Boston College Law Review

Volume 44
Issue 4 *The Impact Of Clergy Sexual Misconduct Litigation On Religious Liberty*

Article 13

7-1-2003

Administrative Inconvenience and the Media's Right to Copy Judicial Records

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ADMINISTRATIVE INCONVENIENCE AND THE MEDIA'S RIGHT TO COPY JUDICIAL RECORDS

Abstract: English and American common law have long recognized the public's right of access to judicial records. The United States Supreme Court has acknowledged the importance of this right but has failed to set clear standards for lower courts to follow in evaluating right-of-access claims. This Note explores the disagreement among the federal courts of appeals regarding the appropriate scope of review in right-of-access cases and the force of the presumption in favor of access. This Note argues that federal appellate courts should not limit review to abuse of discretion, but should evaluate the balancing the lower court performed and determine if the lower court appropriately weighed the competing interests in making its decision. This Note concludes that the presumption in favor of access should yield more readily to constitutional concerns than to administrative concerns. Reasonable constitutional concerns would therefore trump the common-law right of access, whereas administrative concerns must be compelling to overcome the presumption favoring access.

INTRODUCTION

The public has long enjoyed access to judicial and other public records under English and American common law.[1] In 1978, the Supreme Court of the United States recognized a presumption in favor of this common-law right in *Nixon v. Warner Communications, Inc.*[2] The Court, however, did not delineate the relative strength of this presumption and therefore failed to provide guidance to lower courts in deciding right-of-access cases.[3] Following *Warner Communications*, federal appellate courts disagreed about the appropriate scope of review

[1] *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597–98 (1978); United States v. Mitchell, 551 F.2d 1252, 1257–58 (D.C. Cir. 1976), *rev'd sub nom. Warner Communications*, 435 U.S. 589; Nowack v. Fuller, 219 N.W. 749, 750–51 (Mich. 1928); Ferry v. Williams, 41 N.J.L. 332, 339 (Sup. Ct. 1879); William Ollie Key, Jr., Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or on Camera*, 16 GA. L. REV. 659, 661–69 (1982).

[2] 435 U.S. at 602.

[3] *See id.*

in right-of-access cases and the force of the presumption in favor of access.[4] The Supreme Court has yet to resolve this disagreement.[5]

Courts have generally weighed the presumption favoring access against constitutional concerns, primarily the defendant's right to a fair trial.[6] Technological advancements, however, are implicating administrative concerns, such as difficulty of reproduction, that also weigh against the media's right of access.[7] As a result of these advancements, courts have extended the right of access to audio- and videotaped exhibits and, recently, to electronic exhibits.[8] The media or public, however, may be unable to reproduce computer-displayed electronic exhibits.[9] As courtroom technology progresses, courts should develop standards to resolve the conflict between right-of-access claims and administrative difficulties of reproduction.[10]

Part I of this Note surveys the common-law history of the public's physical right of access to inspect and copy judicial records.[11] It details the English origins of the common-law right and the American common-law adoption of that right that has extended to audio- and videotaped and electronic evidence.[12] Part II explores the contours of the right of physical access, which the Supreme Court broadly defined in *Warner Communications*.[13] Part III examines the federal appellate decisions that follow *Warner Communications*. It focuses on the standard of review and the strength of the presumption the federal courts of appeals have adopted in favor of the media's access to documents.[14] In conclusion, Part IV proposes an appropriate standard of review in right-of-access cases and suggests that the relative strength of the presumption favoring access depends on the nature of competing concerns.[15]

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[4] *See, e.g.*, Belo Broad. Corp. v. Clark, 654 F.2d 423, 434 (5th Cir. 1981); United States v. Criden (*In re* Nat'l Broad. Co.), 648 F.2d 814, 822–23 (3d Cir. 1981); United States v. Myers (*In re* Nat'l Broad. Co.), 635 F.2d 945, 952 (2d Cir. 1980).

[5] *See In re* Providence Journal Co., 293 F.3d 1, 16 (1st Cir. 2002).

[6] *See, e.g.*, *Belo*, 654 F.2d at 431; *Criden*, 648 F.2d at 826–27; *Myers*, 635 F.2d at 953.

[7] *See Providence Journal*, 293 F.3d at 17; Valley Broad. Co. v. United States Dist. Court for the Dist. of Nev., 798 F.2d 1289, 1295 (9th Cir. 1986).

[8] *See Warner Communications*, 435 U.S. at 599; *Providence Journal*, 293 F.3d at 17.

[9] *See Providence Journal*, 293 F.3d at 17–18.

[10] *See infra* notes 235–314 and accompanying text.

[11] *See infra* notes 16–49 and accompanying text.

[12] *See infra* notes 16–49 and accompanying text.

[13] *See infra* notes 50–96 and accompanying text.

[14] *See infra* notes 97–234 and accompanying text.

[15] *See infra* notes 235–315 and accompanying text.

I. Common Law History of the Right of Access

The common-law right of access to judicial records arose in fourteenth-century England.[16] Prior to 1372, English law limited the public's right of access to protect the king.[17] Courts would not allow an opponent of the king to inspect or copy records that aided suits against the king or hindered prosecutions in his name.[18] In 1372, Parliament expanded the right of access to copy and inspect all judicial records, including those that could potentially harm the king.[19]

English courts limited this expanded right of access, however, to members of the public who had a proprietary interest in, or a particular need for, a document involved in a lawsuit.[20] The restriction did not deny access, but it limited the public's remedy to enforce the right of access.[21] If a court denied a citizen's request for access, the citizen could only enforce that right if the attorney general filed mandamus proceedings on the individual's behalf.[22] English law initially limited this writ to cases implicating the sovereign or public interest.[23] Later, the law allowed a private individual who could show a particularized interest in the material, different from that of the general public, to file a writ of mandamus in his or her own name.[24] Although every citizen had the right to inspect documents, courts generally would not enforce this right unless the individual had an interest in current or future litigation.[25]

American courts have historically allowed the public to examine and reproduce public and judicial documents, without requiring a specific interest in the records.[26] One American court saw the denial of public access to judicial records as "repugnant to the spirit of our democratic institutions."[27] Courts allowed individuals to access public records for the public interest and did not limit the right to individuals with private interests in pending suits.[28]

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[16] Key, *supra* note 1, at 661–62.
[17] *See id.* at 661.
[18] *Id.*
[19] *Id.*
[20] Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).
[21] *See* Nowack v. Fuller, 219 N.W. 749, 751 (Mich. 1928).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Warner Communications*, 435 U.S. at 597–98; *see* Key, *supra* note 1, at 668.
[27] *Nowack*, 219 N.W. at 750.
[28] *See id.* at 751; Ferry v. Williams, 41 N.J.L. 331, 339 (Sup. Ct. 1879).

For example, in 1879, in *Ferry v. Williams*, the Supreme Court of New Jersey granted an individual access to letters on file with the Town of Orange because the individual believed town officials were not enforcing provisions for licensing saloons.[29] A town ordinance required any person who wanted to sell ale to file a letter of recommendation, signed by six legal voters and freeholders, "to the effect that the applicant was of good moral character and of good repute for temperance."[30] The petitioner sought access to the records because he believed that the town did not obey the requirements regarding the letters.[31] The court granted the individual access to the documents because he acted in his private interest as an affected citizen, and for the public convenience, to prevent wrongs by public officials.[32]

The Supreme Court of New Jersey noted that many American courts and a number of English courts did not observe the general English rule requiring the attorney general to maintain a suit to redress public wrongs if an individual did not have a particularized interest.[33] American courts liberalized this rule, in accordance with the "more democratic character of our institutions."[34] Following *Ferry*, American courts have generally granted access to an individual who wants to inspect records in furtherance of the public interest, particularly when related to the redress of wrongs by public officials.[35]

Similarly, in 1929, in *Nowack v. Fuller*, the Michigan Supreme Court rejected the English requirement that allowed an individual to inspect judicial documents only if the documents related to current or potential litigation.[36] According to the Michigan Supreme Court, English law did not fully protect a citizen's right of access because the court would not issue a writ of mandamus unless an individual wanted to use records in defending or pursuing litigation.[37] The court reasoned that this limited remedy did not protect an individual's rights.[38] The court accordingly granted the plaintiff, as a citizen and taxpayer,

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[29] 41 N.J.L. at 333–34, 339.
[30] *Id.* at 333.
[31] *Id.* at 333–34.
[32] *Id.* at 339.
[33] *See id.* at 336–39.
[34] *Ferry*, 41 N.J.L. at 337.
[35] *See Warner Communications*, 435 U.S. at 597–98; *Nowack*, 219 N.W. at 751.
[36] 219 N.W. at 751.
[37] *Id.*
[38] *See id.*

access to public records to determine if the state had properly expended public money.[39]

American courts have thus found general public interest, such as the desire to monitor public agencies, sufficient to justify public access to judicial records.[40] Courts have reasoned that access to public records, including judicial records, increases public understanding of, and encourages confidence in, government and the judicial process.[41] Access to judicial proceedings enables education of the public about the judicial process and allows the public to monitor the conduct of government officials involved in a trial.[42] Additionally, the openness that access fosters is a check on the integrity of the judicial process and helps insure that a defendant receives a fair trial.[43] Although the news media further these policies by broadcasting material to people unable to attend trials, the media do not enjoy a right of access greater than that of the general public.[44]

American courts initially limited the right of access to judicial records to the right to hand copy written trial records, such as transcripts, exhibits, and pleadings.[45] The availability of photocopying and recording equipment facilitated access to other types of evidence and compelled courts to examine how much access they should grant the public, particularly the media.[46] Courts extended the right of access to accommodate technological advancements such as audio- and videotape recordings, as well as electronic exhibits.[47] These technological advancements have caused courts to question the scope of the common-law right-of-access requirement in determining if a court must provide copies of materials that may not be easily reproduced.[48] This

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[39] *Id.*

[40] *See Warner Communications*, 435 U.S. at 597–98; *Nowack*, 219 N.W. at 751; *Ferry*, 41 N.J.L. at 339.

[41] *See* Lisa Kakaty Starczewski, Note, *Media Access to Tape-Recorded Evidence in Criminal Trials*, 32 VILL. L. REV. 183, 189 (1987).

[42] *See* David Marburger, Note, *In Defense of Broadcaster Access to Evidentiary Video and Audio Tapes*, 44 U. PITT. L. REV. 647, 650–51 (1983).

[43] *See id.* at 651; Starczewski, *supra* note 41, at 189.

[44] *See Warner Communications*, 435 U.S. at 609; Belo Broad. Corp. v. Clark, 654 F.2d 423, 427 (5th Cir. 1981).

[45] *See* Alan Evan Marder, Note, *The Common Law Right of Access to Taped Evidence*, 50 GEO. WASH. L. REV. 465, 466 (1982).

[46] *See* United States v. Myers (*In re* Nat'l Broad. Co.), 635 F.2d 945, 950 (2d Cir. 1980); Starczewski, *supra* note 41, at 190–91.

[47] *See Warner Communications*, 435 U.S. at 599; *In re* Providence Journal Co., 293 F.3d 1, 17 (1st Cir. 2002).

[48] *See Providence Journal*, 293 F.3d at 17.

question remains unresolved, largely because the Supreme Court has failed to set a clear standard that lower courts could use to evaluate the media's right of access.[49]

II. Lack of Guidance from the Supreme Court

Nixon v. Warner Communications, Inc. is the only case in which the Supreme Court of the United States directly addressed the media's right to copy evidentiary recordings under the right of access.[50] In 1978, in *Warner Communications*, the Court reviewed and reversed the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *United States v. Mitchell*.[51] The federal court of appeals in *Mitchell* had granted media outlets access to the audiotapes presented in the Watergate trials, based on the well-settled common-law right of access.[52] In *Warner Communications*, the Supreme Court reversed this decision on statutory grounds, holding that the Presidential Recordings Act exclusively directed the procedure for releasing the tapes to the public.[53] Although the Supreme Court reversed the decision in *Mitchell*, the Court did not overrule the D.C. Circuit's evaluation of the strength of the common-law right of access or its method of evaluating a lower court's decision in a right-of-access claim.[54]

A. *Denial of Access Only When Justice So Requires*

In *Mitchell*, the D.C. Circuit held that the common-law right of access outweighed both potential prejudice to the criminal defendants at a possible retrial and President Nixon's privacy claim.[55] The court reversed the decision of the U.S. District Court for the District of Columbia denying media access to audiotapes relating to the Watergate scandal that had been played at the criminal trials of President Nixon's top aides.[56] The trial court decided that it could not release

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[49] *See* James K. Foster, Note, *Constitutional Law—Assessing the Media's Right: Copying Audio and Video Tapes Played as Evidence in Criminal Trials*, 10 W. New Eng. L. Rev. 99, 131 (1988).

[50] *See* 435 U.S. 589, 595–97, 610–11 (1978); Foster, *supra* note 49, at 99.

[51] *Warner Communications*, 435 U.S. at 595–97, 610–11; United States v. Mitchell, 551 F.2d 1252, 1261–65 (D.C. Cir. 1976), *rev'd sub nom. Warner Communications*, 435 U.S. 589.

[52] *See Mitchell*, 551 F.2d at 1263–65.

[53] 435 U.S. at 603.

[54] *See id.* at 602–03.

[55] *See* 551 F.2d at 1261–65.

[56] *Id.* at 1255. For discussions of *Mitchell*, see Foster, *supra* note 49, at 102–05; Marburger, *supra* note 42, at 653–54; Marder, *supra* note 45, at 472–73.

the tapes until the aides' pending appeals were completed.[57] The prosecution had played admissible and relevant portions of the tapes and introduced them into evidence.[58] The trial court gave people attending the trial earphones, with which to listen to the tapes in court, and transcripts of the tapes, which the media were allowed to keep and reprint.[59] The media moved at trial for permission to copy and broadcast the tapes that had been introduced into evidence.[60] The court granted the motion but determined that the media could not make copies until the aides' appeals ended.[61]

The *Mitchell* court recognized a well-settled and "precious" common-law right to inspect and copy public, including judicial, records.[62] The court stated that this right is indispensable to a democratic state and "predates the Constitution itself."[63] The court also traced the history of the right, noting that American courts have rejected its curtailment and "granted all taxpayers and citizens access to public records."[64] Concealing court records would be "'inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access.'"[65] The court held, therefore, that the right to inspect judicial records is part of the right of access to public records.[66]

According to *Mitchell*, a court has discretion regarding access because of the inability to set bright-line standards for granting access.[67] This discretion is limited.[68] A trial court may only restrict the media's fundamental common-law right of access when "justice so requires."[69] In *Mitchell*, the trial court erroneously required the networks to provide a compelling justification for access.[70] The trial court, according to *Mitchell*, should have placed the burden on Nixon and the defendants to prove that justice demanded prohibiting media access to the

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[57] *Mitchell*, 551 F.2d at 1255.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *See* 551 F.2d at 1257–60.
[63] *Id.* at 1260.
[64] *Id.* at 1257.
[65] *Id.* at 1258 (quoting *Ex Parte* Drawbaugh, 2 App. D.C. 404, 407 (1894)).
[66] *Id.*
[67] 551 F.2d at 1260.
[68] *See id.* at 1260–61.
[69] *Id.* at 1260.
[70] *Id.* at 1261.

records.[71] Based on this standard, the D.C. Circuit determined that the trial court abused its discretion in denying access to the audiotapes until the aides' appeals were decided.[72] The D.C. Circuit found that the President's privacy claims and the potential risk of prejudice at a second trial were not compelling enough interests to interfere with the media's established right to inspect and copy the audiotapes.[73] Because the court already played the tapes at trial and the media widely circulated the transcripts, it was unlikely that potential jurors for a retrial would be biased by release of the tapes.[74] Justice therefore did not require that the trial court deny access.[75]

B. *A Presumption, However Gauged, in Favor of Access*

In 1978, in *Warner Communications*, the U.S. Supreme Court reversed the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Mitchell*.[76] The Court reviewed the parties' competing interests, but did not weigh those interests because the Court resolved the case based on a controlling statute.[77] The Court determined that the Presidential Recordings Act governed the processing and release of historically significant presidential materials, including the audiotapes in question.[78]

Although the Supreme Court decided *Warner Communications* on statutory grounds, the Court recognized in dicta the public's and the media's common-law rights of access to judicial records.[79] The Court acknowledged the existence of a presumption for the common-law right of access, but failed to clarify a standard under which lower courts should evaluate the right.[80] The Court noted that the common-law right of access to judicial records is "[a]n infrequent subject of litigation," and that "its contours have not been delineated with any

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[71] *See id.*

[72] *See Mitchell*, 551 F.2d at 1255, 1261.

[73] *Id.* at 1261, 1263.

[74] *Id.* at 1262.

[75] *See id.* at 1263–64.

[76] *Warner Communications*, 435 U.S. at 610–11.

[77] *Id.* at 603.

[78] *Id.*

[79] *Id.* at 597, 602. For discussions of *Warner Communications*, see Foster, *supra* note 49, at 105–09; Marburger, *supra* note 42, at 654–55; Donna R. Moliere, Note, *The Common Law Right of Public Access When Audio and Video Tape Evidence in a Court Record Is Sought for Purposes of Copying and Dissemination to the Public*, 28 Loy. L. Rev. 163, 167–68 (1982).

[80] *See Warner Communications*, 435 U.S. at 602.

precision."[81] Significantly, the Court also extended the right of access from documents to tape recordings.[82]

As the D.C. Circuit held in *Mitchell*, the Court stated that the decision regarding access is a matter of discretion for the trial court, "to be exercised in light of the relevant facts and circumstances of the particular case."[83] The Court decided the case on statutory grounds, based on the Presidential Recording Act, and therefore did not establish the extent to which it would review a lower court's decision granting or denying access.[84] As in *Mitchell*, the Court noted, however, that it would weigh the parties' competing interests, "in light of the public interest and the duty of the courts," were it to evaluate the trial court's findings.[85]

The Court then listed the factors to consider in such a balancing of interests.[86] Increased public understanding of the Watergate scandal was a factor favoring releasing the tapes.[87] The Court also recognized the existence of a "presumption—however gauged—in favor of public access to judicial records."[88] Factors weighing against the right of access included infringement on Nixon's privacy rights and the role the courts would play in commercializing the tapes.[89] Although the Court delineated these factors, it did not balance them because it found that the Presidential Recordings Act restricted public access to the tapes.[90]

The Court declined to recognize a constitutional basis in the First or Sixth Amendment for the media's common-law right of access, holding that these amendments did not require release of the tapes.[91] Under the First Amendment, the media's right to information is equivalent to that of the general public.[92] A denial of access does not implicate a defendant's Sixth Amendment right to a public trial, either,

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[81] *Id.* at 597.

[82] *Id.* at 599.

[83] *Id.*; *see Mitchell*, 551 F.2d at 1260; Marburger, *supra* note 42, at 654–55.

[84] *See Warner Communications*, 435 U.S. at 603.

[85] *Id.* at 602; *see Mitchell*, 551 F.2d at 1261–63 (weighing the factors favoring and opposing access).

[86] *Warner Communications*, 435 U.S. at 602–03.

[87] *See id.* at 602.

[88] *Id.*

[89] *Id.* at 600–02.

[90] *See id.* at 603.

[91] *Warner Communications*, 435 U.S. at 608.

[92] *See id.* at 609.

because the public and media may attend and report on the proceedings.[93]

The Supreme Court failed in *Warner Communications* to define the scope of the right of access.[94] The Court did not set a standard that trial courts could use to evaluate a right-of-access claim to copy or inspect evidence; the Court instead set vague guidelines for federal appellate courts to follow when reviewing a trial court's decisions.[95] Although the Supreme Court recognized the existence of a presumption in favor of the common-law right of access, the Court refused to acknowledge a constitutional basis for that presumption.[96]

III. Circuit Split: Strength of the Presumption in Favor of Access

Following the decision in *Nixon v. Warner Communications, Inc.*, the federal courts of appeals have disagreed on the strength of the presumption in favor of access when they balanced the factors in a right-of-access determination.[97] Courts have varied in their interpretations of the Supreme Court's recognition in *Warner Communications*, in dicta, of a presumption, "however gauged," in favor of access to public records.[98] In 1980, in *United States v. Myers (In re National Broadcasting Co.)*, the U.S. Court of Appeals for the Second Circuit determined that "only the most compelling circumstances" can overcome a strong presumption in favor of access.[99] Alternatively, in 1981, in *Belo Broadcasting Corp. v. Clark*, the U.S. Court of Appeals for the Fifth Circuit determined that a number of factors can defeat the relatively weak presumption in favor of the common-law right of access.[100] In 1981, in *United States v. Criden (In re National Broadcasting Co.)*, and in 1986, in *Valley Broadcasting Co. v. United States District Court for the District of Nevada*, the U.S. Courts of Appeals for the Third and Ninth Circuits, re-

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[93] *Id.* at 610.

[94] *See id.* at 602–03.

[95] *See id.*

[96] *Warner Communications*, 435 U.S. at 602, 608.

[97] *See, e.g.*, Belo Broad. Corp. v. Clark, 654 F.2d 423, 434 (5th Cir. 1981); United States v. Criden (*In re* Nat'l Broad. Co.), 648 F.2d 814, 822–23 (3d Cir. 1981); United States v. Myers (*In re* Nat'l Broad. Co.), 635 F.2d 945, 952 (2d Cir. 1980). *See generally* Starczewski, *supra* note 41, at 185–87.

[98] 435 U.S. 589, 602 (1978); *see* Valley Broad. Co. v. United States Dist. Court for the Dist. of Nev., 798 F.2d 1289, 1294 (9th Cir. 1986); *Belo*, 654 F.2d at 434; *Criden*, 648 F.2d at 822–23; *Myers*, 635 F.2d at 952.

[99] 635 F.2d at 952.

[100] 654 F.2d at 434.

spectively, created an intermediate standard.[101] These courts found a strong presumption favoring public access to judicial records, but allowed less-than-compelling circumstances to overcome that presumption.[102] The Supreme Court has not yet resolved this disagreement among the federal courts of appeals.[103]

A. *Tipping the Scales in Favor of Access*

In *Myers*, the Second Circuit found that only extraordinary circumstances could outweigh the strong presumption in favor of access.[104] Because the Supreme Court did not set a standard for evaluating the right of access, the Second Circuit struggled to find guidance in balancing the competing rights of the media and the defendant.[105] In *Myers*, the media wanted to copy videotapes revealing illegal dealings (the "Abscam" operation), including bribery, between undercover FBI operatives and the criminal defendants, who were members of Congress and other public officials.[106] In the courtroom of the U.S. District Court for the Eastern District of New York, members of the media and general public viewed videotaped evidence of illegal transactions.[107] The court gave the jury and the media transcripts of the tapes, and as the jury viewed the tapes, media artists sketched the video images.[108] The media publicized these transcripts and sketches throughout the trial.[109]

The media applied to the court for permission to copy the tapes by connecting a wire from the courtroom video equipment to the media's equipment while the prosecutor presented them to the jury.[110] This method, according to the court, would not disturb the trial.[111] The trial court granted the request, allowing the copying to occur at the close of each trial day.[112] The court noted that, absent "a

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[101] *See Valley*, 798 F.2d at 1294; *Criden*, 648 F.2d at 822–23.

[102] *See Valley*, 798 F.2d at 1294; *Criden*, 648 F.2d at 822–23.

[103] *See In re* Providence Journal Co., 293 F.3d 1, 16–17 (1st Cir. 2002). *See generally* Starczewski, *supra* note 41, at 187.

[104] 635 F.2d at 952.

[105] *See id.* at 951–52.

[106] *Id.* at 947.

[107] *Id.* at 947, 948.

[108] *Id.* at 948.

[109] *Myers*, 635 F.2d at 948.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 948–49.

strong showing of reasons why they should not be made available," the court should provide the tapes to the media.[113]

In reviewing the trial court's decision, the Second Circuit relied on the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *United States v. Mitchell*.[114] Although the Supreme Court reversed *Mitchell* on statutory grounds in *Warner Communications*, the Second Circuit noted that the D.C. Circuit's opinion was a significant evaluation of the common-law right of access and remained "strong authority" for the media's right to copy videotaped evidence.[115]

The Second Circuit also cited Supreme Court decisions that generally addressed the competing values involved in evaluating the right of access.[116] Opposing the right of access are the right of the defendant to a fair trial and the obligation of the court to refrain from cooperating with the media in a manner that would impede that right.[117] Favoring the right of access is the public interest in knowing what occurs in the courtroom.[118]

Considering these competing concerns, the Second Circuit followed the lead of the D.C. Circuit in *Mitchell*.[119] The Second Circuit concluded that when evidence "is in a form that readily permits sight and sound reproduction," only "the most extraordinary circumstances" could justify limiting the general public's opportunity to observe the evidence.[120] The presumption favors access if the media can copy the evidence "without any significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial."[121] In such circumstances, particularly if the evidence reveals actions of public officials, "only the most compelling circumstances should prevent contemporaneous public access" to the taped evidence.[122]

The initial determination regarding access, according to the Second Circuit's interpretation of the Supreme Court's dicta in *Warner Communications*, is within the "informed discretion" of the trial

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[113] *Id.* at 949.
[114] *See Myers*, 635 F.2d at 950–51.
[115] *Id.*
[116] *See id.* at 951.
[117] *Id.*
[118] *Id.*
[119] *Myers*, 635 F.2d at 952.
[120] *Id.*
[121] *Id.*
[122] *Id.*

court.[123] This standard of review for the lower court decision is more stringent than just abuse of discretion.[124] The federal court of appeals must find that the lower court carefully evaluated the competing interests and that the trial court limited the right of access only under "the most extraordinary circumstances."[125] The Second Circuit therefore limited the trial court's discretion and set a standard that requires compelling circumstances to overcome the presumption in favor of access.[126] Applying this standard, the court determined that the risk to the fair-trial right of the *Myers* defendants and others facing trial in the Abscam operations was speculative.[127] Potential jurors, the court noted, are likely not as aware of the news as the defendants and media think they are, and defendants can rely on voir dire to excuse potentially partial jurors.[128] The possible threat to the defendants' right to a fair trial was therefore not a sufficiently compelling reason to hinder the media's right of access to the videotapes.[129]

B. *Lowering the Standard to Overcome Access*

In contrast to *Myers*, the Fifth Circuit determined in 1981, in *Belo*, that a variety of factors could overcome the relatively weak presumption in favor of the common-law right of access.[130] The Fifth Circuit held that the district judge did not abuse his discretion in denying access based on potential prejudice to the future defendant's fair-trial right.[131] The audiotapes in question in *Belo* were recordings of conversations between FBI operatives in a sting operation (the "Brilab" investigation) and the defendants.[132] The defendants were public officials charged with bribery in awarding state employee insurance contracts.[133] The U.S. District Court for the Southern District of Texas

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[123] *Id.* at 950.

[124] *See Myers*, 635 F.2d at 950, 953–54 (evaluating competing concerns in affirming trial court's decision); *see also* United States v. Salerno (*In re* CBS, Inc.), 828 F.2d 958, 960 (2d Cir. 1987) (access determination is "committed to the trial court's discretion," but "that discretion is limited by the strength of the presumption of public access").

[125] *See Myers*, 635 F.2d at 952.

[126] *See id.*; *see also Salerno*, 828 F.2d at 960–61 (holding that the privacy rights of a witness did not outweigh the presumption in favor of the media's right of access to a videotaped deposition).

[127] 635 F.2d at 954.

[128] *Id.* at 953.

[129] *Id.* at 954.

[130] *Belo*, 654 F.2d at 434.

[131] *Id.*

[132] *Id.* at 425.

[133] *Id.*

denied two broadcasting stations' requests to copy the audiotapes.[134] Broadcast of the tapes, the trial court held, would prejudice a future defendant's right to a fair trial and obstruct the court's selection of an impartial jury.[135]

The Fifth Circuit rejected the broadcasters' argument that the right of physical access to the tapes derived from the First Amendment, noting that the Supreme Court in *Warner Communications* rejected a constitutional right to copy.[136] The Fifth Circuit determined that, under *Warner Communications*, the media enjoys no right to information beyond the rights enjoyed by the public, and that the Constitution does not grant the media or the public the right of physical access to judicial records.[137]

According to the court's reading of *Warner Communications*, a federal court of appeals reviews the trial court decision solely for abuse of discretion.[138] The Fifth Circuit recognized that a court could interpret ambiguous language in *Warner Communications* as granting the federal court of appeals the right to balance the interests advanced by the parties in a right-of-access case.[139] Nevertheless the Fifth Circuit stated that federal appellate courts should only reverse a decision if the trial court has flagrantly abused its discretion.[140]

The trial court judge, the Fifth Circuit held, did not abuse his discretion when he denied physical access to the tapes.[141] Although the possibility of prejudice to a future defendant's fair-trial right may have been speculative, the court decided that federal appellate courts should defer to a trial judge's decision to protect a defendant's fair-trial right.[142] The court additionally emphasized the diminished importance of the common-law right of access in relation to the defendant's constitutionally guaranteed fair-trial right.[143]

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[134] *Id.*

[135] *Belo*, 654 F.2d at 425.

[136] *Id.* at 426–27.

[137] *Id.* at 428–29.

[138] *Id.* at 430–31.

[139] *Id.* at 430 & n.15 (citing *Warner Communications*, 435 U.S. at 602 ("At this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts."); *id.* at 603 ("We need not decide how the balance would be struck if the case were resolved only on the basis of the facts and the arguments reviewed above.")).

[140] *Belo*, 654 F.2d at 431.

[141] *Id.*

[142] *Id.*; *see* William J. Whelan, III, Note, *Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right*, 50 FORDHAM L. REV. 551, 578 (1982).

[143] *See Belo*, 654 F.2d at 432.

The court also addressed the strength of the media's common-law right of access to the audiotapes.[144] *Warner Communications*, the Fifth Circuit noted, did not support other holdings from federal appellate courts that a strong presumption exists in favor of the media's common-law right of physical access.[145] Other federal courts of appeals, in requiring a party to prove compelling circumstances to oppose the media's right of access, elevated the right of access to a level reserved for constitutional rights.[146] Conversely, the Fifth Circuit read *Warner Communications* as noting that various factors limit the right of access.[147] In upholding the trial court's denial of the media's request for access to the tapes, the Fifth Circuit in *Belo* emphasized the common-law, rather than a constitutional, basis for the media's right of physical access to judicial documents.[148]

C. *An Intermediate Standard: The Majority Approach*

In 1981, the Third Circuit, unlike the Fifth Circuit in *Belo*, accepted a strong presumption in favor of the right of access in *Criden*.[149] The Third Circuit, however, did not place the stringent "compelling circumstances" standard on those opposing access that the Second Circuit articulated in *Myers*.[150] In *Criden*, the Third Circuit ruled on the media's right of access to videotaped evidence in another prosecution of public officials in the Abscam operation.[151] The U.S. District Court for the Eastern District of Pennsylvania in *Criden* released transcripts of the videotapes to the media but held that the circumstances of the case were "sufficiently extraordinary" to deny the media's request to copy the tapes.[152] The trial court also rejected the Second Circuit's broad view of the strength of the right of access, noting *Warner Communications*.[153]

The Third Circuit decided that federal appellate courts should not limit their review of right-of-access decisions to abuse of discretion.[154] Federal courts of appeals must also consider a trial court's

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[144] *See id.* at 434.
[145] *Id.* at 433–34.
[146] *Id.* at 434.
[147] *Id.*
[148] *See* 654 F.2d at 432, 434.
[149] *See Criden*, 648 F.2d at 823.
[150] *See id.*
[151] *Id.* at 815.
[152] *Id.* at 816.
[153] *Id.*
[154] *See Criden*, 648 F.2d at 818.

evaluation and balancing of competing interests.[155] The Third Circuit extensively reviewed the justifications for varying levels of trial court discretion.[156] The reason the law places the decision within the discretion of the trial court, the Third Circuit noted, influences the scope of review.[157] For example, the law insulates trial courts from appellate review when a trial court's decision is based on first-hand observation.[158] Trial courts, however, may also retain discretion for pragmatic reasons, because, for example, federal courts of appeals have not yet developed guidelines on an emerging issue.[159] The Third Circuit reasoned that it could conduct a broader review of the weight and relevance of the factors contemplated by the trial court because the trial court's decision regarding access to the tapes was not based on first-hand observations.[160] The Third Circuit then evaluated the factors favoring release of the tapes, focusing on the strength of the media's right to inspect and copy judicial records.[161]

Additionally, the court compared the common-law right of access with the First Amendment right to attend trial, which the Supreme Court recognized in 1980 in *Richmond Newspapers, Inc. v. Virginia*.[162] Although the Third Circuit did not determine if the First Amendment applied to the right of access in question, the court stated that the policy considerations in *Richmond* supported a strong presumption in favor of the right to copy and inspect judicial documents.[163] The Third Circuit reasoned that dissemination of the information presented at trial to those unable to attend "would serve the same values of 'community catharsis,' observation of the criminal trial process, and public awareness served by the open trial guarantee."[164] The in-

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[155] *Id.*

[156] *See id.* at 817–18.

[157] *Id.* at 817.

[158] *Id.* at 817–18.

[159] *Criden*, 648 F.2d at 818.

[160] *Id.*

[161] *Id.* at 819.

[162] *See Richmond*, 448 U.S. 555, 580 (1980); *Criden*, 648 F.2d at 820.

[163] *Criden*, 648 F.2d at 821–22. For commentary comparing the right of access to First Amendment rights, see Moliere, *supra* note 79, at 165 (contending that the common-law right of access should be accorded significance comparable to First Amendment rights because both rights protect the same democratic values); Starczewski, *supra* note 41, at 208–12 (arguing that even if the right of access does not rise to a constitutional level, policy considerations similar to those supporting a right to attend trial should lead to a standard that enables the media to access judicial records).

[164] *Criden*, 648 F.2d at 822.

volvement of public officials enhanced the public interest in viewing the proceedings.[165]

The common-law right of access, the Third Circuit concluded, creates a strong presumption in favor of access.[166] If there is a public interest in access to trial events, the presumption favoring access becomes "undeniable."[167] Therefore, the Third Circuit held that the trial court in *Criden* erroneously minimized the strength of the public-access and education benefits of releasing the tapes.[168] Publication or rebroadcast of the copies, the court noted, contributes to the public's comprehension of judicial proceedings.[169] This publicity would not further punish the defendants or invade their privacy because the media had already widely publicized the defendants' actions.[170] The Third Circuit also determined that the threat to the fair-trial right of the defendant was conjectural.[171] If publicity could prejudice a defendant, courts should rely on voir dire to reveal potentially partial jurors.[172]

In a concurring and dissenting opinion, Judge Joseph Weis evaluated the majority's standard for the burden of proof needed to overcome the presumption in favor of the right of access.[173] Weis characterized this standard as less stringent than "the most extraordinary circumstances" burden the Second Circuit articulated in *Myers*.[174] Judge Weis also remarked that the court failed to set clear guidelines for access determinations.[175] The court, according to Judge Weis, should have explained that the presumption favoring the right of access is a factor to be balanced, rather than classifying the strength of the presumption.[176]

Similar to the Third Circuit's decision in *Criden*, in 1986 the Ninth Circuit, in *Valley*, followed a middle ground between the Second Circuit in *Myers*, favoring access, and the Fifth Circuit in *Belo*, oppos-

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[165] *Id.*
[166] *See id.* at 823.
[167] *Id.*
[168] *Id.* at 829.
[169] *Criden*, 648 F.2d at 824.
[170] *Id.* at 825.
[171] *Id.* at 827.
[172] *See id.* at 828.
[173] *See id.* at 830–31 (Weis, J., concurring and dissenting).
[174] *Criden*, 648 F.2d at 830 (Weis, J., concurring and dissenting).
[175] *See id.* at 830–31 (Weis, J., concurring and dissenting).
[176] *Id.* at 831 (Weis, J., concurring and dissenting).

ing access.[177] After reviewing the Supreme Court and federal courts of appeals precedents, the Ninth Circuit followed *Criden* and required less-than-compelling circumstances to overcome the strong presumption in favor of the right of access.[178] In *Valley*, a television station requested video- and audiotapes admitted into evidence in a trial for RICO conspiracies.[179] The Ninth Circuit reversed the trial court's denial of the media's request, ordering the trial court to grant the media access to the tapes as long as the media provided the technology and funding necessary to duplicate the tapes.[180]

The Ninth Circuit first characterized the nature of the right to physical access.[181] The right to copy and inspect evidence, the court noted, is distinct from the public's constitutional right to attend trial.[182] The trial court had provided the media with access to the proceedings and transcripts of the taped evidence, therefore satisfying the media's constitutional right to attend the trial.[183] Whereas the right to copy advances interests similar to those protected by the First Amendment, such as monitoring public officials and institutions, the Ninth Circuit believed that such a common-law right should not receive the same deference as a constitutional right.[184]

The Ninth Circuit then reviewed binding and persuasive authority on the media's right of physical access.[185] Because the Supreme Court had not squarely addressed the right to copy and inspect judicial documents, the Ninth Circuit examined rulings of other federal courts of appeals on the matter.[186] The Ninth Circuit noted that the Fifth Circuit in *Belo* and the Second Circuit in *Myers* both adopted standards that contained "built-in biases," which either favored or opposed access.[187]

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[177] *See Valley*, 798 F.2d at 1294. For another case in which a court found this middle ground, see United States v. Edwards (*In re* Video-Indiana, Inc.), 672 F.2d 1289, 1294 (7th Cir. 1982) (finding that a court may deny access "only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture").

[178] *See Valley*, 798 F.2d at 1294.

[179] *Id.* at 1290.

[180] *Id.* at 1297.

[181] *See id.* at 1292–94.

[182] *Id.* at 1293.

[183] *Valley*, 798 F.2d at 1292–93.

[184] *See id.* at 1293–94.

[185] *See id.* at 1292–94.

[186] *See id.*

[187] *Id.* at 1293.

The Ninth Circuit placed the holdings of the federal courts of appeals along a spectrum.[188] At one end is the Second Circuit's "compelling circumstances" test from *Myers*, favoring access and creating rigorous standards that those challenging access to reproducible materials must overcome.[189] The Ninth Circuit noted that this standard provided protections for the common-law right of access comparable to those provided for constitutional rights.[190] The Ninth Circuit declined to adopt this standard, however, stating that the Supreme Court in *Warner Communications* delineated distinct levels of protection for the common-law right of access and First Amendment rights.[191] At the other end of the spectrum from *Myers* is the Fifth Circuit's *Belo* decision, which allows even speculative challenges to a defendant's fair-trial right to overcome the media's right of access.[192] The Ninth Circuit stated that the Fifth Circuit decision did not follow the *Warner Communications* dicta that supported a presumption favoring access.[193]

Three federal appellate courts, including the Third Circuit in *Criden*, adopted standards in the middle of the spectrum, between the *Myers* and *Belo* holdings.[194] These courts found a strong presumption in favor of access but required opponents of access to articulate reasonable facts, rather than requiring compelling circumstances, to defeat that presumption.[195] The Ninth Circuit embraced this majority, middle-ground approach, citing the Supreme Court's direction in *Warner Communications* that a trial court should evaluate "'the interests advanced by the parties in the light of the public interest and the duty of the courts.'"[196] In balancing these interests, the Ninth Circuit stated that courts should look at factors favoring access, such as the public interest in understanding the proceedings, and factors countering the right of access, such as the likelihood of improper uses.[197]

Under the middle-ground standard, the Ninth Circuit in *Valley* then analyzed and overturned the trial court's denial of media access

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[188] *See Valley*, 798 F.2d at 1293.
[189] *See id.*
[190] *Id.* at 1293–94.
[191] *See id.*
[192] *See id.* at 1294.
[193] *Valley*, 798 F.2d at 1294.
[194] *See id.* at 1293.
[195] *Id.*
[196] *Id.* at 1294 (quoting *Warner Communications*, 435 U.S. at 602).
[197] *Id.*

to the audio- and videotapes.[198] The Ninth Circuit briefly stated that the standard of review when a trial court denies access is abuse of discretion.[199] The court, however, held that a trial court must articulate specific facts supporting a denial of access, and may not just speculate as to harm to a defendant's fair-trial right.[200]

In rejecting the media's requests, the trial court had considered inconvenience to the court, the risk of loss of the tapes, the probable difficulty in finding impartial jurors in upcoming trials, and the possibility that current jurors would ignore the court's warnings to disregard publicity.[201] The Ninth Circuit held that under the facts of *Valley*, these factors did not warrant denying the media access to the recordings.[202] The court first determined that the administrative inconvenience of copying the tapes did not justify restricting the media's right of access to the judicial records.[203] The broadcaster and the courtroom clerk had developed a method of copying the tapes that did not interfere with the courtroom proceedings.[204] The broadcaster would pay the costs of reproduction and provide the necessary personnel and equipment.[205]

Although administrative inconvenience did not warrant the trial court's denial of access, the Ninth Circuit noted that the lower court could reject a request if there were a reasonable possibility that copying might destroy the materials.[206] Where this possibility exists, the trial court should consider other ways to provide access.[207] The Ninth Circuit also noted that certain administrative difficulties could justify refusing access.[208] The determination, according to the Ninth Circuit, is within the "sound discretion" of the trial court.[209] The trial court, however, must explicitly state facts indicating an administrative inconvenience that justifies denying access.[210]

The Ninth Circuit noted the possibility of prejudice to future defendants as the most substantial concern of the trial court in right-of-

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[198] *See* 798 F.2d at 1294–97.
[199] *Id.* at 1294.
[200] *Id.* at 1295 (citing *Edwards*, 672 F.2d at 1294) (quotations omitted).
[201] *Id.* at 1294–95.
[202] *Id.* at 1295.
[203] *Valley*, 798 F.2d at 1295.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Valley*, 798 F.2d at 1295.
[209] *Id.*
[210] *Id.*

access cases.[211] This concern, however, was either hypothesis or conjecture, and therefore was not an "articulable" basis for rejecting the media's request for access.[212] An articulable basis, in which a court articulates facts for its decision, would be a trial court's actual problems with jury selection and a showing, through a review of each exhibit in question, of which materials would relate to future trials.[213] The Ninth Circuit in *Valley* held that articulable facts existed to warrant denial of access to one of the tapes, because of the difficulties in jury selection in the prior trial and the direct references on the tape to a future defendant.[214] The Ninth Circuit, however, directed the lower court to grant access to the remaining requested tapes.[215]

D. *Recent Case Law: Ease of Reproduction*

In 2002, in *In re Providence Journal Co.*, the U.S. Court of Appeals for the First Circuit held that the right of access encompasses "'materials on which a court relies in determining the litigants' substantive rights.'"[216] *Providence Journal* added a new wrinkle to the still unresolved debate over the strength of the presumption of the media's right to inspect and copy public records by affirming a denial of access based solely on administrative inconvenience.[217] The court, however, did not articulate a standard for evaluating media requests to inspect and copy judicial records.[218] Instead, the First Circuit left the decision to the discretion of trial courts to determine on a case by case basis.[219]

In *Providence Journal*, the media had requested to copy evidence from the April 2002 trial of Providence Mayor Vincent "Buddy" Cianci and other public officials, who were tried on a variety of racketeering charges.[220] During the trial, the government played excerpts from seventy-one video- and audiotapes of secretly recorded conversations involving the defendants.[221] The government used a software program to present the excerpts, through which it introduced selected por-

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[211] *Id.*
[212] *See id.* at 1295–96.
[213] *Valley*, 798 F.2d at 1296.
[214] *Id.*
[215] *Id.* at 1297.
[216] 293 F.3d at 16 (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986)).
[217] *See id.* at 17.
[218] *See id.* at 16–19.
[219] *See id.* at 17.
[220] *Id.* at 5.
[221] *Providence Journal*, 293 F.3d at 7–8.

tions of the conversations into evidence.[222] The prosecutor played these excerpts using the software and simultaneously broadcast them to video monitors in the courtroom and an overflow room.[223] A transcript scrolled across the monitor screen on which the excerpts played.[224]

The Providence Journal newspaper ("*The Journal*") petitioned the trial court for access to, and copies of, these video and audio exhibits.[225] *The Journal* based this petition in part on the public's common-law right of access to judicial proceedings.[226] The trial court refused, stating that the form in which the prosecutor presented the evidence made it difficult to replicate the excerpts played for the jury.[227] The First Circuit upheld the trial court's decision and determined that permitting the media and public to observe, but not copy, the software satisfied the common-law right of access.[228] The court exercised only limited review, stating that the decision is best left to the "informed discretion of the trial court" in light of the particular facts and circumstances involved.[229] The First Circuit held that the lower court had not abused its discretion.[230] The First Circuit therefore affirmed the lower court's determination that the right of access did not require the lower court to create a new recording that consisted only of the evidence played in court.[231]

The Journal also contended that it could record the excerpts while the government presented them in court.[232] The clerk for the trial court, however, stated that the courthouse's technical staff and the vendors of the courtroom technology agreed that it would not be practicable to record the audio or video presentation in court.[233] *The Journal* argued that a feasible method existed to copy the tapes, but the First Circuit declined to consider this argument because *The Journal* had not submitted it to the trial court.[234]

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[222] *Id.* at 8.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *See Providence Journal*, 293 F.3d at 16.
[227] *Id.* at 17.
[228] *See id.* at 17–18.
[229] *See id.* at 17.
[230] *Id.* at 18.
[231] *See Providence Journal*, 293 F.3d at 17–18.
[232] *Id.* at 18.
[233] *Id.*
[234] *Id.*

IV. Analysis: Creating a Uniform Standard for Access Decisions

In re Providence Journal Co. is a reminder that twenty-five years after the U.S. Supreme Court first addressed the media right of access in *Nixon v. Warner Communications, Inc.*, the standard for evaluating a right-of-access claim remains unsettled.[235] Because the Supreme Court decided *Warner Communications* on statutory grounds, its extended dicta on the common-law right of access is persuasive rather than binding authority.[236] After *Warner Communications*, the federal courts of appeals were free to craft their own standards for assessing lower courts' decisions in right-of-access disputes.[237] The interpretations of *Warner Communications* in the federal courts of appeals varied widely, which led to conflicting evaluations of the standard of review of a trial court's access decision and of the strength of the presumption favoring access.[238]

An abuse-of-discretion standard of review may be insufficiently exacting to protect the important common-law right that a request to copy implicates.[239] Therefore, under the appropriate standard of review of an access decision, a federal court of appeals should evaluate the factors the trial court considered and the weight the trial court accorded those factors.[240] In evaluating the presumption in favor of access, a trial court should accord varying degrees of importance to competing interests, depending on the nature of the interest.[241] This standard addresses constitutional concerns by requiring trial courts, in denying media access, to articulate facts demonstrating a reasonable threat to a constitutional right such as a defendant's right to a fair trial.[242] This standard also addresses the relative significance of administrative concerns by requiring a trial court to articulate compelling circumstances that justify denying access.[243] The standard rec-

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[235] *See In re* Providence Journal Co., 293 F.3d 1, 9, 16–18 (1st Cir. 2002).

[236] *See* 435 U.S. 589, 602–03 (1978).

[237] *Id.*; *see* United States v. Myers (*In re* Nat'l Broad. Co.), 635 F.2d 945, 950 (2d Cir. 1980) (finding that the "most pertinent precedent considering" the media's right of access was the D.C. Circuit's decision in United States v. Mitchell, 551 F.2d 1252 (D.C. Cir. 1976)).

[238] *See supra* notes 97–234 and accompanying text.

[239] *See Warner Communications*, 435 U.S. at 598–99; United States v. Criden (*In re* Nat'l Broad. Co.), 648 F.2d 814, 818–19 (3d Cir. 1981).

[240] *See Warner Communications*, 435 U.S. at 602; *Criden*, 648 F.2d at 818–19.

[241] *See infra* notes 267–315 and accompanying text.

[242] *See infra* notes 268–281 and accompanying text.

[243] *See infra* notes 282–315 and accompanying text.

ognizes that administrative concerns do not rise to a constitutional level and thus are not as important as constitutional rights.[244]

A. *Scope of Review*

The Supreme Court's ambiguous statement in *Warner Communications* that the decision "is one best left to the sound discretion of the trial court . . . to be exercised in light of the relevant facts and circumstances of the particular case" has caused federal courts of appeals to diverge sharply in the scope of review they apply to a trial court's decision on media access to judicial records.[245] In *United States v. Criden (In re National Broadcasting Co.)*, the U.S. Court of Appeals for the Third Circuit held that federal appellate courts should review a lower court's decision on rights of access and balancing of the factors involved under heightened scrutiny because the decision does not depend on trial court observations.[246] In contrast, in *Belo Broadcasting Corp. v. Clark*, the U.S. Court of Appeals for the Fifth Circuit determined that federal appellate courts should only review lower courts' right-of-access decisions for abuse of discretion.[247] Considering the nature of right-of-access decisions and the policy considerations supporting more exacting review, the Third Circuit's heightened scrutiny is more appropriate.[248]

The Third and Fifth Circuits adopted their respective standards of review based on different determinations of the nature of a trial court's decision.[249] The Third Circuit thoughtfully analyzed the reasons for various levels of review and determined that a trial court's proximity to and direct observation of trial proceedings do *not* provide it with a "superior vantage point" over the federal court of appeals.[250] In contrast, the Fifth Circuit held that the access decision does depend on a trial judge's direct observations because it implicates concerns for judicial efficiency and a defendant's right to a fair trial.[251] Neither the Third nor Fifth Circuit, however, fully explained

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[244] *See infra* notes 282–315 and accompanying text.
[245] *See* 435 U.S. at 599; *supra* notes 83–85, 123–125, 138–140 and accompanying text.
[246] *See Criden*, 648 F.2d at 818–19.
[247] *See* 654 F.2d 423, 431 (5th Cir. 1981).
[248] *See Criden*, 648 F.2d at 817–19.
[249] *See Belo*, 654 F.2d at 431 n.18; *Criden*, 648 F.2d at 818.
[250] *See Criden*, 648 F.2d at 817–18.
[251] *See Belo*, 654 F.2d at 431 n.18.

its finding that a right-of-access decision is or is not based on first-hand observation.[252]

Although not well-supported, the Third Circuit's determination that a trial judge's observations are not crucial to evaluating an access decision is still compelling.[253] The trial judge's direct observation of the trial does not provide the trial court with a vantage point superior to that of a federal court of appeals with a full record of the trial judge's findings.[254] As the Fifth Circuit noted, the trial judge *is* in a position to gauge the effect of access on the efficiency of trial proceedings, as well as the impact of broadcasting released evidence on finding impartial jurors.[255] Nevertheless, the trial court could convey this information to the federal court of appeals in a detailed decision, articulating the reasons for the trial court's grant or denial of access.[256]

Policy considerations also support the Third Circuit's more exacting standard of review.[257] Although trial court discretion has the advantage of flexibility, it is subject to various disadvantages.[258] Inconsistency of decisions, a lack of predictability, and the deprivation of a litigant's opportunity for review weigh against trial court discretion.[259] Additionally, as the Third Circuit stated in *Criden*, the heightened standard of review requiring the trial court to articulate clearly the basis for its decision would benefit the trial court.[260] With no clear record of the basis for a trial court's decision, a federal court of appeals may exercise its judgment in place of the trial court's.[261] Alternatively, with a clear record, the federal court of appeals could only review the factors the trial court considered and weighed.[262]

The access decision, however, uniquely involves the trial court because it implicates concerns for efficiency of the trial court's proceedings, as the Fifth Circuit noted.[263] The determination also implicates the court's records and files, over which the court has supervi-

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[252] *See Belo*, 654 F.2d at 431 n.18; *Criden*, 648 F.2d at 818.
[253] *See Criden*, 648 F.2d at 818–19.
[254] *See id.* at 818.
[255] *See Belo*, 654 F.2d at 431 n.18.
[256] *See Criden*, 648 F.2d at 818–19.
[257] *See id.* at 818.
[258] *Id.*
[259] *Id.*
[260] *See id.* at 819.
[261] *See Criden*, 648 F.2d at 819.
[262] *See id.*
[263] *See Belo*, 654 F.2d at 431 n.18.

sory authority.[264] The court has an interest in preventing use of its records for improper means, such as in the promotion of scandal.[265] The trial court's heightened interest in the determination, however, favors a broader scope of review because the federal court of appeals could monitor a trial court's interest in its decision to ensure the trial court does not give that interest undue weight in light of competing concerns.[266]

B. *Strength of the Presumption: A Proposal for Weighing Competing Concerns*

Courts have weighed constitutional concerns and administrative inconvenience, such as the difficulty and expense of reproducing evidence, against the uncertain presumption in favor of access.[267] The standards for the two interests should differ when weighed against the presumption favoring access because administrative difficulties do not demand the weight that courts must afford a defendant's constitutional rights.[268]

1. Constitutional Concerns

When there is an articulated threat to a defendant's constitutional right to a fair trial, courts should adopt the middle-ground standard that the Third and Ninth Circuit Courts of Appeals established.[269] These courts emphasized that the strong presumption in favor of access must yield to reasonable concerns for the defendant's right to a fair trial.[270] This standard recognizes the significance of the common-law right of access but requires less-than-compelling circumstances to overcome the presumption in favor of access.[271]

This test is less stringent than the approach of the Second Circuit Court of Appeals in *United States v. Myers (In re National Broadcasting Co.)*, which provides that "only the most compelling circumstances" warrant denying access.[272] Policy considerations such as the importance of transparency in judicial proceedings, considerations similar to rights the First Amendment protects, support this strong presump-

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[264] *See Warner Communications*, 435 U.S. at 598.
[265] *Id.*
[266] *See id.*; *Criden*, 648 F.2d at 819.
[267] *See supra* notes 126–129, 201–215, 225–234 and accompanying text.
[268] *See supra* notes 126–129, 201–215, 225–234 and accompanying text.
[269] *See supra* notes 149–215 and accompanying text.
[270] *See supra* notes 149–215 and accompanying text.
[271] *See supra* notes 149–215 and accompanying text.
[272] *See* 635 F.2d at 952.

tion in favor of access.[273] The court in *Myers* recognized these policy concerns.[274] Other federal courts of appeals, however, have criticized *Myers* for elevating the common-law right of access to a level of protection only afforded constitutional rights.[275] The Third and Ninth Circuits' middle-ground approach avoids this problem and recognizes the limitations of the common-law right of access.[276] A trial court, under this standard, could deny the media's request for access if the court articulated reasonable, but not hypothetical, concerns about a threat to a defendant's constitutional right to a fair trial.[277]

The middle-ground approach also recognizes the significant policy concerns supporting the common-law right that the Fifth Circuit gave relatively little weight to in *Belo*.[278] The court in *Belo* held that the presumption in favor of access is merely one factor for courts to consider in balancing competing interests.[279] The court stated that federal appellate courts should defer to the discretion of the trial court and not assess the relative weight it accorded the interests involved.[280] The middle-ground standard for weighing the right of access against constitutional concerns would allow a federal court of appeals to exercise more exacting discretion in reviewing the factors that the trial court considered and weighed.[281]

2. Administrative Concerns

In contrast, when reviewing a denial of access on the basis of administrative considerations, federal appellate courts should require the trial court to articulate compelling circumstances justifying denial.[282] When faced with competing administrative concerns, the court

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[273] *See* Valley Broad. Co. v. United States Dist. Court for the Dist. of Nev., 798 F.2d 1289, 1293 (9th Cir. 1986); *Myers*, 635 F.2d at 951–52; Moliere, *supra* note 79, at 189; Starczewski, *supra* note 41, at 211–12.

[274] *See* 635 F.2d at 952.

[275] *See, e.g.*, *Valley*, 798 F.2d at 1293; *see also* Whelan, *supra* note 142, at 573.

[276] *See Valley*, 798 F.2d at 1293–94; Foster, *supra* note 49, at 130–31.

[277] *See* Foster, *supra* note 49, at 130–31 (advocating *Valley* standard "recognizing a strong presumption in favor of granting media requests, but allowing an avenue for the defendant's constitutional fair trial right to override it").

[278] *See Belo*, 654 F.2d at 431–32; *Criden*, 648 F.2d at 822 (discussing policy behind right of access).

[279] 654 F.2d at 434.

[280] *See id.*

[281] *See Criden*, 648 F.2d at 818.

[282] *See Myers*, 635 F.2d at 952. Prior to *Providence Journal*, federal courts of appeals rarely mentioned or weighed judicial efficiency that was implicated by administrative inconvenience, such as difficulty reproducing evidence. *See supra* notes 97–215 and accompanying

should accord significant weight to the presumption in favor of access.[283] Administrative concerns only warrant limiting the right of access under compelling circumstances, such as a reasonable chance that the evidence would be lost or destroyed.[284] If there is a legitimate threat of damaging the evidence, the trial court should try to find an alternative method of copying it.[285] The trial court must articulate compelling circumstances that warrant denying access.[286] This standard requires the trial court to explicitly delineate administrative burdens that are compelling enough to prevent access, but also recognizes that administrative difficulties could, under limited circumstances, impede reproduction and access to judicial records.[287]

The strength of the presumption favoring access would resemble that which the Second Circuit articulated in *Myers*.[288] The Second Circuit, however, would weigh the presumption in favor of access uniformly, regardless of competing interests.[289] The presumption should only be at its strongest, at the level the Second Circuit delineated in *Myers*, when countered by interests such as administrative concerns that do not rise to a constitutional level.[290] When evidence is in a form that enables copying without a significant risk of damaging the evidence or interfering with trial, only the most compelling circumstances should justify denying access based on administrative concerns.[291]

In *Providence Journal*, the U.S. Court of Appeals for the First Circuit should therefore have required the trial court to demonstrate that the administrative difficulties were compelling enough to warrant denying access.[292] The materials the prosecutor presented in court in *Providence Journal* were spliced and stored on a laptop computer and did not exist as a single document; therefore, reproduction would require the creation of a new recording.[293] The trial court found that

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text (courts of appeals' considerations of competing concerns). The Ninth Circuit in *Valley* and the Second Circuit in *Myers* are the only federal courts of appeals to have addressed administrative difficulties in any detail. *See Valley*, 798 F.2d at 1295; *Myers*, 635 F.2d at 952.

[283] *See Valley*, 798 F.2d at 1295.

[284] *See id.*; *Myers*, 635 F.2d at 952.

[285] *See Valley*, 798 F.2d at 1295.

[286] *See Myers*, 635 F.2d at 952.

[287] *See id.*

[288] *See id.*

[289] *See id.*

[290] *See id.*

[291] *See Myers*, 635 F.2d at 952.

[292] *See Providence Journal*, 293 F.3d at 17; *Myers*, 635 F.2d at 952.

[293] 293 F.3d at 17.

creating a new recording was a "daunting task."[294] The First Circuit deferred to the trial court's determination and held that these materials could not be readily reproduced.[295] Rather than applying an abuse-of-discretion standard of review, the First Circuit should have examined the factors that the trial court considered, and the weight it gave those factors, to determine if the administrative difficulties created compelling circumstances.[296] A sparse record on the feasibility of reproduction made heightened scrutiny of the lower court's decision difficult.[297] The First Circuit, however, could have remanded the case and required the trial court to articulate technical or other difficulties that created circumstances sufficiently compelling to deny access.[298]

In addition, the First Circuit erroneously relied on the Second Circuit's statement in *Myers* that the compelling-circumstances standard only applies to evidence that is "'in a form that readily permits sight and sound reproduction.'"[299] Practical concerns, according to the First Circuit, thus "invariably" limit the public's right to copy documents to materials that are easily reproduced.[300] The First Circuit, however, in relying on *Myers*, failed to address the Second Circuit's statements later in *Myers*; those statements implied that a form that readily permits copying is one that does not unduly burden the trial proceedings or damage the evidence.[301]

Because of the scantiness of the record, it is unclear how readily the media could have reproduced the materials in *Providence Journal*.[302] At a minimum, however, the First Circuit should have required the trial court to present carefully articulated findings that copying would have damaged the evidence or interfered with the "orderly

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[294] *Id.*

[295] *See id.*

[296] *See supra* notes 245–266 and accompanying text.

[297] *See Providence Journal*, 293 F.3d at 17. There was conflicting information about the difficulty of reproducing the material and no information about the software that created the evidence on the record. *Id.* Additionally, *The Providence Journal* proposed a technically practical and unobtrusive method of recording the material as it was played in open court. *Id.* at 18. The First Circuit could not consider this contention, however, because the *Providence Journal* did not submit it to the trial court. *Id.*

[298] *See Valley*, 798 F.2d at 1295 (finding that the district court must delineate the facts creating an administrative burden warranting denying access and "should have given little, if any, weight to its administrative burdens"); *Myers*, 625 F.2d at 952.

[299] *Providence Journal*, 293 F.3d at 17 (quoting *Myers*, 635 F.2d at 952).

[300] *Id.*

[301] *See id.*; *Myers*, 635 F.2d at 952.

[302] 293 F.3d at 17.

conduct" of the proceedings.[303] Because the interests competing with the presumption in favor of access did not implicate constitutional concerns, the court should have required the lower court to demonstrate that the administrative difficulties created compelling circumstances before interfering with the media's common-law right of access to the judicial records.[304]

Prior to *Providence Journal*, the federal appellate courts primarily upheld denials of access based on the risk of prejudice to the defendant's constitutional right to a fair trial.[305] *Providence Journal*, however, added a new element to the debate by affirming a trial court decision that denied access solely because of administrative inconvenience.[306] The First Circuit should have recognized that administrative concerns are not as significant as constitutional interests and applied the standard of review the Second Circuit articulated in *Myers*.[307] That standard requires the lower court to demonstrate that the administrative burden in question creates circumstances compelling enough to justify restricting access.[308]

As courtroom technology advances, it is likely that the media, in attempting to copy evidence pursuant to the public's common-law right of access, will continue to encounter administrative difficulties similar to those in *Providence Journal*.[309] A trial court such as the district court in *Providence Journal* faces a heightened interest in a case if copying involves administrative difficulties.[310] A federal court of appeals, as a disinterested party, should therefore require the trial court to articulate compelling circumstances that warrant denying access based solely on administrative concerns.[311] This requirement could insure that a trial court does not give too much weight to concerns

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[303] *See id.* at 17–18; *Valley*, 798 F.2d at 1295; *Myers*, 635 F.2d at 952 (applying "compelling circumstances" standard only to evidence that the media could copy "without any significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial").

[304] *See Myers*, 635 F.2d at 952; *see also Valley*, 798 F.2d at 1295 (stating that in light of the media's development of unobtrusive procedures and provision of equipment for copying, "the district court should have given little, if any, weight to its administrative burdens in this case").

[305] *See supra* notes 126–129, 141–143, 211–215 and accompanying text.

[306] 293 F.3d at 17.

[307] *See Myers*, 635 F.2d at 952.

[308] *See id.*

[309] *See* 293 F.3d at 17.

[310] *See id.*

[311] *See Myers*, 635 F.2d at 952.

that its own resources would be taxed in reproducing the documents in question.[312]

In addition to concerns that a trial court may not be objective when considering administrative difficulties, a heightened standard requiring compelling circumstances for denying access based on administrative concerns recognizes that such concerns do not rise to a constitutional level.[313] Courts should not afford administrative difficulties the same deference as constitutional concerns.[314] A standard requiring a trial court to articulate compelling circumstances to overcome access based on administrative concerns, and, in contrast, only reasonable concerns to overcome access based on constitutional rights, recognizes the diminished significance of administrative, in comparison with constitutional, concerns.[315]

Conclusion

English and American common law have long recognized the public's right of access to judicial records. This right of access has policy considerations of openness similar to those the First Amendment promotes. The Supreme Court has recognized the importance of this right, but has yet to address the disagreement among the federal courts of appeals regarding the standard for evaluating a lower court's decision of whether to grant the public or media access to judicial records. A trial court does not uniquely base its access decision on firsthand observations that it could not adequately convey on the record to a federal court of appeals. Therefore, federal appellate courts should not limit review to abuse of discretion. The federal court of appeals should evaluate a lower court's balancing and determine if the lower court appropriately weighed the competing interests in making its decision.

Federal courts of appeals have also disagreed on the strength of the presumption in favor of the common-law right of access. They have uniformly failed to recognize that the relative strength of the presumption depends on the competing interest involved. The presumption in favor of access should yield more readily to constitutional concerns such as a defendant's right to a fair trial, as implicated by

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[312] *See id.*

[313] *See Valley*, 798 F.2d at 1295 (finding that administrative considerations did not warrant restricting the right to copy); *Myers*, 635 F.2d at 952.

[314] *See Valley*, 798 F.2d at 1295.

[315] *See Myers*, 635 F.2d at 952.

the effect of the publicity on jurors. Legitimate constitutional concerns would therefore trump the common-law right of access. When the competing concerns, such as administrative inconvenience, do not rise to a constitutional level, the presumption in favor of the common-law right of access should be more difficult to overcome. Federal appellate courts should require lower courts to articulate compelling circumstances to justify a denial of access based on administrative inconvenience. This standard recognizes the well-settled common-law right of access and protects that right from encroachment based on technological or other administrative difficulties.

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