Sealed Judicial Records and Infant Doe: A Proposal to Protect the Public's Right of Access

"A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both.... A people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1]

I. Introduction

In the Spring of 1982, the rights of critically ill infants became the center of a public controversy when the Indiana courts decided the *Infant Doe* case.[2] The case involved court rulings that permitted the parents of an infant suffering from multiple congenital defects to withhold medical treatment, thus allowing the infant to die.[3] The public was denied access to information about this controversial case when, on appeal, the Indiana Court of Appeals sealed all judicial records dealing with *Infant Doe.*[4] Closure of both the lower court hearings and the appellate court records was apparently requested to protect the privacy of the infant's parents.[5] The closure order withheld from public view the courts' analysis of the controversial and unsettled legal issues surrounding passive euthanasia of radically defective infants.[6] *Infant Doe*, therefore, cannot provide standards for hospitals,

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[1]9 The Writings of James Madison 103 (Hunt ed. 1910), *quoted in* United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[2]Because all judicial records concerning the *Infant Doe* case were sealed and no opinion was published, neither a docket number nor a citation to the case is available.

[3]In April, 1982 "Infant Doe" was born with Down's syndrome, a tracheal-esophageal fistula, and heart and intestinal disorders, in Bloomington, Indiana. After consulting with doctors, the infant's parents decided to let the infant die and refused intravenous feeding and surgery. The Monroe County Prosecutor intervened, and sought a court ruling ordering treatment for the infant. Indianapolis Star, Apr. 27, 1982, at 1, col. 4. For the Indiana Code sections giving the Prosecutor authority to intervene, see *infra* note 6. After several hearings, the Monroe County Circuit Court upheld the parents' decision. An emergency appeal was taken, and the Indiana Supreme Court summarily affirmed without issuing a written opinion. The infant died before a planned appeal reached the United States Supreme Court. Bloomington Hearld Telephone, Apr. 17, 1982, at 1, col. 4; J. Robertson, The Rights of the Critically Ill 88 (1983).

[4]After "Infant Doe's" death, the Monroe County Prosecutor appealed to the Indiana Court of Appeals, asking the court to review the legality of the parents' action. Indianapolis Star, Dec. 8, 1982, at 24, col. 1.

[5]Bloomington Herald Telephone, Apr. 15, 1982, at 1, col. 1.

[6]*See generally* Ellis, *Letting Defective Babies Die: Who Decides*, 7 Am. J.L. & Med. 393 (1982); Kluge, *The Euthanasia of Radically Defective Neonates: Some Statutory*

doctors, and parents to follow when they are faced with similar situations. The closure order also forced the Indiana Legislature to attempt to draft legislation responsive to *Infant Doe* without complete information about the case.[7] Additionally, because the court records are sealed and no opinion was issued, *Infant Doe* offers no guidance to the courts in subsequent similar cases. The *Infant Doe* case, therefore, demonstrates that sealing court records adversely affects the public and the legislative and judicial branches of government.

United States courts have long recognized that the public has a right of access to judicial records.[8] Some courts describe the right of access as based on the common law, and others find that the right is protected by the United States Constitution.[9] Under either view, the courts' commitment to the right of access is founded on the belief that limiting public access to governmental records, including judicial records, is repugnant to the democratic principles of self-government.[10] The right of access to judicial records is also closely related to the long-standing Anglo-American tenet that justice should be conducted openly with the public present at judicial proceedings.[11]

Considerations, 6 DALHOUSIE L.J. 229 (1980). The judge who first ruled that the parents had a right to choose to withhold medical treatment said "no specific law can be cited, only the [common] law that the parents have a right to exercise jurisdiction over the care of their children." Bloomington Herald Telephone, Apr. 16, 1982, at 1, col. 1. *But see* IND. CODE §§ 35-46-1-4 (1982) (neglect of a dependent); 35-46-1-5 (nonsupport of a dependent child); 35-46-1-1 (defining support to include medical care).

[7]In 1983 the Indiana Legislature amended IND. CODE § 31-6-4-3 (1982) to add handicapped children to the definition of "children in need of services." The amendment reads, in part:

> (f) A child in need of services under subsection (a) includes a handicapped child who is deprived of nutrition that is necessary to sustain life, or who is deprived of medical or surgical intervention that is necessary to remedy or ameliorate a life threatening medical condition, if the nutrition or medical or surgical intervention is generally provided to similarly situated handicapped or nonhandicapped children.
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> (g) A handicapped child under subsection (f) is an individual under eighteen (18) years of age who has a handicap as defined in IC 22-9-1-3(q).

Act of Apr. 19, 1983, Pub. L. No. 288, § 1, 1983 Ind. Acts 1783, 1784-85 (codified at IND. CODE § 31-6-4-3 (Supp. 1983)).

[8]*See, e.g.*, Nash v. Lathrop, 142 Mass. 29, 35, 6 N.E. 559, 560 (1886) (acknowledging in dictum that the public had a right of access to the opinions of the Massachusetts Supreme Judicial Court); *Ex parte* Drawbaugh, 2 App. D.C. 404 (1894) (court refused to seal the court records in a patent case).

[9]*See infra* text accompanying notes 84-142.

[10]United States v. Mitchell, 551 F.2d 1252, 1257-58 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Jensen v. Jensen, 103 Misc. 2d 49, 425 N.Y.S.2d 208 (N.Y. Sup. Ct. 1980).

[11]*See infra* notes 24-25 and accompanying text. *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311 (1979).

In spite of the long acceptance of the right of public access to judicial records, American courts have not clearly defined the contours of the right.[12] A court generally permits any member of the public to inspect records within the court's custody.[13] Exercise of the right of access is not conditioned either upon a proprietary interest in the record sought or upon a showing of need for the record as evidence in a lawsuit.[14] Nevertheless, when faced with a conflict between the right of access and other interests that may be impaired by public exposure, courts occasionally limit access to their records.[15] The courts, however, have not provided clear standards for limiting public access to judicial records.[16] Several reasons for the lack of clear standards can be identified. First, although the courts agree that the right of access exists, they have different views about the source of the right. A court finding that the right of access is a constitutional right may be less willing to limit public access than a court finding that the right originates in the common law.[17] Second, the nature of the interests the courts seek to protect by limiting access affects the decision to limit or allow public access.[18] Courts have also used different methods to limit public access without saying why one method is more appropriate than another in a particular case.[19] Finally, the

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[12]Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

[13]*Id.* at 614 n.1 (Stevens, J., dissenting).

[14]*Id.* at 597.

[15]For example, courts have limited public access to judicial records to protect privacy interests, *see In re* Caswell, 18 R.I. 835, 29 A. 259 (1893); *accord* C. v. C., 320 A.2d 717, 722-23 (Del. 1974), the right to a fair trial, *see* United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981), and trade secrets, *see* Centurion Indus., Inc. v. Warren Steurer, 665 F.2d 323 (10th Cir. 1981); Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); American Dirigold Corp. v. Dirigold Metals Corp., 104 F.2d 863 (6th Cir. 1939). *See also supra* note 71.

[16]Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

[17]*Compare* Miami Herald Publishing Co. v. Chappell, 403 So. 2d 1342, 1345 (Fla. Dist. Ct. App. 1981) (holding that the public's first amendment right of access to the judicial proceedings and records of criminal cases can only be limited if "closure is necessary to prevent a serious and imminent threat to the administration of justice" and "no less restrictive alternative measure is available") *with* Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 434 (5th Cir. 1981) (reviewing a denial of broadcasters' requests to copy tapes admitted into evidence during a criminal trial, the court found a common law right of access and stated that there is "no basis from which one can derive the overpowering presumption in favor of access discovered by [other courts]").

[18]*See supra* note 15.

[19]Public access to judicial records may be limited by sealing the records, *see* Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977); Munzer v. Blaisdell, 268 A.D. 9, 48 N.Y.S.2d 355 (1944), or by less severe methods including the use of pseudonyms, *see* United States v. Doe, 496 F. Supp. 650 (D.R.I. 1980), the deletion of names, *e.g.*, Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 54 (1982), or the deletion of particular pieces of evidence from the records, *see* Centurion Indus., Inc. v. Warren Steurer, 665 F.2d 323 (10th Cir. 1981).

courts apply different criteria for limiting public access depending upon the type of judicial record involved.[20] The uncertain standards regarding limits on public access to judicial records, combined with a complete denial of public access in a case like *Infant Doe*, which involves controversial and unsettled legal issues, emphasizes the need for a clear and uniform procedure for courts to follow when deciding questions of public access.

This Note will examine the source of the public's right of access to judicial records by discussing the accepted common law source of the right and by exploring the possibility of a constitutional basis for the right. The scope of the right of public access will be probed by examining the balancing process courts use when faced with a conflict between the right of access and other interests. Finally, a procedure will be suggested for courts to follow when deciding which limits on public access to judicial records are justified.

II. The Source of the Right of Access to Judicial Records

A. *The Common Law Source*

American courts do not agree about the source of the public's right of access to judicial records. Although many courts acknowledge a common law right of public access to judicial records,[21] some courts suggest that the right of access is implied by first amendment guarantees.[22] The courts have recognized that the public's common law right of access to judicial records pre-dates the United States Constitution.[23] Underlying the courts' commitment to the common law right of access is the distrust of secretly administered justice that led to the abolition of English inquisitorial courts.[24] Exposing judicial

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[20]The term judicial records may refer to judges' opinions, *see* Lowenschuss v. West Publishing Co., 542 F.2d 180 (3d Cir. 1976), evidence, *see* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978), discovery material, *see* Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 54 (1982), pleadings, *see* Sanford v. Boston Herald Traveler Corp., 61 N.E.2d 5 (Mass. 1945); Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977), or the entire court file, *see* C. v. C., 320 A.2d 717 (Del. 1974).

[21]*See infra* notes 23-36 and accompanying text.

[22]*See e.g.*, Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 54 (1982); Miami Herald Publishing Co. v. Chappell, 403 So. 2d 1342 (Fla. Dist. Ct. App. 1981).

[23]United States v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). *Accord* Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981); United States v. Burka, 289 A.2d 376, 379 (D.C. 1972); *see also* Banks v. West Publishing Co., 27 F. 50, 59 (C.C.D. Minn. 1886).

[24]The Courts of Star Chamber, Chivalry and High Commission compelled self incrimination and handed out harsh punishment when the king's arbitrary proclama-

records to public view helps to " 'safeguard against any attempt to employ our courts as instruments of persecution.' "[25] The historical significance of the common law right of access has also been discussed as a function of the public's ownership of the law in a democratic system where "the law derives its authority from the consent of the public."[26]

Courts also recognize that justice and sound public policy require that the general public have convenient access to judicial decisions in a system that presumes and requires that each person knows the law.[27] As early as 1888, the United States Supreme Court held that a state could not prohibit an unofficial reporting service from copying and publishing the written opinions of state judges because "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute."[28]

The right of access to judicial records also serves an important function in a common law system based on the principle of stare decisis. The American legal system is a mixture of common law and statutory law. Within this system, judges declare and construe the law each time they decide a particular case; each case then has precedential force in subsequent similar cases.[29] By requiring precedents to be regarded as guiding principles in future cases, the doctrine of stare decisis promotes uniformity and continuity in the law and removes the capricious element from judicial decisionmaking.[30] When access to judicial records is denied, the decisions embodied in those records are not available for future use and have no precedential value. A legal system based upon the principle of stare decisis

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tions were disobeyed. The excesses of these courts led to their abolition in the sixteenth century. F. MAITLAND & F. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 103-28 (1978). *See also* A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW (1973).

[25]United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (quoting *In re* Oliver, 333 U.S. 237, 270 (1948)), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); United States v. Burka, 289 A.2d 376, 379 (D.C. 1972) (quoting Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83, 91 (Cal. Ct. App. 1968)). *See also* Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555, 564-73 (1980) (historical and contemporary significance of open criminal trials).

[26]Building Officials & Code Admin. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980).

[27]Nash v. Lathrop, 142 Mass. 29, 35, 6 N.E. 559, 560 (1886). *See also* Banks v. Manchester, 128 U.S. 244, 253 (1888); Connecticut v. Gould, 34 F. 319 (N.D.N.Y. 1888); Banks v. West Publishing Co., 27 F. 50, 57 (C.C.D. Minn. 1886); *Ex parte* Brown, 166 Ind. 593, 612, 78 N.E. 553, 559 (1906).

[28]Banks v. Manchester, 128 U.S. 244, 253 (1888).

[29]Lowenschuss v. West Publishing Co., 542 F.2d 180, 185 (3d Cir. 1976).

[30]People v. Hobson, 348 N.E.2d 894, 900-01, 384 N.Y.S.2d 419, 427 (1976). *See also* Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

cannot function effectively unless lawyers and courts have ready access to relevant decisions.[31]

The common law right of access to judicial records also allows the public to scrutinize judicial decisionmaking. Public scrutiny of the decisionmaking process helps prevent abuses of judicial authority[32] and may decrease the chance that litigation will be conducted in an improper manner.[33] Public access to judicial records also promotes confidence in the judicial system by allowing the public to scrutinize the competence and impartiality of judicial decisionmaking.[34] Finally, by permitting the public to know how courts function in individual cases, public access to judicial records helps produce an informed and enlightened public.[35]

As demonstrated above, many courts recognize that the public has a common law right of access to judicial records. Although the right has long been acknowledged, "[t]his common law right is not some arcane relic of ancient English law."[36] The democratic principles of open justice and enlightened self-government that underlie the right of access are vital principles in the American legal system. Furthermore, the public's need for access to judicial opinions and the important functions served by public scrutiny of judicial decisionmaking demonstrate the contemporary significance of the common law right of access.

B. Constitutional Source

The Supreme Court has not often addressed the issue of the source of the right of public access. The most recent case in which the Court directly examined this issue was *Nixon v. Warner Communications, Inc.*,[37] decided in 1978. In *Warner Communications*, the Court, in dicta, expressly recognized a common law right of public access to judicial records[38] and apparently rejected the possibility of a constitutional right of public access.[39] The Supreme Court has not again addressed

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[31]Lowenschuss v. West Publishing Co., 542 F.2d 180, 185 (3d Cir. 1976). *Accord Ex parte* Brown, 166 Ind. 593, 612, 78 N.E. 553, 559 (1906).

[32]*See supra* notes 24-25 and accompanying text.

[33]Jensen v. Jensen, 103 Misc. 2d 49, 51, 425 N.Y.S.2d 208, 209 (N.Y. Sup. Ct. 1980).

[34]United States v. Burka, 289 A.2d 376, 379 (D.C. 1972) (quoting Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83, 91 (Cal. Ct. App. 1968)).

[35]United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (quoting Grosjean v. American Press Co., 297 U.S. 233, 247 (1936)), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[36]United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[37]435 U.S. at 589 (1978) (dicta).

[38]*Id.* at 597.

[39]*Id.* at 608.

the issue of the source of the right of access, except by implication in *Richmond Newspapers, Inc. v. Virginia*[40] decided in 1980.

In *Warner Communications*, the Supreme Court addressed the issue of whether a federal district court should allow broadcasting companies to copy tapes that were admitted into evidence during a public session of the Watergate trial.[41] At the trial court level, the broadcasters petitioned the district court for permission to copy and broadcast the tapes that were played for the jury in the courtroom. The district court found that public broadcast of the tapes prior to a resolution of the Watergate defendants' appeals might prejudice the defendants' right to a fair trial. The court therefore denied the broadcasters' requests.[42]

The broadcasters appealed to the United States Court of Appeals for the District of Columbia Circuit. The appellate court reversed, emphasizing the importance of the common law right of access.[43] The

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[40]448 U.S. 555 (1980).

[41]In 1974, several individuals, including former Attorney General Mitchell and three former White House aides, were indicted for conspiring to obstruct justice by concealing the identities of the persons responsible for the Watergate break-in. Prior to trial, the Watergate Special Prosecutor subpoenaed tape recordings of conversations between Nixon and his former aides. Nixon contested the validity of the subpoena, but the Supreme Court upheld it in United States v. Nixon, 418 U.S. 683 (1974). The tapes were turned over to the district court which listened to them *in camera* and had a copy made of the admissible portions. The admissible portions were then turned over to the Special Prosecutor.

At the trial of Mitchell and the former aides most of the tapes were introduced into evidence as exhibits. During the trial, broadcasters petitioned Judge Sirica, the trial judge in the Watergate case, for permission to copy and broadcast the portions of the tapes admitted into evidence. Judge Sirica ruled that the broadcasters lacked standing to make a motion in the criminal case and ordered that the motion be converted into a separate civil action. Because Judge Sirica did not have time to consider the broadcasters' request during the Watergate trial, the civil action was referred to another district judge, Judge Gesell. Judge Gesell entered an opinion upholding the broadcasters' right to access, but because of anticipated administrative difficulties decided to withhold permission to copy the tapes until the Watergate trial had ended. United States v. Mitchell, 386 F. Supp. 639, 643 (D.D.C. 1975).

When the Watergate trial ended, Judge Gesell transferred the civil action back to Judge Sirica. Judge Sirica issued an opinion on "the narrow issue of the timing of the release" of the tapes. United States v. Mitchell, 397 F. Supp. 186, 187 (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). Judge Sirica found that distribution of the tapes could prejudice the Watergate defendants' rights if, on appeal, their convictions were reversed and a new trial was ordered. Judge Sirica, therefore, denied the broadcasters' requests. 397 F. Supp. at 188-89.

[42]United States v. Mitchell, 397 F. Supp. 186 (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).

[43]United States v. Mitchell, 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).

court described the common law right to inspect judicial records as "fundamental" to a democratic system of government, implying a constitutional basis for the right.[44] The court of appeals, however, found it unnecessary to decide whether a denial of the broadcasters' requests would infringe a constitutional right,[45] and based its decision to allow access on the public's common law right of access to judicial records.[46]

Upon former President Nixon's petition, the Supreme Court granted certiorari to review the appellate court's ruling.[47] The Supreme Court reversed the court of appeals decision and held that the issue was governed by the Presidential Recordings Act.[48] This Act was passed by Congress to provide an administrative procedure for public release of the Watergate tapes.[49] The Supreme Court rejected the broadcasters' argument that the first amendment guarantee of freedom of the press required the Court to grant their request to copy the tapes.[50] Some appellate courts have interpreted the Court's rejection of the first amendment claim in *Warner Communications* as an explicit rejection of a constitutional source for the right of public access to judicial records.[51] However, a careful reading of the Supreme Court's discussion is less conclusive than these appellate court decisions indicate.[52] In *Warner Communications*, the broadcasters claimed that the Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*[53] guaranteed the press the right to copy and publish exhibits displayed in public sessions of trials.[54] The Supreme Court rejected this argument, finding that *Cox Broadcasting* only held that courts cannot prohibit the press from publishing information contained in court records that are available to the public.[55] The Court found *Cox Broadcasting* inapplicable in *Warner Communications* because

> [t]here simply were no restrictions upon press access to, or publication of, any information in the public domain. . . . There

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[44]The court of appeals analogized the right of access to the first, fifth, sixth, and fourteenth amendments. *Id.* at 1258.

[45]551 F.2d at 1259.

[46]*Id.* at 1260.

[47]Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[48]44 U.S.C. § 2107 (1976), *cited in Warner Communications*, 435 U.S. at 603.

[49]435 U.S. at 603.

[50]*Id.* at 608-09.

[51]*See* United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 426 (5th Cir. 1981).

[52]*See infra* notes 66 and 69.

[53]420 U.S. 469 (1975).

[54]435 U.S. at 609. In *Cox Broadcasting*, the Court struck down a state law that prohibited press publication of the names of minor rape victims revealed in open court as violative of the first amendment. 420 U.S. at 495.

[55]435 U.S. at 609.

> is no question [in *Warner Communications*] of a truncated flow of information to the public. Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying. . . . The First Amendment generally grants the press no right to information about a trial superior to that of the general public.[56]

An analysis of the Court's statement requires an understanding of the specific factual context within which it was made. The Court in *Warner Communications* addressed the right of the broadcasters to copy tapes admitted into evidence and played for the jury in a courtroom open to the public and press. The press and other spectators were furnished transcripts of the tapes that were played for the jury. The Supreme Court only held that the first amendment does not guarantee the press physical access to copy exhibits when the public and press already have access to the information contained in those exhibits.[57] The Court did not address or decide the issue presented by the complete denial of public access in the *Infant Doe* case: whether the first amendment guarantees the public the right to information contained in judicial records.

The possibility of a first amendment guarantee of public access to information contained in judicial records was raised by the Supreme Court's plurality decision in *Richmond Newspapers Inc. v. Virginia.*[58] In *Richmond Newspapers*, the Court addressed the issue of whether a Virginia trial court had the authority to grant a criminal defendant's motion to exclude the public and the press from the courtroom during his trial. The United States Supreme Court reversed the Virginia Supreme Court's decision to uphold the closure order.[59] Because the United States Supreme Court's plurality decision contained six separate opinions, the Court's reasons for the reversal are far from clear.[60] Chief Justice Burger determined that "the [public's] right to attend criminal trials is implicit in the guarantees of the First Amendment."[61] Therefore, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[62] Justice

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[56]*Id.* (emphasis in original).

[57]*See* Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 432 (5th Cir. 1981). *But see* United States v. Myers, 635 F.2d 945, 952 (2d Cir. 1980).

[58]448 U.S. 555 (1980).

[59]*Id.* at 562, 581.

[60]A dissent was also entered by Justice Rehnquist, and Justice Powell did not participate.

[61]448 U.S. at 580.

[62]*Id.* at 581.

Stevens stated that the closure order in question was unacceptable because "the First Amendment protects the public and the press from [arbitrary] abridgment of their rights of access to information about the operation of their government, including the Judicial Branch."[63] Justice Brennan, joined by Justice Marshall, also characterized the right in question in *Richmond Newspapers* as a right of "access to information" that "may at times be implied by the First Amendment."[64] Brennan outlined a structural analysis in which a first amendment claim to a right of "access to governmental information is subject to a degree of restraint dictated by the nature of the information [sought] and countervailing interests in security or confidentiality."[65]

The issue brought before the Supreme Court in *Richmond Newspapers* concerned the public's right to attend criminal trials. The Court, therefore, did not directly address the issue of whether the first amendment implies a right of access to judicial records. The concurring opinions of Justices Stevens and Brennan, however, intimate that the first amendment guarantees may be broad enough to encompass the right of access to judicial records.[66] Furthermore, both public access to trials and public access to judicial records are based on the principle that justice should be conducted openly in a democratic society.[67] Therefore, the Supreme Court's plurality decision in *Richmond Newspapers*, that the first amendment guarantees public access

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[63] *Id.* at 584 (Stevens, J., concurring).

[64] *Id.* at 586 (Brennan, J., concurring).

[65] *Id. See also* Globe Newspaper Co. v. Superior Court 457 U.S. 596 (1982) (limitations on public access to criminal trials will be examined with strict scrutiny; safeguarding the physical and psychological well-being of a minor rape victim was found to be a compelling state interest, but the statute in question was not narrowly tailored to serve the interest and could not be relied upon to justify closure of criminal trials).

[66] *See* 448 U.S. at 582-84, 584-98 (Stevens, J., Brennan, J., concurring). *Cf.* United States v. Criden, 648 F.2d 814 (3d Cir. 1981). In *Criden*, the Court of Appeals for the Third Circuit weighed competing interests examined by the district court in a factual context similar to that in *Warner Communications*. The Third Circuit found that what it termed the common law right of access to judicial records outweighed the defendant's sixth amendment right to a fair trial in the circumstances of the case. The Third Circuit emphasized that under these circumstances, there was only a possibility that access to the tapes in the district court's custody would interfere with the defendant's right to a fair trial. However, the court did not explain how a common law right can, in any situation, prevail over a constitutional right. The Third Circuit's decision in *Criden* was criticized by the Fifth Circuit in Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 431 n.18 (5th Cir. 1981). *See also* Note, *The Common Law Right to Inspect and Copy Judicial Records:* In Camera *or On Camera*, 16 Ga. L. Rev. 659 (1982) (examines conflict in United States courts of appeals concerning proper balance of free press interest in public access and criminal defendant's fair trial rights).

[67] *See supra* notes 11, 24-25 and accompanying text.

to trials,[68] may itself suggest first amendment protection for public access to judicial records.[69]

The Supreme Court has not specifically ruled on the issue of whether a complete sealing of judicial records infringes upon a constitutional right. In *Warner Communications*, the Court only rejected the claim that the first amendment guarantees physical access to evidentiary exhibits which have been displayed in open court. The Court's decision in *Richmond Newspapers*, applies only to public access to criminal trials. *Richmond Newspapers*, therefore, suggests possibilities for finding a constitutional source for the right of access to judicial records but does not resolve the issue. The source of the right of access limits the scope of the right when it conflicts with other interests. Therefore, the uncertainty about the source of the right is, perhaps, the crux of the ambiguous standards used to limit public access. Without guidance from the Supreme Court, the courts are left to evaluate and protect the right of access on an ad hoc basis.

III. The Scope of the Right of Access to Judicial Records: An Examination of the Courts' Balancing Tests

The public generally has a right of access to judicial records without showing any special interest in or need for the information in the records.[70] Nevertheless, it is well settled that courts have the discretionary power to limit public access to judicial records when other interests conflict with the right of access.[71] Determining when

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[68]448 U.S. at 580 (opinion of Burger, C.J.). The Supreme Court noted that the considerations that mandate that the public have access to information about criminal trials are also applicable to civil cases. *Id.* at 580 n.17.

[69]In *Criden*, the Third Circuit stated:

> [T]he interests identified by the Court in *Warner Communications* as supporting the right to access [to judicial records], "the citizen's desire to keep a watchful eye on the workings of public agencies" and publication of "information concerning the operations of government," are identical to the interests identified in the subsequent decision in *Richmond Newspapers* . . . .

United States v. Criden, 648 F.2d 814, 820 (3d Cir. 1981) (citation omitted). *Cf.* Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981). In *Belo Broadcasting*, the Fifth Circuit stated: "Our reading of *Richmond Newspapers* convinces us that the holding of *Warner Communications* that the press enjoys no constitutional right of physical access to courtroom exhibits remains undisturbed. Despite a gentle suggestion perhaps to the contrary . . . ." *Id.* at 428. *See also* Note, *supra* note 66.

[70]*See supra* notes 13-14 and accompanying text.

[71]In Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), the Supreme Court stated that "[e]very court has supervisory power over its own records and files." *Id.* at 598. Courts often limit public access to records of divorce cases when court files would otherwise become "a vehicle for improper purposes." *Id. See, e.g., In re* Caswell,

limitations are appropriate, however, is sometimes difficult for the courts. In *Nixon v. Warner Communications, Inc.*,[72] the Supreme Court stated that a decision to limit the public's common law right of access to judicial records requires a balancing of various interests.[73] The Court in *Warner Communications* identified a number of interests to be weighed. Interests in favor of granting the broadcasters' requests were the increased public understanding of the Watergate situation and "the *presumption*—however gauged—in favor of public access to judicial records."[74] Interests opposing access included a number of arguments advanced by former President Nixon. Nixon argued that he had a proprietary interest in the sound of his voice, that his privacy would be infringed by public broadcast of the tapes, and that facilitation of the commercialization of the tapes by the courts would be improper.[75] The Supreme Court, however, declined to balance the various conflicting interests and relied on the Presidential Recordings Act[76] to determine the outcome.[77] It is important to note the Supreme Court's statement that except for the presence of the Presidential Recordings Act "we [the Supreme Court] normally would be faced with the task of weighing the interests advanced by the parties."[78] This statement suggests that an appellate court may reweigh competing interests advanced by the parties at the trial court level.[79] However, the Court also stated that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[80] The Supreme Court decision in *Warner Communications* left unanswered a number of questions regarding limits on public access to judicial records. Among these questions are: how strong is

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18 R.I. 835, 29 A. 259 (1893) (court records of divorce case should be sealed when access is sought "from mere curiosity" or "to gratify private spite or promote public scandal").

Courts also frequently seal records of defamation cases to prevent court files from becoming "reservoirs of libelous statements for press consumption." 435 U.S. at 598 (citing Park v. Detroit Free Press Co., 72 Mich. 560, 568, 40 N.W. 731, 734-35 (1888)). Similarly, courts seal their records concerning trade secret litigation to prevent the records from becoming "sources of business information that might harm a litigant's competitive standing." 435 U.S. at 598. *See also* Annot., 62 A.L.R. 2d 509 (1958). *See generally* Annot., 84 A.L.R. 3d 598 (1978).

[72]435 U.S. 589 (1978).

[73]*Id.* at 602.

[74]*Id.* (emphasis added).

[75]*Id.* at 600-01.

[76]44 U.S.C. § 2107 (1976).

[77]435 U.S. at 606-07.

[78]*Id.* at 602.

[79]*See supra* note 66.

[80]435 U.S. at 599.

the "presumption" favoring public access to judicial records;[81] what conflicting interests tip the scales in favor of denying access;[82] and what standards should appellate courts use to review decisions regarding public access.[83]

A. *The Right of Access in Criminal Cases*

1. *Federal Courts.*—Federal appellate courts are not in agreement as to the proper resolution of the questions left unanswered in *Warner Communications.* In *United States v. Myers,*[84] television networks claimed a common law right to copy and televise videotapes entered into evidence during public sessions of the Abscam trials. The Court of Appeals for the Second Circuit affirmed an order granting access to the tapes even though Myers' trial was still in progress and juries were soon to be selected for the trials of other Abscam defendants.[85] The Second Circuit acknowledged "a presumption in favor of public inspection and copying of any item entered into evidence at a public session of a trial."[86] The court found that "[o]nce the evidence has become known to the . . . public . . . through their attendance at a public session of court"[87] only the "most extraordinary" or the "most compelling" circumstances could prevent public access to the evidence.[88] The Second Circuit therefore found a very strong presumption in favor of public access, but limited the application of the presumption to evidence displayed in a courtroom open to the public.

In *Myers,* the Second Circuit balanced the public's right of access against the criminal defendant's constitutional right to a fair trial.[89] The court noted that increased public awareness of the tapes would not necessarily result in prejudiced jurors.[90] Furthermore, the defendants' exercise of rights such as voir dire examination and change of venue would adequately protect their right to a fair trial.[91] The court, therefore, held that the risk which adverse publicity posed to a fair trial was "too speculative to justify denial of the public's right to inspect and copy evidence presented in open court."[92] The court

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[81]*See infra* text accompanying notes 147-54.
[82]*See infra* text accompanying notes 155-58.
[83]*See infra* text accompanying notes 159-60.
[84]635 F.2d 945 (2d Cir. 1980).
[85]*Id.* at 947, 949.
[86]*Id.* at 952.
[87]*Id.*
[88]*Id.*
[89]*Id.* at 951.
[90]*Id.* at 953.
[91]*Id.*
[92]*Id.* at 954. The court did not explain how the protection of a common law right can ever justify even the possibility of infringing a constitutional right. *See also supra* note 66.

in *Myers* engaged in an extensive examination of the proper balance between the common law right of access and the right to a fair trial,[93] thus, indicating a willingness to reweigh the interests advanced in the district court.

In *Belo Broadcasting Corp. v. Clark*,[94] the Court of Appeals for the Fifth Circuit addressed many of the questions the Second Circuit faced in *Myers*. The Fifth Circuit reviewed district court orders denying broadcasters' requests to copy audiotapes admitted into evidence during a public session of a criminal trial. The tapes were made during the "Brilab" investigation which resulted in the indictment of four individuals.[95] The district judge denied the broadcasters' requests because public broadcast of the tapes might have made it difficult to impanel an impartial jury for the fourth defendant's trial. In *Belo Broadcasting*, the Fifth Circuit balanced the conflicting interests of the common law right of access to judicial records[96] with the criminal defendant's constitutional right to a fair trial.[97] In contrast to *Myers*, the Fifth Circuit did not begin its inquiry with a strong presumption favoring public access. Rather, the court in *Belo Broadcasting* identified the "presumption" favoring public access as only one factor to be weighed in deciding whether to allow the broadcasters to copy the tapes. The court stated that there is "no basis from which one can derive the overpowering presumption in favor of access discovered by the [Second Circuit]."[98] Purporting to follow *Warner Communications*, the Fifth Circuit reviewed the district court decision to deny access only for abuse of discretion and declined to reweigh the interests advanced by the parties in the district court.[99] Finding that "the provision to a defendant of a fair trial is a reasonable and necessary concern of the presiding judge," the court held that the district court's denial of the broadcasters' request was not an abuse of discretion.[100]

In *United States v. Edwards*,[101] the Court of Appeals for the Seventh Circuit addressed a factual situation analagous to those in *Myers* and *Belo Broadcasting*.[102] The Seventh Circuit, like the Second

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[93]635 F.2d at 951-54.

[94]654 F.2d 423 (5th Cir. 1981).

[95]The "Brilab" investigation was a Federal Bureau of Investigation "sting" operation concerned with alleged bribery in awarding state employee insurance contracts.

[96]654 F.2d at 429.

[97]*Id.* at 425.

[98]*Id.* at 434.

[99]*Id.* at 431-32.

[100]*Id.* at 431.

[101]672 F.2d 1289 (7th Cir. 1982).

[102]The Seventh Circuit addressed the issue of whether the district court erred in denying the media's requests to copy and broadcast audiotapes admitted into evidence during a public session of a criminal trial.

Circuit in *Myers*, found that "there is a strong presumption in favor of the common law right of access to judicial records."[103] The court stated, in dicta, that when the common law right of access to judicial records conflicts with a defendant's constitutional right to a fair trial, access should be denied only if "articulable facts known to the court"[104] show that "justice so requires."[105] That is, access should be denied only when necessary to ensure the defendant a fair trial. The Seventh Circuit noted that the district court did not clearly indicate what "articulable facts" led it to conclude that closure was necessary in *Edwards*. The Seventh Circuit said, "[w]e stress that it is vital for a court clearly to state the basis of its ruling, so as to permit appellate review of whether relevant factors were considered and given appropriate weight."[106] Nevertheless, the court reviewed the district court decision only for abuse of discretion and affirmed the order denying access.[107]

2. State Courts.—State courts have also examined the public's right of access to judicial records of criminal cases. In *Miami Herald Publishing Co. v. Chappell*,[108] a Florida appellate court examined the public's right of access in the context of a factual situation analagous to *Infant Doe*.[109] The Florida appellate court reviewed a trial court's decision to deny the public and press access to both a criminal pretrial competency hearing and the tapes of testimony presented during the hearing.[110] The appellate court found that the first amendment guarantees the public and the press access to criminal trials because "[i]nherent in our system of justice is a presumption of openness."[111] In the court's view, pretrial competency hearings must be open for the same reasons trials must be open.[112] Additionally, because pre-

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[103]672 F.2d at 1290.

[104]*Id.* at 1294.

[105]*Id.* at 1290. *See also* Note, *supra* note 66.

[106]672 F.2d at 1294.

[107]*Id.* at 1296-97.

[108]403 So. 2d 1342 (Fla. Dist. Ct. App. 1981).

[109]*Miami Herald* is similar to *Infant Doe* for two reasons. First, both cases involve a court's denial of public access to both the court proceedings and the court records, thus denying access to all information about the case. Second, in both cases, the sole impediment to access is a court's closure order. *Miami Herald* and *Infant Doe* differ in this respect from *Warner Communications*. In *Warner Communications*, the district court faced an additional problem because the tapes the broadcasters sought to copy were being used as evidence in the trial at the time access was sought. *See supra* note 42 and accompanying text.

[110]403 So. 2d at 1343.

[111]*Id.* at 1344.

[112]*Id.* For citations to authorities describing the importance of open trials, see *supra* note 11. *But cf.* Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (holding that the United States Constitution does not guarantee the right of access to a pretrial *suppression* hearing in which all participants have agreed that closure is appropriate to protect the defendant's fair trial rights).

trial proceedings may eliminate the need for a trial, "'if the public is routinely excluded from all proceedings prior to trial, most of the work of the criminal courts will be done behind closed doors.' "[113] The court, however, recognized that a defendant's right to a fair trial may sometimes conflict with the public's right of access to information; therefore, the court adopted a test for reviewing closure orders.[114] The court held that the public can be denied access to court proceedings and *court records* only if the party opposing access proves that: "(1) closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) no less restrictive alternative measure is available, and (3) closure will in fact achieve the court's purpose."[115]

This test requires the court to balance the public's right of access with conflicting interests. The heavy burden of proof that this test places on the party requesting closure is consistent with the court's description of the right of access as a "First Amendment freedom."[116] Using these criteria, the court found that closure was not necessary to ensure the defendant a fair trial.[117] The court, however, indicated that a concrete threat to a criminal defendant's constitutional right to a fair trial is one example of "a serious and imminent threat to the administration of justice."[118] *Miami Herald* also suggests that unless closure is required by "a serious and imminent threat," first amendment guarantees may be infringed when public access to the information contained in judicial records is completely denied by a closure order encompassing both court proceedings and court records.[119]

In *Northwest Publications, Inc. v. Anderson*,[120] the Supreme Court of Minnesota also examined the public's right of access to judicial records. In *Northwest Publications*, the court reviewed two separate orders that prohibited public access to judicial records relating to pending criminal cases. In one case, the accused was charged by complaint with murder. Responding to a joint motion by the state and

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[113] 403 So. 2d at 1345 (quoting Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 436, 399 N.E.2d 518, 523, 423 N.Y.S.2d 630, 636 (N.Y. 1979)).

[114] 403 So. 2d at 1345.

[115] *Id.*

[116] *Id.*

[117] Because only the defendant's ability to assist counsel would be in question at the competency hearing, and not his guilt, innocence, or sanity, the court stated that public access did not endanger the defendant's right to a fair trial. *Id.*

[118] *Id.*

[119] *Cf.* Krause v. Rhodes, 671 F.2d 212, 217 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982) (balancing "emanations from the First Amendment such as the public's right to know" and "legitimate privacy rights of many individuals," the *Rhodes* court affirmed a lower court order allowing public disclosure of discovery material that was not entered into evidence at trial).

[120] 259 N.W.2d 254 (Minn. 1977).

the defendant, the trial court denied the public access to the state's complaint.[121] Similarly, in the second case, the trial court sealed the court file in a pending criminal case upon the joint motion of the defendant and the state.[122] Newspapers petitioned the Minnesota Supreme Court for writs of prohibition to restrain the trial courts from enforcing the closure orders.

The Minnesota Supreme Court discussed the nature of the right of access to judicial records and outlined a procedure for reviewing orders denying public access. Although the court described the right of access in terms of first amendment prohibitions of prior restraints on press publication, the court clearly stated that the review procedure applied to "decision[s] to limit *public* access to [judicial] records."[123] The court noted that closure is justified only in a "rare or extraordinary case" where public access interferes with a criminal defendant's right to a fair trial.[124] The court, however, found that the decision regarding access should largely remain with the trial court judge, and outlined a procedure to ensure a complete record from which an appellate court could effectively conduct a limited review.[125] The party requesting closure must make a "clear and substantial showing" that closure is justified.[126] This burden of proof must be met in "an adversary setting at which the public must be represented and afforded an opportunity to be heard."[127] The trial court must make "specific factual findings" showing how the court reached its conclusion that closure was "necessary" under the circumstances of the case.[128] The trial court must also consider all alternatives to closure and state its reasons for finding each alternative inadequate.[129] Ex-

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[121]Without the closure order, the complaint would have been filed with the clerk of the court and become a public record to which the public has a right of access.

[122]The court file included "orders for search warrants, supporting affidavits, and return of search warrants." 259 N.W.2d at 256 (quoting order of St. Louis County, Minn., District Ct. (July 29, 1977) (directing court clerk to allow public inspection of court file)).

[123]*Id.* at 257 (emphasis added).

[124]*Id.* The court cited the following cases as authority for the statement that in rare cases sealed records may be justified:

1) Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (in dicta, the United States Supreme Court refused to hold that the accused's sixth amendment right to a fair trial is subordinate to the press' first amendment right to publish in all circumstances); 2) Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (in dicta, the court stated that the sixth amendment right to a fair trial must take precedence over the attorney's free speech right to make comments about pending litigation when there is an irreconcilable conflict between the rights), *cert. denied*, 427 U.S. 912 (1976).

[125]259 N.W.2d at 257.

[126]*Id.* at 258.

[127]*Id.* at 257.

[128]*Id.*

[129]*Id.* For examples of alternatives to closure see *supra* note 19.

amining the records of the two cases before it, the Minnesota Supreme Court concluded that each was "barren of any facts or other evidence which would constitute a clear and substantial showing" justifying denial of public access.[130]

B. The Right of Access in Civil Cases

Courts have also examined the public's right of access to judicial records of civil cases. In *Krause v. Rhodes*,[131] the Court of Appeals for the Sixth Circuit reviewed public disclosure orders issued by a district court. The orders allowed the public access to discovery material generated by civil cases arising from the Ohio National Guard action at Kent State University in 1970. The discovery material covered by the disclosure orders was not admitted at trial and never became part of the trial records. The Sixth Circuit identified several conflicting interests in the case before it. In favor of allowing disclosure were "emmanations from the First Amendment such as the public's right to know" and the historical relevance of the events portrayed in the records.[132] Opposing access were the privacy interests of individuals whose statements were recorded in the discovery materials in question.[133] Although the court identified the public's right of access as a first amendment right, the Sixth Circuit noted that " 'the decision as to access is one best left to the sound discretion of the trial court.' "[134] Reviewing the orders only for abuse of discretion,[135] the Sixth Circuit found that the district judge had properly balanced conflicting interests by allowing public access, while ordering the deletion of witnesses' names.[136]

In *Lowenschuss v. West Publishing Co.*,[137] the Court of Appeals for the Third Circuit examined the public's right of access to judicial opinions. Lowenschuss, a lawyer, brought a defamation action against West Publishing for the verbatim publication of a federal district judge's opinion containing an allegedly defamatory footnote.[138] Reviewing the

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[130]259 N.W.2d at 258.

[131]671 F.2d 212 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982).

[132]*Id.* at 217. *Cf. In re* "Agent Orange" Litigation, 9 Media L. Rep. (BNA) 1083 (E.D.N.Y. Jan. 18, 1983) (no first amendment right of access by non-parties to materials produced in discovery but not filed with the court and thus not made part of the public record).

[133]671 F.2d at 217.

[134]*Id.* at 219 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978)).

[135]671 F.2d at 219.

[136]*Id.* at 217.

[137]542 F.2d 180 (3d Cir. 1976).

[138]Lowenschuss sought damages and a mandatory injunction to compel West to print an explanation with the controversial footnote. The footnote read: "It should be of some interest to the appropriate body of the Pennsylvania Bar whether the

district court's dismissal of the suit, the Court of Appeals for the Third Circuit recognized a "public interest in and need for access to verbatim reports of judicial decisions without excessive delay or expense."[139] The Third Circuit found that a common law system based upon the principle of stare decisis cannot function effectively unless authoritative precedents are readily available. Given the need for public access, the Third Circuit found that the judicial branch has a "duty" to publish and disseminate its decisions.[140] Because judges must be unhampered in the publication of their decisions, "a judge is absolutely privileged to publish even defamatory statements" if it has some relation to the case before the judge.[141] The Third Circuit found that the judge's absolute privilege extended to West Publishing in this case because "West's verbatim publication and effective dissemination of judicial opinions serves an intrinsic function in our system of jurisprudence."[142] The Third Circuit therefore upheld the dismissal of the suit.

IV. Analysis of the Courts' Balancing Process

The cases discussed above demonstrate that the public's right of access to judicial records is broad. The right may be exercised to gain access to court records of both criminal and civil cases. The right extends from discovery material,[143] to evidence displayed in open court,[144] to judge's opinions.[145] Considered altogether, these cases suggest some general answers to the questions left unresolved by the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*:[146] the strength of the presumption favoring public access, the interests that outweigh the right of access, and the standards appellate courts should use to review trial court decisions to limit or allow public access.

The first question left unresolved by *Warner Communications* is the strength of the presumption to allow public access to judicial records. The Fifth Circuit, in *Belo Broadcasting*, stated that the Supreme Court's decision in *Warner Communications* was inconclusive

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plaintiff, a lawyer, truly purchased these shares as an investment for his pension plan or merely as a vehicle for this litigation in which counsel fees are sought." *Id.* at 182 (quoting Lowenschuss v. Kane, 367 F. Supp. 911, 913 n.1 (S.D.N.Y. 1973). *rev'd,* 520 F.2d 255 (2d Cir. 1975)).

[139] 542 F.2d at 185.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 186.

[143] *See* Krause v. Rhodes, 671 F.2d 212 (6th Cir.), *cert. denied,* 103 S. Ct. 54 (1982).

[144] *See* United States v. Myers, 635 F.2d 945 (2d Cir. 1980).

[145] *See* Lowenschuss v. West Publishing Co., 542 F.2d 180 (3d Cir. 1976).

[146] 435 U.S. 589 (1978).

regarding the weight to be assigned to the common law right of access to judicial records. The Fifth Circuit then described the presumption favoring public access as only one factor to be considered when deciding whether to limit access.[147] This discussion indicates that the Fifth Circuit viewed the presumption language in *Warner Communications* not as an evidentiary presumption resulting from the common law right of access, but rather as another way to describe the right itself.

In contrast to *Belo Broadcasting*, the majority of decisions have found a strong evidentiary presumption favoring public access that the party opposing access must overcome. In *Myers*, the Second Circuit found that only the "most compelling" circumstances justify denying public access to exhibits displayed in open court.[148] Similarly, in *Edwards*, the Seventh Circuit found a strong presumption in favor of public access.[149] The state courts in *Miami Herald* and *Northwest Publications* identified the first amendment as the source of the public's right of access and therefore strictly scrutinized arguments that a criminal defendant's right to a fair trial required a denial of public access.[150]

In civil cases most courts also assign the right of access more significance than did the Fifth Circuit in *Belo Broadcasting*.[151] For example, in *Krause v. Rhodes*,[152] the Sixth Circuit found that the "public's right to know" about the events surrounding the Kent State killings was based on the first amendment. The court, therefore, assigned the right significant weight when it was balanced against privacy interests.[153] In *Lowenschuss*, the Third Circuit found that the public's need for access to judicial opinions was crucial to the effective

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[147]*See supra* text accompanying note 98.

[148]*See supra* text accompanying notes 87-88.

[149]*See supra* text accompanying note 103.

[150]*See supra* text accompanying notes 115-19 and 123-29.

[151]Courts employ various protective measures to preserve confidentiality while allowing public access. *See, e.g.*, Centurion Indus., Inc. v. Warren Steurer & Assoc., 665 F.2d 323 (10th Cir. 1981) (protective orders fashioned by trial court held sufficient to protect against improper disclosure of trade secret when enforcing subpoenas to litigate trade secrets dispute); United States v. Doe, 496 F. Supp. 650 (D.R.I. 1980) (use of pseudonym "Doe" for juvenile petitioner sufficient to protect interests of juvenile); Application of Anonymous, 89 Misc. 2d 132, 390 N.Y.S.2d 779 (N.Y. Fam. Ct. 1976) (natural parents are necessary parties in an adoption proceeding, but court appointed guardian ad litem to protect the natural parents' anonymity); Olman v. Olman, 205 Or. 216, 286 P.2d 662 (1955) (evidence sustained finding that wife was entitled to divorce on grounds of cruel and inhuman treatment, but particular reference in appellate opinion to factual reasons for holding deemed unnecessary).

[152]671 F.2d 212 (6th Cir. 1982).

[153]*See supra* text accompanying notes 132-36.

operation of the American legal system and extended the judge's absolute immunity to protect West Publishing's publication of a defamatory judicial opinion.[154]

The second question left unanswered by the Supreme Court's decision in *Warner Communications* is what interests outweigh the public's right of access to judicial records. That is, when other interests conflict with the right of access, which interests preclude an exercise of the right. Although *Belo Broadcasting* indicates that closure is justified whenever adverse publicity poses any threat to a criminal defendant's fair trial rights,[155] the majority of the decisions indicate that the party opposing access must clearly demonstrate both that public access poses a real, immediate threat to a fair trial, and that less restrictive alternatives such as voir dire examination or change of venue will not adequately ensure a fair trial if public access is allowed.[156] Similarly, the privacy interests of litigants or witnesses in civil cases do not justify denying public access if less restrictive measures, such as the deletion of names from the court's records, will protect those privacy interests.[157] Finally, *Lowenschuss* demonstrates that the public's right of access to judicial opinions outweighs even a lawyer's interest in maintaining his good reputation.[158]

The final question left unanswered by *Warner Communications* is what standard appellate courts should use to review trial court decisions regarding public access to judicial records. Although the courts in *Myers* and *Miami Herald* indicated a willingness to reweigh the interests advanced by the parties in the trial court,[159] the majority of the decisions expressly state that the appropriate level of appellate review is for abuse of discretion.[160]

The cases discussed above provide some general principles for deciding when limits on public access are justified. However, these diverse cases only address limitations on access within the specific circumstances of individual cases. The discernible general principles cannot be used effectively until they are translated into clear standards applicable to many types of judicial records and applicable to a variety of factual situations.

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[154]*See supra* text accompanying notes 139-42.

[155]*See supra* text accompanying notes 96-100.

[156]*See, e.g.*, United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982).

[157]*See supra* note 151 and text accompanying note 136.

[158]*See supra* text accompanying notes 140-42.

[159]*See supra* text accompanying notes 93, 115-17.

[160]*See, e.g.*, United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982); Krause v. Rhodes, 671 F.2d 212 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981); Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977).

V. Suggested Procedure

This procedure is suggested as a rule of appellate procedure for the purpose of reviewing trial court decisions to deny public access to judicial records. The procedure is applicable to decisions denying public access to records of either civil or criminal cases.

1. The public may not be denied access to judicial records unless the party petitioning for closure demonstrates that justice so requires.

   (a) A trial court, upon receiving a petition to deny public access to the records in its custody, shall hold a hearing within thirty days for the purpose of determining whether closure will be ordered. At the hearing, the public must be represented and afforded an opportunity to be heard.

   (b) The party petitioning for closure has the burden of proving by clear and convincing evidence that closure is necessary to protect a countervailing interest.

   (c) The trial court shall make specific factual findings which led it to conclude that closure was necessary under the circumstances of the particular case.

   (d) The trial court shall consider alternatives to closure, and state the reasons for its conclusion that other alternatives are inadequate to protect the interests advanced by the petitioning party.

2. A petition to review an order excluding the public from access to judicial records, if the records are not required by law to be confidential, shall be filed in the appellate court, within thirty days following the issuance of the closure order. A copy shall be furnished to the judge issuing the closure order and to all parties involved. Review by the appellate court is limited to review for abuse of discretion.

Section 1 of the suggested procedure establishes a presumption to allow public access to judicial records. Unless the Supreme Court clearly acknowledges a constitutional source for the public's right of access to judicial records, a procedure outlining standards for reviewing closure orders should assume a common law source for the right. Nevertheless, the democratic principles underlying the common law right of access to judicial records demonstrate that the right serves important functions in the American legal system.[161] The significance of the common law right suggests that a strong presumption in favor of access is justified even if the right is not protected by the United

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[161] *See supra* text accompanying notes 23-35.

States Constitution. By requiring the party petitioning for closure to demonstrate that justice requires denying public access, Section 1 establishes a strong presumption to allow access, in line with the federal court of appeals decisions in *Myers*[162] and *Edwards*,[163] yet avoids the stringent standards enunciated by courts finding a constitutional source for the public's right of access.[164]

Section 1(a) follows the procedure outlined in *Northwest Publications* requiring a hearing before closure is ordered.[165] Although the court in *Northwest Publications* found a first amendment source for the right of access, the hearing requirement is also appropriate in a procedure relying on the common law right of access. Unless a forum is provided where the public can protect the common law right, the right has little meaning or force.

Section 1(b) places on the party requesting closure the burden of persuading the court by clear and convincing evidence that closure is necessary to protect competing interests. The cases discussed in this Note do not give precise indications of the proper burden of persuasion that must be met to justify denying public access. However, the standards ennunciated by the courts in *Myers* ("the most compelling circumstances"),[166] in *Edwards* ("justice so requires"),[167] in *Miami Herald* ("a serious and imminent threat to the administration of justice"),[168] and in *Northwest Publications* ("clear and substantial showing")[169] demonstrate that a heavier burden of proof than the normal civil standard of proof by a preponderance of the evidence is appropriate.[170]

Section 1(c) follows *Edwards* and *Northwest Publications* by emphasizing that a clear statement of the trial court's reasons for ordering closure is necessary for effective appellate review.

The criminal cases discussed above demonstrate that the public may not be denied access to judicial records when the defendant's fair trial rights can be protected by less restrictive measures such as voir dire examination and change of venue.[171] Similarly, in *Krause* the Sixth Circuit found that public access could not be denied when the deletion of names protected privacy interests that conflicted with

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[162]*See supra* text accompanying notes 86-88.

[163]*See supra* text accompanying notes 103-05.

[164]*See, e.g.*, Miami Herald Publishing Co. v. Chappell, 403 So. 2d 1342, 1345 (Fla. Dist. Ct. App. 1981) (stating that the party opposing access must prove that "closure is necessary to prevent a serious and imminent threat to the administration of justice").

[165]*See supra* note 142 and accompanying text.

[166]635 F.2d at 952.

[167]672 F.2d at 1290.

[168]403 So. 2d at 1345.

[169]259 N.W.2d at 258.

[170]*See generally* C. McCormick, Handbook of the Law of Evidence §§ 339-41 (2d ed. 1972).

[171]*See, e.g.*, United States v. Myers, 635 F.2d 945, 953 (2d Cir. 1980).

the public's right of access.[172] Section 1(d) of the suggested procedure follows these cases by requiring the trial court to consider alternatives to closure. To facilitate appellate review, this subsection also requires the trial court to state the reasons that other methods were deemed inadequate.

Section 2 of the suggested procedure recognizes a forum for vindication of the common law right of access when public access is denied by a trial court.[173] Each of the cases discussed in this Note demonstrates that a forum for reviewing denials of public access is appropriate; in each case an appellate court reviewed a lower court's decision regarding public access. Section 2 also acknowledges that some judicial records, such as records of adoption[174] and juvenile court proceedings,[175] are required by law to be confidential and excludes from appellate review closure orders directed to these records. Guided by the express statements in the majority of cases, Section 2 provides for limited appellate review for abuse of discretion.

VI. Conclusion

United States courts recognize the historical and contemporary importance of the public's right of access to judicial records. The right is based upon the distrust of secretly administered justice and the principle that the law proclaimed and construed by courts must be available to all, because it binds everyone. The right of access also serves the doctrine of stare decisis by ensuring that relevant decisions are available for future use. Furthermore, the right of access allows the public to scrutinize judicial decision making. Such public scrutiny helps to prevent abuses of judicial authority, to promote confidence in the judicial system, and to produce an informed and enlightened public.

Although the significance of the right of access is well recognized, the courts have not provided clear standards for limiting public ac-

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[172]*See supra* text accompanying note 136.

[173]Section 2 is modeled after Fla. R. App. P. 9.100, *quoted in* Miami Herald Publishing Co. v. Chappell, 403 So. 2d 1342, 1342-43 n.1 (Fla. Dist. Ct. App. 1981):

> (d) Exception; Orders Excluding Press or Public.
>
> (1) A petition to review an order excluding the press or public from access to any proceeding, any part of a proceeding, or any judicial records, if the proceedings or records are not required by law to be confidential, shall be filed in the court as soon as practicable following rendition of the order to be reviewed, if written, or announcement of the order to be reviewed, if oral. A copy shall be furnished to the person . . . issuing the order, and the parties to the proceeding.

[174]*See, e.g.*, Ind. Code § 31-3-1-5 (Supp. 1983).

[175]*See, e.g.*, 18 U.S.C. § 5038 (1976); Ind. Code § 31-6-8-1 (1982).

cess to judicial records. A number of factors that contribute to the uncertainty surrounding the standards used to limit public access have been identified. Perhaps the most significant factor is the indecision about the source of the right of public access. The source of the right of access affects the scope of the right and limits the right when it is balanced against other interests. As long as the source of the right of access remains in doubt, other aspects of the right also remain undefined. If the United States Supreme Court were to give clearer direction concerning the source of the right of public access, then the courts could apply and protect the right in a more uniform manner.

Identification of the source of the right of public access, however, would not alone cure the problem of uncertain standards. The need for a clearly articulated procedure for imposing and reviewing limitations on public access is emphasized by a complete denial of public access in a case, like *Infant Doe*, involving controversial and unsettled legal issues. The decision in *Infant Doe* led to public outcry[176] which was, perhaps, intensified by the denial of access to information about the case. The public reaction to *Infant Doe* required the Indiana Legislature to attempt to draft responsive legislation without complete information about the case.[177] The public and the Indiana Legislature might have responded to the *Infant Doe* decision even if information about the case had been available. The response, however, might have been foreclosed, or more informed, if the facts and law underlying the decision had been available for public inspection. If judicial bodies develop procedural rules, such as the procedure suggested above, for the imposition and review of closure orders, the public will be assured that information about cases like *Infant Doe* will be available except in the rare case where justice requires the records to be sealed.

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[176]Indianapolis Star, Apr. 27, 1982, at 1, col. 4.

[177]Act of Apr. 19, 1983, Pub. L. No. 288, 1983 Ind. Acts 1783 (codified at IND. CODE § 31-6-4-3 (Supp. 1983)).