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Public Access to Civil Court Records: A Common Law Approach

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RECENT DEVELOPMENT

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I. INTRODUCTION

Courts have long recognized a general common law right of access to courtroom proceedings[1] and court records.[2] Recently, however, courts have begun to consider whether the first amendment of the Constitution[3] protects this right of access. In 1980 the United States Supreme Court in *Richmond Newspapers, Inc. v. Virginia*[4] held that the press and the public have a first amendment right to attend criminal trials.[5] The Supreme Court found this right implicit in the various clauses of the first amendment.[6]

Although the Supreme Court has taken few opportunities since *Richmond Newspapers* to define precisely the contours of the first amendment right of access,[7] the United States Courts of Appeals have expressed a willingness to extend this right beyond its application to the criminal courtroom. One circuit has expressly concluded that the first amendment protects the right of access to criminal court records.[8] Circuit courts also have held that the first amendment protects the public's right to attend civil trials.[9] More recently, several circuits have extended first amendment protections even further to cover the right of access to civil court records.[10]

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1. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605-07 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565 (1980).

2. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 & n.8 (1978). *See generally* Annotation, *Restricting Public Access to Judicial Records of State Courts*, 84 A.L.R.3d 598 (1978); Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260 (1948) (discussing cases concerning access to judicial records).

3. The first amendment states in part: "Congress shall make no law . . . abridging the freedom . . . of the press." U.S. CONST. amend. I.

4. 448 U.S. 555 (1980).

5. *Id.* at 580; *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (same holding in rape trial). For a discussion of both cases, see *infra* notes 56-83 and accompanying text.

6. *Richmond Newspapers*, 448 U.S. at 580; *Globe Newspaper*, 457 U.S. at 604.

7. *See* Press-Enterprise Co. v. Superior Court, 54 U.S.L.W. 4869 (U.S. June 30, 1986) (extending first amendment right of access to criminal preliminary hearing); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511-13 (1984) (extending first amendment right of access to voir dire examination of jurors); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33-34 (1984) (denying existence of first amendment right to disseminate information gained through pretrial discovery).

8. Associated Press v. District Court, 705 F.2d 1143 (9th Cir. 1983). For a discussion of *Associated Press*, see *infra* notes 85-98 and accompanying text.

9. *See* Publicker Indus. Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984).

10. Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir. 1985); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). *But see In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985).

This Recent Development considers whether the first amendment grants to the press and the public a right of access to civil court records. Part II examines the cases that led to the current debate over the constitutional right to inspect and copy civil court records. Part III discusses the five recent circuit court opinions that have considered whether the press and the public have a first amendment right of access to civil court records. Part IV argues that this recent trend adopted by the majority of circuit court opinions is inappropriate in light of current constitutional theory. Finally, Part V suggests a common law balancing approach for courts to apply when considering access questions.

II. LEGAL BACKGROUND

The right to inspect and copy judicial records is an ancient doctrine under English common law.[11] In England the common law allows both a person who has a proprietary interest in a document and a person who needs a document as evidence to enforce a right of access in court.[12] In the United States the right of access to judicial records is even broader.[13] American courts have interpreted the common law as allowing all citizens the right of access to judicial records.[14] This right stems from the conviction that all persons should be able to view the government in operation and to learn how it functions.[15] Despite this accepted doctrine, however, few courts have had the opportunity to examine and define the scope

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11. As early as 1372 the English Parliament enacted laws governing the right of access to court records. 46 Edw. 3 (1372), *reprinted in* 2 ENGLISH STATUTES AT LARGE 191, 196-97 (1341-1411). *See generally* Note, *The Common Law Right to Inspect and Copy Judicial Records: In camera or On Camera*, 16 GA. L. REV. 659, 660-66 (1982) (discussing the history of the English common law concerning judicial records).

12. *See, e.g.*, Hewitt v. Pigott, 131 Eng. Rep. 155 (C.P. 1831); Browne v. Cummings, 109 Eng. Rep. 377 (K.B. 1829).

13. *See* 1 S. GREENLEAF, TREATISE ON THE LAW OF EVIDENCE §§ 471-73 (Boston 1842). *See generally* Note, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311, 337-43 (1979) (discussing the history of the American common law concerning judicial records); Note, *supra* note 11, at 666-72 (same).

14. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978); *Ex parte* Uppercu, 239 U.S. 435 (1915); *Ex parte* Drawbaugh, 2 App. D.C. 404 (1894).

15. *Warner Communications*, 435 U.S. at 597-98. Justice Holmes remarked in Crowley v. Pulsifer, 137 Mass. 392 (1884):

> It is desirable that the trial[s] . . . should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Id. at 394; *see also Drawbaugh*, 2 App. D.C. at 407-08.

and characteristics of this common law right of access to judicial records. This part of the Recent Development examines the cases that set the stage for the current discussion of whether the press and the general public have a right of access to court records and, if so, whether that right is of constitutional magnitude.

A. Warner Communications *and Progeny: Common Law Right of Access to Criminal Court Records*

In the early 1980s several United States Courts of Appeals, spurred by an important Supreme Court decision,[16] began to consider whether the press and the general public have a common law right to inspect and copy judicial records in criminal trials.[17] The courts split on the question. A number of the circuits concluded that trial courts should deny the press and public the right of access to court records only in exceptional circumstances.[18] Another circuit, giving great discretion to the trial judge, viewed the common law presumption of access as just one factor of many that a trial court should consider in resolving the matter.[19]

In *Nixon v. Warner Communications*[20] the Supreme Court examined the media's right to copy audiotapes that the prosecution had introduced into evidence during public proceedings of the Watergate trial.[21] Although deciding against the media on the basis

16. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

17. *See* United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981); *In re* National Broadcasting Co., 653 F.2d 609 (D.C. Cir. 1981) (referred to by commentators as "the Jenrette case"). United States v. Criden, 648 F.2d 814 (3d Cir. 1981); United States v. Myers, 635 F.2d 945 (2d Cir. 1980).

18. *Criden*, 648 F.2d at 823; *Myers*, 635 F.2d at 952; *National Broadcasting Co.*, 653 F.2d at 613.

19. *Belo Broadcasting*, 654 F.2d at 430.

20. 435 U.S. 589 (1978).

21. *Id.* at 591. The Watergate trial concerned the prosecution of four former presidential aides for conspiring to obstruct justice by concealing the identities of individuals responsible for the Watergate break-in. During the trial, the special prosecutor publicly introduced into evidence edited tape recordings of the President's conversations. Numerous parties, including three national television networks, requested access to the tapes to inspect and copy the contents. United States v. Mitchell, 551 F.2d 1252, 1254-55 (D.C. Cir. 1976), *rev'd on other grounds sub nom.*, Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). In *Warner Communications*, the United States District Court for the District of Columbia had refused to allow the requested access, fearing the prejudicial impact that the broadcast of the tapes might have on the defendants' ability to obtain a fair trial. United States v. Mitchell, 397 F. Supp. 186, 188 (D.D.C. 1975), *rev'd*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom.*, Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed. United States v. Mitchell, 551 F.2d 1252 (D.C. Cir. 1976). The court alluded to the possibility of a constitutional right of access to the requested material. *Id.* at

of a federal statute that specified the time and procedure for release of the Watergate tapes,[22] the majority discussed the common law sources of the presumption of access to judicial records.[23] The Court acknowledged the existence of a general common law right to inspect and copy judicial records.[24] The Court found support for this right in the public's desire to monitor the judicial process[25] and in the public's need for information about the operation of government.[26] The Court noted, however, that this general right of access was not absolute.[27] For example, the Court would not allow the use of judicial records either to satisfy "private spite or [to] promote public scandal"[28] or as a "source of business information that might harm a litigant's competitive standing."[29] Finally, the Court indicated that the decision whether to allow access to judicial records generally is best left to the sound discretion of the trial judge[30] because of his ability to weigh all the relevant factors in light of the facts of a particular case.[31]

Addressing the constitutional issues, the Court rejected the argument that the first amendment requires that the media be al-

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1263 n.52, *quoted in Warner Communications*, 435 U.S. at 596. (The "court's power to control the uses to which the tapes are put *once released* . . . is sharply limited by the First Amendment.") (emphasis in original). The court, however, *relied on* the common law presumption in favor of public access to judicial records to hold that the broadcasters had a right to copy the audiotapes. *Id.* at 1260-63; *see Warner Communications*, 435 U.S. at 596.

22. *Warner Communications*, 435 U.S. at 603-08 (citing Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974) (note following 44 U.S.C. § 2107 (1982)).

23. *Warner Communications*, 435 U.S. at 597-99.

24. *Id.* at 597. For example, the Court stated that the District of Columbia has recognized a right of access to judicial records since 1894. *Id.* at 597 n.8; *see Ex parte* Drawbaugh, 2 App. D.C. 404 (1894).

25. *Warner Communications*, 435 U.S. at 598 (citing State *ex rel.* Colscott v. King, 154 Ind. 621, 621-27, 57 N.E. 535, 536-38 (1900); State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 336-39 (N.J. 1879)).

26. *Warner Communications*, 435 U.S. at 598 (citing State *ex rel.* Youmans v. Owens, 28 Wis. 2d 672, 677, 137 N.W.2d 470, 472 (1965), *modified on other grounds*, 28 Wis. 2d 685a, 139 N.W.2d 241 (1966) (per curiam)).

27. *Warner Communications*, 435 U.S. at 598.

28. *Id.* The Court used as an example "the painful and sometimes disgusting details of a divorce case." *Id.* (quoting *In re* Caswell, 18 R.I. 835, 836, 29 A. 259, 259 (1893), and citing King v. King, 25 Wyo. 275, 168 P. 730 (1917)). The Court also noted that courts have refused to "permit their files to serve as reservoirs of libelous statements for press consumption." *Id.* (citing Cowley v. Pulsifer, 137 Mass. 392, 395 (1884) (per Holmes, J.)).

29. *Warner Communications*, 435 U.S. at 598 (citing Schmedding v. May, 85 Mich. 1, 5-6, 48 N.W. 201, 202 (1891)).

30. *Warner Communications*, 435 U.S. at 599.

31. *Id.*; *cf.* State *ex rel.* Youmans v. Owens, 28 Wis. 2d 672, 682, 137 N.W.2d 470, 474-75 (1965), *modified on other grounds*, 28 Wis. 2d 685a, 139 N.W.2d 241 (1966) (per curiam).

lowed to inspect and copy the Watergate tapes.[32] The Court found that the press did not have a constitutional right superior to that of the public, who in this instance had not been given physical access to the tapes.[33] According to the majority, the Court satisfied the media's first amendment rights by allowing the press to attend the trial, listen to the tapes, and read the transcripts — the same degree of access available to the public.[34]

Because the Supreme Court based its decision in *Warner Communications* on a federal statute, the Court did not examine fully the scope of the common law right to inspect and copy court records in criminal trials. Consequently, subsequent judicial considerations of whether to allow public access to court records have resulted in inconsistent rationales and holdings. Three federal circuits have upheld claims of a common law right to inspect and copy evidentiary material in criminal trials. In *United States v. Myers*[35] the United States Court of Appeals for the Second Circuit affirmed a district court decision allowing the general public access to the Abscam videotapes[36] shown at the trial.[37] The court recognized a strong presumption in favor of public access.[38] According to the Second Circuit, "only the most compelling circumstances should prevent contemporaneous public access to [judicial records]."[39]

In *United States v. Jenrette*[40] and *United States v. Criden*[41]

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32. *Warner Communications*, 435 U.S. at 608 ("Respondents argue that release of the tapes is required by both the First Amendment guarantee of freedom of the press and the Sixth Amendment guarantee of a public trial. Neither supports respondents' conclusion."). Courts are not in complete agreement on this conclusion. For an alternative interpretation of the Supreme Court's holding, see *infra* notes 191-98 and accompanying text.

33. *Warner Communications*, 435 U.S. at 609; *see* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (holding that the first amendment prohibited state action designed to prevent the publication of the names of rape victims when official court records already had placed the information in the public domain).

34. *Warner Communications*, 435 U.S. at 609.

35. 635 F.2d 945 (2d Cir. 1980).

36. Abscam was an F.B.I. operation designed to expose certain government officials who were accepting bribes. The F.B.I. recorded the "sting" operations on videotape and submitted the incriminating information as evidence during the trial proceedings. National television networks requested the right to inspect and copy the tapes for broadcast to the public. See *Myers*, 635 F.2d at 947-49, for a complete history of the case.

37. *Id.* at 947.

38. *Id.* at 949-50. Because this case concerned exclusively the scope of the common law right to inspect and copy court records, the Second Circuit relied heavily on the D.C. Circuit's opinion in United States v. Mitchell, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom., Warner Communications*, 435 U.S. 589.

39. *Myers*, 632 F.2d at 952.

40. 653 F.2d 609 (D.C. Cir. 1981).

the United States Courts of Appeals for the District of Columbia Circuit and the Third Circuit reversed lower court decisions that had denied broadcasters the right to copy Abscam videotapes. In *Jenrette* the D.C. Circuit indicated that a district court should deny public access only if, after weighing the interests of the parties and the public, the court concludes that "justice so requires."[42] In *Criden* the Third Circuit undertook its own analysis of the parties' interests, giving little deference to the discretion exercised by the trial court.[43]

In contrast to the three Abscam cases, in *Belo Broadcasting Corp. v. Clark*[44] the United States Court of Appeals for the Fifth Circuit affirmed a lower court decision denying the media the right to inspect and copy audiotapes that the prosecution had used as evidence in the Brilab trial.[45] The Fifth Circuit diverged from the D.C., Second, and Third Circuit decisions for two reasons. First, the court found no language in the Supreme Court's *Warner Communications* opinion to justify the D.C. Circuit's and the Second Circuit's strong presumption in favor of public access.[46] The Fifth Circuit held that the presumption in favor of access to criminal court records should be only one of several factors courts should consider when examining the media's interests.[47] Second, the Fifth Circuit noted that an appellate court may reverse a trial court's conclusions of law only for abuse of discretion.[48] Unlike the Third Circuit in *Criden*, the Fifth Circuit emphasized that the trial court

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41. 648 F.2d 814 (3d Cir. 1981).

42. *Jenrette*, 653 F.2d at 613 (citing *Mitchell*, 551 F.2d at 1260).

43. *Criden*, 648 F.2d at 818. The Third Circuit undertook a de novo evaluation of the competing values of the parties. The court concluded that the trial court could have used a less drastic measure than denial of access. *Id.* at 829; *see also* United States v. Martin, 746 F.2d 964 (3d Cir. 1984). In *Martin*, the Third Circuit held that the press had a *common law* right of access to transcripts of tape recordings that the jury had used in a criminal trial. Although the transcripts were never submitted into evidence, the court concluded that the strong presumption in favor of access applied to all "judicial records and documents." *Id.* at 968.

44. 654 F.2d 423 (5th Cir. 1981).

45. *Id.* at 425. The Brilab trial concerned an F.B.I. "sting" operation that led to the indictment of the speaker of the Texas House of Representatives and three other individuals for alleged bribery. Audiotapes of various transactions implicating the defendants were submitted at public trial as evidence. Two Dallas broadcasting stations requested access to the tapes. *Id.*

46. *Id.* at 433-34.

47. *Id.* at 434.

48. *Id.* at 430-33. The Fifth Circuit read the *Warner Communications* decision as holding that only the most egregious abuse of discretion by the trial court could merit reversal. *Id.* at 430-431; *see Warner Communications*, 435 U.S. at 613-14 (Stevens, J., dissenting).

has supervisory power over its own records and has freedom to make a sound choice based on all relevant factors.[49] In sum, the Fifth Circuit was concerned that the other circuits were creating a presumption of constitutional, rather than of common law, proportion.[50]

Finally, in *United States v. Edwards*[51] the United States Court of Appeals for the Seventh Circuit upheld a lower court decision that denied reporters access to audiotapes used in a public trial.[52] The Seventh Circuit, however, did not adopt the Fifth Circuit's rationale in *Belo Broadcasting*. Rather, after evaluating the earlier decisions, the court adopted a strong presumption in favor of public access to this type of evidentiary material.[53] Nevertheless, the court acknowledged that this presumption was not absolute[54] and in this instance the Seventh Circuit gave considerable deference to the trial court's judgment that public access would affect adversely the defendant's pending second trial.[55]

B. Richmond Newspapers *and Progeny: First Amendment Right of Access to Criminal Court Proceedings*

In *Richmond Newspapers, Inc. v. Virginia*[56] the Supreme Court held that the press and the public have a first amendment

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49. *Belo Broadcasting*, 654 F.2d at 430.

50. *Id.* at 434.

51. 672 F.2d 1289 (7th Cir. 1982).

52. *Id.* at 1290, 1296. The case concerned charges that the president pro tempore of the Indiana Senate accepted money from a private businessman in exchange for legislative favors. Law enforcement agents had recorded a telephone conversation between the two defendants and had presented this recording as evidence at trial. *Id.* at 1290-91.

53. *Id.* at 1290. The Seventh Circuit, however, noted that it did not consider the presumption in favor of access to be as strong as the Second Circuit had claimed. *Id.* at 1294.

54. *Id.* at 1294.

55. *Id.* at 1295.

56. 448 U.S. 555 (1980). *Richmond Newspapers* began with the trial of John Stevenson for the murder of a hotel manager. Facing his fourth trial for the same charge, the defendant moved to close the courtroom from the public to insure that witnesses and jurors would not receive information about the trial from outside sources. *Id.* at 559-63. The prosecutor raised no objection and the trial court granted the motion without a hearing. *Id.* The trial judge based the authority to close the proceeding on a Virginia statute. The statute gave the court discretion to exclude any party whose presence might hinder the possibility of a fair trial, as long as the court did not violate the defendant's right to a public trial. VA. CODE § 19.2-266 (1983); *see Richmond Newspapers*, 448 U.S. at 560.

Two reporters for Richmond Newspapers moved for a hearing to vacate the closure order. *Richmond Newspapers*, 448 U.S. at 560. The trial court denied the motion based on its desire to guarantee a fair trial for the defendant. *Id.* at 561. The trial continued in secrecy and the defendant was acquitted. The Virginia Supreme Court, finding no reversible error, denied Richmond Newspapers'petitions for mandamus, prohibition, and leave to ap-

right to attend criminal trials.[57] Although the Court addressed only the right to *attend* criminal trials, this decision began a revolution in access analysis and had a tremendous impact on all decisions relating to the rights of the press and public to obtain information from judicial proceedings. The plurality opinion, written by Chief Justice Burger,[58] focused on the historical foundation that influenced the drafters of the Constitution in enacting the first amendment.[59] Specifically, the Chief Justice stressed the traditional presumption of openness that marked the history of the common law.[60] The Chief Justice noted that the right to attend criminal trials is implicit in the guarantees of the first amendment[61] and plays a critical role in ensuring that the enumerated freedoms of the first amendment, which are designed to protect free communication about government, maintain their meaning.[62] Similarly, the Chief Justice emphasized that open criminal trials serve a therapeutic purpose by allowing society to see its criminal laws in operation.[63]

Justice Brennan's concurring opinion offered a structural, rather than an historical, justification for the first amendment right of access to criminal trials.[64] According to Justice Brennan, open discussion about the operation of our criminal system was vi-

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peal. *Id.* at 562.

57. *Richmond Newspapers*, 448 U.S. at 580-81.

58. Justices Stevens and White joined the Chief Justice's plurality opinion, *id.* at 558, although both wrote separate concurring opinions. Justice Stevens found that the decision implied the existence of a first amendment right of access to other important government information. *Id.* at 583 (Stevens, J., concurring). Justice White noted that the sixth amendment was the proper source for the open trial rule. *Id.* at 581-82 (White, J., concurring). Justice Blackmun, who wrote a separate opinion concurring in the judgment, set forth a similar argument. *Id.* at 603-04 (Blackmun, J., concurring) (discussing Gannett Co. v. DePasquale, 443 U.S. 368 (1979)). The Justices, however, were able to concur in the first amendment decision as a secondary position. *Id.* at 581-82, 604.

Justice Powell did not participate in the Court's decision. *Id.* at 581. In Gannett Co. v. DePasquale, 443 U.S. 368 (1979), however, Justice Powell had found a first amendment right of access to pretrial proceedings. *Id.* at 397-98. Justice Rehnquist dissented on the ground that nothing in the Constitution could be read to overturn state court decisions regarding closure. *Richmond Newspapers*, 448 U.S. at 606.

59. *Richmond Newspapers*, 448 U.S. at 569-71, 577-80 (plurality opinion of Burger, C.J.). According to the Chief Justice, the Bill of Rights was enacted against the backdrop of open trial proceedings. *Id.* at 577-80. The Chief Justice noted that this traditional common law right applied to both civil and criminal trials. *Id.* at 580 n.17.

60. *Id.* at 565-73. The Chief Justice viewed the common law history of open courtroom proceedings as "unbroken" and "uncontradicted." *Id.* at 573.

61. *Id.* at 580.

62. *Id.* at 576-77.

63. *Id.* at 570-73.

64. *Id.* at 587 (Brennan, J., concurring in the judgment).

tal in "securing and fostering our republican system of self-government."[65] Justice Brennan argued that the dissemination of information concerning criminal trials was necessary to promote meaningful and informed discussion about government.[66] From this reasoning, Justice Brennan suggested two guidelines for determining whether the first amendment protects a particular right of access.[67] First, the claim of access must enjoy a foundation in the traditions of self-governance.[68] Second, the right of access must play a particularly significant role in the judicial process and in government as a whole.[69] In this instance Justice Brennan concluded that a long tradition of openness in criminal trials existed[70] and that this openness afforded the public an opportunity to observe and evaluate the administration of our criminal laws.[71]

Although unanimous in concluding that the first amendment right of access was not absolute,[72] none of the opinions in *Richmond Newspaper* offered a clear standard by which to determine what circumstances constitutionally justify closing a trial.[73] In

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65. *Id.*

66. Justice Brennan relied in part on Professor A. Meiklejohn for development of this structural theory. *Id.*; *see* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT (1948); *see also* Brennan, *Address*, 32 RUTGERS L. REV. 173, 176-77 (1979) (explaining structural model of first amendment).

67. *Richmond Newspapers*, 448 U.S. at 588-89. Justice Brennan referred to these guidelines as "helpful principles" because the "judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning." *Id.* at 588; *see also Globe Newspaper*, 457 U.S. at 605-06 (using same two principles to reach holding for majority opinion).

68. *Richmond Newspapers*, 448 U.S. at 589.

69. *Id.*

70. Justice Brennan found that "[t]radition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that '[a] trial is a public event.'" *Id.* at 593 (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

71. Justice Brennan listed other societal interests served by the open courtroom. The open criminal trial checks abuse in the system and promotes public confidence. The open trial also promotes accurate fact-finding and encourages unknown witnesses who may have valuable information to come forward. 448 U.S. at 594-97.

72. *Id.* at 581 n.18. (Burger, C.J., plurality opinion); *id.* at 598 n.24 (Brennan, J., concurring in judgment); *id.* at 600 (Stewart, J., concurring in judgment).

73. *Id.* at 581 n.18 (Burger, C. J., plurality opinion). The Chief Justice stated that an "overriding interest" would be necessary to justify closure. *Id.* at 581. The Chief Justice indicated that a trial judge may impose "reasonable limitations on access to a trial" in the "interest of the fair administration of justice." *Id.* at 581 n.18. "[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.* (quoting Cox v. New Hampshire, 312 U.S. 569, 574 (1941)). The Chief Justice, however, failed to define the scope of "overriding interest," finding that closure was clearly unwarranted in this instance. The trial court had failed to make adequate findings of fact to justify closure and had failed to consider the available alternatives to closure. *Id.* at 580-81.

Globe Newspaper Company v. Superior Court[74] the Supreme Court further defined the first amendment right to attend criminal trials and discussed the circumstances under which a trial court properly might order closure. Writing for the majority, Justice Brennan reiterated his structural argument in support of this first amendment right.[75] According to Justice Brennan, the first amendment serves a strategic role in promoting the participation of the public in "our republican system of self-government."[76] Consequently, by guaranteeing the public a first amendment right of access to criminal trials, courts ensure that the "constitutionally protected 'discussion of governmental affairs' is an informed one."[77] Justice Brennan then reiterated his two-part test,[78] noting that the right to attend criminal trials is both firmly rooted in history[79] and

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Justice Brennan refused to address the issue, arguing that the statute unconstitutionally gave the trial judge unlimited discretion. *Id.* at 598. In two footnotes, Justice Brennan mentioned that the interest in protecting courtroom decorum and national defense secrets may outweigh the presumption of openness. *Id.* at 598 nn.23, 24. Finally, Justice Stewart noted that the trial judge has the authority to reasonably limit access to the courtroom by the press and public. *Id.* at 600. According to Justice Stewart, these limitations need not be constitutional to justify closure. Justice Stewart mentioned such exceptions as the preservation of trade secrets and the protection of youthful witnesses. *Id.* at 600 n.5.

74. 457 U.S. 596 (1982). The case arose when a trial court in Massachusetts denied the local media access to a criminal trial concerning the rape of three minors. *Id.* at 598. The lower court based its decision on a state statute that required the trial judge to ban access by the press and public to the courtroom during testimony of rape victims under the age of eighteen. *Id.* at 598-600; *see* MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981). In this instance, the Supreme Court reversed the decision of the Massachusetts Supreme Judicial Court and held that the statute effected an unconstitutional infringement of the public's right of access to attend criminal trials. *Id.* at 602, 610-11.

The Supreme Court had heard the *Globe Newspaper* case once before. The Court had vacated an earlier judgment of the Massachusetts Supreme Judicial Court that dismissed the newspaper's appeal from the initial closure order. The Court remanded the case to allow the lower court to reconsider its decision in light of *Richmond Newspapers*, 448 U.S. at 555. On remand, the Massachusetts Supreme Judicial Court again dismissed the suit, concluding that the statute was constitutionally sound under the *Richmond Newspapers* standards. *Globe Newspaper*, 457 U.S. at 600.

75. *Globe Newspaper*, 457 U.S. at 604. Justice Brennan also emphasized the long tradition of open trials under the common law. *Id.* at 605. In dissent, Chief Justice Burger, joined by Justice Rehnquist, accused the majority of ignoring "the weight of historical practice," noting that "[t]here is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors." *Id.* at 614 (Burger, C.J., dissenting). According to the Chief Justice, absent this historical openness, the Massachusetts statute did not violate the first amendment. *Id.* at 614-16.

76. *Id.* at 604; *see supra* notes 65-66 and accompanying text.

77. *Globe Newspaper*, 457 U.S. at 605 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

78. *See supra* text accompanying notes 68-69.

79. *Globe Newspaper*, 457 U.S. at 605.

serves a significant role in the functioning of the judicial process.[80]

The majority opinion then provided a standard of review for future decisions concerning the right of access to criminal proceedings. The Court asserted that even when a first amendment right of access attaches, that right is not absolute.[81] This qualified right of access may be overcome if a closure order is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[82] In the instant case the Court found that the justification for the Massachusetts statute—the desire to protect young rape victims from further trauma and embarrassment—did not meet this test and, therefore, was unconstitutional.[83]

Although in *Richmond Newspapers* and *Globe Newspaper* the Court discussed only the right to attend criminal trials, several federal courts quickly expanded the Supreme Court's reasoning to provide constitutional protection for access rights to pretrial suppression hearings, entrapment hearings, and *voir dire* proceedings.[84] More significantly, the United States Court of Appeals for the Ninth Circuit, in *Associated Press v. District Court*,[85] held that the first amendment required that a court provide access to pretrial documents filed in the highly publicized narcotics trial of John Z. DeLorean.[86] To ensure that the court did not violate either the defendant's sixth amendment right to a fair trial or the public's first amendment access right,[87] the trial judge placed all documents filed in the case under seal until the court could make an adequate determination concerning the appropriateness of

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80. *Id.* at 606.

81. *Id.*

82. *Id.* at 606-07.

83. *Id.* at 607-11. First, the Court found uncompelling Massachusetts' argument that the statute was necessary to protect minor victims from trauma and embarrassment. *Id.* at 607-08. The Court emphasized the benefits of a case-hy-case analysis over a mandatory closure order. *Id.* Second, the Court was unpersuaded by Massachusetts' argument that closed trials encourage more victims to come forward and testify. *Id.* at 609-10. The state had failed to support its position with any empirical evidence. *Id.* Furthermore, the trial court's release of verbatim transcripts nullified the effect of closure.

84. *See* United States v. Criden, 675 F.2d 550 (3d Cir. 1982) (pretrial suppression, due process, and entrapment hearings); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) (voir dire proceeding).

85. 705 F.2d 1143 (9th Cir. 1983).

86. The authorities indicted DeLorean and two other defendants for violating federal narcotics statutes. *Id.* at 1144.

87. *Id.* The authorities indicted the defendants in October 1982. Between that time and December 22, 1982, when the district court issued the closure order, tbe court allowed the press and public to inspect the records and files of the court openly. *Id.*

disclosure.[88]

On appeal,[89] the Ninth Circuit directed the lower court to vacate its blanket closure order.[90] The court held that the order violated the public's first amendment right to inspect criminal records.[91] Relying on an earlier Ninth Circuit decision,[92] the court found no reason to distinguish between a first amendment right of access to documents filed in pretrial proceedings and the proceedings themselves.[93] The court found that the *Globe Newspaper* rationale,[94] which the Supreme Court had used to justify the first amendment right to attend criminal trials, was equally applicable to pretrial documents for two reasons.[95] First, the court noted the common law history of allowing access to pretrial documents.[96] Second, the court indicated that pretrial documents "are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning."[97] The court, therefore, concluded that filing a document under seal, regardless of the length of time, impermissibly undermined the first amendment presumption of access to criminal proceedings.[98]

III. Recent Developments

Following the Ninth Circuit's decision in *Associated Press,* which concerned the right of access to documents used in a crimi-

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88. *Id.*

89. The media requested that the court reconsider its blanket closure order, but the district court denied the motion. *Id.* at 1145. The court left in effect its order that all documents be filed under seal. The court, however, modified the procedure for access to sealed documents. The court allowed all parties, including the press, upon receipt of notice, to make comments within forty-eight hours concerning the propriety of sealing specific documents to which the party desired access. *Id.* The Associated Press and several other news organizations appealed. *Id.*

90. *Id.* at 1147.

91. *Id.* The *Associated Press* court was not the only court to reach this conclusion. In 1981 a federal district court, in United States v. Carpenter, 526 F. Supp. 292 (E.D.N.Y. 1981), *aff'd,* 689 F.2d 21 (2d Cir. 1982), held that the public had a first amendment right to inspect evidence that a party had submitted in a public sentencing hearing. *Id.* at 294-95. The court based this conclusion on what the court perceived as the growing trend exemplified by *Richmond Newspapers. Id.*

92. United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) (enumerating the tests for deciding whether the press and public have a right of access to criminal proceedings).

93. *Associated Press,* 705 F.2d at 1145.

94. *Globe Newspaper,* 457 U.S. at 605-06. For a discussion of the *Globe Newspaper* rationale, see *supra* notes 74-83 and accompanying text.

95. *Associated Press,* 705 F.2d at 1145.

96. *Id.* (relying on Nixon v. Warner Communications, 435 U.S. 589, 597-98 (1978)).

97. *Associated Press,* 705 F.2d at 1145 (quoting *Globe Newspaper,* 457 U.S. at 606).

98. *Associated Press,* 705 F.2d at 1147; *see Richmond Newspapers,* 448 U.S. at 573.

nal pretrial proceeding, the Third, Sixth, Seventh, Eleventh, and D.C. Circuits considered the question of access to documents filed in *civil* proceedings.[99] Four of the circuit courts have adopted a strong presumption in favor of access to civil court documents.[100] The Sixth, Seventh, and Eleventh Circuits found the presumption to be of constitutional magnitude.[101] According to these three courts, only exceptional circumstances could justify a claim of confidentiality.[102] In each circuit the courts relied heavily on the Supreme Court's *Richmond Newspapers* and *Globe Newspaper* decisions as support for their holdings.[103] The Third, Sixth, Seventh, and Eleventh Circuits did not hesitate to apply the standards enunciated in the Supreme Court decisions regarding criminal proceedings to the civil setting.[104] Only the D.C. Circuit held that the press and the public do not have a first amendment right of access to civil court records.[105] This part of the Recent Development examines these decisions.

A. Brown & Williamson Tobacco Corp. v. F.T.C.

The United States Court of Appeals for the Sixth Circuit, in *Brown & Williamson Tobacco Corp. v. F.T.C.*,[106] was the first circuit to address the right of access question in a civil proceeding. The plaintiff brought suit to prevent the Federal Trade Commission (F.T.C.) from publishing damaging commercial information in

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99. *See In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985); Wilson v. American Motors Corp. 759 F.2d 1568 (11th Cir. 1985); *In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). The Third Circuit's decision in *Publicker Indus.* is associated primarily with the conclusion that the press enjoys a first amendment right of access to *civil trials*. The decision, however, did discuss, and has a tremendous impact on, the question of a constitutional right of access to civil court *documents*. This Recent Development, therefore, will discuss *Publicker Indus.* together with the recent decisions that have addressed specifically the issue of access to civil court documents.

100. *See Brown & Williamson*, 710 F.2d at 1179; *Continental Ill.*, 732 F.2d at 1308; *Publicker Indus.*, 733 F.2d at 1070; *Wilson*, 759 F.2d at 1570.

101. *Brown & Williamson*, 710 F.2d at 1178; *Continental Ill.*, 732 F.2d at 1314; *Wilson*, 759 F.2d at 1571.

102. *Brown & Williamson*, 710 F.2d at 1179; *Continental Ill.*, 732 F.2d at 1314; *Wilson*, 759 F.2d at 1571.

103. *See Brown & Williamson*, 710 F.2d at 1177-79; *Continental Ill.*, 732 F.2d at 1308-09; *Publicker Indus.*, 735 F.2d at 1067-70; *Wilson*, 759 F.2d at 1569-71.

104. *See Brown & Williamson*, 710 F.2d at 1178-79; *Continental Ill.*, 732 F.2d at 1308-09; *Publicker Indus.*, 733 F.2d at 1067-70.

105. *Reporters Comm. for Freedom of the Press*, 773 F.2d at 1339.

106. 710 F.2d 1165 (6th Cir. 1983).

the Federal Register.[107] The district court dismissed the action, but placed the administrative records and other documents filed by the F.T.C. under seal pending appeal.[108] On appeal, the Sixth Circuit upheld the lower court's decision to dismiss, but reversed the decision to place the documents under seal.[109]

In deciding to reverse the district court's order placing the documents under seal, the court first determined the level of discretion to give to the lower court's decision.[110] Following *Warner Communications* the Sixth Circuit acknowledged that the trial court had supervisory power over its own records and files, and that appellate courts were to give considerable discretion to the trial judge's decision concerning the right of access to these materials.[111] The court, however, emphasized that the lower court's supervisory power must be governed by standards.[112] According to the court, both the first amendment and common law limited the trial court's discretion.[113]

In determining the appropriate standard of review for right of access cases, the Sixth Circuit adopted Justice Brennan's two-part test enunciated in the *Richmond Newspapers* and *Globe Newspa-*

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107. *Id.* at 1168-69. The F.T.C. operates a testing and reporting program designed to determine the tar and nicotine level of cigarettes. *Id.* at 1168. The F.T.C. designed the test to provide consumers with a means of comparing the many brands of cigarettes on the market. *Id.* After a complaint from a competitor of Brown & Williamson, the F.T.C. reevaluated the testing procedure for Brown & Williamson's Barclay cigarette. *Id.* Because of its unique filter system, which the knowledgeable smoker could render ineffective, the F.T.C. made an announcement that Brown & Williamson could no longer rely on and disseminate "misleading information" based on data from the old testing procedure. *Id.* The F.T.C. also announced that it was going to run new tests on the Barclay cigarette. *Id.* at 1169. Finally, the F.T.C. announced that it was going to publish this news in the Federal Register. *Id.* at 1168-69.

108. *Id.* at 1169.

109. *Id.* Concerning the seal, the Sixth Circuit addressed the issue on the court's own motive. A nonprofit consumer organization called The Public Citizen Health Research Group filed a comprehensive amicus curiae brief. The Group's objective was to persuade the Sixth Circuit to lift or modify the seal placed on the documents. The organization argued that the Freedom of Information Act, the first amendment, and the common law gave the public a right of access to the court records. According to the Sixth Circuit, Brown & Williamson "aptly defended" against this request for disclosure. *Id.*

110. *Id.* at 1177.

111. *Id.*

112. *Id.* The Sixth Circuit noted that "the trial court's discretion is circumscribed by a long-established legal tradition." *Id.* Citing John Locke, the court emphasized that "[t]he English common law, the American constitutional system, and the concept of 'the consent of the governed' stress the 'public' nature of legal principles and decisions." *Id.*; *see* J. LOCKE, TREATISE OF CIVIL GOVERNMENT, §§ 124, 136-137 (1690).

113. *Brown & Williamson*, 710 F.2d at 1177.

per decisions.[114] The court noted that, historically, both civil and criminal trials have been presumptively open[115] and the court found the open courtroom to be fundamental to the American judicial system.[116] The court also emphasized the functional benefits derived from open court proceedings.[117] First, open proceedings provide an outlet for community concerns and emotions.[118] Second, open trials give the public a means of critiquing the judicial system.[119] Last, public trials encourage the pursuit of truth and accuracy in the fact-finding process.[120] The court found these policy considerations applicable to both civil and criminal cases because just resolution of private disputes frequently involves issues in which third parties and the general public have an interest.[121] The court, therefore, found that a strong presumption in favor of access attached to judicial records used in civil proceedings.[122]

As a last step of analysis, the Sixth Circuit examined countervailing interests that might outweigh the strong presumption in favor of access.[123] The court noted that time, place, and manner restrictions,[124] and content-based exceptions may provide a legitimate means of protecting a party's desire for confidentiality.[125] In the latter category, the court borrowed from *Warner Communications,* mentioning privacy rights of participants or third parties, trade secrets, and national security as types of interests that might preclude disclosure.[126] In the instant case the court refused to ac-

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114. *Id.* at 1177-79; *see Richmond Newspapers,* 448 U.S. at 589-97; *Globe Newspaper,* 457 U.S. at 605-07.

115. *Brown & Williamson,* 710 F.2d at 1169; *see Richmond Newspapers,* 448 U.S. at 569 (recognizing that criminal trials have been presumptively open); *see also* Gannett Co. v. DePasquale, 443 U.S. 368, 386 n.15 (concluding that historical support for access to criminal trials applies equally to civil trials).

116. *Brown & Williamson,* 710 F.2d at 1177.

117. *Id.* at 1178-79.

118. *Id.* at 1178.

119. *Id.* at 1178-79. "In either the civil or criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.* at 1179.

120. *Id.* at 1178-79.

121. *Id.* The court noted that the "community catharsis" is necessary at civil trials, especially when involving such important public issues as discrimination, voting rights, antitrust issues, government regulation, and bankruptcy. *Id.* at 1179.

122. *Id.* The court, however, noted that this strong presumption is not absolute and may be overcome by certain "distinct, but limited, common law exceptions." *Id.*

123. *Id.*

124. *Id.* For the origin of the three-part test, see United States v. O'Brien, 391 U.S. 367, 377 (1968).

125. *Brown & Williamson,* 710 F.2d at 1179.

126. *Id.*; *see Warner Communications,* 435 U.S. at 598. In *In re* Knoxville News-Senti-

cept the argument that the plaintiff had a legitimate interest in protecting a trade secret.[127] The court believed that this argument was really nothing more than an attempt to shield the company's operation and protect the company's reputation.[128] For the court, the mere assertion that this information qualified as a trade secret was not enough.[129] Because other companies had access to the information, and because the plaintiff willingly submitted the reports to the F.T.C., the court concluded that sealing of the documents was unjustified.[130]

B. In re Continental Illinois Securities Litigation

In *In re Continental Illinois Securities Litigation*[131] the Seventh Circuit affirmed the district court's grant of access to the defendant corporation's special litigation committee report submitted into evidence as part of a shareholder derivative suit.[132] As the Sixth Circuit did in *Brown & Williamson*,[133] the Seventh Circuit concluded that the public was entitled to the report. The court reached this decision by examining the presumption of access to civil court records and balancing this presumption against Conti-

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nel Co., 723 F.2d 470 (6th Cir. 1983), the Sixth Circuit applied this exception concerning the privacy interest of third parties. In this instance the court allowed the bank to remove from the court files documents containing personal financial records of the bank's customers. *Id.* at 474, 476-78.

127. *Brown & Williamson*, 710 F.2d at 1180.

128. *Id.* at 1179-80; *see* Joy v. North, 692 F.2d 880, 894 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) (holding that the report of a bank's special litigation committee, disclosure of which would supposedly affect the bank and community, should not be placed under court seal).

129. *Brown & Williamson*, 710 F.2d at 1180.

130. *Id.* at 1180-81.

131. 732 F.2d 1302 (7th Cir. 1984).

132. *Id.* at 1304, 1316. The shareholders of Continental Illinois Corporation brought a derivative suit to compel the corporation to assert claims it may have had against third parties. Continental established a special litigation committee ("SLC") to evaluate the potential of each suit. The SLC, after conducting more than eighty interviews and reviewing extensive paperwork assembled by Continental's previous counsel, submitted a 158 page report consisting of a "full and candid discussion of all the SLC's significant factual findings, its understanding of the applicable law, and its conclusions." *Continental Ill.*, 732 F.2d at 1305, (citing from Brief of Appellants at 8). The SLC's report determined that all but one of the claims should be dismissed; Continental then sought approval of this decision from the district court. *Continental Ill.*, 732 F.2d at 1304-05. Upon order of the district court, Continental admitted the report of the SLC into evidence in connection with the motion to terminate the claims. *Id.* at 1305. At these proceedings reporters requested access to the report. The district court determined that because the court relied on the report in reaching its decision, the newspapers were entitled to access to the SLC's findings. Continental appealed. *Id.* at 1306-07.

133. 710 F.2d 1165 (6th Cir. 1983).

nental's interest in confidentiality.[134] The court found that, historically, a strong presumption in favor of access to court records applied to both criminal and civil documents.[135] According to the court, this presumption was of "constitutional magnitude."[136] Similarly, following *Brown & Williamson*,[137] the court had no difficulty in applying this strong presumption to civil cases. Like the Sixth Circuit, the court found that the policies considered in granting access to civil proceedings should be the same as those considered in criminal cases.[138] These policies included the public's right to "monitor the functioning of [the] courts, thereby insuring quality, honesty, and respect for [the] legal system."[139]

In reaching this conclusion, the Seventh Circuit addressed the defendant's argument that the courts previously had not recognized a right of access to pretrial proceedings in civil cases.[140] The defendant relied on a D.C. Circuit decision[141] that interpreted *Warner Communications* to mean that neither the first nor the sixth amendment grants a constitutional right of access to judicial records or evidence used at trial.[142] The Seventh Circuit claimed that the D.C. Circuit had read *Warner Communications* too broadly.[143] According to the court, *Warner Communications* did not imply a general denial of the right of access.[144] Rather, the Supreme Court merely had held that the press' constitutional right of access was no greater than that of the public.[145] Refuting the de-

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134. *Continental Ill.*, 732 F.2d at 1308-09.

135. *Id.* (quoting from United States v. Mitchell, 551 F.2d 252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.*, Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

136. 732 F.2d at 1308; *see* United States v. Dorfman, 690 F.2d 1230, 1233-34 (7th Cir. 1982); Associated Press v. District Court, 705 F.2d 1143, 1145 (9th Cir. 1983).

137. 710 F.2d 1165 (6th Cir. 1983).

138. *Continental Ill.*, 732 F.2d at 1308.

139. *Id.*; *see id.* n.9.

140. *Id.* at 1309. Although the Seventh Circuit addressed the constitutional ramifications of Continental's argument in a footnote, the court based its holding on the status of the motion to terminate. The court considered the motion to terminate equivalent to a " 'hybrid summary judgment motion.' " *Id.* (citation omitted). Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981). The Court, therefore, concluded that "the presumption of access applie[d] to the hearings held and evidence introduced in connection with Continental's motion to terminate." *Continental Ill.*, 732 F.2d at 1309.

141. Tavoulareas v. The Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984).

142. *Id.* at 1017; *see Warner Communications*, 435 U.S. at 608-10; see also *supra* notes 20-34 and accompanying text for discussion of *Warner Communications*.

143. *Continental Ill.*, 732 F.2d at 1309 n.11.

144. *Id.* The court noted that the only right denied the press in *Warner Communications* was the right to copy the Watergate tapes. *Id.*

145. *Id.*; *see Warner Communications*, 435 U.S. at 609.

fendant's argument, the Seventh Circuit held that the presumption of access applied to pretrial hearings and to evidence introduced in connection with those hearings.[146]

After determining that a strong presumption in favor of access attached to civil court records, the court balanced this presumption against the defendant's interest in confidentiality.[147] The defendant argued that the attorney-client privilege, work-product immunity, effective functioning of special litigation committees, and maintenance of high standards of accountability and confidence in the banking industry were valid reasons to prevent disclosure.[148] The court disagreed,[149] asserting that only under exceptional circumstances could a court refuse disclosure for material used in actual adjudication.[150] The Seventh Circuit found that when courts have relied on documents as part of the decision-making process, a strong presumption arises that the party who admits the documents has surrendered the right to confidentiality of information relating to matters of public interest.[151]

C. Publicker Industries, Inc. v. Cohen

In *Publicker Industries, Inc. v. Cohen*[152] the Third Circuit reversed a district court decision to seal sensitive documents filed in

146. *Continental Ill.*, 732 F.2d at 1309.

147. *Id.* at 1313.

148. *Id.*

149. *Id.* at 1314; *see also* Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983). In *Joy v. North* the Second Circuit reversed a district court decision to seal a special litigation report used in the adjudication stages of a derivative action. 692 F.2d at 894. The court noted that only "the most compelling reasons" could justify sealing this type of document because the district court had relied on the report in making its decision to dismiss the action. *Id.* at 893. Despite this strong language, the Second Circuit based its decision to reverse on the common law presumption of openness. The court, however, did indicate that the sealing of such documents may "create serious constitutional issues." *Id.*

150. *Continental Ill.*, 732 F.2d at 1315.

151. *Id.* at 1314-16. In Joy v. North, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983), the Second Circuit held that the party had waived the attorney-client privilege and work product immunity by submitting the special litigation report as evidence for the motion to dismiss. 692 F.2d at 894. In general, courts will honor these privileges only when the party seeking to prevent disclosure has maintained the confidentiality of the materials. *See* Periman Corp. v. United States, 665 F.2d 1214, 1222 (D.C. Cir. 1981); United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980). The Seventh Circuit, in this instance, found it unnecessary to decide whether Continental had waived these privileges, hut noted that "[t]here [was] little interest in the confidentiality of documents which [had] been publicly discussed by their custodian." *Continental Ill.*, 732 F.2d at 1314.

152. 733 F.2d 1059 (3d Cir. 1984).

litigation concerning the control of the plaintiff corporation.[153] The court held that both the first amendment and common law secure for the public and press a right of access to civil trials and judicial records.[154] Concluding first that the media had a common law right of access to the desired information,[155] the court concentrated on first amendment issues to reach its holding. Following closely Justice Brennan's reasoning in *Globe Newspaper*,[156] the Third Circuit set forth an extensive historical[157] and structural[158] framework in

153. As part of the litigation, one of the parties presented to the district court sensitive information concerning the operation of a foreign subsidiary of the plaintiff. *Id.* The plaintiff's subsidiary had been using an enzyme in the production of scotch whiskey to help in the aging process. The plaintiff, however, had failed "to get approval for the introduction of the enzyme from Customs and Excise as required by the English Company Finance Act." *Id.* at 1064-65. The plaintiff desired to keep this information from its stockholders and the general public. *Id.* at 1063-65. Because the company illegally produced the whiskey, the company would be required to pull the whiskey off the world market. Such action would cause "irreparable financial loss to [the plaintiff] in the millions of dollars." *Id.* at 1065. The court held a hearing to determine whether the plaintiff would be required to disclose this information to its stockholders at its annual meeting. *Id.* at 1063-64. At the hearing, on the plaintiff's request, the trial judge excluded memhers of the local and national media from the courtroom because of the sensitive nature of the information and because the future confidentiality of this information was at issue hefore the court. *Id.* at 1063. The trial judge considered himself in a no-win situation. Acknowledging the press' interest in access, the trial court felt compelled to hinder disclosure to insure that the court's decision was of value. To have allowed the press access would have rendered the court's decision moot. *Id.* Pending a final decision on the issue of confidentiality, the trial judge sealed the transcript containing reference to the sensitive information. *Id.* at 1063-64. The media appealed, claiming that the trial court had violated their first amendment and common law rights of access to the civil trial and judicial records. *Id.* at 1064. The media also claimed that the trial court violated their due process rights. *Id.* at 1061, 1064.

154. *Id.* at 1064.

155. *Id.* at 1066. *See* United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) (acknowledging that the existence of a common law right of access to judicial proceedings and to inspect judicial records is heyond dispute). The court bad no difficulty applying this common law presumption to the civil courtroom. *Publicker Indus.*, 733 F.2d at 1066-67; *see also* Gannett Co. v. DePasquale, 443 U.S. at 386 n.15 (holding constitutional right to demand a public trial is equally applicable to civil and criminal cases).

156. *Publicker Indus.*, 733 F.2d at 1067.

157. The court quoted English legal historians, including Coke, Hale, Jencks, and Blackstone, to support the proposition that both criminal and civil trials traditionally have been open to the public under the common law. *Id.* at 1068-69; *see* 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 103 (6th ed. 1681); M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 163 (C. Gray ed. 1971); E. JENCKS, THE BOOK OF ENGLISH LAW 73-74 (6th ed. 1967); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1773). The court also noted numerous statements from recent Supreme Court decisions indicating that under American tradition both criminal and civil trials presumptively have been open. *Publicker Indus.*, 733 F.2d at 1068-69; *see Richmond Newspapers*, 448 U.S. at 580 n.17 (Burger, C.J.) (plurality opinion); *Gannett*, 443 U.S. at 386 n.15; *see also Warner Communications*, 435 U.S. at 597 (recognizing a general right to inspect and copy judicial records).

158. *Publicker Indus.*, 733 F.2d at 1070. The court stated:

From these authorities we conclude that public access to civil trials "enhances the

support of the first amendment right of access to civil trials. The court emphasized that the public right of access to civil trials is fundamental to the democratic form of government.[159] According to the Third Circuit, public access to civil trials is crucial to guarantee free and informed discussion of governmental affairs.[160]

Having found a first amendment right of access to civil court trials, the Third Circuit proceeded to formulate the appropriate standard of review.[161] The court acknowledged that the first amendment right was not absolute, yet noted that, as with other fundamental rights, the right of access to civil trials deserved a strict standard of scrutiny.[162] To limit the public's right of access to civil trials, therefore, the party opposing disclosure must show "that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest."[163] In the immediate case, because the trial court neither articulated an overriding interest for sealing the transcripts nor considered whether a less restrictive means could keep the information from the public, the Third Circuit concluded that the trial court had abused its discretion.[164]

Although the court's decision did not reach the merits of the access question, the court pointed out that this case did not concern the type of commercially sensitive information typically entitled to protection from disclosure.[165] This case, the court noted, simply concerned a matter of poor management.[166] The interest of investors in preventing financial loss and the interest of manage-

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quality and safeguards the integrity of the fact-finding process." Access "fosters an appearance of fairness," and heightens "public respect for the judicial process." It "permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs.

Id. (footnotes omitted).

159. *Id.* at 1069.

160. *Id.* at 1070; *see also Brown & Williamson*, 710 F.2d at 1177-79 (embracing first amendment right to civil trial to insure informed discussion of governmental affairs).

161. *Publicker Indus.*, 733 F.2d at 1070.

162. *Id.*

163. *Id.*; *see Globe Newspaper*, 457 U.S. at 606-07; *see also Brown & Williamson*, 710 F.2d at 1177-79 (holding that only exceptional circumstances warrant closing court records).

164. *Publicker Indus.*, 733 F.2d at 1079.

165. *Id.*; *see* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 890 n.42 (E.D. Pa. 1981) (listing cases in which business information was protected).

166. *Publicker Indus.*, 733 F.2d at 1074. "[P]otential harm . . . in disclosure of poor management in the past . . . is hardly a trade secret." *Id.* (quoting Joy v. North, 692 F.2d 880, 894 (2nd Cir. 1982)).

ment in avoiding embarrassment did not overcome the presumption of openness supported by the public interest in being protected from bad business practices.[167]

D. Wilson v. American Motors Corp.

In *Wilson v. American Motors Corp.*[168] the United States Court of Appeals for the Eleventh Circuit considered whether a plaintiff should be permitted access to sealed records from an earlier federal court case involving the same defendant.[169] The court divided its opinion into two parts on the basis of the evidence sought by plaintiffs. The first part concerned the earlier court's "record of the proceedings."[170] The record consisted of the pleadings, docket entries, orders, filed depositions or affidavits, and the transcripts from the hearings and court proceedings.[171] The second part concerned the exhibits that the parties had offered at trial.[172] The court made this distinction because of the earlier *Belo Broadcasting*[173] opinion in which the Fifth Circuit had held that "the Constitution grants neither press nor public the right to physical access to *courtroom exhibits*."[174] Accordingly, the Eleventh Circuit held that the plaintiff was not entitled to access to the trial exhibits.[175]

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167. *Publicker Indus.*, 733 F.2d at 1074.

168. 759 F.2d 1568 (11th Cir. 1985).

169. The initial case, also styled *Wilson v. American Motors Corp.*, concerned a wrongful death claim arising from an accident involving an American Motors jeep. 759 F.2d at 1569. The initial *Wilson* case was settled. The parties reached an agreement, with the encouragement and assistance of the trial judge, following the jury's response to special interrogatories. *Id.* The plaintiff wanted the information to invoke offensive collateral estoppel in her state court action against the defendant. The state court suit, Decker v. American Motors Corp., No. 474278, Superior Court of San Diego County, State of California, was also a wrongful death action arising from an American Motors jeep accident. *Id.* The federal district court denied the plaintiff's request for the documents, stating that in the defendant's earlier case, the court had sealed the records as an integral part of the negotiated settlement hetween the parties. *Id.* The Eleventh Circuit assumed that had the court heen unwilling to seal the documents, the parties never would have agreed to settlement. *Id.*

170. *Id.* at 1569.

171. *Id.*

172. *Id.*

173. Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981). The court considered *Belo Broadcasting* to be binding under the Eleventh Circuit opinion that adopted all previous Fifth Circuit opinions as binding precedent. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc) (asserting that Eleventh Circuit adopts Fifth Circuit precedent prior to October 1, 1981).

174. 759 F.2d at 1570 (emphasis in original); *see Belo Broadcasting*, 654 F.2d at 428 (discussed *supra* at notes 44-50 and accompanying text).

175. *Wilson*, 759 F.2d at 1572.

Concerning access to the record of the proceedings, the court found no binding precedent. Addressing a potential constitutional source for the right of access, the court noted that the Supreme Court had not yet decided whether the press and the public enjoy a constitutional right to attend civil trials.[176] The court was aware that the Third and Sixth Circuits had found a constitutional right of access to documents filed in civil proceedings,[177] but because of the lack of clear guidance, the court avoided the constitutional question and focused instead on the common law right of access.[178]

The court decided that a common law right of access indisputably exists with respect to civil proceedings.[179] According to the court, under a common law analysis courts use an abuse of discretion standard on review.[180] The court indicated, however, that the common law presumption of open proceedings was not determinative in this case because different courts had taken different approaches to the question of access to *records* of court proceedings.[181] After articulating the various approaches courts had taken on the access question, the court relied on an earlier Eleventh Circuit case and adopted a compelling interest test.[182] Although the court asserted that not every hearing, deposition, conference, or trial need be open, the court required that closure be necessitated by a "compelling governmental interest, and [be] narrowly tailored to that interest."[183] Applying the newly articulated standard to this case, the Eleventh Circuit concluded that the defendant's desire to prevent the plaintiff from using the sealed information in the later suit was inadequate justification for sealing the court's records.[184]

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176. *Id.* at 1569.

177. *Id.* at 1569-70 (referring to *Publicker Indus.*, 733 F.2d at 1071, and *Brown & Williamson*, 710 F.2d at 1178-79).

178. *Wilson*, 759 F.2d at 1570.

179. *Id.* (quoting Craig v. Harney, 331 U.S. 367 (1947) ("What transpires in the courtroom is public property.")); *see* Newman v. Graddich, 696 F.2d 796, 803 (11th Cir. 1983).

180. *Wilson*, 759 F.2d at 1570.

181. *Id. See In re* National Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981); United States v. Myers, 635 F.2d 945, 952 (2d Cir. 1980). See *supra* notes 35-39 and accompanying text for a discussion of *Myers*; *see also Belo Broadcasting*, 654 F.2d at 434 (rejecting the overwhelming presumption of openness). For a discussion of *Belo Broadcasting*, see *supra* notes 44-50 and accompanying text.

182. *Id.* at 1571; *see Newman*, 696 F.2d at 802.

183. *Wilson*, 759 F.2d at 1571. The court adopted the standard set forth by the Supreme Court in *Globe Newspapers*, 457 U.S. at 606-07. According to the court, this standard was less stringent than the standard the Sixth Circuit adopted in *Brown & Williamson* and the standard the Fifth Circuit condemned in *Belo Broadcasting*. *Wilson*, 759 F.2d at 1570-71.

184. *Wilson*, 759 F.2d at 1571. According to the court, the litigants in the first trial in

E. In re The Reporters Committee for Freedom of the Press

The D.C. Circuit, in *In re The Reporters Committee for Freedom of the Press*,[185] considered whether the district court had violated the press' and the public's first amendment rights of access to civil court records by delaying until after trial the right to examine documents submitted as part of the trial.[186] The D.C. Circuit affirmed the district court decision, holding that neither the press nor the public has a first amendment right of access to court records prior to judgment.[187]

The D.C. Circuit began its constitutional analysis by considering Supreme Court precedent. The court noted that the Supreme Court had not yet decided whether the first amendment provided the public a right of access to court records in civil cases.[188] According to the court, the Supreme Court only recently had found in the first amendment a right to *observe criminal proceedings*.[189] The court indicated that, although the contours of this constitutional right were being elaborated on, "the [right] has not yet been applied to access to civil trials, much less to access to records in

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federal court had no right to agree to seal what were actually public records. The Eleventh Circuit reminded the district court to "keep in mind the rights of a third party—the public, 'if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system.'" *Id.* (quoting *Newman*, 696 F.2d at 803).

185. 773 F.2d 1325 (D.C. Cir. 1985).

186. *Id.* at 1325-26. In *Reporters Committee* Mobil Oil Company, a party to a complicated libel and slander suit, requested and received a protective order covering documents transferred during discovery. *Id.* at 1326. The district court entered the first protective order on November 1, 1981, on the basis of an affidavit filed by Mobil's vice-president. The affidavit described the adverse effects the material's release would have on Mobil's competitive standing. The affidavit also indicated that practical difficulties would arise in going through the documents one-by-one to determine which documents contained sensitive information. *Id.* Later, after the trial court had denied each of the parties' summary judgment motions, which contained a number of documents that had been labeled confidential, Mobil requested that the trial court continue the protective order through trial. *Id.* The district court denied the summary judgment motions one week before trial. *See* Tavoulareas v. Piro, Nos. 82-1820, 82-1821 (D.C. Cir. July 30, 1982) (order). The trial court granted this request. *Reporters Committee*, 773 F.2d at 1327. At trial, the media moved to intervene and requested that the trial court reconsider its earlier protective orders. The trial court granted the reporters' motion to intervene, but refused to lift the seal from the confidential records. The trial court, however, did agree to reevaluate the need for the seal at the close of the trial. *Id.* The reporters appealed, raising only the constitutional argument that the first amendment required the court to grant the media access. *Id.* at 1326. The court, therefore, did not consider whether a common law right of access existed. *Id.* at 1330. *But see id.* at 1342 (Wright, J., dissenting) (chastising the majority for not considering common law right of access).

187. 773 F.2d at 1325.

188. *Id.* at 1330-31.

189. *Id.* at 1331 (citing *Richmond Newspapers*, 448 U.S. at 575).

civil trials—or, for that matter, even records in criminal trials."[190]

The court indicated that the two Supreme Court cases that have considered rights of access to court records were not relevant to the instant case. First, the court indicated that *Warner Communications* was of little practical help because the Supreme Court had not considered whether the public possessed a first amendment right of access to the tapes.[191] According to the D.C. Circuit, the Supreme Court's decision in *Warner Communications* was determinative only of the press' constitutional and common law rights of access.[192] Second, the court indicated that the recent *Seattle Times v. Rhinehart*[193] decision had limited application to the instant case because in *Seattle Times* the Court discussed a litigant's constitutional right to disseminate information.[194] Similarly problematic, the information the newspaper sought to disseminate had not yet heen filed with the court nor introduced into evidence.[195]

Despite the lack of directly applicable Supreme Court precedent, the court undertook a constitutional analysis based on the general guidelines developed in the Supreme Court's earlier access cases.[196] The court began by examining the historical tradition of public access to court records.[197] Quoting extensively from *Warner Communications,* the court initially concluded that a tradition of public access to judicial documents existed, but that this right was not absolute.[198] The court then considered whether this tradition included "pre-judgment access" and concluded that, based on the historical evidence, no common law right of access to court records existed prior to judgment.[199] The court gave three reasons for this conclusion. First, the court examined several nineteenth century cases which seemed to indicate that, under the common law, no right of public access attached to prejudgment records in civil

190. 773 F.2d at 1331.

191. *Id.* at 1331.

192. *Id.*; *see Warner Communications*, 435 U.S. at 608-10. The court, however, did note that "[p]resumably the Court believed it was *constitutional* that the public had been denied access" because of the Court's "finding of no common law right of access." *Reporters Committee*, 773 F.2d at 1331 (emphasis in original).

193. 467 U.S. 20 (1984).

194. *Reporters Committee*, 773 F.2d at 1331-32; *see Seattle Times*, 467 U.S. at 32-33.

195. *Reporters Committee*, 773 F.2d at 1332; *see Seattle Times*, 467 U.S. at 33.

196. *See supra* notes 67-69 and accompanying text (discussing the Supreme Court's two-part approach to access questions).

197. *Reporters Committee*, 773 F.2d at 1332.

198. *Id.* at 1332-33.

199. *Id.* at 1333-36.

cases.[200] Second, the court noted the "natural connection" between the policy of nonaccess and the well-established common law "public records privilege."[201] The public records privilege did *not* extend to " 'accusations contained in papers filed by a party and not yet brought before a judge or magistrate for official action.' "[202] Last, the court indicated that modern courts' practice of announcing a public right of access to civil cases without making the prejudgment/postjudgment distinction does not constitute "an historic practice of such clarity . . . as to justify the pronouncement of a *constitutional rule* preventing federal courts and the states from treating the records of private civil actions as private matters until trial or judgment."[203]

The court also undertook a functional analysis. The court began by listing the reasons the Supreme Court had given for opening criminal trials to the public.[204] The D.C. Circuit determined that the those reasons were not as relevant when considering access to civil proceedings between private parties.[205] The court then noted that prejudgment access to documents did not promote the purposes of open trials.[206] According to the court, third parties rarely request access to trial documents; consequently, denial of access to these documents rarely provokes the outcry associated with closing the trial itself.[207] As a result, the court concluded that the lower court had acted properly in sealing the documents until after the close of trial.[208]

The dissent in *Reporter's Committee* disagreed with the majority's approach regarding the right of access to trial exhibits.[209] According to the dissent, both the common law and the first amendment guarantee the press and the public a *contemporaneous*

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200. *Id.* at 1333-34.

201. *Id.* at 1335. The "public records privilege" refers to the privilege against liability for defamation in the accurate reporting of public records. *Id.*

202. *Id.* at 1335. (quoting Stanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 158 61 N.E.2d 5, 6 (1945)). According to the court, "it would be strange, if not unthinkable, to assess civil liability for hringing to the public's attention government records which the public is entitled to see." *Reporters Committee,* 773 F.2d at 1335 (citing Cowley v. Pulsifer, 137 Mass. 392, 396 (1884).

203. *Reporters Committee,* 773 F.2d at 1336 (emphasis in original).

204. *Id.* at 1336-37.

205. *Id.* at 1337.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1325, 1341 (Wright, J., dissenting). The dissent concurred with the majority's opinion with respect to the documents the district court considered in denying the summary judgment motion. *Id.*

right of access to evidentiary exhibits in civil proceedings.[210] The dissent accused the majority of opening the door to abuses of confidential seals,[211] fearing that litigants, on the basis of summary affidavits, could "make broad, unsubstantiated, claims of confidentiality and prevent public access to critical evidentiary exhibits until public interest in such documents ha[d] long faded."[212] The dissent emphasized the importance of timing and acknowledged the "contemporaneous" nature of the right of access.[213] The dissent believed this contemporaneous right of access demanded, "*at a minimum*," that a party seeking a seal produce a document-by-document need for the seal.[214] In an historical analysis,[215] the dissent concluded that "a review of the common law precedent suggests a presumptive right of contemporaneous access to the records of civil proceedings."[216] To the degree that the common law limited the time at which such access might occur, common law courts have "shown a preference for access at the time the trial began, not at the time judgment was issued."[217] The dissent began its functional analysis by listing the benefits of open trials. Relying on the few Supreme Court cases that have addressed the issue in the criminal context, the dissent stated that open trials (1) "enhance the quality of fact finding," (2) "assume the appearance of fairness," (3) "play a cathartic role in permitting the community to observe justice being done," and (4) legitimize judicial proceedings.[218] The dissent expressly aligned itself with those circuits which have held that these functional arguments apply equally well to civil proceedings and to evidentiary exhibits.[219] Finally, the dissent disagreed with the majority's conclusion that the public can learn of the subtleties of the exhibits through a postjudgment investigation. According to the dissent, such an approach suppresses important news through delay.[220]

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210. *Id.* at 1342.

211. *Id.*

212. *Id.*

213. *Id.* n.3.

214. *Id.* at 1344 (emphasis in original).

215. *Id.* at 1347. The dissent undertook an historical analysis only after criticizing the majority for placing considerable emphasis on the historical practice of the courts. According to the dissent, the most recent court decisions have come to rely almost entirely on functional arguments for determining the scope of the right of access.

216. *Id.* at 1347-51.

217. *Id.* at 1351.

218. *Id.*

219. *Id.*

220. *Id.* at 1353. The dissent then established its own standard, recognizing that the

IV. ANALYSIS

After the Supreme Court's decisions in *Richmond Newspapers* and *Globe Newspaper*, courts generally have accepted the existence of a first amendment right to attend civil trials.[221] Courts, however, still dispute both the existence and scope of a first amendment right of access to documents filed in civil proceedings. The Sixth and Seventh Circuits have stated that the first amendment does grant the press and the public a contemporaneous right of access to court records and have indicated that this right attaches to all records submitted for judicial consideration.[222] The Eleventh Circuit has concluded that the first amendment does not mandate the disclosure of trial exhibits, but that a constitutional presumption of openness applies to all other court records.[223] The D.C. Circuit, on the other hand, has held that the first amendment does not grant to the press and the public a right of access to judicial records prior to final determination of the case on the merits.[224] The first section of this Analysis argues that a first amendment right of access to court records is inappropriate in light of current constitutional theory. The second section of the Analysis suggests a common law balancing test for courts to apply when considering a right of access question.

A. The Constitutional Right of Access

Although the Supreme Court has not addressed directly the issue of access to civil court documents, lower courts have extrapolated various conclusions from *Warner Communications*. Initially,

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first amendment generally requires a test of strict scrutiny. The dissent, however, argued that in evaluating a provisional seal a court need only use an intermediate level of scrutiny. The dissent would "require only that the trial court establish (a) that the provisional seal was justified by a substantial government interest, and (b) that there was no less restrictive means of achieving that interest." Finally, the dissent indicated that the government's interest in closure must be unrelated both to the content of the documents and the consequences of disclosure. *Id.* at 1353-55.

221. *See supra* notes 56-83 and accompanying text; *see also* Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866 (E.D. Pa. 1981); Fenner & Koley, *Access to Judicial Proceedings: To* Richmond Newspapers *and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415 (1981); Note, *After* Richmond Newspapers: *A Public Right to Attend Civil Trials?*, 4 COMM/ENT L.J. 291 (1982) [hereinafter Note, *After* Richmond Newspapers]; Note, *The First Amendment Right of Access to Civil Trials After* Globe Newspaper Co. v. Superior Court, 51 U. CHI. L. REV. 286 (1984) [hereinafter Note, *The First Amendment Right*].

222. *See supra* notes 106-51 and accompanying text.

223. *See supra* notes 168-84 and accompanying text.

224. *See supra* notes 185-220 and accompanying text.

the majority of courts and commentators construed *Warner Communications* broadly, finding that the Supreme Court expressly had denied a first amendment right to inspect and copy judicial records.[225] More recently, courts have adopted a narrow approach, arguing that the Supreme Court's disposition of *Warner Communications* did not constitute a general denial of the right of access to judicial records.[226] According to these courts, *Warner Communications* held only that the press' constitutional right of access was not superior to that of the public.[227] Although these more recent interpretations of *Warner Communications* are technically correct—the Court did not expressly deny a first amendment right of access to judicial records—these decisions fail to recognize that the first amendment right of access question was not at issue before the Court.

More importantly, extrapolating a constitutional right of access from *Warner Communications* misinterprets the opinion. The Supreme Court did not even hint that a constitutional right of access exists. On the contrary, the Court gave every indication that the common law presumption in favor of access is not of constitutional magnitude. First, the Court listed several exceptions to the right to inspect and copy judicial records, exceptions that would not stand up under a strict standard of review.[228] Interestingly, nowhere in the opinion did the Court mention the necessity of finding a compelling interest before concluding that the party seeking confidentiality has overcome the presumption of access. Rather, the Supreme Court indicated that the presumptiom is just one factor to be considered in the media's favor.[229] The Court mentioned numerous privacy concerns as exceptions. For instance, courts are not to allow access to information that would promote public scandal, embarrass or discomfort divorce litigants, or serve as a

225. *See* Tavoulareas v. Washington Post Co., 724 F.2d 1010, 1016 (D.C. Cir.), *vacated*, 737 F.2d 1170 (D.C. Cir. 1984); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 426-29 (5th Cir. 1981); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 913-14 (E.D. Pa. 1981); *see also* Note, *supra* note 13, at 329-43; Note, *supra* note 11, at 686-92.

226. *See Continental Ill.*, 732 F.2d at 1309 n.11; *Associated Press*, 705 F.2d at 1145; *In re* Coordinated Pretrial Proceedings in Petroleum Product Antitrust Litig., 101 F.R.D. 34, 42 (C.D. Cal. 1984).

227. *Continental Ill.*, 732 F.2d at 1309 n.11. These courts contend that the only "right" the Supreme Court denied was the right to make copies of the tapes. The Court allowed the press to listen to the tapes, read and publish the transcripts of the tapes, and make comments about the tapes to the general public. *Id.*

228. *Id.*; *see supra* notes 21-34 and accompanying text.

229. *Warner Communications*, 435 U.S. at 598.

"reservoi[r] of libelous statements for press consumption."[230]

Second, the Court placed considerable emphasis on the trial court's discretion.[231] The Court gave no indication that the trial judge's discretion in closing the court records is limited to extraordinary circumstances. Rather, the Court stated that the trial court must weigh all the factors in light of "the relevant facts and circumstances of the particular case."[232] Last, many of the cases cited by the Supreme Court in its discussion of the common law suggest that material disclosed in the litigation process may not be presumptively open, particularly in civil trials.[233] For these reasons, any reliance on *Warner Communications* as support for a constitutional right of access is clearly misplaced. A complete analysis of this issue, however, must distinguish between pretrial records and trial exhibits.

1. Pretrial Records

When conducting a first amendment analysis, courts generally determine whether the item of interest was historically available to the press and public.[234] As *Warner Communications* clearly states, the courts of this country have long recognized a general right to inspect and copy judicial records.[235] The Court in *Warner Communications* lists numerous nineteenth and twentieth century cases as authority for this proposition.[236] Interestingly, an examination of these cases, and other early cases, reveals that the presumption of access to court records does not apply to pretrial documents.[237] As one commentator concluded, "the cases cited by the Court in *Nixon v. Warner Communications* confirm the general understanding . . . that pretrial proceedings are analytically distinct from actual trial proceedings for purposes of public disclosure and that material disclosed in private litigation, even if filed in court, is not presumptively public."[238]

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230. *Id.*

231. *Id.* at 599.

232. *Id.*

233. *Id.*

234. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982).

235. Publicker Indus., Inc. v. Coben, 733 F.2d 1059, 1069 (3rd Cir. 1984); *see Warner Communications*, 435 U.S. at 597.

236. *Publicker Indus.*, 733 F.2d at 1069; *see Warner Communications*, 433 U.S. at 597.

237. *Id.*; *see supra* notes 24-31 and accompanying text.

238. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 33 n.136 (1983). For example, in Schmedding v. May, 85 Mich. 1, 5-6, 48 N.W. 201, 202 (1891), *cited in Warner Communications*, 435 U.S. at 598, the Michigan Supreme Court

Strong functional reasons explain why pretrial records historically have not been open to the public when the records have not been instrumental in a ruling that may be appealed. Courts are interested in maintaining the integrity of their records and protecting private parties from unnecessary harm.[239] Courts recognize that pretrial pleadings often contain "scurrilous charges which, although filed, may never come to hearing or trial."[240] One court has pointed out that if pleadings can be published by anyone gaining access to them, then a party could cause great damage simply by filing pleadings containing false charges and having them published.[241] This fear is particularly well founded given that parties often move for summary judgment as a pretext for public dissemination of discovery materials.[242] Finally, if a court opens to the public all the material submitted with a motion for summary judgment and that motion is subsequently denied, the court will have precluded the opportunity for settlement of the case conditioned on confidentiality.[243]

Those courts which have held that a presumptive right of access to pretrial records exists and attaches to all documents submitted for judicial determination will contend that the foregoing arguments confuse the consideration of the presumptive right itself with the consideration of whether countervailing interests should

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upheld a trial court ruling that denied a newspaper's request for access to the pleadings, emphasizing that civil suits are private rather than public affairs. Similarly, in Cowley v. Pulsifer, 137 Mass. 392, 394 (1894), *cited in Warner Communications*, 435 U.S. at 598, Justice Holmes stated that, although an open courtroom is necessary to protect the public's ability to oversee the judicial system, courts should not allow access to some written statements because exposure of those statements does not aid public oversight of judicial administration. *See also* Burton v. Reynolds, 110 Mich. 354, 355-56, 68 N.W. 217, 217 (1896) (stating that "it is not the absolute right of persons to make merchandise of the contents and allegations contained in the records of private actions and suits").

With regard to documents that have not been filed with the court, the Supreme Court recently has confirmed the pretrial document exception to the general access rule. Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984). In *Seattle Times* the Supreme Court had to decide whether the Constitution protected the defendant's right to disseminate information transferred from the plaintiff during discovery. *Id.* The Court held that the Constitution did not give the defendant this right, noting that "during the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone . . . that a pretrial deposition or pretrial interrogatories were other than wholly privato to the litigants." Gannett Co. v. DePasquale, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring), *cited with approval in* Seattle Times v. Rhinehart, 104 S. Ct. at 2208.

239. *Schmedding*, 85 Mich. at 4-6, 48 N.W. at 202.

240. *Id.*

241. Park v. Detroit Free Press Co., 72 Mich. 560, 568, 40 N.W. 731, 734 (1888).

242. Marcus, *supra* note 238, at 49.

243. *Id.* & n.206 (discussing particular problems that arise in class action suits).

overcome that right.[244] These courts, stressing the need for contemporaneous review of judicial performance, will argue that only by allowing access to all records prior to a final decision can the public adequately assess the correctness of the judge's decision.[245] This reasoning fails for two reasons. First, as the early decisions implicitly recognized, drawing a distinction between the presumption of openness and the countervailing interests is nearly impossible.[246] A court, by determining that a first amendment or strong common law presumption of access attaches to a pretrial record, has pracatically destroyed any chance that a countervailing interest will prevail because the countervailing interest must be of a greater constitutional magnitude to outweigh the strong presumption.[247] Second, by emphasizing the need for contemporaneous access to trial documents, the press and public are often doing nothing more than emphasizing that they are really interested in the contents of the materials requested. The press can oversee the correctness of a decision just as well after a proceeding as during the proceeding. Having the judge act as a screen does very little harm to this ability in relation to the invaluable protection this service affords the privacy and commercial interests of the litigants.

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244. *See Brown & Williamson*, 710 F.2d at 1179-80; *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 43; *see also Reporter's Committee*, 773 F.2d at 1341-56 (Wright, J., concurring in part and dissenting in part).

245. *See Petroleum Products Antitrust Litig.*, 101 F.R.D. at 43.

246. *See, e.g., Schmedding*, 85 Mich. at 3-4, 48 N.W. at 201-02; Cowley v. Pulsifer, 137 Mass. at 395.

247. The recent circuit court opinions in favor of access, by instituting a strict scrutiny standard consistent with a first amendment right, have rendered meaningless any exceptions to the general rule in favor of access. These courts should realize that the qualified nature of the tradition is as important as the general presumption of access. These courts may argue that the courts are aware that the right of access to court records never has been absolute and have acknowledged in their opinions that even the first amendment right to inspect and copy judicial documents is not absolute. *See, e.g., Brown & Williamson*, 710 F.2d 1165; *Continental Ill.*, 732 F.2d 1302; *Publicker Indus.*, 733 F.2d 1059. Analyzing the recent decisions reveals that this argument is seriously fiawed. As the Eleventh Circuit states in Wilson v. American Motors Corp., 759 F.2d 1568, 1570 (11th Cir. 1985), the courts in favor of a first amendment right of access suggest that "the defendant's right to a fair trial, certain privacy rights of participants or third parties, trade secrets and national security, are virtually the only reasons which would justify total closure of public records." *Id.* (referring specifically to the Sixth Circuit's opinion in *Brown & Williamson*). Such a restrictive approach is not what courts and commentators have meant when they have indicated that the general right of access is not absolute. *See, e.g., supra* text accompanying notes 27 & 55.

2. Trial Exhibits

Unlike the dispute over access to pretrial records, the dispute over access to trial exhibits focuses more on the nature of the right of access than on the existence of a right of access. Although the D.C. Circuit questioned whether a general right of access attaches to trial exhibits prior to judgment,[248] most courts have concluded that a contemporaneous right of access attaches to all exhibits submitted in open court proceedings.[249] The principal question is whether this right of access is of a constitutional magnitude.

The right of access to documents filed with a court must play a significant role in the functioning of the judicial process if courts are to treat the right as constitutionally protected.[250] Each of the four recent circuit court opinions that permitted the press and the public access to court records focused on this functional test in relation to *civil trials*.[251] These courts unanimously concluded that public access to civil trials was appropriate because access enhanced the fact-finding process, fostered an appearance of fairness, and served as a check on the judicial process.[252] Arguably, good reasons justify focusing on the functional test in relation to civil trials when considering the presumption of access to civil court documents. As the Sixth Circuit noted, "court records often provide important, sometimes the only, bases or explanations for a court's decision."[253] As the Sixth Circuit opinion suggests, civil courts might give greater effect to the policies underlying public access to the courtroom when civil courts are subject to having their court records opened for inspection.[254]

These reasons supporting the general right of the press and public to inspect court records, although not entirely unpersuasive, are inadequate to justify a first amendment right of access in civil

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248. *See Reporter's Committee*, 773 F.2d at 1333-40.

249. *See, e.g., Continental Ill.*, 732 F.2d 1302; *Brown & Williamson*, 710 F.2d 1165.

250. *Globe Newspaper*, 457 U.S. at 605-06.

251. *Brown & Williamson*, 710 F.2d at 1178-79; *Continental Ill.*, 732 F.2d at 1308-09; *Publicker Indus.*, 733 F.2d at 1067-71.

252. *Brown & Williamson*, 710 F.2d at 1178-79; *Continental Ill.*, 732 F.2d at 1308-09; *Publicker Indus.*, 733 F.2d at 1067-71.

253. *See, e.g., Brown & Williamson*, 710 F.2d at 1177.

254. One commentator notes:

> [Judicial records] reflect what the parties and the court wished to expose to public view and afford an opportunity to analyze and authenticate the public's knowledge of its judicial system. Without records, no information of practical use would exist to explain why, after an extended period of time, a court acted in a particular fashion.

Note, *supra* note 13, at 343.

cases. Unlike the open trial proceeding, access to civil court records does not sufficiently serve desired societal and judicial interests.[255] First, the court's current access policies already satisfy the first amendment guarantees of freedom of speech and press. If a particular document is relevant and probative on the issue at trial, the parties concerned undoubtedly will reveal the information during the trial proceeding.[256] Public access to documents, therefore, would neither enhance the quality of, nor add to the integrity of, a civil trial to any significant degree when the trial itself is completely open to the public.

Second, documents filed as part of the court proceeding generally are not critical to promoting an understanding of the trial. Consequently, denying access to the documents does not hinder the press from functioning in a meaningful fashion.[257] Third, documents frequently may contain prejudicial and sensitive material that a court may find inadmissible at trial as evidence. Public access to these documents may mislead the public and compromise the integrity of the trial.[258] Similarly, the prospect of public access might discourage the litigant from submitting relevant evidence for fear of exposing other facts contained in a document.[259]

Fourth, public access to court documents increases the chance that a party may not bring a suit or may be forced to settle a suit for reasons unrelated to the merits of the case. Logically, the greater the chance that a court will enable the press and public to gain access to documents containing sensitive, irrelevant information, the greater the chance a threatened party will avoid the embarrassing or harmful predicament litigation may pose. A potential plaintiff may hesitate to bring suit, or a defendant may be unwilling to fully litigate matters, if either believes that the opposition is likely to uncover and submit for judicial consideration documents that include sensitive and damaging, yet irrelevant, information which the party wishes to keep private. In such a situation, the press' and the public's rights of access greatly hinder, rather than contribute to, the integrity and effectiveness of the judicial process.

Last, most of the arguments advanced against a constitutional right of access to documents should be given even greater weight in

255. *See generally* United States v. DeLorean, 561 F. Supp. 797 (C.D. Cal. 1983) (rejecting constitutional right of access to judicial records).

256. *See id.*

257. *See id.*

258. *See id.*

259. *See id.*

a civil suit than in a criminal one.[260] In civil proceedings, the state is rarely a party to the action; rather, most civil suits concern private disputes between private parties. Arguably, the public plays less of a role in assuring the proper functioning of the courts in civil cases. In a criminal trial, the defendant is involuntarily thrust into a system in which he stands alone against the state. The system then entrusts the press and public with serving the essential function of assuring that the courts both administer justice and protect the individual's liberties. In a civil suit, the parties have chosen to bring their dispute before the court as a socially acceptable alternative to other private means of dispute resolution. The judiciary, by redressing wrongs and preventing undue hardships, merely provides a necessary service that allows society to function smoothly. Furthermore, the adversary system, an integral part of the civil suit, acts to guard the integrity of the fact-finding process and assure the fairness of the proceeding.

B. The Common Law Right of Access: A Balancing Approach

The foregoing analysis highlights the weaknesses of mechanically determining that the right to examine court records is of a constitutional magnitude. The arguments against finding a constitutional right, however, do not condemn the existence of a common law right to inspect and copy judicial documents. Indeed, this common law right has a strong historical basis[261] and plays some role in allowing the public to oversee the functioning of the judiciary. The strength of this common law right, however, remains unclear.

As indicated by the Supreme Court in *Warner Communications,* under the common law approach access decisions should be left to the trial judge.[262] This Recent Development argues that a trial judge should use a simple balancing formula, based on factors readily accessible to the court, in determining a third party's access rights. Under this test a court should balance the interests of the press and public to determine the strength of the presumption of openness. Courts then should balance this presumption against the competing interests of the litigants and the court. In weighing the interests of the press and public, a court should consider: (1) the public nature of the trial; (2) the type of information requested—pretrial discovery documents or trial exhibits; and (3) if

260. *See* Note, *After* Richmond Newspapers: *supra* note 221, at 311-12.
261. *See supra* notes 11-15 and accompanying text.
262. *Warner Communications,* 435 U.S. at 599.

a final determination has been made, the degree to which the trial court relied on the information in reaching its decision. Having determined the strength of the presumption of openness, the court should consider: (1) the burden the request will impose on the court and the litigants; and (2) the litigant's interest in closure.

1. The Presumption of Openness

The Supreme Court has indicated, and logic would dictate, that the greater the public interest in a trial's outcome, the greater the need for public access to the courtroom and the court's records.[263] The first factor that courts should consider when determining the strength of the public's interest is the public nature of the trial. Courts should examine three subfactors in this regard: (1) the nature of the parties; (2) the nature of the cause of action; and (3) the subject matter of the suit. The nature of the parties to the civil proceeding is a crucial factor in determining whether the courtroom should be open. For example, the court should be less hesitant to open its records if one of the litigants is a government agency or a prominent public figure than if both litigants are private parties. The former instance is analogous to the criminal setting, where the government's presence is a driving force behind the trial proceedings and thus enhances the need for the press and public to play a substantial role in assuring the proper functioning of the court.[264] In the latter instance, courts should be sensitive to the privacy interests of private citizens.[265]

As a second subfactor, courts should consider the nature of the cause of action. Whether the action is in contract, tort, or brought pursuant to a state or federal statute will affect the need for the public to oversee the application of law. In a contract dispute, for instance, the court will determine the outcome of the proceeding based on an agreement between the parties. Generally, the court should not have to look outside the parties' contract either to determine if a cause of action exists or to resolve the dispute. Thus,

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263. *See* Gannett Co. v. DePasquale, 443 U.S. at 386-87; *see also Brown & Williamson*, 710 F.2d at 1180 (considering public interest in learning tar and nicotine content of cigarettes as important factor in determining whether order to seal administrative documents filed at trial was constitutional); *Newman v. Graddick*, 696 F.2d at 801-03 (noting importance of public interest in overseeing penal administration); *Petroleum Products Antitrust Litig.*, 101 F.R.D. at 38-39 (noting that public interest in oil crisis necessitated seal in antitrust action).

264. *See supra* note 259 and accompanying text.

265. *See infra* notes 280-84 and accompanying text.

the public has little interest in overseeing the court's resolution of the case. In a tort action, by contrast, the court must look to a body of established law that exists apart from the parties and their relationship, both to determine if a cause of action exists and to redress the harm. The public, therefore, has a greater interest in observing the law's application. Finally, with a federal or state statute, the court is applying law that society has expressly created and law in which society has a vested interest in seeing applied properly.

As a last subfactor, courts should consider the subject matter of the suit and the potential public impact of the court's decision. Courts should be more inclined to allow access in a lawsuit seeking to enjoin the destruction of a scenic landmark or a suit seeking to break up a large corporate merger than in a suit for a divorce. In the former instances courts' records are less likely to be used to gratify private spite or to promote public scandal.[266] The courts have long indicated that they will not let their records serve merely as a means of satisfying curiosity or of facilitating the embarrassment and humiliation of a person.

Next, courts should consider the type of information requested when determining whether the court's records should be open for inspection. The courts historically have made distinctions between the parties' pretrial discovery documents and exhibits the parties present as part of the actual trial.[267] Pretrial information, even if filed in court, generally has not been open for public inspection.[268] Courts should protect this type of information from public disclosure because pretrial documents could contain sensitive information about matters that may never come before the tribunal.[269] Trial exhibits, on the other hand, deserve less protection because they contain information relevant to the actual trial and, therefore, are of greater interest to the public. Last, in determining the strength of the presumption in favor of access, courts should consider the degree to which the trial court relied on the requested document in reaching its decision. Logically, the greater the reli-

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266. *See supra* notes 28-29 and accompanying text.

267. See *supra* notes 234-42 and accompanying text for a discussion of the distinction between pretrial and trial records.

268. *See id.*

269. *See Schmedding*, 85 Mich. at 4-6, 48 N.W. at 202. The courts, however, have indicated, as common sense would dictate, that the presumption of access greatly increases if the trial court makes a final determination at a pretrial ruling. *See Continental Ill.*, 732 F.2d at 1314; Joy v. North, 692 F.2d at 893.

ance on the document, the greater the need for the press and public to examine the evidence to gain an informed understanding of the trial.

Given the liberal discovery mechanisms of the Federal Rules of Civil Procedure, courts in complex civil cases can find themselves flooded with thousands of documents.[270] Having the court conduct a review concerning the confidential nature of each document that the press or public requests, therefore, can place a great burden on the court. Courts should consider this burden as a competing interest in nondisclosure. Avoiding the time-consuming chore of document-by-document review may be well justified, especially if the court believes that further proceedings will filter the relevant information from the irrelevant documents.

2. The Litigant's Interest in Closure

Courts that have recently considered the right of access question have offered very few examples of competing interests sufficient to justify closing a trial proceeding or sealing a court's records. Courts have recognized the protection of trade interests,[271] the preservation of national security,[272] the protection of privacy interests,[273] and the attorney-client privilege[274] as *potential* competing interests in civil trials. Courts also have indicated that even these interests will not support a categorical rule of closure. Rather, the courts must consider each interest on a case-by-case basis to determine whether the interest is sufficient to justify nondisclosure.[275] As courts undertake a more thorough balancing approach and realize that the public's interest in a civil court document may vary, courts should be more willing to give greater weight to other competing interests.

A litigant's interest in withholding sensitive commercial infor-

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270. *See, e.g., Reporter's Committee*, 773 F.2d at 1326 ("designat[ing] approximately 3,800 pages of deposition and an unspecified number of documents as confidential"); Zenith Radio Corp.v. Matsushita Elec. Indus. Co., 529 F. Supp. at 873-74 (designating 100,000 pages of discovery documents as confidential); *see generally* Marcus, *supra* note 238, at 11 n.51 (listing cases with tremendous document loads).

271. *See In re* Iowa Freedom of Information Council, 724 F.2d 658, 661 (8th Cir. 1983); *Brown & Williamson*, 710 F.2d at 1180.

272. *See Brown & Williamson*, 710 F.2d at 1179.

273. *See id; In re* Knoxville News-Sentinel Co., 723 F.2d 470, 474 (6th Cir. 1983).

274. *See Continental Ill.*, 732 F.2d at 1313; Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 462 (10th Cir. 1980).

275. *See Continental Ill.*, 732 F.2d at 1313; *Brown & Williamson*, 710 F.2d at 1179-80. The courts consistently have placed the burden of persuasion on the party seeking closure. *See Petroleum Products Antitrust Litig.*, 101 F.R.D. at 43-44.

mation is one competing factor courts should consider when a third party requests documents. Sensitive commercial information has enjoyed a long tradition of protection at common law.[276] Courts often have protected commercial information that may not be classified neatly as a trade secret—"the state of one's accounts, the amount of his bid for a contract, his sources of supply, his plans for expansion or retrenchment, and the like."[277] Similarly, the Federal Rules of Civil Procedure provide that a litigant's interest in confidential commercial information outweighs the presumption of openness.[278] The courts have used this provision to protect sensitive information from public disclosure in pretrial discovery.[279] Finally, Congress, when enacting its open access laws, expressed a willingness to protect a broad range of sensitive commercial information.[280] Courts should give similar consideration to sensitive commercial information when balancing the interests at issue in an access question.

The litigant's interest in privacy is also a factor in some access determinations. The Supreme Court has held that the first amendment protects certain privacy interests.[281] A party with a constitutionally protected privacy interest should be protected from disclosure. The more important issue, therefore, concerns those privacy interests that the Court has not deemed worthy of constitutional protection.

Although at least one commentator has argued that a litigant waives his privacy rights when he enters the courtroom,[282] the

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276. See *Tavoulareas*, 724 F.2d at 1018-19, for a thorough discussion of common law protection of sensitive commercial information.

277. *Id.* at 1018 n.18 (quoting RESTATEMENT OF TORTS § 759 comment b (1939)). The Restatement further provides: "there are no limitations as to the type of information included except that it relate to matters [of one's] business." *Id.*

278. *See* FED. R. CIV. P. 26(c)(7) (A court may order, upon a showing of good cause, that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.").

279. *Tavoulareas*, 724 F.2d at 1018 n.17 (citing Centurion Indus., Inc. v. Warren Steurer & Assoc., 665 F.2d 323 (10th Cir. 1981); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889 (E.D. Pa. 1981); Liberty Folder v. Curtiss Anthony Corp., 90 F.R.D. 80, 82-3 (D. Ohio 1981).

280. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1982) (allowing agency not to disclose trade secrets and other confidential and financial information); Internal Revenue Code, 26 U.S.C. § 6103 (1982) (prohibiting disclosure of business information given for tax collection purposes).

281. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965) (forbidding the use of contraceptive devices violated the right of marital privacy).

282. *See* Note, *The First Amendment Right*, *supra* note 221, at 310.

courts have not established such a principle. Rather, quite the contrary is true. As the Supreme Court noted in *Warner Communications,* courts historically have sought to prevent the disclosure of embarrassing or humiliating information concerning a litigant in a private lawsuit.[283] Similarly, state legislatures have acknowledged that in certain civil proceedings, such as divorce actions, juvenile proceedings, will contests, or sensitive personal injury actions, the parties may present particularly sensitive information that demands recognition of the litigants' great privacy rights.[284] These legislatures have given courts mandatory guidelines or discretionary power to exclude the press and public in these circumstances.[285] Courts, therefore, must use discretion in determining when a litigant's right to privacy warrants protection from disclosure.

A litigant's interests in privacy and commercially sensitive information should be taken seriously. Courts should look beyond mechanical terminology, such as "trade secret," and consider the harm disclosure will have on the litigant. Even when a given document does not contain a trade secret or a constitutionally protected privacy concern, courts still should consider a litigant's legitimate interest in nondisclosure when conducting the foregoing balancing test. This balancing process best accommodates the interests of the parties, the press, the public, and the system as a whole.

V. CONCLUSION

This Recent Development argues that neither the press nor the public have a first amendment right of access to judicial records in civil proceedings. Rather, the press and public have only a common law right of access to such records. The courts, therefore, are not bound by a standard of strict scrutiny when determining whether to close court records. Under the common law, courts should conduct a balancing test that gives the trial court freedom

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283. *Warner Communications,* 435 U.S. at 598; *see* King v. King, 25 Wyo. 275, 284-85, 168 P. 730, 732 (1917); *In re* Caswell, 18 R. I. 835, 836, 29 A. 259, 259 (1893). *But see* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (holding that publication of names of rape victims obtained from court records was not invasion of privacy). Note, *After* Richmond Papers, *supra* note 221, at 312, citing *In re* Shortridge, 99 Cal. 526, 534, 34 P. 227, 230 (1893) (which rejected the view that humiliation and embarrassment of divorce litigants warrant closure of courtroom).

284. Note, *After* Richmond Newspapers, *supra* note 221, at 312.

285. *Id.* at 318 (listing state statutes authorizing courts to close court proceedings).

to weigh all the relevant factors in light of the facts and circumstances of a particular case. In undertaking the balancing test, courts should weigh the common law presumption of openness—the belief that the press and public play a role in overseeing the function of the courts—against the litigants' interest in closure, the public nature of the trial, the degree to which the request for access will burden the court and the litigants, the type of records being requested, and the state of the proceedings. This approach attempts to implement the Supreme Court's only statement on the issue, the *Warner Communications* decision, a decision that represents the most sensible approach to the question of access to judicial documents.

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