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## Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right

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## NOTES

### COPYING AND BROADCASTING VIDEO AND AUDIO TAPE EVIDENCE: A THREAT TO THE FAIR TRIAL RIGHT

#### INTRODUCTION

The public and the press have a common-law right to inspect and copy public records.<sup>1</sup> With respect to criminal court records,<sup>2</sup> this right is most often exercised by the press to enable the public to monitor the workings of its government's judicial branch.<sup>3</sup> In 1980,

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1. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Ex parte Uppercu*, 239 U.S. 435, 439-40 (1915); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 949 (2d Cir. 1980); *United States v. Hubbard*, 650 F.2d 293, 314 (D.C. Cir. 1980); *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504, 506-07 (C.C.D. Colo. 1902); *Ex parte Drawbaugh*, 2 App. D.C. 404, 407-08 (D.C. Cir. 1894); *In re McLean*, 16 F. Cas. 237, 239 (C.C.S.D. Ohio 1879) (No. 8,877); *United States v. Carpentier* (Carpentier II), 526 F. Supp. 292, 294-95 (E.D.N.Y. 1981); *United States v. Ming Sen Shiue*, 504 F. Supp. 360, 361 (D. Minn. 1980); *In re Mosher*, 248 F.2d 956, 958-59 (C.C.P.A. 1957); *In re Sackett*, 136 F.2d 248, 249 (C.C.P.A. 1943); *C. v. C.*, 320 A.2d 717, 723 (Del. 1974); *United States v. Burka*, 289 A.2d 376, 379 (D.C. 1972); *Schmedding v. May*, 85 Mich. 1, 4-5, 48 N.W. 201, 202 (1891); *Werfel v. Fitzgerald*, 23 A.D.2d 306, 308-09, 260 N.Y.S.2d 791, 794-95 (1965); *North v. Foley*, 238 A.D. 731, 733, 265 N.Y.S. 780, 782 (1933); *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758, 762-63 (N.D. 1967); *In re Caswell*, 18 R.I. 835, 835, 29 A. 259, 259 (1893); see H. Cross, *The People's Right to Know* 25-37, 55-56 (1953); 1 S. Greenleaf, *A Treatise on the Law of Evidence* §§ 471-473 (12th ed. Boston 1866). There are also statutes that grant a right to inspect and copy public records, but some, such as the federal Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. II 1978), expressly exclude court records from their coverage. *Id.* § 552(e). State courts have held that court records are excluded from the coverage of statutes granting access to public records. *E.g.*, *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 157-58, 61 N.E.2d 5, 6 (1945); *Grand Forks Herald, Inc. v. Lyons*, 101 N.W.2d 543, 545 (N.D. 1960).

2. Most judicial records are considered to be public records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975); *State ex rel. Holloran v. McGrath*, 104 Mont. 490, 497, 67 P.2d 838, 841 (1937); *North v. Foley*, 238 A.D. 731, 733, 265 N.Y.S. 780, 782 (1933); H. Cross, *supra* note 1, at 136. Some judicial records are not open to public inspection, either because of statute or the trial judge's discretion. *Id.* at 143-52.

3. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863

the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*<sup>4</sup> held that the public has a first amendment right to attend criminal trials,<sup>5</sup> and thus arguably elevated the correlative right to inspect to constitutional status.<sup>6</sup> Two years earlier, however, in *Nixon v. Warner Communications, Inc.*,<sup>7</sup> the Supreme Court had held that the first amendment does not protect the right to copy all judicial records.<sup>8</sup> Rather, the Court concluded that the common-law right to copy provides merely a presumption, "however gauged," in favor of copying judicial records.<sup>9</sup> It is the tension between the right to copy and the right of the accused to a fair trial that has been the center of controversy in the cases involving the press's requests for the release of the Abscam<sup>10</sup> and Brilab<sup>11</sup> tapes.

(1974) (Powell, J., dissenting); *Estes v. Texas*, 381 U.S. 532, 539 (1965); *Medico v. Time, Inc.*, 643 F.2d 134, 141 (3d Cir. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus.*, No. 74-2451, slip op. at 65 (E.D. Pa. Dec. 10, 1981); *United States v. Ming Sen Shiu*, 504 F. Supp. 360, 361 (D. Minn. 1980); *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 159, 61 N.E.2d 5, 7 (1945); *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

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

5. *Id.* at 580 (plurality opinion).

6. *See id.* at 583 (Stevens, J., concurring); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 427-29 (5th Cir. 1981); *United States v. Criden*, 648 F.2d 814, 820-22 (3d Cir. 1981); *United States v. Carpentier* (Carpentier II), 526 F. Supp. 292, 294-95 (E.D.N.Y. 1981).

7. 435 U.S. 589 (1978).

8. *Id.* at 608-10.

9. *Id.* at 602.

10. Abscam is a coined word derived from the joining of the first two letters of Abdul Enterprises, Ltd., a fictitious entity represented by undercover F.B.I. agents, and the word "scam," which means a swindle or sting operation. The videotapes involved, surreptitiously made by the F.B.I., show the defendants discussing with the agents their willingness to take a bribe and, in some cases, actually taking the bribe. For a good summary of the facts of the Abscam cases, see *United States v. Myers*, 635 F.2d 945, 947-48 (2d Cir. 1980). *Myers* cites the seven prosecutions resulting from the Abscam investigations: *United States v. Jenrette*, No. Cr-80-00289 (D.D.C.); *United States v. Kelly*, No. Cr-80-00340 (D.D.C.); *United States v. Criden*, No. 80-166 (E.D. Pa.); *United States v. Thompson*, No. Cr-80-00291 (E.D.N.Y.); *United States v. Lederer*, No. Cr-80-00253 (E.D.N.Y.); *United States v. Myers*, No. Cr-80-00249 (E.D.N.Y.); and *United States v. Carpentier*, No. Cr-80-00102 (E.D.N.Y.). This Note discusses *Myers*, *Jenrette*, *Criden* and *Carpentier*, in which the issue of the release of the tapes was extensively analyzed. The case involving the release of the Watergate tapes is also discussed in this Note. The Watergate case, *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), was the trial of five defendants for their involvement with the break-in of the Democratic National Committee Headquarters in June of 1972 and the subsequent cover-up. The tapes recorded conversations that took place in the Oval Office of the White House. *Id.* at 57-59.

11. Brilab, an acronym that results from the joining of the words bribery and labor, is the name of another F.B.I. sting operation involving alleged bribery in the awarding of state employee insurance contracts, wherein audio tapes recorded the conversations between the defendants and the F.B.I. agents. In *Belo Broadcasting*

Made in the course of government sting operations, these tapes revealed the defendants either discussing or committing the acts for which they were tried.<sup>12</sup> The tapes were played to the jury in open court,<sup>13</sup> and members of the press and public attended and were often allowed to follow along with court-furnished transcripts.<sup>14</sup> The transcripts were subsequently reproduced in whole or in part in the print media.<sup>15</sup> Television and radio networks sought to copy the tapes in order to broadcast them to the public.<sup>16</sup> They argued that the public, by actually hearing and seeing the tapes, could gain knowledge that would not be obtained by merely reading the transcripts.<sup>17</sup> The requests to copy were usually opposed either by the defendants at whose trial the tapes were introduced into evidence or by persons

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Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981), the Fifth Circuit decided not to release these tapes to the media for copying.

12. See *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 425 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 611 (D.C. Cir. 1981); *United States v. Myers*, 635 F.2d 945, 947 (2d Cir. 1980); *United States v. Carpentier* (Carpentier II), 526 F. Supp. 292, 293 (E.D.N.Y. 1981); *United States v. Criden*, 501 F. Supp. 854, 855 (E.D. Pa. 1980), *rev'd*, 648 F.2d 814 (3d Cir. 1981); *cf. United States v. Haldeman*, 559 F.2d 31, 58 & n.23 (D.C. Cir. 1976) (Watergate case), *cert. denied*, 431 U.S. 933 (1977).

13. All those in attendance at the Watergate, Abscam and Brilab trials were allowed to view or listen to the tapes. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 427 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 611 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 948 (2d Cir. 1980); *United States v. Mitchell*, 551 F.2d 1252, 1255 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *United States v. Carpentier* (Carpentier I), No. Cr-80-00102, slip op. at 1 (E.D.N.Y. Dec. 1, 1980). The tapes introduced into evidence during Carpentier's sentencing hearing were not played in open court. *United States v. Carpentier* (Carpentier II), 526 F. Supp. 292, 294 (E.D.N.Y. 1981).

14. See *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 427 (5th Cir. 1981); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981); *United States v. Mitchell*, 551 F.2d 1252, 1255 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). *But see In re National Broadcasting Co.*, 653 F.2d 609, 611 (D.C. Cir. 1981) (transcripts of audio, but not video, tapes furnished); *United States v. Myers*, 635 F.2d 945, 948 (2d Cir. 1980) (transcripts furnished to members of press only).

15. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 427 (5th Cir. 1981); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981); *United States v. Mitchell*, 551 F.2d 1252, 1255 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

16. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 425 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 611 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 815-16 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 948 (2d Cir. 1980); *United States v. Mitchell*, 551 F.2d 1252, 1255 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

17. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 602 (1978); *United States v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980).

implicated by the tapes who were under indictment and awaiting trial.<sup>18</sup> The primary argument against release of the tapes is that their broadcast would severely impair the chance of those implicated to receive a fair trial.<sup>19</sup> The rationale for this argument is that the broadcast of the tapes on radio and television is likely to reach more jurors and potential jurors and to leave a greater impression than printed publication of transcripts.<sup>20</sup>

These and other<sup>21</sup> tapes cases have forced courts to consider whether *Richmond* created a constitutional right to inspect and

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18. In the Watergate tapes case, the application to copy was opposed in the district court by former President Nixon. *United States v. Mitchell*, 551 F.2d 1252, 1254 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). When the case was appealed to the court of appeals, defendant H.R. Haldeman joined Nixon in opposing the request. *Id.* at 1262 n.47. The United States attorneys submitted a memorandum stating that the government did not believe unfairness to the defendant would result if the tapes were released for copying. They maintained, however, that "since the extent of the dissemination of these tape recordings or the manner in which they will be reproduced and broadcast is entirely speculative at present, the government is unable to conclude with certainty that large-scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial." Memo of Appellee United States at 2, *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), *reprinted in* Petition for Writ of Certiorari app. R, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In the first Abscam tapes case, *United States v. Myers*, 635 F.2d 945 (2d Cir. 1980), the application to copy the tapes was opposed by defendants Myers, Errichetti, Johanson and Criden. *Id.* at 946. Errichetti was facing one other indictment, Johanson two others and Criden three. *Id.* at 947-48. The government in this case did not oppose the release of the tapes for copying, but suggested that in the event of release sequestration of the jury would be necessary to secure a fair trial. *Id.* at 953 n.8. In the second Abscam tapes case, *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), defendants Janotti and Schwartz and indietee Criden opposed the request, and the government made no appearance. *Id.* at 815, 817. In the third Abscam tapes case, *In re National Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981), only defendant Jenrette opposed the application to copy the tapes. *Id.* at 610. The government had originally supported the application, but because Jenrette commenced a civil suit against it, that support was withdrawn. *Id.* at 611 n.5. In the Brilab tapes case, *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981), only defendant Clark opposed the copying request. *Id.* at 425. The Special Prosecutor of the Watergate cases expressed a concern that televised Senate hearings on the matter "might prejudice future criminal trials." S. Rep. No. 981, 93d Cong., 2d Sess. XXXII (1974).

19. See *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 615-16 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 826-27 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 952-53 (2d Cir. 1980).

20. See *In re National Broadcasting Co.*, 653 F.2d 609, 616 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 824 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980).

21. E.g., *In re Griffin Television*, 7 Media L. Rep. (BNA) 1947 (W.D. Okla. July 22, 1981); *In re Kansas City Star Co.*, 7 Media L. Rep. (BNA) 1689 (W.D. Mo. July

whether that right encompasses the right to copy. While the press has strenuously maintained that *Richmond* has set up a constitutional right to copy,<sup>22</sup> most of the recent cases have followed *Nixon* in holding that the right to copy is merely a common-law right.<sup>23</sup> These courts have then had to gauge the strength of the presumption in favor of the common-law right to copy, but have disagreed over the importance of the right to copy when balanced against the accused's right to a fair trial. While two courts have concluded that the risk to a fair trial, although only speculative, was enough to deny the copying of the tapes,<sup>24</sup> the others have decided that the potential for prejudice was not sufficient to deny the right to copy.<sup>25</sup>

This Note discusses the differences between the right to inspect and the right to copy information for republication. The importance of the right to a fair trial is viewed in light of the potentially great prejudicial effect of the wide dissemination of non-documentary records such as video and audio tapes. This Note argues that the presumption in favor of immediate<sup>26</sup> access to copy judicial records should not apply

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15, 1981), *vacated on other grounds*, No. 81-1744 (8th Cir. Dec. 14, 1981); *United States v. Dean*, 7 Media L. Rep. (BNA) 1405 (S.D. Ga. May 19, 1981); *United States v. Reiter*, 7 Media L. Rep. (BNA) 1927 (D. Md. May 12, 1981); *United States v. Haimowitz*, 7 Media L. Rep. (BNA) 1111 (M.D. Fla. Apr. 6, 1981); *United States v. Ming Sen Shiue*, 504 F. Supp. 360 (D. Minn. 1980); *cf. Guarriello v. Benson*, 90 N.J. Super. 233, 217 A.2d 22 (Law Div. 1966) (audio tape of municipal hearing); *Ortiz v. Jaramillo*, 82 N.M. 445, 483 P.2d 500 (1971) (magnetic computer tape); *Hearst Corp. v. Vogt*, 62 A.D.2d 840, 406 N.Y.S.2d 567 (1978) (photographs).

22. *See, e.g., Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426-29 (5th Cir. 1981); *United States v. Carpentier* (Carpentier II), 526 F. Supp. 292, 294-95 (E.D.N.Y. 1981). The press in *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), did not argue that *Richmond* set up a constitutional right to copy, but the court suggested that the policy considerations identified by *Richmond* that support open trials also support the right of the public to copy the tapes. *Id.* at 820-22.

23. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 612 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 949 (2d Cir. 1980).

24. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431-33 (5th Cir. 1981); *United States v. Marcello*, No. 80-274, slip op. at 5 (E.D. La. Dec. 1, 1981).

25. *See, e.g., In re National Broadcasting Co.*, 653 F.2d 609, 616 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 827 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 954 (2d Cir. 1980). Interestingly, the district court judges in both *Criden* and *National Broadcasting* had denied the applications to copy because of the risks of unfairness to the defendants, but were reversed on appeal. *See In re National Broadcasting Co.*, No. 80-260 (D.D.C. Nov. 19, 1980), *rev'd*, 653 F.2d 609 (D.C. Cir. 1981); *United States v. Criden*, 501 F. Supp. 854 (E.D. Pa. 1980), *rev'd*, 648 F.2d 814 (3d Cir. 1981).

26. The terms "immediate" or "contemporaneous" access do not necessarily imply copying simultaneous with the playing of the tapes in court, but rather copying within a reasonable time thereafter, such as at the end of each trial day. *See United States v. Myers*, 635 F.2d 945, 952 n.7 (2d Cir. 1980). Those opposed to the copying

to these non-documentary records. Rather, it concludes that courts should, as a matter of law, deny applications to copy tapes until all risk of prejudice has passed.

## I. CONFLICTING RIGHTS

### A. *The Right to Inspect and the Right to Copy*

Crucial to the resolution of the issues in cases involving non-documentary records has been the distinction between "access" to the information contained on the records and "physical access" to the records themselves for the purpose of copying. This distinction has been blurred by the imprecise use of these and other terms. The constitutional right to the information has been variously termed as the right to know,<sup>27</sup> the right of access,<sup>28</sup> or the right to gather information.<sup>29</sup> The right emanates from the free speech and free press clauses of the first amendment.<sup>30</sup> It can be satisfied, with respect to information regarding criminal trials, by permitting the public to attend the trial<sup>31</sup> or to inspect the records of the open proceeding.<sup>32</sup> The right of physical access to the records for the purpose of copying is distinguishable, however, because it is not a means by which the first amendment right is satisfied.<sup>33</sup> No information is gathered through copying that could not be obtained through attendance or inspection. It is rather a physical act of duplicating

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have argued that copying should be denied until the trial is completed or while an appeal is still pending. *See, e.g.,* *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431 (5th Cir. 1981); *United States v. Criden*, 648 F.2d 814, 826 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980).

27. *Estes v. Texas*, 381 U.S. 532, 541 (1965); *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981).

28. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality opinion); *id.* at 583 (Stevens, J., concurring); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *In re National Broadcasting Co.*, 653 F.2d 609, 614 (D.C. Cir. 1981).

29. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality opinion); *id.* at 582 (Stevens, J., concurring); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

30. U.S. Const. amend. I, *construed in* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion); *id.* at 585 (Brennan, J., concurring in the judgment); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). *But cf.* *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public").

31. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion).

32. *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811, 815 (Ky. 1974); *Newton v. Fisher*, 98 N.C. 20, 22, 3 S.E. 822, 823 (1887); *see* *ICC v. Gould*, 629 F.2d 847, 854 (3d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

33. *See* *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981) (distinguishing the issue of the right to copy from the rights to attend a trial and to inspect records).

information to allow dissemination in a particular form.<sup>34</sup> This distinction was not accorded legal significance until the propriety of copying video or audio tapes introduced into evidence at criminal trials became an issue, starting with *Nixon v. Warner Communications, Inc.*<sup>35</sup> Prior to *Nixon*, the right to copy had usually been treated as coextensive with, or as included in, the right to inspect.<sup>36</sup> In fact, it had been held that without the right to copy, the right to inspect is meaningless.<sup>37</sup>

The common-law rights to inspect and copy public records first developed in England.<sup>38</sup> Except for access to the records of the King's courts, which was considered to be the right of every subject,<sup>39</sup> access to most records was restricted to those with a sufficient interest in them.<sup>40</sup> The interest usually required was the need to use the documents in the bringing or defense of a legal action.<sup>41</sup>

In the United States, however, while the same limitation on access was often noted,<sup>42</sup> it was rarely followed.<sup>43</sup> Most jurisdictions held

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34. *United States v. Ming Sen Shiue*, 504 F. Supp. 360, 363 (D. Minn. 1980).

35. 435 U.S. 589 (1978).

36. *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981); e.g., *Whorton v. Gaspard*, 239 Ark. 715, 716, 393 S.W.2d 773, 774 (1965); *People ex rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 374, 181 N.E.2d 376, 378 (1962); *Ortiz v. Jaramillo*, 82 N.M. 445, 446, 483 P.2d 500, 501 (1971); see H. Cross, *supra* note 1, at 34; 1 S. Greenleaf, *supra* note 1, § 471. When the right to inspect is statutory, it similarly includes the right to copy. See *Fuller v. State ex rel. O'Donnell*, 154 Fla. 368, 369, 17 So. 2d 607, 607 (1944); *Boylan v. Warren*, 39 Kan. 301, 307, 18 P. 174, 177 (1888); *Direct-Mail Serv. v. Registrar of Motor Vehicles*, 296 Mass. 353, 356-57, 5 N.E.2d 545, 546-47 (1937); *Becker v. Lunn*, 200 A.D. 178, 180, 192 N.Y.S. 754, 756 (1922); *Clay v. Ballard*, 87 Va. 787, 791, 13 S.E. 262, 263 (1891).

37. *Whorton v. Gaspard*, 239 Ark. 715, 716, 393 S.W.2d 773, 774 (1965); see *State ex rel. Colscott v. King*, 154 Ind. 621, 629, 57 N.E. 535, 538-39 (1900).

38. For a good discussion of English cases on the issues of inspecting and copying public records, see *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 334-38 (Sup. Ct. 1879).

39. 1 S. Greenleaf, *supra* note 1, § 471. This was true because all subjects of the King had an interest in those records.

40. *Id.* § 473.

41. H. Cross, *supra* note 1, at 25-26.

42. See, e.g., *State ex rel. Holloran v. McGrath*, 104 Mont. 490, 497, 67 P.2d 838, 841 (1937); *North v. Foley*, 238 A.D. 731, 733, 265 N.Y.S. 780, 782 (1933). In *Nowack v. Auditor General*, 243 Mich. 200, 219 N.W. 749 (1928), the court, after noting this limitation, argued that it was merely a declaration of the interest one needed before a court will enforce a right to inspect. *Id.* at 204-05, 219 N.W. at 750. Thus, "[a]s a citizen and taxpayer, [a person seeking access] had the right of inspection; but, when he wanted to use it for private purposes, his right was restricted by the limited remedy [i.e., mandamus] which the courts allowed him for its enforcement." *Id.* at 206, 219 N.W. at 751. According to *Nowack*, when the citizen sought to inspect records, an "absurd" distinction was made between purposes that were litigation related and those that were not. *Id.*

43. 1 S. Greenleaf, *supra* note 1, § 471; see *State ex rel. Colscott v. King*, 154 Ind. 621, 628-29, 57 N.E. 535, 538 (1900); *Burton v. Tuite*, 78 Mich. 363, 374, 44 N.W. 282, 285 (1889).

that a person who was a citizen and a taxpayer had 'enough of an interest in public records to be granted access to them, provided his motivation was proper.<sup>44</sup> Today, most jurisdictions presumptively allow access regardless of motivation,<sup>45</sup> leaving the decision to the discretion of the trial court.<sup>46</sup> The practical effect of this common-law presumption is that any reasonable request to copy a document in a criminal case file has been granted as a matter of course.<sup>47</sup> In the

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44. See, e.g., *C. v. C.*, 320 A.2d 717, 723 (Del. 1974); *Nowack v. Auditor General*, 243 Mich. 200, 208, 219 N.W. 749, 751 (1928); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 336 (Sup. Ct. 1879); *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758, 762 (N.D. 1967); *In re Caswell*, 18 R.I. 835, 835, 29 A. 259, 259 (1893); *Clement v. Graham*, 78 Vt. 290, 318, 63 A. 146, 153-54 (1906); *Payne v. Staunton*, 55 W. Va. 202, 213, 46 S.E. 927, 932 (1904).

45. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 602 (1978); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980); *Zenith Radio Corp. v. Matsushita Elec. Indus.*, No. 74-2451, slip op. at 64 (E.D. Pa. Dec. 10, 1981); *People ex rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 374-75, 181 N.E.2d 376, 378 (1962); *Werfel v. Fitzgerald*, 23 A.D.2d 306, 312, 260 N.Y.S.2d 791, 798 (1965). Some jurisdictions have for quite some time been very liberal in granting access to their records. E.g., *Ex parte Drawbaugh*, 2 App. D.C. 404, 407-08 (D.C. Cir. 1894); *Burton v. Tuite*, 78 Mich. 363, 374, 44 N.W. 282, 295 (1889); *Stenstrom v. Harnett*, 131 Misc. 75, 77, 226 N.Y.S. 338, 341 (1927), *aff'd*, 224 A.D. 127, 230 N.Y.S. 28, *aff'd*, 249 N.Y. 606, 164 N.E. 602 (1928); *Newton v. Fisher*, 98 N.C. 20, 22-23, 3 S.E. 822, 823 (1887).

46. See, e.g., *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429-31 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981); *C. v. C.*, 320 A.2d 717, 724 (Del. 1974); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332, 339 (Sup. Ct. 1879); *State ex rel. Wellford v. Williams*, 110 Tenn. 549, 595, 75 S.W. 948, 959 (1903). In *Nixon*, however, the Court did not specifically state that the decision was strictly discretionary and subject only to limited appellate review. Rather, the Court only said that "[t]he few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court." 435 U.S. at 599. Later in the opinion, however, after listing the arguments in favor of and against copying the Watergate tapes, the Court stated that "[a]t this point, we normally would be faced with the task of weighing the interests advanced by the parties." *Id.* at 602 (emphasis added). Thus, it is not clear whether the decision of the trial judge was solely discretionary or whether a more liberal appellate review was justified. See *United States v. Myers*, 635 F.2d 945, 950 n.3 (2d Cir. 1980). The Third Circuit in *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), held that the decision as to copying was discretionary not because it was dependent on the first-hand observations of the trial judge but because there were no clear rules formulated that could apply to the many fact patterns that might arise. Thus, the court justified a somewhat more liberal appellate review. *Id.* at 818; *accord In re National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981). *But see* *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 431 n.18 (5th Cir. 1981). In light of the conclusion arrived at in this Note—that courts should as a matter of law deny the release of tapes in evidence—the decision regarding the immediate release of the tapes should not be discretionary.

47. *United States v. Mitchell*, 386 F. Supp. 639, 641 (D.D.C. 1974). With respect to all judicial records, however, if the proceeding itself was closed to the public, then not only the right to copy, but also the right to inspect, can be denied. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 392-93 (1979); *C. v. C.*, 320 A.2d

past few years, however, requests to copy tapes in a criminal case file have not been granted so readily.

*Nixon* is the leading case making the legal distinction between the right to inspect and the right to copy. The question presented in that case was whether copies of audio tapes that had been introduced into evidence and played at an open criminal trial should be made available to the press for broadcast.<sup>48</sup> The press argued that the common-law right to copy<sup>49</sup> and, alternatively, the first amendment<sup>50</sup> required the release of the tapes.

In dismissing the first amendment claim, Justice Powell, writing for the majority, distinguished the two rights. After indicating that the amount of access to the tapes that had already been allowed was great, Justice Powell wrote:

There is no question [here] 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.<sup>51</sup>

The Supreme Court's use of the phrase "physical access" has been interpreted to apply either to copying alone<sup>52</sup> or to both inspection and copying.<sup>53</sup> Given the narrow issue presented in the case, which Justice Powell stated was the extent of the press's right to copy tapes,<sup>54</sup> the phrase is best interpreted as applying to copying alone. The tapes were played in open court and heard by members of the press and

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717, 722-23 (Del. 1974); *News-Press Publishing Co. v. State*, 345 So. 2d 865, 867 (Fla. Dist. Ct. App. 1977); *Schmedding v. May*, 85 Mich. 1, 5, 48 N.W. 201, 202 (1891); *In re Caswell*, 18 R.I. 835, 836, 29 A. 259, 259 (1893). In *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458 (10th Cir. 1980), while oral argument on the appeal was open to the public, the information that was being sought by the petitioner was not brought out in open court, and therefore the court ordered the sealing of documents containing that information. *Id.* at 462. The more difficult question is whether the courts may seal records containing information that was brought out in open court. See *infra* note 59 and accompanying text.

48. 435 U.S. at 591.

49. Brief for Respondent National Broadcasting Co. at 18, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

50. *Id.* at 33.

51. 435 U.S. at 609.

52. *E.g.*, *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 427-29 (5th Cir. 1981); *United States v. Criden*, 501 F. Supp. 854, 859 (E.D. Pa. 1980), *rev'd*, 648 F.2d 814 (3d Cir. 1981).

53. *E.g.*, *Zenith Radio Corp. v. Matsushita Elec. Indus.*, No. 74-2451, slip op. at 110 (E.D. Pa. Dec. 10, 1981); *Stephens v. Van Arsdale*, 227 Kan. 676, 686-87, 608 P.2d 972, 980-81 (1980); see Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 Temple L.Q. 311, 340 (1979) [hereinafter cited as *All Courts*].

54. 435 U.S. at 591.

public in attendance. Therefore, the public's right to inspect for the purpose of gathering information was satisfied.<sup>55</sup> As the Court noted, there was no restriction on the flow of information to the public.<sup>56</sup>

The Court, in bifurcating the two rights, indicated that the right to copy these tapes was not as important as the right to have the information that was contained on them.<sup>57</sup> At least with respect to tapes, the former was deemed not to be a constitutional right, but rather only a common-law right that merely raises a presumption in favor of copying.<sup>58</sup> The Court strongly implied, however, that there is some information to which access, and therefore inspection, is "guaranteed" to the public.<sup>59</sup> Decided only two years later, *Richmond Newspapers, Inc. v. Virginia*<sup>60</sup> provided further support for this inference.

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55. See *supra* note 32 and accompanying text. Of course, there is no guarantee that every member of the public must be permitted to inspect. Cf. 435 U.S. at 610 ("The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.").

56. 435 U.S. at 609.

57. *Nixon* was not the first case that recognized the different interests that are involved in the two rights. In *Guarriello v. Benson*, 90 N.J. Super. 233, 217 A.2d 22 (Law Div. 1966), the court denied a petition to copy tapes of hearings held by the Township Committee of Wyckoff, New Jersey. The court concluded that the Committee's policy of allowing the inspection but denying the copying of the tapes was reasonable. There was no attempt to thwart the public's right to know, argued the court, and the copies of the tapes could be easily altered. *Id.* at 241, 217 A.2d at 27; accord *Newton v. Fisher*, 98 N.C. 20, 22-23, 3 S.E. 822, 823 (1887) (allowing petitioner to inspect all land transfer records of the county but denying him the right to make copies of those records in which he did not have a present interest).

58. See *supra* note 9 and accompanying text.

59. 435 U.S. at 609, quoted *supra* text accompanying note 51. In the court of appeals decision, *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), the court noted that "[a] serious question exists as to whether sealing transcripts of proceedings held in open court or exhibits displayed in open court is ever justifiable. We have found no cases in which an attempt has been made to do so." *Id.* at 1260-61. Two years later, the Hawaii Supreme Court upheld a trial judge's decision to seal a transcript of a preliminary criminal hearing that had been open. *Honolulu Advertiser, Inc. v. Takao*, 59 Hawaii 237, 580 P.2d 58 (1978). The reason for doing so was a fear that dissemination of that transcript would create a substantial likelihood that the defendant would be unable to receive a fair trial. The Supreme Court of Hawaii reviewed only for an abuse of discretion and found none. *Id.* at 240, 580 P.2d at 61-62. Prior to *Nixon*, it had been held that "[i]f the proceedings must be public, then the same is true of the record." *United States v. Burka*, 289 A.2d 376, 379 (D.C. Cir. 1972); see *Ex parte Drawbaugh*, 2 App. D.C. 404, 407-08 (D.C. Cir. 1894); *In re Sackett*, 136 F.2d 248, 249 (C.C.P.A. 1943). Several courts, when deciding whether or not to seal the record of a case, have discussed the propriety of closing the trials themselves. *E.g.*, *United States v. Hubbard*, 650 F.2d 293, 317 (D.C. Cir. 1980); *United States v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *News-Press Publishing Co. v. State*, 345 So. 2d 865, 867 (Fla. Dist. Ct. App. 1977); *Miami Herald Publishing Co. v. Collazo*, 329 So. 2d 333, 336-37 (Fla. Dist. Ct. App. 1976); *Cohen v. Everett City Council*, 85 Wash. 2d 385, 387-89, 535 P.2d 801, 803 (1975) (en banc). These courts implicitly

In *Richmond*, the Court was asked for the first time to decide whether the first amendment guaranteed the public the right to attend criminal trials.<sup>61</sup> The Court noted that the traditional openness of criminal trials<sup>62</sup> served to enlighten the public regarding the judicial system,<sup>63</sup> to protect the accused from injustice<sup>64</sup> and to provide a community cathartic effect in cleansing society of the criminal.<sup>65</sup> A majority of the Court agreed that such a right was implicitly guaranteed in the free speech and free press clauses of the first amendment.<sup>66</sup> The plurality opinion of Chief Justice Burger concluded that, absent overriding interests, criminal trials must be open.<sup>67</sup> He

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equated open trials and open records, and presumably would agree with *Burka* that if the courtroom is open, so also are the records. See also 2 T. Cooley, A Treatise on the Constitutional Limitations 931-32 (8th ed. 1927) ("The [members of the] public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials."). At least two other courts had hinted prior to *Nixon* that the right to inspect the court's files was included in first amendment guarantees. *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254, 257 (Minn. 1977); *Davis v. Davis*, 107 N.Y.S.2d 460, 461 (Sup. Ct. 1951), *aff'd*, 279 A.D. 865, 110 N.Y.S.2d 904 (1952); *cf. Alexander v. National Farmers Org.*, 405 F. Supp. 118, 121 (W.D. Mo. 1975) (because reporter can report what transpires in the courtroom, he may also report pleadings and other data found in the court files).

60. 448 U.S. 555 (1980).

61. *Id.* at 563-64 (plurality opinion). Only one year earlier in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Court had to decide whether either the first or the sixth amendment guaranteed the public a right to attend pre-trial criminal hearings. The Court first reaffirmed its position that the sixth amendment guaranteed only the accused a public trial, and therefore it could not be the basis by which the public obtained an open hearing. *Id.* at 385-87. Then the Court stated that whether or not the first amendment guaranteed an open hearing was irrelevant, because even if it did, that guarantee was outweighed in that case by the concern of all the trial participants that an open hearing could endanger the accused's right to a fair trial. *Id.* at 391-93.

62. 448 U.S. at 564-69 (plurality opinion).

63. *Id.* at 572-73 (plurality opinion).

64. *Id.* at 569 (plurality opinion).

65. *Id.* at 570-72 (plurality opinion). A community catharsis occurs when the public's yearning to see justice done is satisfied. Because an open trial serves as an outlet for community concern, hostility and emotion, it has significant therapeutic value. *Id.*

66. *Id.* at 580 (plurality opinion). Justices White and Stevens concurred with Chief Justice Burger in the plurality opinion. Justice Brennan, with whom Justice Marshall agreed, concurred in the result only, but in his separate opinion, he stated that he also "believe[d] that the First Amendment . . . secures such a public right of access [to trial proceedings]." *Id.* at 585 (Brennan, J., concurring in the judgment). Similarly, Justice Stewart agreed that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials." *Id.* at 599 (Stewart, J., concurring in the judgment).

67. *Id.* at 581 (plurality opinion).

went on to point out that this right could also be called a "right to gather information" or a "right of access."<sup>68</sup> Although the Court did not expressly address the issue, it is reasonable to infer that the right to inspect judicial records is a first amendment right as well;<sup>69</sup> inspection, which complements the right to attend,<sup>70</sup> is also a method of gathering information.<sup>71</sup> The right to copy those records, however, was denied constitutional status in *Nixon*, and while it remains an important right, it is less significant than the right to inspect.

### B. *The Right to a Fair Trial*

The primary obstacle to the free exercise of the rights to inspect and copy criminal court records is the accused's guarantee of a fair trial. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

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68. *Id.* at 576 (plurality opinion).

69. In the short time since *Nixon* and *Richmond*, only a few courts have discussed the applicability of these two Supreme Court decisions to the right to inspect criminal court files. The district court in *United States v. Carpentier* (Carpentier II), 526 F. Supp. 292 (E.D.N.Y. 1981), has been the only one expressly to extend the holding of *Richmond* to the inspection of judicial records. Faced with a government application to seal videotapes that had been introduced into evidence but not played in open court, District Judge Costantino ruled that "the public has a strong First Amendment claim to access to evidence admitted in a public sentencing hearing . . . and . . . the tapes should be disclosed." *Id.* at 294-95. The court in *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), discussed *Richmond* at length when faced with the request of the broadcast media to copy tapes introduced into evidence. At one point in that discussion, the court grouped together the rights to attend a trial and to inspect the files as distinct from the right to copy. *Id.* at 822. The implication was that the first two rights, while different manifestations of the right to gather information, are rights of equal stature. Finally, in *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981), when faced with a request similar to that made in *Criden*, the court stated very clearly that "[c]onstitutional requirements are fully satisfied by . . . untrammelled access to the information contained [on the tapes]." *Id.* at 427.

70. See *All Courts*, *supra* note 53, at 338. It is logical to say that the right to attend a trial encompasses the right to inspect because the former would seem to be a greater entitlement than the latter. Given the choice between the right to attend or the right to inspect, a newsgatherer would surely choose the right to attend. See 448 U.S. at 597 n.22 (Brennan, J., concurring in the judgment). But see *State ex rel. Williston Herald, Inc. v. O'Connell*, 151 N.W.2d 758 (N.D. 1967), in which the petitioner newspaper preferred, because of the expenses involved, to inspect the files after proceedings had been completed rather than have its reporter be present at the actual trial. *Id.* at 760. The court did not view the issue as one involving newsgathering: "This proceeding involves, therefore, not so much the right of the petitioner to secure the information it seeks as it does the method of getting such information. The petitioner's contention that this proceeding involves the public's 'right to know' is not entirely accurate, since it involves only the method by which it is to gain its knowledge." *Id.* This distinction is erroneous because attending a trial is also a way of gathering information. See *supra* note 31 and accompanying text.

71. See *supra* notes 27-32 and accompanying text.

impartial jury.”<sup>72</sup> This right has been labelled the most “fundamental” right of our constitutional system<sup>73</sup> and its guarantee termed “absolute.”<sup>74</sup> It is thus the duty of the trial judge to preserve this right for the defendant.<sup>75</sup> Not only does this duty include countering the effects of preexisting prejudice, but also preventing “the probability of unfairness.”<sup>76</sup> In assessing the fairness of a trial, the appellate court should consider the degree to which it was public.<sup>77</sup> The “glare of publicity”<sup>78</sup> on a trial will result in close public scrutiny of the legal process, so that should any impropriety occur, the outraged public conscience will demand a correction.<sup>79</sup>

The right to a fair trial also requires that the jury be impartial. Ironically, one of the greatest threats to the impartiality of the jury is excessive publicity. When a defendant appeals a conviction on the ground that he did not receive a fair trial, the appellate court will review the record to determine whether actual bias or prejudice existed in the mind of any juror.<sup>80</sup> If it can be shown that a juror was predisposed concerning the guilt of the accused,<sup>81</sup> or had received so

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72. U.S. Const. amend. VI.

73. *Estes v. Texas*, 381 U.S. 532, 540 (1965); see *United States v. Criden*, 648 F.2d 814, 827 (3d Cir. 1981); *CBS v. Young*, 522 F.2d 234, 241 (6th Cir. 1975).

74. *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974); *McIntosh v. Commonwealth*, 368 S.W.2d 331, 336 (Ky. 1963).

75. See *infra* notes 92, 176 and accompanying text.

76. *In re Murchison*, 349 U.S. 133, 136 (1955); accord *United States v. Gurney*, 558 F.2d 1202, 1209-10 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *United States v. Columbia Broadcasting Sys.*, 497 F.2d 102, 104 (5th Cir. 1974).

77. See *Estes v. Texas*, 381 U.S. 532, 538-39 (1965); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83, 90 (Ct. App. 1968).

78. *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 159, 61 N.E.2d 5, 7 (1945).

79. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975); *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884); *Werfel v. Fitzgerald*, 23 A.D.2d 306, 312, 260 N.Y.S.2d 791, 798 (1965); 2 T. Cooley, *supra* note 59, at 931.

80. See *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963); cf. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976) (probability of the evil that pre-trial publicity will work must be shown with a degree of certainty to justify the imposition of a prior restraint). During appellate court review, courts must be mindful that “[i]t is not required . . . that the jurors be totally ignorant of the facts and issues involved. . . . [S]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Rather, the court must search for “those strong and deep impressions [in a juror] which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force . . . .” *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g) (Marshall, C.J.).

81. *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961); see *Chandler v. Florida*, 449 U.S. 560, 575 (1981) (“the appropriate safeguard against . . . prejudice is the defendant’s right to demonstrate that the media’s coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly”).

much information regarding the investigation and prosecution of the accused that his verdict was not based solely on evidence adduced at the trial,<sup>82</sup> a new trial should be ordered. Furthermore, it is clear that the burden of making this showing is on the defendant.<sup>83</sup>

Appellate review is not the sole means by which the defendant's fair trial right is protected. The trial judge is empowered, and indeed required, to root out all traces of unfairness in the first instance.<sup>84</sup> Among the vehicles for his meeting this obligation is voir dire—an examination of prospective jurors to determine their fitness to serve as jurors.<sup>85</sup> Others include continuation, change of venue, sequestration and admonitions to the jurors.<sup>86</sup>

The effectiveness of these measures has been recognized and their use actively encouraged.<sup>87</sup> Indeed, the failure to effectively employ

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82. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

83. *Reynolds v. United States*, 98 U.S. 145, 157 (1878). There are some circumstances that are inherently unfair, however, and the defendant need not prove any actual bias. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (extensive inflammatory pre-trial publicity); *Turner v. Louisiana*, 379 U.S. 466 (1965) (key witnesses speaking to jurors); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (televising confession made without aid of counsel); *Irvin v. Dowd*, 366 U.S. 717 (1961) (press releases of defendant's confessions to prior murders). In *Estes v. Texas*, 381 U.S. 532 (1965), the Supreme Court seemed to hold that the televising of a trial denies the defendant a fair trial because "it is deemed inherently lacking in due process." *Id.* at 542-43. In the 1980 Term, however, the Court in *Chandler v. Florida*, 449 U.S. 560 (1981), held that the Constitution does not prohibit a state from experimenting with the state-authorized program of televising trials. *Id.* at 583. The Court distinguished, but did not overrule, *Estes*. *Id.* at 570-74. Two Justices, White and Stewart, in their concurring opinions, asserted that *Estes* had announced a per se constitutional rule against the televising of a trial and that therefore *Estes* should have been overruled, not distinguished. *Id.* at 583 (Stewart, J., concurring in the result); *id.* at 587 (White, J., concurring in the judgment).

84. Because events occurring prior to trial must be considered by a reviewing court in evaluating the fairness of a trial, the trial judge may find it necessary to take measures well before the date of trial in order to preserve any hope of a fair trial. See *Estes v. Texas*, 381 U.S. 532, 536 (1965) ("Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence.").

85. Any person found to be predisposed regarding the guilt or innocence of the accused, or unfit for any other reason, should be dismissed from service. See A.B.A. Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press 130-34 (Approved Draft 1968) [hereinafter cited as Standards].

86. Should the judge, upon voir dire, determine that there is extensive bias in the community against the defendant, he should order a change of venue or a continuation. Standards, *supra* note 85, at 119-28. A showing of actual bias in individual jurors is unnecessary. *Id.* at 123. In cases in which there is likely to be much prejudicial publicity, the judge may sequester the jury on his own motion or that of either party. *Id.* at 141. The judge should also admonish jurors not to watch or listen to any news reports concerning the trial and not to discuss the case amongst themselves during the course of the trial. *Id.* at 144.

87. See *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966); *Beck v. Washington*, 369 U.S. 541, 557 (1962).

these devices can be reversible error.<sup>88</sup> It would be naive, however, to think that these measures, even if liberally used, will always be effective in ensuring a fair trial to the defendant. With the modernization of communication techniques, which bring news of high-interest trials to homes across the nation, the effectiveness of a change of venue or a continuation comes into question.<sup>89</sup> Sequestration has always been disfavored as a remedy because it often causes the jurors inconvenience and annoyance and increases the taxpayers' burden.<sup>90</sup> Even exhaustive voir dire is ineffective in rooting out those prejudices that the juror himself does not recognize or admit.<sup>91</sup>

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88. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir.), cert. denied, 372 U.S. 978 (1963).

89. See *United States v. Haldeman*, 559 F.2d 31, 64 nn.42 & 43 (1976), cert. denied, 431 U.S. 933 (1977); *United States v. Criden*, 501 F. Supp. 854, 861 (E.D. Pa. 1980), rev'd, 648 F.2d 814 (3d Cir. 1981); *People v. Manson*, 61 Cal. App. 3d 102, 177, 132 Cal. Rptr. 265, 310 (1976), cert. denied, 430 U.S. 986 (1977); *Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 380, 372 N.E.2d 544, 550, 401 N.Y.S.2d 756, 762 (1977), aff'd, 443 U.S. 368 (1979); Committee on the Operation of the Jury System, Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391, 413 (1968) [hereinafter cited as Report]; Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 Wm. & Mary L. Rev. 1, 20 (1971); Comment, *Gagging the Press in Criminal Trials*, 10 Harv. C.R.-C.L. L. Rev. 608, 617-18 (1975) [hereinafter cited as *Gagging the Press*]. Furthermore, they both may involve the sacrifice of other precious rights guaranteed to the accused. *United States v. Criden*, 648 F.2d 814, 833 (3d Cir. 1981) (Weis, J., concurring and dissenting) ("the frequent invocation of customary 'remedies' for prejudicial publicity neglects to recognize that their use may deprive the defendant of valued constitutional rights, such as a speedy trial, a jury of the vicinage, or a jury representing a fair cross section of the population"); Standards, *supra* note 85, at 75 ("A continuance . . . may require the defendant to sacrifice his right to a speedy trial. . . . A change of venue may also require the sacrifice of state or federal constitutional rights."); Report, *supra*, at 413 ("some of [these protective measures] will involve additional complications such as, in the case of a protracted continuance, prejudice to the right of a defendant to a speedy trial and the interest of the public in the prompt administration of justice").

90. See Standards, *supra* note 85, at 75; Stanga, *supra* note 89, at 23; *Gagging the Press*, *supra* note 89, at 617.

91. Standards, *supra* note 85, at 75; Stanga, *supra* note 89, at 2; *Gagging the Press*, *supra* note 89, at 617 & n.50; see *Crawford v. United States*, 212 U.S. 183, 196 (1909) ("Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence."); *Delaney v. United States*, 199 F.2d 107, 112-13 (1st Cir. 1952) ("One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity."); Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial: A Plea for Reform*, 38 S. Cal. L. Rev. 672, 680 (1965) ("Just as a person is

In light of these pitfalls, it becomes clear that the duty of the trial judge extends not only to negating and balancing the effects of existing prejudice, but also to preventing, whenever possible, the occurrence of circumstances that create prejudice.<sup>92</sup> Trial judges must heed the Supreme Court's admonition that "it is precisely because reversal is such an extreme remedy, and is employed in only the rarest cases, that our criminal justice system permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial."<sup>93</sup> One way of adhering to this precept would be to prevent the broadcasting of evidence which so strongly implicates defendants that its broadcast may prejudicially influence prospective or present jurors.

### C. *The Influence of Tape Evidence on Viewers and Listeners*

In the usual case in which prejudicial publicity has resulted in an unfair trial, the biases have been caused by inflammatory or otherwise prejudicial information printed in the newspapers. In the famous case of *Sheppard v. Maxwell*,<sup>94</sup> massive amounts of information concerning the investigation of a murder and the primary suspect, Dr. Sam Sheppard, were reported in the newspapers. Daily headlines linked Sheppard with the crime and made much of his refusal to take a lie-detector test.<sup>95</sup> The Court reversed Sheppard's conviction because hostile feelings toward the doctor pervaded the trial court environment.<sup>96</sup> The case is a classic example of how prejudicial information in written form can lead, when widely publicized, to an unfair trial.

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not conscious of the mechanism by which he perceives . . . he is not conscious of the mechanism by which he selects, excludes, or distorts that which is perceived." (footnote omitted)) [hereinafter cited as *Fair Trial-Free Press*].

92. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 601 (1976) (Brennan, J., concurring in the judgment); *In re Murchison*, 349 U.S. 133, 136 (1955); *CBS v. Young*, 522 F.2d 234, 241 (6th Cir. 1975); *Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 380, 372 N.E.2d 544, 549-50, 401 N.Y.S.2d 756, 762 (1977), *aff'd*, 443 U.S. 368 (1979); Stanga, *supra* note 89, at 39 n.224, 68. For instance, the trial judge may close a pre-trial hearing and withhold temporarily the transcript thereof to prevent the dissemination of possibly prejudicial information. *Gannett Co. v. DePasquale*, 443 U.S. 368, 392-93 (1979). Of course, what the judge may not do is prevent the press from disseminating information it already has in its possession. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *CBS v. Young*, 522 F.2d 234 (6th Cir. 1975).

93. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 n.6 (1979).

94. 384 U.S. 333 (1966).

95. *Id.* at 338. Other examples of the publicity regarding the case include the publishing of the names and addresses of the veniremen, which caused many of them to receive anonymous phone calls, the televising of the coroner's inquest at which Sheppard was denied counsel, and the printing of photos of trial exhibits and the jurors in the newspapers. *Id.* at 337-42.

96. *Id.* at 363.

Prejudice is not, however, generated solely by what is printed and read. Television and radio broadcasts are even more capable of creating bias; they pose risks not encountered with the written word. The case of *Rideau v. Louisiana*<sup>97</sup> illustrates that even television broadcasts of accurate information, information essentially the same as that subsequently adduced at trial, can be so powerful as to be presumptively prejudicial.<sup>98</sup> In *Rideau*, an interrogation of the defendant, during which he confessed to the crime, was filmed and then shown on television. The Supreme Court held that "due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" <sup>99</sup> It determined that the television broadcast "in a very real sense *was* Rideau's trial,"<sup>100</sup> after which any court proceeding in that community would be a "hollow formality."<sup>101</sup> It was the broadcast itself, with its powerful effects on its viewers, that was inherently prejudicial.

There is little dispute that, compared with printed information, information that is broadcast will both reach a greater number of potential jurors and have a greater impact.<sup>102</sup> Because information

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97. 373 U.S. 723 (1963).

98. *Id.* at 727. Three of the jurors had seen all or part of the televised confession. While the text of oral and written confessions was admitted into evidence at trial, the film was marked as an exhibit but was not introduced into evidence. *Id.* at 730 (Clark, J., dissenting); cf. *Delaney v. United States*, 199 F.2d 107, 113 (1st Cir. 1952) (The televising of Senate hearings prior to the trial of the defendant caused prejudice because "[n]one of the testimony of witnesses heard at the committee hearing ran the gauntlet of defense cross-examination. Nor was the published evidence tempered, challenged, or minimized by evidence offered by the accused.").

99. 373 U.S. at 727.

100. *Id.* at 726 (emphasis in original).

101. *Id.*

102. See *In re National Broadcasting Co.*, 653 F.2d 609, 616 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 824 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980); see also *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 432 (5th Cir. 1981) ("General pretrial publicity and any attendant prejudice to a defendant's rights before disclosure and rebroadcast of the tapes would not necessarily be the same as what may obtain in a second trial following public broadcast."); *United States v. Criden*, 501 F. Supp. 854, 860 (E.D. Pa. 1981) ("The viewer of videotape becomes virtually a participant in the events portrayed."), *rev'd*, 648 F.2d 814 (3d Cir. 1981). The American public "has developed a sense of comfort and security with the cinematic process." Perlman, *Seeing is Believing*, Trial, June 1981, at 34, 34. Further, one commentator has noted that "95% of what a person sees on television he believes." Thornton, *Expanding Video Tape Techniques in Pretrial and Trial Advocacy*, 9 Forum 105, 105 (1973). Videotape testimony has even begun to replace live testimony in some cases, as it has been suggested that "jurors were more interested and involved in the taped testimony than in the same information presented live." G. Miller & N. Fontes, *Videotape on Trial: A View from the Jury Box* 92 (1979). Furthermore, the viewer of a film, while likely after a period of time to forget the details of what he saw, will not forget his general impressions, and

received by means of a tape is thus more influential, the potential for prejudice is greater. The only way to ensure that prejudice will not occur is to prohibit the copying and dissemination of tapes that jeopardize the defendant's fair trial right.

## II. RESOLVING THE CONFLICT

### A. *The Constitutional Right of Access*

Once video or audio tapes have been introduced into evidence at an open criminal trial, they become part of the public record. As such, they should be available to the public under the common-law right to inspect.<sup>103</sup> In addition, because the public has a right of access to the information brought out in criminal trials,<sup>104</sup> there is arguably a first amendment right to inspect the tapes as well.<sup>105</sup> Thus, when a judge is presented with a request by the media to copy tapes, the first question he must resolve is whether a denial of the request would

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indeed, will even "reinforce what [he] remember[s] of the general idea." R. Flesch, *The Art of Clear Thinking* 166 (1969) (emphasis in original). "Thus, the circumstance that prospective jurors stated they could not recall particulars did not negate the strong possibility that they had formed and retained some general opinions about what they had seen and heard." *United States v. Haldeman*, 559 F.2d 31, 155 (D.C. Cir. 1976) (MacKinnon, J., concurring in part and dissenting in part), *cert. denied*, 431 U.S. 933 (1977). One reason for this greater impact is that a person must use more of his senses when he hears the words being spoken and sees the visual image than when he reads. M. McLuhan, *Understanding Media: The Extensions of Man* 314 (1965); see Perlman, *supra*, at 36 ("it is an established and documented fact that learning and retention are increased significantly through visual communication"). When the Watergate defendants moved for a change of venue in the trial court, they appended to their papers a public survey that evaluated the impact of pre-trial publicity in the case. 559 F.2d at 143 (MacKinnon, J., concurring in part and dissenting in part). Asked which medium had the greatest influence on them, 58% of the subjects of the national poll responded that television was the most influential, and only 37% responded that newspapers were most influential. *Id.* at 179 (MacKinnon, J., concurring in part and dissenting in part) (Sindlinger Affidavit). In that there are any doubts about the greater effects of television broadcasting, they are only with respect to their precise extent and not to their existence. In the case that has become a *cause celebre* and has been preceded by heavy publicity adverse to the defendant, "[t]he conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence." *Estes v. Texas*, 381 U.S. 532, 545 (1965); *cf. id.* at 550 ("[W]e cannot afford the luxury of saying that, because [the effects of televising a trial on the jurors, judge, witnesses and the defendant] are difficult of ascertainment in particular cases, they must be ignored. Nor are they 'purely hypothetical.' . . . They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process.").

103. See *supra* notes 38-45 and accompanying text.

104. See *supra* notes 61-68 and accompanying text.

105. See *supra* note 69 and accompanying text.

interrupt the flow of information to the public, thereby creating a first amendment issue.<sup>106</sup>

The tapes played in the Watergate, Abscam and Brilab cases<sup>107</sup> were all played to the jury in open court. All in attendance were permitted to see or hear the tapes, and at least in a few of the trials, were allowed to follow along with printed transcripts. The transcripts were widely reproduced in the print media. The press had been permitted to fully report what it observed in the courtroom, and the public was kept informed about the events of these historic cases.<sup>108</sup> Thus, it would seem that because the flow of information was not restricted, no first amendment right had been infringed. The argument was made by the press in these cases, however, that there was information contained on the tapes that was not in the printed transcript. The press argued that the inferences to be drawn from seeing the actions of the defendants, hearing the inflections and emphases in their voices, and detecting the pauses in their speech would give the public a greater understanding of the events.<sup>109</sup> Further, because some of the defendants were elected public officials, the press claimed that there was even greater reason to make this information available to the public.<sup>110</sup> Thus, the press urged that the first amendment

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106. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978).

107. See *supra* notes 10-11.

108. See *supra* note 14 and accompanying text.

109. See *supra* note 17 and accompanying text; cf. Stein, *Criminal Trial by Paper Deposition vs. the Right of Confrontation*, 25 B.B.J., Apr. 1981, at 18, 23-24 (paper testimony does not accurately reflect live testimony, omitting the "wordless language" of intonations, quivered voice, demeanor and posture).

110. *In re National Broadcasting Co.*, 653 F.2d 609, 614 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 822 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980); see *Medico v. Time, Inc.*, 643 F.2d 134, 141 (3d Cir. 1981); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83, 91-92 (Ct. App. 1968); *Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 381, 372 N.E.2d 544, 550, 401 N.Y.S.2d 756, 763 (1977), *aff'd*, 443 U.S. 368 (1979); *Payne v. Staunton*, 55 W. Va. 202, 216-17, 46 S.E. 927, 933 (1904) (Dent, J., dissenting). But see *Gannett Co. v. DePasquale*, 443 U.S. 368, 443 (1979) (Blackmun, J., concurring in part and dissenting in part) ("It is also true, however, that as the public interest intensifies, so does the potential for prejudice."); *Estes v. Texas*, 381 U.S. 532, 545 (1965) (When a case becomes a *cause celebre*, "[t]he whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status . . . Every juror carries with him into the jury box these solemn facts and thus increases the chance of prejudice that is present in every criminal case."); *United States v. Criden*, 501 F. Supp. 854, 863 (E.D. Pa. 1980) ("There is . . . a growing public awareness that when a person becomes a totally public figure [because of national or worldwide exposure], there are trade-offs which benefit neither the public, its institutions, nor the individual."), *rev'd*, 648 F.2d 814 (3d Cir. 1981). The fact that these defendants are political figures also means that greater publicity regarding their trials may bring about penalties not prescribed by law upon the defendants. For example, the relief of a jury's acquittal would be considerably diminished if the broadcast of the tapes ruined the defendant's

required release of the tapes so that the public could be completely informed.

The Supreme Court, in *Nixon v. Warner Communications, Inc.*,<sup>111</sup> considered this argument, however, and unequivocally rejected it. The Court conceded there might be some extra information that would "arguably" flow from the hearing of the Watergate tapes.<sup>112</sup> Whatever the volume of this extra information, the Court dismissed its value and the need for its dissemination, concluding that there was "no question of a truncated flow of information to the public."<sup>113</sup>

Furthermore, the Court said that the press's argument stemmed from a misreading of a prior case.<sup>114</sup> In *Cox Broadcasting Corp. v. Cohn*,<sup>115</sup> the Court had held that a state could not prohibit the press from accurately publishing information it had already obtained from public records that were open to public inspection.<sup>116</sup> The case neither stands for the proposition that the press or public is guaranteed access to the information contained in public records,<sup>117</sup> nor that there is a right of physical access<sup>118</sup>—meaning the right to copy—to evidence brought out in court. The *Nixon* Court made clear that *Cox Broadcasting* did not establish a first amendment right of access to the tapes, much less a right to copy them.

Despite the holding of *Nixon*, it remains uncertain whether the constitutional right of access includes the right to copy. One line of thought is that *Richmond Newspapers, Inc. v. Virginia*<sup>119</sup> effectively overruled *Nixon*, in that the first amendment right to attend a trial should not only be extended to the right to inspect, but also to the

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political career. Furthermore, Congressman Jenrette argued that the entire Abscam investigation was tainted by political motivation. In *re* National Broadcasting Co., 653 F.2d 609, 618 (D.C. Cir. 1981). These were among the reasons why the district court in *Criden* denied the copying request. 501 F. Supp. at 863. That court wrote that broadcasting the tapes was similar to parading the defendants through the streets. In addition, the court said that the balance between the public's interest in access to news regarding criminal trials and the dignity of the accused "would be destroyed by intentionally creating a situation in which the defendant's initial misconduct is graphically portrayed in every living room in America." *Id.* at 860. But see *Murphy v. FBI*, 490 F. Supp. 1138, 1139 (D.D.C. 1980), in which the plaintiff sought disclosure of tapes prior to indictment to ensure a fair re-election campaign.

111. 435 U.S. 589 (1978).

112. *Id.* at 602; *accord* United States v. Ming Sen Shiue, 504 F. Supp. 360, 363 (D. Minn. 1980).

113. 435 U.S. at 609.

114. *Id.* at 608-09.

115. 420 U.S. 469 (1975).

116. *Id.* at 495.

117. *Id.* at 496 n.26.

118. 435 U.S. at 608-09.

119. 448 U.S. 555 (1980).

right to copy.<sup>120</sup> The Fifth Circuit in *Belo Broadcasting Corp. v. Clark*,<sup>121</sup> decided a year after *Richmond*, responded to this view.

The thrust of the press's argument in *Belo* was that because of the policy reasons cited in *Richmond* that support the public's right to an open trial,<sup>122</sup> the interpretation of *Cox Broadcasting* that was rejected by *Nixon* was revived.<sup>123</sup> The *Belo* court noted, however, that there was nothing in *Richmond* that expressly contradicted Justice Powell's specific language denying constitutional status to the right to copy.<sup>124</sup> It held that "[o]n the basis of comments general in nature [in *Richmond*] and addressed to a different problem, the Supreme Court will not here be presumed to have abandoned an only recently stated principle [in *Nixon*]." <sup>125</sup>

Further, to the extent that the press's argument might have been based on the claim that because copying was denied, the trial itself was less than public, the argument must be regarded as flawed. The *Nixon* Court had said that the requirement of a public trial is fully satisfied when members of the public are allowed to sit in the courtroom, observe all that occurs, and then report their observations freely to others.<sup>126</sup> The public trial right does not mean that every member of the public must be allowed to view the proceedings in their homes.<sup>127</sup>

### B. The Common-Law Right to Copy

Assuming that the right to copy was not accorded constitutional protection by *Richmond*, the issue arises of whether the common-law right to copy judicial records includes records that are non-documentary. The Court in *Nixon* merely assumed, for the sake of argument, that it did, but intimated no position on the issue.<sup>128</sup> In the D.C.

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120. See *supra* note 23 and accompanying text.

121. 654 F.2d 423 (5th Cir. 1981).

122. See *supra* notes 62-65 and accompanying text.

123. 654 F.2d at 428. The Third Circuit in *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), made the same argument as did the press in *Belo*.

124. 654 F.2d at 428-29.

125. *Id.* at 428.

126. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 610 (1978).

127. See *United States v. Criden*, 501 F. Supp. 854, 858 (E.D. Pa. 1980), *rev'd*, 648 F.2d 814 (3d Cir. 1981).

128. 435 U.S. at 599 & nn.10-11. The Court felt it could make this assumption because it ultimately did not decide the case on the basis of the common-law right to inspect and copy. *Id.* at 603. Rather, the Court concluded that the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 note (1976), was the "congressionally prescribed avenue of public access" and therefore should control the release of the tapes for public consumption. 435 U.S. at 605-06. That Act empowered the Administrator of General Services to decide which of the recordings were of historical value to be kept in the Archives, and which were personal and should be returned to former President Nixon. *Id.*

Circuit's opinion in that case, *United States v. Mitchell*,<sup>129</sup> Chief Judge Bazelon reasoned that because two courts had applied the right to copy to magnetic computer tape,<sup>130</sup> it should also be applied to audio tapes.<sup>131</sup> The Third Circuit in *United States v. Criden*<sup>132</sup> also ruled that the right was applicable to the tapes,<sup>133</sup> but cited for support a case which only held that one seeking to copy documentary records could use more advanced techniques to copy.<sup>134</sup> The *Belo* court, as had the Court in *Nixon*, assumed *arguendo* that the right applied to the tapes.<sup>135</sup> The Second Circuit, in *United States v. Myers*,<sup>136</sup> also said the right applies, citing only to *Mitchell*.<sup>137</sup> The D.C. Circuit, in *In re National Broadcasting Co.*,<sup>138</sup> citing *Myers*, agreed.<sup>139</sup>

Despite the Supreme Court's reluctance to answer the question, and the misuse by some of the circuit courts of precedent,<sup>140</sup> there is no reason not to extend the right to copy judicial records to video and audio tapes. They have been shown in open court and are thereby part of the public record. Although some courts have noted the greater danger to the integrity of non-documentary records because they can more easily be erased or destroyed,<sup>141</sup> adequate precautionary measures would protect them. Thus, the better rule is that the common-law right to copy does apply to these tapes.

The next stage of the analysis is to determine the strength of this common-law right to copy. Justice Powell wrote in *Nixon* that there is a presumption, "however gauged," in favor of copying judicial records.<sup>142</sup> The *Myers* court held that the right to copy tapes contemporaneously with their being played in court should be denied only upon

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129. 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).

130. *Menge v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973); *Ortiz v. Jaramillo*, 82 N.M. 445, 483 P.2d 500 (1971).

131. 551 F.2d at 1258 n.21.

132. 648 F.2d 814 (3d Cir. 1981).

133. *Id.* at 823-24.

134. *Id.* (citing *Moore v. Board of Freeholders*, 76 N.J. Super. 396, 184 A.2d 748 (App. Div. 1962)). A case in accord with *Moore* is *People ex rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 375, 181 N.E.2d 376, 378 (1962).

135. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981).

136. 635 F.2d 945 (2d Cir. 1980).

137. *Id.* at 950.

138. 653 F.2d 609 (D.C. Cir. 1981).

139. *Id.* at 612 & n.13.

140. See *supra* notes 129-34 and accompanying text.

141. See, e.g., *United States v. Mitchell*, 551 F.2d 1252, 1265 (D.C. Cir. 1976) (MacKinnon, J., dissenting), *rev'd on other grounds sub nom.* *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Guarriello v. Benson*, 90 N.J. Super. 233, 241, 217 A.2d 22, 27 (Law Div. 1966).

142. 435 U.S. at 602. In his dissenting opinion, Justice Stevens labelled the presumption in favor of access "normal." *Id.* at 615 (Stevens, J., dissenting).

the showing of "the most compelling circumstances."<sup>143</sup> The *National Broadcasting* court, adhering to the standard it had set earlier in *Mitchell*, said that such copying could be denied only when " 'justice so requires.' " <sup>144</sup> The court in *Criden* labelled the presumption "strong."<sup>145</sup> The *Belo* court, however, said that the presumption should not be gauged in terms of its strength; rather, it was merely one factor to be considered when deciding whether or not to grant access.<sup>146</sup>

The standards erected by the Second and D.C. Circuits have been appropriately criticized as creating constitutional protection for a right to which *Nixon* had expressly denied such protection two years earlier.<sup>147</sup> The use of the word "compelling" suggests the tests used to protect the first amendment rights of free exercise of religion and free speech.<sup>148</sup> The *Belo* court pointed out that *Nixon* supplied no foundation for "erecting such stout barriers against those opposing access."<sup>149</sup> Because after *Nixon* the right to copy should not be given such constitutional protection as that afforded by the Second and D.C. Circuits, the only remaining conflict is that between *Criden*'s "strong" presumption and *Belo*'s "one factor to be considered." Whatever the difference between these two standards, however, it becomes insignificant when the presumption is balanced against the threatened infringement of the constitutional right to a fair trial.

### C. *Balancing the Fair Trial Right Against the Right to Copy*

Given the existence of the presumption in favor of granting a request to copy judicial records, the court's role is to determine whether there exist reasons why the presumption should not hold. The primary argument offered in opposition to these requests to copy has been that

143. 635 F.2d at 952. In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Supreme Court was asked to announce a rule that for pre-trial criminal hearings closure could only occur when "strictly and inescapably necessary." *Id.* at 378. Justice Powell, in his concurring opinion, wrote that "[a] rule of such apparent inflexibility could prejudice defendants' rights and disserve society's interest in the fair and prompt disposition of criminal trials." *Id.* at 399 (Powell, J., concurring).

144. 653 F.2d at 613 (quoting *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 C. v. C.*, 320 A.2d 717, 724 (Del. 1974).

145. 648 F.2d at 829.

146. 654 F.2d at 434.

147. *Id.* at 433-34; *United States v. Ming Sen Shiue*, 504 F. Supp. 360, 362 n.1 (D. Minn. 1980); *United States v. Criden*, 501 F. Supp. 854, 856-57 (E.D. Pa. 1980), *rev'd*, 648 F.2d 814 (3d Cir. 1981); *see United States v. Criden*, 648 F.2d 814, 830-31 (3d Cir. 1981) (Weis, J., concurring and dissenting).

148. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (free exercise of religion); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (free speech).

149. 654 F.2d at 434.

broadcast of the tapes will impair the chances of the defendants to receive a fair trial.<sup>150</sup> Although the issue was not present in the Watergate tapes case by the time it reached the Supreme Court, the circuit court concluded that "the 'risk of causing possible prejudice' at a *hypothetical* second trial does not justify infringing" the common-law right.<sup>151</sup> In *Criden*, it was also determined that the prediction of prejudice was "hypothetical."<sup>152</sup> The *Myers* court stated that the likelihood of prejudice to the present defendants, either during the present trial or during any possible retrial, or to other Abscam defendants who might also be implicated on the tapes, was exaggerated, primarily because the information contained on them was already disseminated.<sup>153</sup> *National Broadcasting* not only said that the chance of prejudice was slim, but also noted that the chance of a retrial was speculative.<sup>154</sup>

The argument that the potential for prejudice is speculative derives its support from the observation that the tapes are almost uniformly deemed admissible evidence,<sup>155</sup> and that any present or potential juror will either have already seen the tapes in court or would see them

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150. See *supra* notes 19-20 and accompanying text.

151. *United States v. Mitchell*, 551 F.2d 1252, 1261 (D.C. Cir. 1976) (emphasis in original) (quoting lower court), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The court believed that the release of the tapes might actually decrease prejudice, because dramatic re-enactments of the events heard on the tapes would no longer be necessary. *Id.* at 1262 n.45. The court also noted that the arguments favoring release of these particular tapes were buttressed by the national significance of the Watergate trial. *Id.* at 1265. Circuit Judge MacKinnon dissented in the case, believing that release of the tapes might present risks to the integrity of the tapes themselves. Further, until the need for the tapes as evidence had passed, "courts and the Government should be concerned that they do not become a party to manufacturing presumptive prejudice against defendants." *Id.* at 1265 (MacKinnon, J., dissenting) (footnote omitted). Responding to the majority's observation that a retrial of these defendants was only hypothetical, he wrote that "[a] significant *reduction* in the possibility of prejudice to a fair trial should not cause a court concerned with constitutional rights to ignore the possibility of prejudice that remains." *Id.* at 1265-66 (MacKinnon, J., dissenting) (emphasis in original) (footnote omitted). Interestingly, Judge MacKinnon wrote the unanimous opinion in *In re National Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981), just five years later, in which he did not mention his earlier dissenting opinion.

152. 648 F.2d at 827.

153. 635 F.2d at 953.

154. 653 F.2d at 616.

155. The admissibility of the tapes as evidence was only contested in *United States v. Criden*, 501 F. Supp. 854 (E.D. Pa. 1980), *rev'd*, 648 F.2d 814 (3d Cir. 1981). For a discussion of the issues involved, see *id.* at 861-63. As for the admissibility issue in the other main cases, see *In re National Broadcasting Co.*, 653 F.2d 609, 614 (D.C. Cir. 1981); *United States v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980); and *United States v. Mitchell*, 551 F.2d 1252, 1255 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

should he be picked to sit at trial.<sup>156</sup> The tapes that were involved in all of these cases either showed the defendant committing the acts for which he was charged or recorded his voice in conversations discussing the crime. They have constituted the primary evidence against the defendant.<sup>157</sup> Thus, it would appear that broadcast of the tapes, which are accurate and pertinent, could not be considered prejudicial.

In considering the prejudicial effect on the potential juror, however, it is important to recognize that the tapes are not the sole evidence offered at the trial. In addition, both sides at trial are able to offer witnesses to explain the context and the meaning of the words and actions on the tapes. More importantly, the defendant has the opportunity to cross-examine those testifying against him.<sup>158</sup> Thus, the jury receives a good deal of information beyond the tapes themselves, allowing them to put the tapes in their proper perspective.

Conversely, there is no such accompanying information to help the viewer when the tapes are broadcast on television. Rather, he is exposed to raw evidence without any explanations<sup>159</sup> except the potentially biased commentaries of newscasters.<sup>160</sup> Moreover, while the information that is being disseminated is the same as that contained in the reprinted transcripts, it is conveyed by a much more powerful medium.<sup>161</sup> Therefore, the danger is that the prospective juror will

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156. See *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1980).

157. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 425 (5th Cir. 1981); *In re National Broadcasting Co.*, 653 F.2d 609, 611 (D.C. Cir. 1981).

158. See Brief for Petitioner at 54, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) ("The tapes were perhaps the most critical evidence in the criminal case, and it was essential that they be considered by a jury only under appropriate instructions, only as a whole and not in selections, and only in conjunction with all the other evidence in the case, including the witnesses' explanations of the context, the circumstances, and the intended meaning of each statement.").

159. That the tapes are accurate and are not inflammatory does not mean that they cannot be prejudicial. Standards, *supra* note 85, at 64 ("even exposure to accurate information can cause" prejudice (emphasis in original)); *Gagging the Press*, *supra* note 89, at 616 ("certain admissible evidence may be unduly prejudicial when presented by the press outside of court" (footnote omitted)); *Fair Trial-Free Press*, *supra* note 91, at 684 ("a report may be accurate and fair in what it relates, but . . . the failure to present other facts explaining incriminating evidence can distort the significance and meaning of facts correctly reported"). Furthermore, as former President Nixon argued, the broadcast of the tapes should not be considered accurate if only short excerpts are played by the media. To be fully accurate, the tapes would have to be aired in their entirety. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 601 (1978).

160. See *United States v. Criden*, 501 F. Supp. 854, 861 n.4 (E.D. Pa. 1980), *rev'd*, 648 F.2d 814 (3d Cir. 1981). See *Estes v. Texas*, 381 U.S. 532, 571-72 (1965) (Warren, C.J., concurring), for an example of the types of comments made by newscasters during the televising of a trial.

161. See *supra* note 102.

be significantly influenced by the broadcast of the tapes and will form what may well be a deep impression regarding the guilt of the accused without possession of all the facts.<sup>162</sup> Such an impression could cause him to disregard or distort any evidence ultimately presented at trial that is contrary to that initial impression.<sup>163</sup> When a juror views or listens to the tapes, he effectively becomes a witness to the charged crime.<sup>164</sup> Should the viewer then become a juror at the defendant's

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162. See Standards, *supra* note 85, at 62 ("people tend to form beliefs on a minimum of information"); Stanga, *supra* note 89, at 5 ("a person's first exposure to information about an issue will shape his future attitudes"); *Fair Trial-Free Press*, *supra* note 91, at 677 ("A person cannot say to himself, 'Hold off any interpretation until you collect all the facts.'"). There can be little doubt that the formation of these beliefs is inimical to a sense of justice and inhibitive of the truth-finding process. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."); *Gagging the Press*, *supra* note 89, at 615 ("courts have long followed the principle that the truth best emerges if the jury considers only evidence presented in open court" (footnote omitted)). Furthermore, the deep impressions that may be formed are the type that should disqualify a person from jury service. *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g) ("those strong and deep impressions [in a juror] which will close the mind against the testimony that may be offered in opposition to them . . . do constitute a sufficient objection to him"); *Singer v. State*, 109 So. 2d 7, 24 (Fla. 1959) ("It is not enough that an opinion will readily yield to the evidence, for evidence of innocence is not required to be presented by the accused.").

163. Standards, *supra* note 85, at 64 ("unless [accurate information] is complete in every respect, with all the necessary nuances and shadings, it seems likely to instill a belief that will be hard to shake and that will color the juror's perception of the evidence adduced in court"); *Fair Trial-Free Press*, *supra* note 91, at 677, 682-83 ("lack of related facts can distort the significance and meaning of the totally correct facts . . . data which conforms to a belief will be emphasized and data opposed will be distorted or excluded . . . the juror will not give the defendant's testimony due consideration, since that testimony is contrary to the juror's belief").

164. *United States v. Haldeman*, 559 F.2d 31, 152 (D.C. Cir. 1976) (MacKinnon, J., concurring in part and dissenting in part) (if jurors saw the Senate Watergate hearings in which some of the defendants had committed perjury, one of the crimes for which they were being tried, they "were actual witnesses to the charged crime, a frequent cause for disqualification as a juror" (emphasis in original)), *cert. denied*, 431 U.S. 933 (1977). Judge MacKinnon compared the televised hearings to the situation in *Rideau v. Louisiana*, 373 U.S. 723 (1963), in which a televised confession was in effect the defendant's trial. See *supra* notes 97-101 and accompanying text. The majority in *Haldeman* disagreed with Judge MacKinnon's observation and distinguished *Rideau* on two grounds. First, while in *Rideau* the viewer of the confession was well aware of what he was seeing, the viewer of the testimony before the Senate Subcommittee would not be aware, without the knowledge of extraneous facts, that he was hearing perjured statements. *Id.* at 62 n.35. Second, while *Rideau*'s confession was made without the advice of an attorney, the Watergate defendants who testified before the Subcommittee did have the aid of counsel. *Id.* Whatever the merit of these distinctions, it should be noted that, in the cases involving the release of tapes for copying, any viewer of the tapes on television would be well aware that he was seeing the charged crime, an act done without the aid of counsel. Thus, these

trial, he would deny the defendant his right to be presumed innocent.<sup>165</sup> Finally, the defendant's right to cross-examine the prosecution's witnesses at trial would be undermined because such cross-examination would not coincide with the juror's first exposure to the tapes.<sup>166</sup>

Dangers of prejudice exist not only with respect to potential jurors, but as to present jurors as well. While courts have tended to focus on the possibility of there being a retrial,<sup>167</sup> they have overlooked the risks posed by broadcasting the tapes during the pending trial. There is danger of prejudice if the jurors see or hear the tapes on television during the trial, even after seeing them in court.<sup>168</sup> In the event that an unsequestered juror disregards the judge's admonitions to not watch news reports of the trial, he will most likely see replays of only the most incriminating portions, usually with accompanying commentary from a newscaster. Such repetition of the most damaging parts of the tapes may over-emphasize them to the juror<sup>169</sup>—certainly

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cases are on the *Rideau* side of the distinction. Indeed, the viewer is even more of a witness here than in the *Rideau* situation, because only a confession of the crime was involved there.

165. See *Taylor v. Kentucky*, 436 U.S. 478, 483-86 (1978), for a discussion of the presumption of innocence, which requires that "one accused of a crime [be] entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial." *Id.* at 485. *Accord Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); see *Irvin v. Dowd*, 366 U.S. 717, 729-30 (1961) (Frankfurter, J., concurring) ("How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused."); *Delaney v. United States*, 199 F.2d 107, 114 (1st Cir. 1952) ("[the defendant] would be put under a heavy handicap in establishing his innocence at the impending trial" should the jury be composed of people who saw the televised congressional hearings related to the defendant's indictment). See generally Abramovsky, *Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Prosecutions—Are They Endangered Species?*, 50 Fordham L. Rev. 30, 31-39 (1981). But see *Stroble v. California*, 343 U.S. 181, 195 (1952) (not a denial of the presumption of innocence to release the details of a confession prior to trial, especially in light of the fact that the confession was introduced into evidence at the trial).

166. See *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); *Delaney v. United States*, 199 F.2d 107, 113 (1st Cir. 1952).

167. See *supra* notes 151-52 and accompanying text.

168. *Tanga, supra* note 89, at 23 ("[T]he gravity of the evil may be greater when prejudicial publicity occurs during a trial, for the accused may no longer resort to pretrial protective procedure." (footnote omitted)).

169. Cf. *Estes v. Texas*, 381 U.S. 532, 546 (1965) ("[Unsequestered jurors] would also be subjected to re-enactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast and would be subconsciously influenced the more by that testimony. Moreover, they would be subjected to the broadest commentary and criticism . . .").

he should not be exposed to the commentary. Thus, it is clear that as to both present and potential jurors, the broadcast of these tapes carries with it the significant risk that some prejudice will result.<sup>170</sup>

The *Belo* court, while admitting that the potential of prejudice was speculative, countered that the prognostication that no prejudice would result was equally speculative.<sup>171</sup> Thus, "[i]t is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury."<sup>172</sup> The court concluded that any risk to the fair trial right was enough to deny the right to copy.<sup>173</sup>

No one can predict what the precise effect will be once the tapes are broadcast. The broadcasters in *Belo* argued that unless it could be shown that prejudice would certainly result, release should be granted.<sup>174</sup> This is not, however, the burden that should be imposed on the defendant. He is not trying to have a conviction overturned, in which case a showing of actual prejudice is necessary.<sup>175</sup> Rather, he is at a stage of the trial when he is trying to prevent prejudice from occurring. Such should be the primary concern of the trial judge as well.<sup>176</sup> The defendant's burden should be only to show that there is a reasonable likelihood that prejudice will result.

The proper question, therefore, is whether there is such a reasonable likelihood of prejudice as to negate the presumption in favor of release, however it is measured. This question involves a conflict between "an undeniably important but nonconstitutional right of physical access to courtroom exhibits and a defendant's due process right to a fair trial."<sup>177</sup> Phrased in this way, the answer should be clear. In rather stark terms, once the right to copy is exercised and the tapes are broadcast, there is a significant decrease in the possibility that the defendant will receive a fair trial. Given the threat to this precious constitutional right, which the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*<sup>178</sup> said was superior to even a first amendment right,<sup>179</sup> the presumption in favor of copying should not hold and the common-law right must yield.<sup>180</sup>

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170. See *id.* at 546-47.

171. 654 F.2d at 431.

172. *Id.*

173. *Id.* at 431, 433; accord *United States v. Marcello*, No. 80-274, slip op. at 5 (E.D. La. Dec 1, 1981); *Hearst Corp. v. Vogt*, 62 A.D.2d 840, 842, 406 N.Y.S.2d 567, 569 (1978).

174. 654 F.2d at 431.

175. See *supra* notes 80-81 and accompanying text.

176. *United States v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); see *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966).

177. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 432 (5th Cir. 1981).

178. 448 U.S. 555 (1980).

179. *Id.* at 564 (plurality opinion). But see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

180. It is self-evident that when a constitutional right is in conflict with only a common-law right, the latter must yield. See *Gannett Co. v. DePasquale*, 443 U.S.

#### D. *The Ineffectiveness of Procedural Alternatives*

Despite the fact that prejudice may result from the broadcast of the tapes, it could be argued that there are ways of protecting the defendant's right to a fair trial other than denying release. While the circuit court in *Mitchell* did not address this question, the courts in each of the Abscam cases stated that the various procedural protective devices, such as voir dire, continuation, change of venue and sequestration, would be sufficient to balance any prejudice that might result.<sup>181</sup> The *Belo* court, however, felt that because the right to copy did not rise to a constitutional level, there was no need to consider use of the various devices: "That the balance is heavily weighted in favor of protective measures other than absolute closure of the trial to press or public . . . does not mean that the same balance prevails when less compelling rights are asserted by the press."<sup>182</sup>

Even assuming that the *Belo* position is incorrect, the effectiveness of these devices in cases receiving widespread publicity is not guaranteed. For example, voir dire, although usually efficient, is not fool-proof.<sup>183</sup> The prospective juror may truthfully state during voir dire that he would be able to render a fair verdict based only on the evidence adduced at trial. Yet it is quite possible that he may possess a bias of which he is completely unaware<sup>184</sup> and still become a juror. Should a trial judge decide to disqualify all veniremen who saw or heard any part of the tapes, there exists the possibility of empanelling a jury that is not composed of a cross-section of the community.<sup>185</sup>

As for the suggested use of a continuation or a change of venue, the effectiveness of these devices must be questioned, primarily because the potential media coverage is national.<sup>186</sup> In addition, there is no

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368, 391-94 (1979) (fair trial right vs. common-law right to attend pre-trial hearings); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 432 (5th Cir. 1981) (fair trial right vs. common-law right to copy); *In re National Broadcasting Co.*, 653 F.2d 609, 619-20 (D.C. Cir. 1981) (right of privacy vs. common-law right to copy); *United States v. Ming Sen Shiue*, 504 F. Supp. 360, 363 (D. Minn. 1980) (same).

181. See *In re National Broadcasting Co.*, 653 F.2d 609, 617 & n.45 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814, 827 (3d Cir. 1981); *United States v. Myers*, 635 F.2d 945, 953 & n.9 (2d Cir. 1980).

182. 654 F.2d at 432.

183. For an example of the Supreme Court's less-than-complete confidence in voir dire, see *Rideau v. Louisiana*, 373 U.S. 723 (1963). Despite the fact that the three jurors who had seen the televised confession of the defendant had said during voir dire that they could disregard all that they had seen and heard, the Court held that prejudice against the defendant could be presumed. No showing of actual bias was necessary. *Id.* at 724-27; accord *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam) (ordering new trial because of juror prejudice despite fact that jurors had said they would not be influenced by news articles).

184. See *supra* note 91 and accompanying text.

185. *United States v. Criden*, 648 F.2d 814, 833 (3d Cir. 1981) (Weis, J., concurring and dissenting).

186. See *supra* note 89 and accompanying text.

judicial control over uses of the tapes, such as the timing of the broadcasts, once they are released.<sup>187</sup> Consequently, it is doubtful that use of these devices would aid a defendant in securing an impartial jury.

As for the contention that sequestration would prevent the present jurors from being exposed to the broadcast of the tapes, as has been shown,<sup>188</sup> there are drawbacks to sequestration that may very well make this option unsatisfactory to the defense, the prosecution or the court. Finally, the judge's admonitions to jurors not to listen to news reports may also be ineffective.<sup>189</sup>

The conclusion to be drawn from these observations is that procedural protections may not be effective or desirable in cases of widespread publicity.<sup>190</sup> In such cases, if the tapes are broadcast, the defendant is left only with the hope that none of his jurors will be biased against him. If they are, he is relegated to procedural protections of questionable effectiveness. Consequently, it is clear that the proper time to stem any possible prejudice is before it is allowed to occur. In the cases that involve requests to copy tapes in evidence, the trial judge should deny their release until all risk of prejudice to the current defendants and to those implicated by the tapes has passed. Only when all rights to appeal are exhausted should the tapes be made available for copying.<sup>191</sup>

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187. See *United States v. Mitchell*, 551 F.2d 1252, 1263 n.52 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). But see *Hearst Corp. v. Vogt*, 62 A.D.2d 840, 843-44, 406 N.Y.S.2d 567, 570 (1978) (Kane, J., concurring in part and dissenting in part) ("I cannot assume that petitioners would act in a manner incompatible with their professional responsibilities in using the materials sought.").

188. See *supra* note 90 and accompanying text.

189. See *Standards*, *supra* note 85, at 75.

190. See *supra* note 89.

191. See *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). In *Mitchell*, the request to copy the tapes came before Judge Sirica after the trial of the Watergate defendants was completed. He wrote that "[a]bsent some compelling reason, the Court should not take any action which carries the risk of causing possible prejudice to the rights of the defendants should a retrial be necessary." *Id.* at 188; cf. *Gannett Co. v. DePasquale*, 443 U.S. 368, 400 (1979) (Powell, J., concurring) (a transcript of a closed pre-trial hearing should be made available only "past the time when no prejudice is likely to result to the defendant or the State from its release"); *Reilly v. McKnight*, 7 Media L. Rep. (BNA) 1445, 1446 (N.Y. App. Div. May 21, 1981) (same). The possible consequence of this proposed rule is that the tapes may not be as "newsworthy" if their broadcast is delayed for what could be two or three years. *Gannett Co. v. DePasquale*, 443 U.S. 368, 442 n.17 (1979) (Blackmun, J., concurring in part and dissenting in part) ("[T]he inherent delay may defeat the purpose of the public-trial requirement. Later events may crowd news of yesterday's proceeding out of the public view . . . . Moreover, an important event, such as a judicial election or the

## CONCLUSION

The common-law right to have immediate access to judicial records for the purpose of copying is an undeniably important part of the public's right to know information regarding criminal trials. Important though it may be, however, it is not absolute. A trial judge, in his discretion, may properly decide that there are sufficiently important concerns that outweigh the presumption in favor of copying records.

When the records are video and audio tapes introduced into evidence at trial, the presumption in favor of release should not apply. Because there is a reasonable possibility that the broadcast of those tapes will irreparably harm the accused's right to a fair trial, the courts as a matter of law should deny the release of the tapes for copying until the accused is no longer in jeopardy. Courts must take no action that significantly decreases the chance of a fair trial. The accused is entitled to his day in court, not a few minutes on the nightly news.

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selection of a prosecuting attorney, may occur when the public is ignorant of the details of judicial and prosecutorial conduct."); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly"). Of course, these cases were both addressing the question of keeping all information of the proceeding from the public. There is no such issue in the release of tapes, as long as there has been public attendance at the trial. Even withholding all information from the press and public may be proper if there is the threat of prejudicing the defendant's fair trial right. *See, e.g., Gannett Co. v. DePasquale*, 443 U.S. 368, 393 (1979) ("[A]ny denial of access in this case was not absolute but only temporary. Once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available. The press and the public then had a full opportunity to scrutinize the suppression hearing."); *Delaney v. United States*, 199 F.2d 107, 114 (1st Cir. 1952) (if congressional hearings must be held, they should be closed, "postponing public disclosure of the evidence taken for a comparatively brief period until the trial . . . could have been concluded").