrowly tailored to meet

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72. *Id.* at 13.

73. Bunker, *supra* note 66, at 162.

74. *Id.* (citing Thomas F. Liotti, *The Second Circuit Review: 1996-97 Term: First & Sixth Amendments: Closing the Courtroom to the Public: Whose Rights are Violated?* 63 BROOK. L. REV. 501, 533 (1997)). *See also* THE REPORTER'S KEY: RIGHTS OF FAIR TRIAL AND FREE PRESS 30-35 (A.B.A. 1994). For a complete breakdown of court decisions categorized by the type, proceeding, or document in question, see Dan Paul & Richard J. Ovelmen, *Access*, published annually in COMMUNICATIONS LAW published by the Practicing Law Institute.

75. The Sixth Amendment is often the source of conflict when determining whether a First Amendment right of access to a particular proceeding or document is warranted. *See* CAMPBELL, *supra* note 58.

that interest.[76]

III. CURRENT CIRCUIT SPLIT

Since 1986, courts have grappled with interpreting the Supreme Court's *Press-Enterprise II* test.[77] The Supreme Court, silent on the issue of whether both prongs needed to be satisfied, instead said that its prior decisions have "emphasized two complementary considerations."[78] The plain meaning of the word complementary is "supplying mutual needs or offsetting mutual lacks."[79] Beyond the Court's failure to mandate satisfaction of both prongs, the Court's language suggests that either prong would advance the same objective. That is, the Court sought to devise a test that would ensure a presumption of openness to judicial proceedings. By limiting the scope of that presumption to those proceedings that had a long history of openness (an indication that society was willing to accept media access to proceedings of this

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76. *See generally* BUNKER, *supra* note 19. The test, as originally illustrated in *Richmond Newspapers*, and later reaffirmed in *Press-Enterprise II* involves a two-step consideration before access will be afforded. Step I determines whether there is a presumption of openness to the proceeding, while Step II determines if there is an overriding interest that warrants closure, such as a defendant's Sixth Amendment right to a fair trail or other compelling state interests that are necessary to preserve "higher values." The test breaks down in the following way:

Step I:

a) Whether the place or process have historically been open to the press and general public. (history prong)

b) Whether public access plays a significant positive role in the functioning of the particular process in question. (logic prong)

Step II:

a) Whether a defendant's Sixth Amendment rights are impeded or a compelling state interest is asserted.

b) Whether the closure is narrowly tailored to meet that specific interest.

See Press-Enter. II, 478 U.S. at 8.

77. *See* Douglas Lee, *Courtroom Access: Overview*, THE FIRST AMENDMENT CENTER, Jan. 3, 2005 (last updated), http://www.firstamendmentcenter.org/Press/topic.aspx?topic=courtroom_access (last visited Nov. 5, 2005) ("While the U.S. Supreme Court consistently has reaffirmed the public's right of access to judicial proceedings, trial and appellate judges implementing that right frequently have sacrificed the public's right to know in order to ease the administration of justice.").

78. Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 9 (1986).

79. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 386 (3d ed. 1996).

sort) or those proceedings that would function better with the public's scrutiny, the Court safeguarded against affording access to all aspects of the judicial process. In particular, it appears the Court was reluctant to afford a presumption of access to those proceedings typically operating in secret, so as to protect the involved parties' privacy.[80] Nevertheless, by using the word "complementary," the Court imparted that each prong is a separate consideration. The logic prong compensates for what the history prong lacks. For example, modern proceedings and documents undoubtedly lack a long-standing history of openness; however, access may still promote the functioning of these processes. Therefore, the Court's "complementary" considerations ensure that when a proceeding cannot meet one prong, satisfaction of the other prong will achieve the same result.

Apart from the word "complementary," the Court considered whether the proceeding met both prongs when applying the test but it never explicitly held that a qualified right of access would not be recognized if the proceeding could only meet one of the two prongs.[81] The decision's ambiguity has led courts to take varying approaches when applying the test.[82] The vast majority of courts hold that the Court's test is conjunctive, whereby a qualified right of access will only be recognized when a proceeding passes both the history and the logic prongs.[83] Other courts have broken ground by recognizing the right when only one prong is satisfied.[84] This latter approach is a recent trend and may reflect some courts' final recognition that the history prong often cannot be satisfied when modern forms of adjudication and innovative judicial devices are utilized.

A. *The Conjunctive Test*

The Courts of Appeal for the Third, Fourth, and District of

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80. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

81. *Press-Enter. II*, 478 U.S. at 9 (1986).

82. *See infra* Parts III.A, III.B.

83. *See, e.g.*, N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003); United States v. Hani El-Sayegh, 131 F.3d 158, 160-62 (D.C. Cir. 1997); Balt. Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989).

84. *See, e.g.*, United States v. Suarez, 880 F.2d 626, 631 (2d Cir. 1989). *See also* Boston Herald, Inc. v. Connolly, 321 F.3d 174, 182 (1st Cir. 2003).

Columbia Circuits have expressly held that both the history *and* logic prongs must be met before the public is granted a qualified right of access. In cases where courts cannot identify a history of access to the type of proceeding or document at issue, these Circuits often decline to engage in the logic inquiry and refuse to recognize a qualified right of access.[85] In some cases these Circuits engage in the logic inquiry, making it clear, however, that regardless of the result a right of access cannot be recognized on one prong alone.[86] Perhaps this strategy is useful for appeals purposes but it adds further confusion to First Amendment access right jurisprudence.

In *United States v. Hani El-Sayegh*[87] the District of Columbia Circuit considered a claim of access to a plea agreement. The plea agreement was submitted to the court before the plea was offered to allow the court to rule on the government's initial motion to seal the agreement.[88] The government argued that there was sensitive information in the agreement that required sealing.[89] The defendant later repudiated the agreement entirely and entered a not guilty plea.[90] The government, unable to secure corroborating evidence, moved to dismiss the indictment without prejudice and the court granted the motion.[91] The court noted there has been a history of access to plea agreements that have culminated in guilty pleas in court because such an agreement is, in essence, a substitute for a trial. Nevertheless, the court could not find a history of access to a plea agreement that has never been admitted in court.[92] The court noted that "it is impossible to say that access to such a document has historically been available . . . ."[93] Because it held that the history prong could not

85. *See infra* Parts III.A, III.B.
86. *See, e.g.*, N. Jersey Media Group, 308 F.3d 198.
87. *Hani El-Sayegh*, 131 F.3d at 160-62.
88. *Id.* at 161. Federal Rule of Criminal Procedure 11(e)(2) requires plea agreements to be disclosed in court (or, if good cause is shown, *in camera*) at the time the plea is offered. *Id.* The government and the defendant sought to file the agreement under seal because it contained sensitive and confidential information. Sealing a document removes it from the media's and the public's purview.
89. *See id.* at 159.
90. *See id.*
91. *See id.*
92. *See id.* at 161.
93. *Id.*

be satisfied, the court declined to consider whether a qualified right of access should be recognized under the logic prong.[94] The court did recognize the possibility that a lack of historical access would not bar a court from finding that the history prong had been met.[95] For example, if a new procedure is substituted for an older procedure, a court could look at the long history of access that accompanied the older procedure.[96] However, when the proceeding or document is "entirely novel," it may never pass the test.[97]

The Third Circuit took a similar approach in *North Jersey Media Group v. Ashcroft*[98] when it held that a qualified First Amendment access right could not be recognized on the logic prong alone.[99] The court held that a media outlet did not have a First Amendment right to attend post-September 11th deportation hearings.[100] Although the court appropriately engaged in the logic inquiry and found it was not satisfied, the decision clearly established that even if the court had found that the logic prong was satisfied it believed its hands were tied. The majority was convinced that it could not hold that a qualified right of access vested absent a finding that both prongs were met.[101]

The Fourth Circuit, in *Baltimore Sun Co. v. Goetz*[102] also held that the Supreme Court's test was conjunctive.[103] In that case, the Baltimore Sun sought access to sealed search warrant affidavits that were issued by a federal magistrate and executed by law enforcement officials.[104] Although the court recognized a Circuit split with respect to a First Amendment access right to search warrant affidavits, it held that because there had not been a history of openness, a qualified First Amendment right could not

94. *Id.*
95. *See id.*
96. *See id.*
97. *Id.*
98. 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).
99. *Id.* at 213.
100. *Id.* at 204-05. The court's holding is in stark contrast to the Sixth Circuit's decision that same year. The Sixth Circuit, in *Detroit Free Press v. Ashcroft*, recognized a qualified right of access to deportation hearings based on satisfaction of both prongs. 303 F.3d 681, 705 (6th Cir. 2002).
101. *N. Jersey Media Group*, 308 F.3d at 216.
102. Balt. Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989).
103. *See id.* at 64.
104. *Id.* at 62.

be recognized.[105] The court expressed concerns about jeopardizing an individual's fair trial,[106] but because *Press-Enterprise II* allowed preclusion of access when it is essential to preserve "higher values" and the closure is narrowly tailored to serve that interest, the court's concerns should have been properly addressed under the *Press-Enterprise II* inquiry.

B. *The Disjunctive Test*

Other courts continue to struggle applying the test. The First Circuit parted from its sister Circuits in 2003 when it announced in dicta that if it was called upon to decide how to apply the *Press-Enterprise II* test, it would not hold that both prongs must be satisfied.[107] In *Boston Herald, Inc. v. Connolly*,[108] the court examined a First Amendment access claim to financial affidavits and a document summarizing a criminal defendant's debt that had been submitted to the court under the Criminal Justice Act (CJA) for government funding of a portion of his attorney's fees and legal expenses.[109] The court engaged in the *Press-Enterprise II* inquiry to decide whether a qualified First Amendment access right could be recognized.[110] Although the court recognized it could draw analogies to determine whether there was a history of access to similar documents, in this case it could not find that there were strong analogies to warrant recognition of a history of access.[111] Unlike other courts that would end the inquiry there, the court considered whether access to the document would play a positive role in the actual functioning of the process, under the logic prong.[112] The court decided that "[s]ome courts have treated these considerations as a two-prong test, with a pair of elements that must both be satisfied . . . . We are unpersuaded that this is the correct reading of the 'complementary considerations' of *Press-*

105. *Id.* at 64.
106. *Id.*
107. Boston Herald, Inc. v. Connolly, 321 F.3d 174, 182 (1st Cir. 2003).
108. *Id.*
109. *Id.* at 175-76.
110. *Id.* at 180-82.
111. *Id.* at 184 ("The analogies must be solid ones, however, which serve as reasonable proxies for the 'favorable judgment of experience' concerning access to the actual documents in question.").
112. *Id.* at 186.

Enterprise II."[113] Ultimately the court concluded that public access to a defendant's financial documents would in fact play a negative, not a positive role, but it recognized that access could be afforded on one prong alone.[114] Although Circuit Judge Lipez's dissent suggested that the history prong should be eliminated,[115] the majority maintained that it could not ignore tradition altogether following *Press-Enterprise II*.[116] Rather, it noted "the absence of analogous tradition might not doom a claim where the functional argument for access to a type of judicial document is strong."[117] Nevertheless, in this case, the court was unable to find that the document passed either prong.[118] While the immediate result in *Connolly* was to deny the Boston Herald access to the documents, the decision itself was a glimmer of hope for media access advocates. Media outlets, in the First Circuit at least, can anticipate that their rights to access innovative judicial proceedings and documents will be protected, despite the proceeding's or document's infancy.

C. *Exceptions to the conjunctive test move toward a disjunctive application*

Connolly marked the first time a Circuit recognized a willingness to continually treat the *Press-Enterprise* test as disjunctive. In some other cases, Circuits that have traditionally interpreted the *Press-Enterprise II* test as conjunctive have made exceptions when the logic prong alone was strikingly strong.[119] In *United States v. Suarez*,[120] the Second Circuit recognized access on the logic prong alone.[121] The *Suarez* court examined the same type of access examined in *Connolly* but arrived at a different

113. *Id.* at 182.
114. *Id.*
115. *Id.* at 201 (Lipez, J., dissenting) ("In the end there is no sound reason to exclude criminal proceedings of recent origin from the reach of the First Amendment simply because they cannot match the lineage of proceedings that have long been part of the criminal process.").
116. *Id.* at 184 n.5 ("We do not think we are free, under *Press-Enterprise II*, to simply ignore tradition. Analogies will frequently prove useful reasoning tools which lawyers are well trained to employ.").
117. *Id.*
118. *Id.* at 189.
119. United States v. Suarez, 880 F.2d 626, 626 (2d Cir. 1989).
120. *Id.*
121. *Id.* at 631.

conclusion, holding the lack of tradition with respect to access to CJA forms does not detract from the public's strong interest in how its funds are being spent in the administration of criminal justice.[122] Interestingly, a district court decision rendered after *Suarez*, but before *Connolly*, found a qualified right of access attached to a CJA document, drawing on analogies to satisfy the history prong and concluding that the second prong was strong.[123] Although the court did not delve deeply into the historical analysis and merely set forth arguments both for and against finding history based on analogy, the court determined access should be presumed because "presence of the public improves the performance of all participants, educates the public in the workings of the judicial process, and subjects the judicial system to a healthy public scrutiny"; on these presumptions, a qualified right of access attached.[124]

Like the Second Circuit, the Third Circuit has, on occasion, parted from its traditional conjunctive test.[125] In *United States v. Simone*, the Third Circuit considered a right of access claim to post-trial hearings concerning juror misconduct.[126] Although the court found there had not been a long history of access to such proceedings, it likened the case to another decision rendered in the years between *Richmond Newspapers* and *Press-Enterprise II*, where the Third Circuit "did not believe that historical analysis was relevant to the determination of whether the First Amendment [access right applied] . . . ."[127] Instead, the court "focused on 'the current role of the first amendment and the societal interests,'" thereby relying primarily on the logic prong.[128]

122. *Id.* ("The lack of 'tradition' with respect to the CJA forms does not detract from the public's strong interest in how its funds are being spent in the administration of criminal justice and what amounts of public funds are paid to particular private attorneys or firms.").

123. United States v. Ellis, 154 F.R.D. 692, 696-97 (M.D. Fla. 1993). Although the right of access attached, the court ultimately refused to allow access after finding that the defendant's attorney client privilege and Fifth Amendment rights would be jeopardized, which was sufficient to overcome the First Amendment presumption of openness. *Id.*

124. *Id.* at 696.

125. United States v. Simone, 14 F.3d 833 (3d Cir. 1994).

126. *Id.* at 837.

127. *Id.* at 838.

128. *Id.* (quoting United States v. Criden, 675 F.2d 550, 555 (3d Cir. 1982)).

Under the logic prong the court made several findings, which included: 1) public access to post-trial hearings regarding juror misconduct helps assure the public that the system is fair; 2) access discourages juror misconduct and assures the public of the integrity of those who participate in the system; and 3) access discourages perjury in many cases because the public might be able to contradict the perjured testimony if it learns about the testimony from the media.[129] With these principles in mind, the court held there was a qualified right of access to the post-trial juror misconduct hearing, even though the history prong was wholly lacking.[130]

The inconsistencies of courts' application of the *Press-Enterprise II* test are particularly troublesome because the varying results leave the media with little guidance as to which proceedings will be open in the future. More importantly, however, the conjunctive test moves further away from the Framers' intentions of a right of access to governmental processes as a means of promoting a free press. The court's dicta in *Connolly* proved to be a victory for media access, yet this has not changed the analyses of the vast majority of courts,[131] which still interpret the Supreme Court's test as conjunctive.

IV. MOVING TOWARD A DISJUNCTIVE TEST NECESSARY TO RESTORE FIRST AMENDMENT'S PRESUMPTION OF OPENNESS

A. *Disjunctive test provides true intent and restores presumption*

The disjunctive test provides a workable means of restoring the Framers' intention of a presumption of openness to an otherwise problematic interpretation of the Supreme Court's test. The Supreme Court's *Press-Enterprise II* two-pronged test, properly construed as a disjunctive test, whereby satisfaction of either prong would vest the media with a qualified First Amendment access right, would properly reopen courthouse doors. Although the door will undoubtedly be closed when the second step of the *Press-Enterprise II* analysis is satisfied, a presumption of openness will allow the media access so long as a defendant's

129. *See id.* at 839.
130. *Id.* at 840.
131. *See* discussion *supra* Part III (Part III introduction).

Sixth Amendment rights or a compelling state interest are not infringed.[132] Each prong of the court's first analysis is sufficient on its own to carry out the Framers' intent of awarding a presumption of openness to judicial proceedings and documents.[133] In the end, the same reasons the Supreme Court asserted for allowing the press and the public to attend criminal trials support media access to other judicial proceedings and documents. That is, the media's attendance will "[enhance] the quality" and "[safeguard] the integrity" of the judicial process, while heightening public respect by the "appearance of fairness" and allowing the public to participate through attendance as a check on the judicial process.[134]

1. *Finding access on history prong alone*

When the Constitution was drafted and Amendments were made, the Framers were conscious of the importance of reflecting upon history to find reasoned judgments.[135] Justice Frankfurter even observed that "'[t]he Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature.'"[136] *Richmond Newspapers* was decided under the history prong for precisely this same reason; that is, "a tradition of accessibility implies the favorable judgment of experience."[137] The *Richmond Newspapers* plurality based its decision on the important role that open criminal trials serve in the proper administration of justice, looking to the English system for guidance. According to one legal scholar, "[i]t is one of the most conspicuous features of English justice, that all judicial trials are held in open court. . . . [T]he English system ensures that the enormous force of public opinion is brought to bear on the

132. Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 13-14 (1986).

133. *See infra* Parts IV.A.1, IV.A.2.

134. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

135. *See* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 172 (1969).

136. *Id.* (quoting Youngstown v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring)).

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

proceedings in court, and that the judge and jury are compelled to hear both sides of the case."[138] A look at history, whether it is the United States or English system, for guidance is a continual trend in constitutional interpretation.[139] Indeed, this is not to say that a proceeding must have a thousand years of experience[140] before it will be recognized under the history prong, but when access has been afforded for some considerable length of time the "favorable judgment of experience" is shown. Reliance on history eliminates arbitrary decision-making and provides a consistent pattern of those proceedings that are open, allowing the media to anticipate where access will be allowed. This means that affording access based on the history prong eliminates case-by-case scrutiny, at least with respect to the court's first analysis. In both *Press-Enterprise II* and *Rivera-Pueg v. Garcia-Rosario*,[141] the courts noted that the experience test must be applied in light of the experience of openness of that type of proceeding or document throughout the United States, not just experience in one jurisdiction.[142] The Court's insistence on uniformity guarantees that a document or proceeding that has always been afforded access in other jurisdictions, will be equally afforded access in all jurisdictions, allowing media outlets to know in advance and predict what proceedings will typically be open, so that they can better serve the public in their judicial coverage.[143]

Furthermore, affording access based on the history prong alone sounds in judicial convenience. If a proceeding or a document has always been afforded access, it is unnecessary for a

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138. EDWARD JENKS, THE BOOK OF ENGLISH LAW 73-74 (Ohio Univ. Press 1967) (1928). Jenks also noted that, in some cases, this interest can be overridden when it is essential for a proceeding to take place in secret. *Id.* at 74.

139. *See* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION, ILLUSION AND REALITY, 54-55 (2001) ("History can and should be used to inform the balancing process; it should not, however, replace it.").

140. *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 213 (3d Cir. 2002) ("[A] 1000-year history is unnecessary.").

141. Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1 (1986); Rivera-Pueg v. Garcia-Rosario, 983 F.2d 311 (1992).

142. *See Press-Enter. II*, 478 U.S. at 10-11; *Rivera-Pueg*, 983 F.2d at 323.

143. Although it is argued *infra* that the history prong, in the context of the conjunctive test, arrives at inconsistent results, this is because courts are forced to make the proceeding or document fit into the history prong. Under the disjunctive test, however, courts are not forced to stretch analogies to make findings under the history prong.

court to undergo an extensive analysis every time a media outlet seeks access to a proceeding, except when considering whether countervailing factors warrant closure. This is particularly important in an era where courts are providing electronic access to court documents. So long as the type of document has always been available for the public and the media to access and inspect, court employees should rest assured that this type of access will be continually afforded. Therefore, automatic electronic access to these documents will be presumed unless a party seeks closure. If a party does seek closure, the documents can be shielded from public and media scrutiny so long as the party proves that closure is warranted under heightened or strict scrutiny, depending on which level of scrutiny the court applies. Court initiatives to make some information readily accessible electronically will be curtailed if forced to undergo this analysis each time, defeating both the aims of the First Amendment and the aims of courts hoping to make their proceedings more accessible. Rather, if access has always been afforded to the document in question, access should vest immediately and should only be divested in cases where a party satisfies the burden of proving that closure is warranted because a defendant's Sixth Amendment rights would be jeopardized or some other "higher values" need to be preserved.

Lastly, although it may be contended that courts should not continue to uphold access to proceedings merely because access to that type of proceeding has always been afforded, because the history prong already embodies the logic prong analysis, many of the safeguards supporting the conjunctive test are already ingrained in the history prong of the disjunctive test.[144]

The history prong has not been without criticism. Commentators agree that the test presents many problems when deciding whether access should be afforded.[145] These criticisms are aimed predominately at the history prong's effect when analyzed as part of the conjunctive test. Some commentators and jurists contend that the history prong serves no purpose and ought to be

144. *See* Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 94 (2d Cir. 2004) ("Experience casts an affirming eye on the openness of docket sheets and their historical counterparts.").

145. *See* Bunker, *supra* note 66, at 172; Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1105-20 (1996).

eliminated from the court's analysis because it hinders access to many documents.[146] Proposals to eliminate the history prong are aimed at affording greater access to judicial processes but ultimately leave courts with fewer confines and confer greater discretion to courts in rendering access decisions. For example, eliminating the history prong altogether would mean that courts could deny access to proceedings that have always been afforded access. Additionally, eliminating the history prong entirely would move away from the Founders' strong belief in relying upon the teachings of history and experience of man.[147] Without the history prong, courts would be able to resolve cases on the logic prong alone. The result is that a court, which is increasingly reluctant to afford access to one particular criminal proceeding, may deny access by posturing that public access does not contribute to the system's positive functioning. The ultimate effect is that an individual's fair criminal trial could be jeopardized because part of the rationale in the presumptive openness of judicial proceedings is to allow the media to scrutinize judicial proceedings in an effort to ensure that the integrity of the judicial system is maintained.[148]

Similarly, some commentators have proposed using a sliding scale-type balancing test, whereby a stronger prong may make up for a weaker prong.[149] This also defeats the aims of the First Amendment in affording a right of access to judicial proceedings. By using a sliding scale, courts are likely to place greater, if not too much, reliance on the logic prong each time a proceeding or document fails the history test or has a weak or limited history of

146. *See* Boston Herald, Inc. v. Connolly, 321 F.3d 174, 200 (1st Cir. 2003) (Lipez, J., dissenting); Wood, *supra* note 145.

147. *See supra* note 135.

148. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (plurality) ("The public trial, one of the essential qualities of a court of justice in England, was recognized early in the colonies. There were risks, of course, inherent in such a "town meeting" trial . . . . The modern trial with jurors open to interrogation for possible bias is a far cry from the "town meeting trial" of ancient English practice. Yet even our modern procedural protections have their origin in the ancient common law principle, which provided, not for closed proceedings, but rather for rules of conduct for those who attend trials. . . . Openness in criminal trials, including the selection of jurors, "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."). *See also* FREEDMAN, *supra* note 5, at 3 (1998).

149. *See* Bunker, *supra* note 66, at 172.

openness. In these cases, the result is that courts, mindful of a result they wish to achieve, whether it is opening or closing the proceeding to media access, will be inclined to overemphasize one prong to compensate for a weaker prong.

2. *Finding access on the logic prong alone*

The logic prong dictates that public and media access should be afforded when "access plays a significant positive role in the functioning of the particular process in question."[150] The list of reasons why access may play a significant positive role in the functioning of the process is long, as the *Richmond Newspapers* plurality illustrated. Most importantly, open public trials have a therapeutic value, while also enhancing the fairness of the trial and the public's confidence in the system.[151] Beyond that, "public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice."[152] Ultimately, the plurality hoped that access would contribute "to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system."[153] Allowing media access would foster this goal because the media functions as a surrogate for the public.[154]

Additionally, the Third Circuit has identified six societal interests a court may consider when determining whether public access to a document or proceeding enhances its function, thus satisfying the logic prong:

> Promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion; serving as a check on corrupt practices by exposing the

150. Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 8 (1986).

151. *Richmond Newspapers, Inc.*, 448 U.S. at 570 (plurality).

152. *Id.* at 573.

153. *Id.* (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)).

154. *Id.* at 572.

> judicial processes to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.[155]

Although the logic prong traditionally focuses on whether disclosure is necessary to aid the functioning of the system, some suggest that the issue should not be seen in terms of whether disclosure would aid the functioning of the system, but rather whether disclosure would defeat the purpose of the judicial process at issue.[156] While this approach would break new ground for media access rights,[157] it does not seem this is a feasible approach for courts in light of over twenty years of relatively consistent interpretation of the *Richmond Newspapers* logic test.

The logic prong has not been subjected to the great criticism that its historical counterpart has endured. Nevertheless, some commentators maintain that making decisions based on the logic prong alone would result in opening every judicial document or proceeding because public access almost always plays some significant positive role in the functioning of the process in question.[158] Criticism aimed at the logic prong strikes at the very heart of the Supreme Court's objective of creating a presumption of openness under the First Amendment. This argument fails to consider that just because a qualified First Amendment access right exists does not mean that access will be afforded. Access will be continually denied when closure is essential to preserve "higher values" and is narrowly tailored to serve that interest. Access must continue to be presumed under the logic prong to carry out the First Amendment's intent of allowing the public and the media to cast a watchful eye on judicial proceedings.[159]

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155. United States v. Smith, 123 F.3d 140, 146-47 (3d Cir. 1997).

156. *See* Steinfield, *supra* note 24, at 7, 23 (referring to Judge Lipez's dissent in *Connolly* and proposing that this approach should be deemed the "detriment" view of the logic prong).

157. *Id.*

158. *See* Wood, *supra* note 145, at 1105-20.

159. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

> In a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press (and media) to bring him to convenient form the fact of these operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of the government, and official

B. *Failings of current test*

Richmond Newspapers and its progeny were intended to create a presumption of openness and "designed to vindicate the central purpose of the First Amendment by making the operations of government institutions subject to effective public scrutiny."[160] The plurality envisioned open trials as a means of promoting fairness and integrity in the decision-making process. Despite the Court's vision of affording a presumption of access so that the judicial system could be held accountable to the people, courts' interpretations have continually moved away from a presumption of openness and have instead embraced a presumption of closure, at least when a proceeding fails the history prong.[161] Inevitably, these courts continually deny a qualified right of access to modern adjudicative innovations, which, by their very nature, are unsupported by a history of access.[162] Therefore, only twenty years

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> records and documents open to the public are the basic data of governmental operations. Without the information provided by the press (and media) most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

Id.

160. Globe Newspaper Co. v. Fenton, 819 F. Supp. 89, 94-95 (D. Mass 1993).

161. *See* United States v. Cianci, 175 F. Supp. 2d 194 (D.R.I. 2001); United States v. Town of Moreau, 979 F. Supp. 129, 133 (N.D.N.Y. 1997) (denying access without ever considering the logic prong because a proceeding failed the court's history analysis); *accord* Calder v. Comm'r, 890 F.2d 781 (5th Cir. 1989); *but see* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 211 (3d Cir. 2002) (examining the logic prong after determining there was no history of access but noting that even if it found the proceeding passed the second prong, the court would still deny access because "the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access."). *See also* Balt. Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989); United States v. Ellis, 154 F.R.D. 692, 696-97 (M.D. Fla. 1993).

162. *See N. Jersey Media Group*, 308 F.3d at 213, 216 (finding that there was no history of access to deportation hearings and precluding access on the basis that it does not embrace recognition of a right of access absent a strong showing of openness under the experience prong). Those courts, which hold that access may be afforded on one prong, alone, however, find that the relative newness of a judicial proceeding or document will not preclude the court from awarding access. *See* United States v. Suarez, 880 F.2d 626, 631

after a plurality of the Supreme Court announced its hopeful goals in *Richmond Newspapers*, courts have lost sight of the presumption of openness that the First Amendment affords to judicial proceedings.[163]

Courts, intent on awarding access only when there is both a history of access to the proceeding and when logic dictates that access should be afforded, overlook a core premise of the Constitution. As Chief Justice John Marshall twice explained, "a constitution is framed for ages to come."[164] Moreover, the Constitution is "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[165] Because Marshall continually emphasized the Constitution's flexibility, allowing it to be adapted to meet society's needs, one would be hard-pressed to claim that the Framers intended that courts only afford a right of access to those proceedings and documents that were open to the public when the Constitution was drafted.[166] Nevertheless, every time a court declines to recognize a qualified right of access to a judicial proceeding or document because a history of access is lacking, it undermines the founding principles of the Constitution. The only plausible application of Marshall's explanation of the Constitution's role with respect to First Amendment right-of-access jurisprudence is that the First Amendment guarantees a

(2d Cir. 1989) ("It is true that there is no long 'tradition of accessibility' to CJA forms. However, that is because the CJA itself is, in terms of 'tradition,' a fairly recent development, having been enacted in 1964 . . . . The lack of 'tradition' with respect to CJA forms does not detract from the public's strong interest in how its funds are being spent in the administration of criminal justice and what amounts of public funds are paid to particular private attorneys or firms.").

163. *See* discussion *supra* Part II.

164. Cohens v. Virginia, 19 U.S. 264, 387 (1821).

165. McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

166. The *Richmond Newspapers, Inc.* plurality noted that the "First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the Amendment was adopted." 448 U.S. 555, 576 (1980) (plurality). Although courts have since noted that the history prong may be satisfied even if the proceeding has not enjoyed 1,000 years of access, these courts rely on analogies which may be drawn to other similar proceedings when a new proceeding or document has replaced an old practice. *See supra* note 140 and accompanying text. Courts retain considerable discretion when drawing such analogies, inevitably arriving at different results. *See* discussion *infra* Part IV.A.2.

qualified right of access to those judicial proceedings and documents that were presumptively open in the late eighteenth century; however, this should not preclude courts from recognizing a right of access absent a history of openness.

1. *The blurred line between the court's inquiries lowers defendants' burden of proof*

A continual trend emerging when courts apply the conjunctive test is that the Court's two inquiries are losing their intended separation, thus shifting the burden of proof. In every First Amendment right-of-access case rendered by the Supreme Court, the Court has stressed that there are two separate inquiries that must be considered.[167] The first inquiry considers only whether there is a presumption of access to the proceeding based on history and logic.[168] If the answer is in the negative, the court should look no further and deny access. If, however, the court finds there is a presumption of access, it must then consider whether a defendant's Sixth Amendment rights are impeded or a compelling state interest is implicated.[169] If the court finds it is, it must then consider whether closure is narrowly tailored to meet that specific interest.[170] By this method the defendant carries the burden of proving that an otherwise open proceeding must be closed.[171]

The line dividing these two seemingly separate inquires has been blurred in recent years. Courts' discretion under the history prong is primarily to blame. Courts are empowered with great discretion to make relevant analogies under the historical analysis to help determine if the proceeding or document is of the type that has traditionally been afforded access.[172] For example, courts have looked to the traditional openness of criminal trials as historical

167. Press-Enter. Co. v. Superior Court (*Press-Enter. II*), 478 U.S. 1, 13-14 (1986); Press-Enter. Co. v. Superior Court (*Press-Enter. I*), 464 U.S. 501, 510 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608-09 (1982); *Richmond Newspapers, Inc.*, 448 U.S. at 580-81 (plurality).

168. *Press-Enter. II*, 478 U.S. at 8-9.

169. *Id.* at 9.

170. *Id.*

171. *See* Oberlander, *supra* note 13, at 2242-44.

172. *See* Boston Herald, Inc. v. Connolly, 321 F.3d 174, 184 (1st Cir. 2003) (citing Rivera-Pueg v. Garcia-Rosario, 983 F.2d 311, 323 (1st Cir. 1992) ("Tradition is not meant, we think, to be construed so narrowly; we look also to analogous proceedings and documents of the same "type or kind.")).

support for allowing access to a document submitted in connection with a criminal trial, thereby allowing such documents to satisfy the history prong.[173] Because access has always been afforded to the criminal trial, courts sometimes reason that access to a document submitted in connection with a criminal proceeding or a related criminal hearing should be afforded as well.[174] Other courts expressly reject this notion, requiring closer analogies before a proceeding or document passes the history prong.[175] At least one commentator has examined the analogies courts use to arrive at particular results.[176] For example, a court mindful that at the end of the day access should not be afforded because a defendant's rights may be jeopardized, may intentionally or unintentionally weave this policy decision into its initial consideration under the history test. Courts that mesh the history prong together with the determination that a particular type of access will prejudice a defendant's Sixth Amendment rights or infringe upon some other "higher value," overlook that closure is only warranted when a defendant proves that the open proceeding or document rises to the level of prejudice necessary under a strict scrutiny or heightened scrutiny analysis.

At first glance, it appears it would make no difference whether the court decided under the history and logic prong that no qualified First Amendment access right vested in the proceeding or whether it decided that a qualified right of access existed, but was then trumped by a defendant's competing interests, warranting closure. Clearly, access would be denied in either case. However, the ongoing debate over the appropriate level of scrutiny that must be applied in the court's secondary analysis could inevitably impact the result.[177] Legal scholars have attempted to sift through the Court's language in *Richmond Newspapers* and its progeny to determine what level of scrutiny the Supreme Court intended to afford, but these efforts have been

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173. *See In re* Providence Journal Co., 293 F.3d 1, 11 (1st Cir. 2002); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502-03 (1st Cir. 1989).

174. *See Providence Journal Co.*, 293 F.3d at 11; *Pokaski*, 868 F.2d at 502-03.

175. *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 213 (3d Cir. 2002).

176. *See* Wood, *supra* note 145, at 1115.

177. *See* BUNKER, *supra* note 19, at 94-115. *See also* O'Brien, *supra* note 52, at 206.

unavailing.[178] For example, although the plurality in *Richmond Newspapers* seemed to suggest that the secondary analysis merely required heightened scrutiny, the majority in *Globe Newspaper Co.* articulated a strict scrutiny test whereby closure is only warranted when there is a compelling government interest asserted and the closure is narrowly tailored to meet that interest.[179] Two years later, the Court in *Press-Enterprise I* used the words "'overriding'" and "'higher,'" terms that are traditionally associated with a heightened scrutiny test.[180] Nevertheless, the Court also quoted the *Globe Newspaper Co.* strict scrutiny test, leaving courts and scholars perplexed over the level of scrutiny warranted.[181] Finally, after another two years had passed, the *Press-Enterprise II* decision applied heightened scrutiny.[182] Unfortunately, the Court never addressed the confusion among its previous decisions regarding the appropriate level of scrutiny, leaving lower courts to wonder if the Court intended heightened scrutiny to displace the previously applied strict scrutiny test.[183] Lower courts have also applied differing levels of scrutiny when determining whether closure is warranted.[184] That the Supreme Court has yet to settle the appropriate level of scrutiny to be applied in the secondary analysis is particularly troublesome.

Regardless of which level of scrutiny is applied, in every case the burden is on the defendant to prove that closure is warranted. Although defendants carry the burden of proving that closure is warranted due to either a compelling or substantial interest that overrides the presumption of openness (and also, in some cases, proving that the closure is narrowly tailored to meet these asserted interests), this heavy burden is often overlooked when courts instead lump this analysis with the history prong.[185]

178. BUNKER, *supra* note 19, at 94-115.

179. *Id.* at 96.

180. *Id.* at 98.

181. *Id.* (noting that because the two standards were articulated together in the opinion suggests that the standard is equivalent to strict scrutiny).

182. *Id.* at 100.

183. *Id.*

184. *Id.* at 94 ("There seems to be little consistency among courts either in the choice of test or the apparent commitment to the value of openness in court proceedings.").

185. Courts have also injected this secondary consideration into the logic prong, causing the same problem. In *N. Jersey Media Group v. Ashcroft*, the

Indeed, this is a skillful tactic employed by those courts wishing to close access. By utilizing such an approach, courts essentially eliminate a defendant's burden of proving that closure is warranted.

2. *Fitting a round peg into a square hole*

A second impact of the conjunctive test is that its strict confines force courts to stretch analogies to arrive at particular results. Courts struggle to fit the round peg into the square hole when proceedings would otherwise fail the history prong, precluding access to the proceeding or document at issue. Courts, mindful that at the end of the day access should be awarded, may be inclined to engage in legal casuistry only because a strict reading of the conjunctive test would deny access when the history prong cannot be met. Courts that abandon a strict reading of the historical analysis draw inaccurate and overreaching analogies instead,[186] which should never be encouraged.[187] This happens in cases where, although the court is aware that the "correct" result is to afford media access, there has been no history of access to the type of proceeding or document. Because under the conjunctive test both prongs must be satisfied, courts must attempt to evade the trappings of the history prong by likening the proceeding to something wholly different than the proceeding at hand.[188] While

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court parted from the traditional logic inquiry by adding to the analysis the question of whether there were policies that favored closure. The court noted, "Although existing case law on the logic prong has discussed only the policies favoring openness, we are satisfied that the logic prong must consider the flip side of the coin." 308 F.3d 198, 200 (3d Cir. 2002).

186. In briefs to courts attorneys often stretch analogies to prove there has been a history of access to a proceeding or document in dispute. For example, in *Boston Herald v. Connolly*, counsel for the media company argued that because CJA documents were part of the criminal case, they should be afforded access because the criminal trial has always been afforded access. 321 F.3d 174, 184 (1st Cir. 2003).

187. *See generally* ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY (1988).

188. *See Boston Herald*, 321 F.3d at 200-01 (Lipez, J., dissenting) ("This lack of tradition for criminal proceedings of recent origin places intervenors like the Boston Herald in the awkward position of analogizing the documents or proceedings at issue to materials or proceedings with traditions of accessibility. Such analogies can be useful but not decisive. They are inevitably assailable on grounds that the comparison is imperfect, or that application of the tradition would prove too much.").

analytical reasoning is perhaps one of the most useful tools employed by lawyers and judges,[189] there comes a point where analogies are stretched too far. By allowing courts to stretch these analogies too far, inaccurate analogies result as courts force their own moral values into the history prong. The likely result of courts allowing such attenuated analogies is that courts will arrive at inconsistent results regarding the same type of proceedings.

Quintessential examples of the difficulties courts have had applying the history prong emerged in 2002.[190] In that year, two Circuits, examining precisely the same type of proceeding, arrived at different conclusions under their historical analyses.[191] Both the Sixth and Third Circuits were called upon to decide whether the First Amendment affords a qualified right of access to deportation proceedings.[192] The Sixth Circuit concluded that deportation hearings have historically been open to the public, thus surviving the first prong, while only two months later the Third Circuit rejected this approach, concluding that deportation hearings lack the "tradition of openness sufficient to satisfy *Richmond Newspapers*."[193]

The result in each case suggests that the courts were able to inject their own policy judgments into their considerations under the historical analysis. The Third Circuit, perhaps reluctant to afford access to deportation hearings, made this determination under its history analysis, averting the need to prove that closure was warranted under the court's secondary analysis. Meanwhile, the Sixth Circuit engaged in the inquiry required by the Supreme Court in *Press-Enterprise II* and found that because access has traditionally been afforded to deportation hearings, and because there are logical reasons supporting access, there should be a

189. *See generally* Cass R. Sunstein, *Commentary: On Analogical Reasoning*, 106 HARV. L. REV. 741 (1992).

190. Detroit Free Press v. Ashcroft, 303 F.3d 681, 701 (6th Cir. 2002); *N. Jersey Media Group*, 308 F.3d at 200.

191. *Compare Detroit Free Press*, 303 F.3d at 701 *with N. Jersey Media Group*, 308 F.3d at 200.

192. *Detroit Free Press*, 303 F.3d at 701; *N. Jersey Media Group*, 308 F.3d at 199.

193. *N. Jersey Media Group*, 308 F.3d at 212. *Compare* Detroit Free Press, 303 F.3d at 701 *with N. Jersey Media Group*, 308 F.3d at 212.

presumption of access to the proceedings.[194] The Sixth Circuit properly noted that this is not an absolute right of access and that proceedings may be closed when a party proves there is a compelling interest and that the closure is narrowly tailored to achieve those asserted interests.[195] Nevertheless, the court refused to close the proceedings because the blanket closure at issue was not narrowly tailored to meet the government's compelling interest.[196] The decision, which proved to be a victory for media rights, concluded that "[o]pen proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy."[197]

While the Sixth Circuit properly applied the *Press-Enterprise II* test, the Third Circuit's approach effectively circumvented the Supreme Court's analysis by finding that a presumption of access never vested. With this circumvention, the Third Circuit eliminated the need for a party to prove that closure was necessary because opening the proceedings impinges upon a compelling government interest and closure is narrowly tailored to meet that interest.

The result in these cases further illustrates the difficulties of the conjunctive test. By requiring that courts find that both prongs are satisfied, courts will invariably arrive at different conclusions under the historical analysis. This result runs contrary to the very aims of the history prong, which seeks to afford consistent access by allowing courts to base their historical analysis on whether access has traditionally been afforded throughout the United States, not just one jurisdiction.[198] A better solution would be to allow courts to award access based on satisfaction of either prong, thereby making it less likely that courts would attempt to circumvent the secondary analysis.

3. *Planning news coverage*

Lastly, allowing courts to draw stretched analogies leaves the media without a tool that would otherwise allow it to predict when access will be afforded. It is important that reporters and media

194. *Detroit Free Press*, 303 F.3d at 705.
195. *Id.* at 705-06.
196. *Id.* at 707-10.
197. *Id.* at 711.
198. *See* Rivera-Pueg v. Garcia-Rosario, 983 F.2d 311, 323 (1st Cir. 1992).

outlets are able to track what type of proceedings and documents are traditionally available so that information may be made accessible to the general public.[199] Indeed, the media's right of access would be of little value unless it could anticipate the types of proceedings and documents that would be accessible.

Ultimately, proper application of the conjunctive test forces a court to abruptly end its inquiry after determining that there has not been a history of access to the type of proceeding in question, without regard to whether the type of proceeding is an adjudicative or administrative innovation. The end result is that courts move further away from the First Amendment's intent to provide public access to promote discussion of governmental affairs, and its mission of ensuring the integrity of the judicial system. Because modern proceedings and new forms of adjudication have not endured the long history of public scrutiny that the traditional criminal trial has, the argument is even more compelling that the public needs to extend a more cautious eye to ensure that these proceedings operate fairly and efficiently.

V. PRESUMPTION OF OPENNESS AS A MEANS OF RESTORING PUBLIC FAITH IN THE JUDICIARY

Although the United States' Founders recognized that public trials were the most effective means of ensuring that justice is served,[200] since the late eighteenth century the judiciary has implemented numerous forms of adjudication and adjudicative processes. The trial is no longer the only place where public scrutiny is warranted. By implementing the disjunctive test and thereby restoring a presumption of openness under the logic prong to proceedings that would otherwise fail under the court's history analysis, courts would allow the public eye to scrutinize modern proceedings and decide for themselves whether justice is upheld. It cannot be denied that "[o]penness and public access is the ultimate guardian of fairness in our justice system."[201]

The Supreme Court itself has continually acknowledged the role the press plays in ensuring that the integrity of the judicial

199. *See* THE REPORTER'S KEY, *supra* note 74, at 22-42, 59-65.

200. Frances Kahn Zemans, *Public Access: The Ultimate Guardian of Fairness in our Justice System*, 79 JUDICATURE 173, 173 (1996).

201. *Id.*

system is upheld. "A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism."[202] Following this admonition, the Supreme Court's decision in *Richmond Newspapers* and its progeny undoubtedly recognized for the first time a qualified First Amendment access to many proceedings and documents, recognizing far greater rights for the media.[203] Nevertheless, because the adjudicative process is constantly changing, the impact of *Richmond Newspapers* has been curtailed at the expense of public trust and faith in the judiciary.

A study conducted by the National Center for State Courts and sponsored by the Hearst Corporation surveyed 1,826 Americans about their opinion of the judiciary.[204] Analysts learned that only twenty-three percent of Americans have a great deal of trust and confidence in courts in their community, while thirty-two percent have a great deal of trust and confidence in the United States Supreme Court.[205] Similarly, Americans expressed dissatisfaction with the way courts *handle* cases.[206] One possible cause of American's lack of confidence in the judiciary is the "[p]articular suspicion [that] arises when public institutions have provided open access and later denied it to the public."[207] Taking away the presumption of openness to court documents and proceedings will do nothing more than fuel American distrust in

202. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

203. *Compare* Joel M. Gora, THE RIGHTS OF REPORTERS, THE BASIC ACLU GUIDE TO A REPORTER'S RIGHTS (1977) *with* THE REPORTER'S KEY, *supra* note 74.

204. National Center for State Courts, National Conference on Public Trust and Confidence in the Justice System, National Action Plan: A Guide for State and National Organizations, http://www.ncsconline.org/WC/Publications/Res_AmtPTC_NatlActionPlanPub.pdf (last visited Nov. 14, 2005).

205. National Center for State Courts, *How the Public Views the State Courts: A 1999 National Survey*, 1999, http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf (last visited Nov. 15, 2005). *See also* JOSEPH R. WEISBERGER, THE CURRENT STATE OF PUBLIC TRUST AND CONFIDENCE IN THE JUSTICE SYSTEM 2 (n.d.).

206. *How the Public Views the State Courts*, *supra* note 205.

207. Zemans, *supra* note 200, at 175.

the judiciary. Indeed, "[p]ublic trust and confidence in the way [courts] do business is based, in part, on an open judiciary, which means the judicial system must have some degree of transparency to the extent permitted by law."[208]

Courts continually concern themselves with providing easier access to court records,[209] often overlooking that the real problem is the extent of access, not the ease of access. Courts must realize that "[p]ublic trust and confidence in the courts are based on an open judiciary and accurate public perception of it – for which the bench, the bar, and the media are collectively responsible."[210]

A return to the principles that guided the *Richmond Newspapers* plurality is necessary to ensure that the public and the media continue to scrutinize the judiciary. It is only then that public confidence in the judiciary will rise because, of course, "the means used to achieve justice must have the support derived from public acceptance of both the process and its results."[211]

VI. CONCLUSION

Interpreting the Supreme Court's test as disjunctive is the key for which the media has long awaited. The First Circuit's recognition that the Supreme Court test, properly applied, is a disjunctive test is a valiant stride toward restoring the presumption of openness couched within the First Amendment's grant, but courts must go one step further before achieving the true test contemplated by the *Richmond Newspapers* plurality. Moreover, courts must extract policy decisions favoring closure from its history and logic inquiry and only contemplate these considerations after determining whether a qualified right of access vests. Although court watchers have continually anticipated that it would not be long before the Supreme Court took up the issue,[212] with the denial of *certiorari* in *N. Jersey*

208. Ronald T. Y. Moon, *Together, Courts and Media Can Improve Public Knowledge of the Justice System*, 87 JUDICATURE 205, 205 (2004).

209. THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 465 (A.B.A. 2001).

210. Ronald T. Y. Moon, *supra* note 208, at 205.

211. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (plurality).

212. *See* Steinfield, *supra* note 24, at 15.

Media Group v. Ashcroft,[213] it seems the wait may be longer than media outlets hoped. Nevertheless, it is important that courts recognize it is not necessary to wait until the Supreme Court resolves the issue. The Supreme Court's ambiguous holding, with regard to whether the test is conjunctive or disjunctive, leaves lower courts in a position to interpret and apply the test. Applying the Court's holding as a disjunctive test will restore the First Amendment's presumption of openness by reopening the courthouse door and granting the media a qualified right of access to carefully scrutinize court proceedings and documents. Although the door will be bolted, keeping the media out, when a defendant's Sixth Amendment rights are in jeopardy or when closure is necessary to preserve "higher values," the media will at minimum have the chance to observe innovative adjudicative proceedings and documents. Media observation of both traditional and modern adjudicative processes continues to be essential in restoring public faith in the judiciary.

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213. *See* discussion *supra* Part III.A.

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