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# Establishing a Reporter's Right of Access to All Court Documents Under the First Amendment

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# ESTABLISHING A REPORTER'S RIGHT OF ACCESS TO ALL COURT DOCUMENTS UNDER THE FIRST AMENDMENT

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## I. INTRODUCTION

A free press is crucial to American government. Civic journalism seeks to educate the public and create an informed electorate that has the necessary information to participate in government.[1] While the institution of journalism has expanded beyond this once foundational goal, the freedom of the press remains essential to creating the free flow of information to the public. Although not every article will aid a voter in front of a ballot box, there are thousands of newsworthy events that the public has an interest in. These events include those that capture the interest of the public and inform, entertain, and sometimes offer catharsis.[2] The First Amendment's scope is broad—it protects the newsworthy reporting of crime just as it protects the coverage of elections. While the press has been granted explicit rights by courts, some rights are not so clearly defined, such as the right to access court records.

The Supreme Court of the United States and other federal courts have recognized a general right to access public judicial records, as well as a more concrete right to access judicial *proceedings*.[3] However, no Supreme Court case explicitly defines the scope of the press' right to *court documents* in common law or within the contexts of the First and Fourteenth Amendments.

In June 2018, the Colorado Supreme Court issued a brief opinion rejecting a news organization's request for four sealed documents in a capital murder case.[4] While the decision acknowledged the press's presumptive right to judicial proceedings, it distinguished court records from judicial proceedings.[5] Accordingly, the Court rejected their request and expressly declined to hold that the press is allowed "unfettered access" to court records.[6]

The Colorado news organization asserted its right in these documents,

1. WALTER DEAN, AM. PRESS INST., *What is the purpose of journalism?*, *in* JOURNALISM ESSENTIALS, https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/purpose-journalism/ [https://perma.cc/HC35-EUK2] (last visited Sep. 2, 2019).

2. *What is Newsworthy?*, PBS NEWSHOUR, https://www.pbs.org/newshour/extra/app/uploads/2013/11/What-is-Newsworthy-Worksheet.pdf [https://perma.cc/YL7W-3BQB] (last visited Sep. 2, 2019).

3. Nixon v. Warner Commc'ns, 435 U.S. 589 (1978).

4. People v. Owens, 420 P.3d 257 (Colo. 2018).

5. *Id.*

6. *Id.*

and its lawyers have commented that this is "the only court . . . that has categorically rejected a First Amendment right to records."[7] The newspaper requested the Supreme Court directly address this issue, and hold that there is a First Amendment guarantee of access to such documents, while defining its scope.[8]

This Note will discuss the Colorado Supreme Court decision and compare it with other related federal court decisions as well as relevant Supreme Court decisions relating to the press and its access to judicial proceedings and court documents. Part II provides the historical and legal background of the press's right of access in different courtroom situations. Part III explains why the First Amendment favors a presumptive right of access to court documents, and fashions a suggested test to weigh that right against a defendant's right to a fair trial. Part IV concludes that the Supreme Court of the United States should grant certiorari and expressly hold that there is an explicit First Amendment right for the press to access court documents.

## II. BACKGROUND

This Part explains the relevant historical and judicial background relating to the press in the courtroom. Section A provides a brief history of the role of the press and the policy arguments underpinning the grants of power and rights afforded to the press. Section B discusses *People v. Owens*, the Colorado Supreme Court case that denied access to public records and sparked the current debate. Lastly, section C explains significant federal and Supreme Court cases that, while not directly speaking on this issue, are relevant in the analysis.

### *A. A Brief History of the Press*

Journalism is based on conversation, with reporters acting as mediators. Journalism has existed in some form for centuries, whether through the Parisian gatherings around the tree of Cracow in 1750,[9] through printed reporting in things like newspapers, or electronic reporting through platforms like Twitter. The core theme underlying each form of reporting is communication, with reporters acting as mediators to facilitate the conversation on topics that interest the public. While civic

7. Chris Outcalt, *Media Lawyer Will Petition SCOTUS to Hear Records Case*, THE COLO. INDEP. (Aug. 31, 2018), https://www.coloradoindependent.com/2018/08/31/colorado-supreme-court-scotus-judicial-records-first-amendment/ [https://perma.cc/G42V-BQRU].

8. *Id.*

9. Robert Darnton, *Paris: The Early Internet*, THE N.Y. REV. OF BOOKS (June 29, 2000), https://www.nybooks.com/articles/2000/06/29/paris-the-early-internet/ [https://perma.cc/2S9X-D9X4].

journalism boasts its goal of aiding citizens with making political decisions, modern journalism goes much further to both entertain and inform the general public.[10] Legitimate, newsworthy coverage has long included what people have found interesting, even if not directly relating to political affairs.[11]

The First Amendment guarantees a free press, and does not distinguish between the press that covers politics and the press that reports crime or recaps highlights from a sports game.[12] Spreading information fulfills the human desire to share stories and connect through what is happening in the world; it is this connection that enhances the need to protect journalists and the press industry.

The American press played a significant role in the government—beginning with America's first colonial newspaper, Publick Occurances, which was published nearly one hundred years prior to signing the Constitution[13]—and has maintained its prominence in society since. The press has even been credited with uncovering criminal scandals and corruption.[14] Today, crimes are covered on every level—locally to internationally—with such frequency that the media is often criticized for over-reporting the matters.[15]

Because reporters are tasked with the important duty of informing the public, certain institutional standards guide the profession. For example, the Society of Professional Journalists ("SPJ") has produced a Code of Ethics.[16] The most relevant standard instructs journalists to seek and report the truth, including the duty to ensure that information is accurate.[17]

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10. WALTER DEAN, AM. PRESS INST., *What Makes A Good Story?*, https://www.americanpressinstitute.org/journalism-essentials/makes-good-story/ [https://perma.cc/N269-RAF3] (last visited Sep. 2, 2019).

11. *Id.*

12. U.S. CONST. amend. I. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of . . . the press."

13. David Sheddon, *Today in media history: First colonial newspaper published in 1690*, POYNTER (Sep. 25, 2014), https://www.poynter.org/reporting-editing/2014/today-in-media-history-first-colonial-newspaper-published-in-1690/ [https://perma.cc/L2JZ-QUVH]. The first edition was published on September 25, 1690; however, it was suppressed by British government. The Boston News-Letter, first published 14 years later in 1704, was the first colonial newspaper that was continuously published. *Id.*

14. Perhaps most famously celebrated is the investigation of Watergate by Washington Post reporters Bob Woodward and Carl Bernstein, who are credited in bringing down President Nixon and spurring a new era of investigative journalism. *See* Alicia Shephard, *The Journalism Watergate Inspired Is Endangered Now*, N.Y. TIMES (June 13, 2012), https://www.nytimes.com/roomfordebate/2012/06/13/did-any-good-come-of-watergate/the-journalism-watergate-inspired-is-endangered-now [https://perma.cc/3B8C-7G24].

15. Robert Siegel, *Why The Public Perception Of Crime Exceeds The Reality*, NPR (July 26, 2016), https://www.npr.org/2016/07/26/487522807/why-the-public-perception-of-crime-exceeds-the-reality [https://perma.cc/V5AA-N482].

16. *Code of Ethics*, SOC'Y OF PROF'L JOURNALISTS, https://www.spj.org/pdf/ethicscode.pdf [https://perma.cc/8F5K-FB7T]. (last visited Sep. 2, 2019).

17. *Id.* The Code requires journalists to "[t]est the accuracy of information from all sources . . . ."

This is a vital tenet for every article, but there is perhaps a heightened significance in the realm of judicial proceedings, where people face not only legal consequences, but social and reputational judgments as well.

### *B. People v. Owens*

*People v. Owens* was a recent Colorado Supreme Court case that sparked the debate surrounding the press' right to court documents. The case involves Defendant Sir Mario Owens, a man convicted of first-degree murder and subsequently sentenced to death.[18] Owens filed a motion for post-conviction relief and a motion to disqualify the District Attorney's Office in 2017, both of which were denied by the trial court.[19] The latter motion was based on Owen's allegation that the prosecutor did not disclose evidence that would have been helpful to his defense.[20] While the court found instances of prosecutorial misconduct, it did not find them to be prejudicial to his defense.[21] The trial court partially sealed the post-conviction motions that The Colorado Independent ("Independent"), an online media organization, later requested.[22] Specifically, Independent requested "the initial motion to disqualify the district attorney, the state's response, the transcript of the closed hearing on the motion and the order denying the motion."[23]

Independent asserted that the First Amendment, the Colorado Constitution, common law jurisprudence, and the Colorado Criminal Justice Records Act compelled the trial court to allow public access to those records,[24] but the trial court denied Independent's motion.[25] Independent filed for relief and argued that the press' access to judicial records is mandated by the First Amendment and the Colorado Constitution.[26]

The Colorado Supreme Court, exercising original jurisdiction, also rejected Independent's argument.[27] Citing two opinions from the Tenth Circuit, the Colorado Court stated the First Amendment has not been

18. People v. Owens, 420 P.3d 257, 258 (Colo. 2018).

19. *Id.*

20. Steve Zansberg, *Colorado Supreme Court Holds There is No Constitutional Protection for Public Access to Court Records,* MLRC MEDIA LAW NEWSLETTER (June, 2018), https://www.ballardspahr.com/-/media/files/articles/2018-06-no-protection-for-public-access-to-court-records.pdf?la=en&hash=B34FA56206EF9A6587D23D5F9F12FC39 [https://perma.cc/WG23-VAZU].

21. *Owens*, 420 P.3d at 258.

22. *Id.*

23. Outcalt, *supra* note 7.

24. *Owens*, 420 P.3d at 258.

25. *Id.*

26. *Id.*

27. *Id.*

construed to allow access to all court records, but only to judicial proceedings.[28] The opinion also referenced a prior Colorado Supreme Court case indicating that despite there being "no 'absolute right to examine court records,'" access may be allowed at the court's discretion.[29]

Absent a direct case from either the Supreme Court of the United States or its own jurisprudence, the Colorado Court rejected Independent's request for access to the requested court records.[30] As a final note, the Court reasoned that ruling otherwise would be contrary to Colorado's open records laws that exist upon a presumption that there is not a right of access to all court records.[31] This Colorado Supreme Court decision sparked controversy and led almost one hundred media organizations to rally behind Independent.[32]

### *C. Supreme Court of the United States Jurisprudence*

While the Supreme Court has not addressed the press' right to court documents, other cases striking the balance between a fair press and privacy in judicial proceedings shed light on how the Court would likely rule.

#### 1. Richmond Newspapers v. Virginia: The Right to Attend Criminal Trials

In 1980, the Supreme Court of the United States held that the Constitution guarantees to the press the right to attend criminal trials.[33] In *Richmond Newspapers*, Defendant Stevenson was convicted of second-degree murder in a Virginia County Court; however, the conviction was later reversed by the Virginia Supreme Court due to improper admittance

28. *Id.*

29. *Id.* at 258-59. The Court relied on *Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966), a case that involved interpreting a statute that instructed county clerk courts to allow any person to examine the "books and papers required to be in their offices." *Id.* at 512. However, the statute barred any person who was not a party in interest to examine pleadings in any pending case. *Id.* There, the Colorado Supreme Court held that the statute did not proscribe clerks from allowing non-interested parties from inspecting the pleadings; while there was not an *absolute right* to do so, the statute would allow courts and clerks to provide access at their discretion. *Id.* The Court also noted the underlying case was of public interest in the area, and the news organization had a duty to report fair facts on those matters. *Id.*

30. *Owens*, 420 P.3d at 258-59.

31. *Id*. As an example, the Court cited the Colorado Criminal Justice Records Act, COLO. REV. STAT. §§ 24-72-301 to -309 (2018), which provides that Colorado's public policy requires criminal justice agencies to maintain records that are to be open to examination by *any* person. *Id.*

32. Alex Burness, *Colorado Independent crosses first hurdle in U.S. Supreme Court Case*, THE COLO. INDEP. (November 2, 2018), https://www.coloradoindependent.com/2018/11/02/colorado-independent-crosses-first-hurdle-in-u-s-supreme-court-case/ [https://perma.cc/E35J-JPX3].

33. Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980).

of evidence.[34] Stevenson's second and third trials later ended in mistrial.[35] Reporters for Richmond Newspapers were in the courtroom when the fourth trial was called, but Stevenson's attorney moved to close the trial to the public, which the trial judge granted.[36] Following Richmond Newspaper's motion to vacate the closure order and its accompanying hearing, the trial judge ultimately denied the newspaper's motion and excluded the public from the courtroom.[37]

Recounting the history of public trials, the Court's majority emphasized this important feature's place in American courtrooms.[38] The openness of these trials, the Court described, serves many functions. First, it opens the jury, the judge, and the attorneys up to public scrutiny and offers the public a check on their power.[39] Second, it provides an outlet for communal emotions of rage and pain that follows crime.[40] By observing trials, people who are indirectly involved are able to satisfy their desires for justice by watching a trial unfold.

For those reasons, the Court found that there is a *presumption of openness* in criminal trials.[41] The Court explained that the Sixth Amendment's right to a public trial for criminal proceedings is a "reflection" of the common-law idea that justice also requires the "appearance" of justice.[42] Tying in the First Amendment's guarantees of a free press, the Court held that guarantee implicitly included the right to attend criminal trials.[43]

### 2. Gannett Co. v. DePasquale: No Right to Attend Pre-Trial Hearings

While there is a constitutional right for the press to attend criminal trials, the Court has produced a limitation on that right in terms of pretrial

34. *Id.* at 559.

35. *Id.*

36. *Id.* at 560.

37. *Id.* The trial's judge reasoning was impacted by the facts that this was Defendant's fourth trial, and that the previous trials had issues concerning information communicated to jurors. Defendant Stevenson himself had apprehensions about this, as he was worried misinformation would be published, seen by jurors, and influence their opinions of the case. *Id.* at 561. The judge also stated the layout of the Courtroom would pose problems, because having additional people present would distract the jury (as opposed to the new Courtroom, which would allow an audience to observe while remaining unseen by the jury). *Id.*

38. *Id.* at 569.

39. *Id.*

40. *Id.* at 571.

41. *Id.* at 573.

42. *Id.* at 574.

43. *Id.* at 580. This right also is incorporated into the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925) (finding that freedom of the press is "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment").

proceedings.[44] In *Gannett*, two newspapers covered a local disappearance of a man.[45] The reports detailed his disappearance with stories such as identifications of the people who were with him last, police theories, and revelations that the police were questioning certain suspects, along with updates as the investigation progressed.[46]

Days after an indictment, the papers reported information revealed at the arraignments, including the fact that the two charged defendants pleaded not guilty.[47] The defendants moved to suppress certain statements they made to police, and also requested that due to the amount of publicity, the hearing be closed off from the press and public.[48] The trial judge granted the defendants' motion and closed the hearing.[49]

The following day, a reporter covering the story requested a transcript of the hearing. In response, the trial judge scheduled a hearing and expressed his view that while the press had a presumptive right to access judicial proceedings, it was weighed against the defendants' rights to a fair trial.[50] Because, in this circumstance, such access could reasonably be seen to pose prejudice to the defendants, the press' interest was outweighed.[51]

On review, the Supreme Court held that the Constitution did not give the press a right of access to the pretrial proceeding.[52] Relevant to this holding were findings that there was no common law right to attend pretrial proceedings, and the overwhelming interest that defendants have in securing a fair trial and preventing the public from being prejudiced against the defendant, which was especially true in this case due to the extensive pre-trial coverage.[53] In the Court's opinion, these factors warranted finding that the public has no constitutional right to attend pre-trial hearings. Chief Justice Burger concurred in the opinion, writing separately to clarify that this hearing was not a trial—rather that it was a pretrial hearing.[54] The *Richmond Newspapers* Court, authored by Chief Justice Burger, also relied on this distinction to distinguish this case.[55]

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44. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

45. *Id.* at 371-372.

46. *Id.* at 372.

47. *Id.* at 374.

48. *Id.* at 375.

49. *Id.*

50. *Id.* at 376.

51. *Id.* at 394.

52. *Id.* at 378.

53. *Id.* at 389-390.

54. *Id.* at 396.

55. Richmond Newspapers v. Virginia, 448 U.S. 555, 564 (1980). Chief Justice Burger characterized these two cases as addressing two different questions: first, writing that the *Gannett* case did not decide whether there was a constitutional right of access to *trials*, but whether there was a constitutional right to *pretrial hearings*; and second, explaining that the *Richmond Newspapers* case was

Justice Powell also wrote a concurring opinion and stated that he would have explicitly held that the reporters had an interest, pursuant to the First and Fourteenth Amendments, to attend the pretrial hearing.[56] In his view, this special interest vests in reporters due to their relationship with the public, as they act as agents for the public by disseminating information the public needs to exercise political responsibilities.[57] However, he expressed that this right would not be unqualified—the scope of access would be defined by the constitutional right of a defendant to a fair trial and by the government's need to protect confidential information would outweigh this access.[58]

However, the Court later recognized that if pretrial proceedings were conducted similar to trials, the press had a qualified First Amendment right of access.[59] For example, *Press Enterprise II* established that the preliminary hearings, as conducted in California, were sufficiently like a trial to find a qualified right of access.[60] The Court laid out two "complimentary considerations" when weighing the right of access to criminal proceedings.[61] The first consideration is whether the place and process of the proceeding has traditionally been open to the press; the second consideration evaluates whether the public's access plays a role in maintaining the proper functioning of that proceeding.[62] This second factor analyzes considerations like fairness and the appearance of fairness to the public.[63] Later courts have referred to the first consideration as the "experience" prong and the second as the "logic" prong.

### 3. Cases Recognizing a General Right to Inspect Public Records

The Supreme Court has generally stated that other courts in this country have recognized the right to evaluate public records, although that precise question has not yet been litigated in front of and decided by the Supreme Court. In the most relevant case, *Nixon v. Warner Commissioners*, the Court stated that lower courts recognized this right, yet mentioned that it was not absolute.[64]

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in fact deciding the unanswered question created by *Gannett* of whether there was a constitutional right to attend *trials.*

56. *Gannett*, 443 U.S. at 397.

57. *Id.* at 397-98.

58. *Id.*

59. Press Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986).

60. *Id.* at 12. This case reversed the California Supreme Court's holding that the right of access extended *only* to criminal trials.

61. *Id.* at 8.

62. *Id.*

63. *Id.* at 13.

64. Nixon v. Warner Commc'ns, 435 U.S. 589, 598 (1978).

The *Nixon* case centered on President Nixon's Watergate scandal. Reporters sought to copy and sell portions of tapes containing President Nixon's conversations that were played at trial.[65] The *Nixon* Court explained that a court has supervisory powers over its own records and files, which would allow denial of access to public records when that access would lead to improper results.[66] While acknowledging this general right, the Court commented that it was "difficult" to glean a precise definition of what the common-law right of access entails from the "relatively few" cases addressing the issue.[67] Applied to the particular case before it, though, the Court felt it unnecessary to clarify the scope of this common law right and expressly declined to do so in the absence of such a need.[68]

The reporters advanced the argument of public understanding, arguing that as reporters, it is their duty to give the public understanding of historical situations.[69] Also weighing in favor of the journalists was the "presumption" of access to these records.[70] However, there was a unique twist in this case: an existing statute directed an administrator to take possession of the materials.[71] Ultimately, the Court found that the common law right of access to judicial records was not enough, and President Nixon's interests, as a defendant, outweighed that right.[72]

The Supreme Court further rejected the reporters' First and Sixth Amendment arguments.[73] While it did reaffirm that the press has a right to information about a trial, the Court made clear that the press' right was on a level equal to that of the public.[74] In other words, all members of the public, when walking into a courtroom, have the same right to attend, regardless of whether the individual is a member of the press.[75] Further, the Court found that the Sixth Amendment similarly did not give the press an upper hand to record and broadcast a trial—a defendant enjoys the right to a public trial so long as members of the public (including the press) attend and document its observations.[76]

In *United States v. Hickey*, the Tenth Circuit has recognized a common

65. *Id.* at 594.

66. *Id.* at 598.

67. *Id.* at 599.

68. *Id.*

69. *Id.* at 602.

70. *Id.*

71. *Id.* at 603. The Presidential Recordings Act directly governed, requiring the Administrator of General Services to take the President's tapes and documents. *Id.*

72. *Id.* at 608.

73. *Id.* at 610.

74. *Id.*

75. *Id.*

76. *Id.*

law right to inspect judicial records.[77] *Hickey* reiterated that courts have discretion when it comes to their own records and that factual circumstances and parties' interests have to be weighed and considered.[78] Recognizing that *Nixon* is the only Supreme Court case that deals with court files directly, the Tenth Circuit reiterated that the access to records was based on common law rights and not on rights derived from the First and Fourteenth Amendments.[79]

Similarly, the Fourth Circuit has stated a cursory overview of the murky jurisprudence.[80] *In re Knight Pub* also briefly described the common-law rights of access to judicial records and documents, noting, again, that it is not absolute.[81] The Fourth Circuit, however, took the dicta from *Nixon* and created factors for courts in its Circuit to consider in these cases to weigh the public right of access against other rights.[82] Per the Fourth Circuit's reading of *Nixon*, the relevant factors in such balancing tests are: (1) whether the records are for a proper or improper purpose; (2) if release would assist the public in its understanding of important events; and (3) whether the public had access to that information previously.[83] Other Circuits have, likewise, found rights of access.[84]

## III. DISCUSSION

This Part discusses the reasons favoring a solidified First Amendment right of access to court documents, and possible tests. Section A briefly outlines the need for a First Amendment right rather than relying on a common law right due to policy reasons underlying institutional standards in the press industry. Section B explains how court records play the same significant functional roles that trials do in the context of accurate and fair reporting, further necessitating a constitutional right of access. Section C explores the existing federal case law to set forth possible tests and factors applicable to this qualified right to create a judicially manageable standard. Finally, Section D will apply the test outlined in Section C to the Colorado Independent case to prove the standards are practical and serve the narrow function of aiding the press in its role as educators of the

77. United States v. Hickey, 767 F.2d 705, 708 (10th Cir. 1985).

78. *Id.*

79. *Id.* at 709.

80. *In re* Knight Pub. Co., 743 F.2d 231 (4th Cir. 1984).

81. *Id.* at 235.

82. *Id.*

83. *Id.*

84. *See* N. Jersey Media Grp. Inc. v. United States, 836 F.3d 421 (3d Cir. 2016) (recognizing a common law right to judicial proceedings and records); *see also* United States v. Kravetz, 706 F.3d 47 (1st Cir. 2013) (finding that there was no right of access to subpoenas, but there was a right of access to sentencing memoranda and sentencing letters).

public.

### *A. A Presumptive Right of Access to Court Records is Required for Adequate Operation of the Press*

While the press benefits from a common-law right of access in most areas without a corresponding express First Amendment right, the ability of the press to report on important events can be somewhat hindered by the location of the news source. This hindrance is not a predicted repercussion, but an actual one, evidenced by the Colorado Supreme Court's *Owens* decision. Finding an explicit constitutional right would also promote uniformity and give courts an applicable working standard.

The Supreme Court itself even noted this discrepancy in the jurisprudence guiding the common law right of access, writing that it was hard to determine the actual definition of the common-law right.[85] If the Supreme Court has stated that the definition is unclear, then it seems to logically follow that the standards to apply must also be unclear.

A consistent and clear standard will ensure that reporters are adequately adhering to press industry standards and that the courts are clear on their duties to the press. The SPJ Code of Ethics highlights the importance of accurate reporting; a public that lacks trust in the media is a public that is ultimately uneducated.[86] Without a stronger right of access—found in the First Amendment—to judicial proceedings, the two options a reporter faces are equally unappealing. The journalist who is seeking to inform the public of a newsworthy trial but is denied access to its records must either: (i) drop the story, consequently leaving the public without information, or (ii) leave holes in the article that the journalist knows he cannot fill, again leaving the public without an accurate understanding of the news. In the first scenario, he violates the truth standard by seeking but not reporting the truth. In the second, he reports only half-truths.

As outlined in the Background, journalism coexists alongside humanity because it is predicated on humanity's desire for conversation about world events. While the public's "right to know" information is often touted in the context of politics, it rings true for every facet of day-to-day life, and especially in trials. In order to best serve as an "agent"[87] to the public, journalists must have access to information. Moreover, to conform with industry standards, reporters must ensure that all information is *accurate*, further compounding the necessity for a right of

85. Nixon v. Warner Commc'ns, 435 U.S. 589, 599 (1978).

86. *Code of Ethics*, *supra* note 16.

87. Gannett Co. v. DePasquale, 443 U.S. 368, 397-398 (1979). Justice Powell highlighted the press' role as "agents" to the public.

access to all available information.[88]

### *B. Court Records Are Analogous to Trial Attendance and Trial Transcripts*

In the *Gannett* line of cases, the Court relied on several key characteristics to grant access to trials instead of pre-trial proceedings. In criminal trials, public access serves functions such as: (i) promoting justice and the appearance of justice; (ii) offering checks and balances on the proceedings; and (iii) providing catharsis in the wake of especially egregious crimes in communities. When analyzing access to pre-trial proceedings, the Court weighed other considerations to conclude that there are still too many risks to allow presumed access to pre-trial hearings. In the Court's view, excessive coverage of pre-trial proceedings poses too many threats to defendants' rights to a fair trial, and thus needs to be limited. However, *Press Enterprise II* sets out a clear exception to the rule where the proceedings seem too much like a trial. Therefore, Supreme Court jurisprudence provides a right of access to *proceedings* that serve the functions described above but do not pose too many risks to defendants.[89]

It is helpful to examine certain court documents and test their abilities to pass or fail the functions that public access serves to facilitate. The First Circuit, inspecting three types of court records, did this in *Kravetz*.[90] There, the First Circuit first determined whether the documents were "judicial records," and if so, used the experience and logic test.[91] Judicial records, according to this Circuit, are "materials on which a court relies in determining the litigants' substantive rights."[92]

Using the threshold determination and the experience and logic test, the *Kravetz* court found that pre-trial subpoenas were not subject to presumptive access.[93] However, the Court did find a presumptive right of access to sentencing memoranda and sentencing letters.[94] Crucial to this conclusion were considerations of values comparable to those discussed at common law, including a watchdog role over the courts generally and over criminal trials specifically.[95] While not explicitly discussed by this

88. *See Code of Ethics*, *supra* note 16.

89. Press Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986).

90. United States v. Kravetz, 706 F.3d 47, 56-59 (1st Cir. 2013).

91. *Id.* at 55.

92. *Id.*

93. *Id.*

94. *Id.* at 56-59.

95. *Id.* at 56-57. The court wrote that this function allowed the public to ensure "quality, honesty and respect for [the] legal system." Further, the court wrote that this is especially important in a criminal trial by discouraging overzealous prosecutors or judges who may impose "arbitrary" sentences.

particular First Circuit opinion, the pattern in this case—and indeed, expressly noted in previous Supreme Court cases[96]—is to carefully consider timing, often granting further rights of access *after* trial with a cautious eye before trial.

The same general constitutional principle should be applied to court documents. The Supreme Court of the United States has allowed access to transcripts of the trials the press would normally be allowed to attend, and this presumptive and qualified right should be extended to most court documents. Justice Powell's concurring opinion in *Gannett* is as close to this view as the Supreme Court has discussed—he recognized the fundamental role of the press, as agents to the public, to attend pre-trial hearings.[97] Contrasting with the majority, Justice Powell took the same basic ideas and stretched the right of access to cover even pre-trial hearings, although taking care to note external factors that would limit this presumptive right.[98]

Evaluation of court records serves the same purposes as trial attendance and trial transcripts. The first rationale offered supporting access of trials is the promotion of justice and the appearance of justice. "Double-checking" court records promotes this as well; fact-checking the system promotes the appearance of justice in the eyes of the public, as citizens serve as a check when they read about possible abuses or misuses of power.[99] Permitting the press access to court records also serves the appearance of justice, because even if a minority of people read about certain cases, the mere ability to access that information assures the population that they still hold the power to perform those wellness checks. These actions also allow the public (and, necessarily, allow the journalists digging into the documents) to retain its role as watchdog over proceedings, falling squarely into the second justification involving checks and balances. Finally, with regard to the third justification, reporting on heinous events provides an affected community with an outlet for negative feelings, as well.[100] Providing details of the crime, in addition to the subsequent punishment outlined in court documents, serves that purpose.

Because court records serve the same legitimate and recognized values as access to trials, there should be a presumptive First Amendment right

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*Id.*

96. *E.g.*, Gannett Co. v. DePasquale, 443 U.S. 368, 394-395 (1979).

97. *Id.* at 397.

98. *Id.*

99. *See generally supra* note 14 and accompanying text. One prominent example of this is the Watergate scandal – although the public trust in government probably decreased, the actions taken after discovering the scandal restores faith in the judicial system.

100. These circumstances can also pose a unique problem, though, which will be discussed later in Section II.C., describing the scope of this presumed right of access.

to inspect the records that recount the happenings of court proceedings. In determining an appropriate scope and a corresponding test, the case-law directs careful scrutiny of prejudice to the defendant, which inevitably draws a line between pre-trial and post-trial documents.

### *C. An Appropriate Test Uses Experience, Logic, and Factors Evaluating Prejudice to Involved Parties*

Section A established the foundation for a First Amendment right of access due to policy reasons and institutional reasons underlying the role of journalists. Section B, in analogizing court records to attending trial, concluded that there should be a finding of a presumptive, *constitutional* right of access based on recognized legal values served by such access. Ultimately, it is necessary to have a First Amendment right of access to court records in order to conform with and strengthen the role of journalism today, provide conformity among the states, and serve certain values as recognized by common law.

However, it is important to remember that a presumptive right of access is just that: presumptive. This note is not arguing for a full-fledged, unchecked right of access, but rather one that is qualified and reviews many of the concerns discussed in the cases regarding pretrial proceeding access. Piecing together Supreme Court jurisprudence and federal circuit court cases, this note suggests a synthesized rule providing for a presumptive First Amendment right of the press to have access to judicial records that enhance the values of journalism, trial, and do not impede on any rights of parties to any litigation.

First, courts must determine that the records are applicable. The First Circuit definition of judicial records should be adopted when using this test. Focusing on the records that the judge relies on when evaluating a party's substantive rights ensures that the press is not getting any information that is unnecessary to its reporting.[101] This is a first—albeit, small—limitation on this right.

The second and third steps should be applying the *Press Enterprise II* experience and logic test. The experience factor asks if the press has historically been permitted to attend the proceeding. Common law rights in certain circuits could provide guidance for certain documents, but more importantly, this prong allows for discussion of parties' rights not to be prejudiced. Courts could analogize certain documents with certain proceedings, namely, pretrial documents to pretrial hearings. Consistent with *Gannett*, courts can use this prong to prevent unfair prejudice to defendants in the areas where most risk is present, which have been

101. United States v. Kravetz, 706 F.3d 47, 55 (1st Cir. 2013).

evaluated in the line of cases discussing proceedings. Pretrial proceedings garner the most attention, as there is a lot of risk to prejudice a defendant if there has been extensive coverage. In dicey circumstances, a defendant's right to a fair trial would outweigh a public's access to judicial records and would fail at this step.

The logic prong would normally assess whether access maintains the proper functioning of that specific proceeding. So, as applied to judicial records, this prong would ask if allowing access to this *record*—using the First Circuit requirement that the "record" be one that the judge relies on in the case—maintains the functioning of the most relevant proceeding, or if there is none that directly relates, litigation overall. Because the applicable records are limited to ones that the judge will use, it asks if it relates to the maintenance of the trial as a whole.

With proceedings, for instance, this prong would ask whether access to a sentencing hearing would maintain the proper functioning *of that hearing*. Considering a copy of a sentencing memorandum, an example of a judicial *record*, a judge would ask if access to the document maintained the functioning of the corresponding sentencing hearing, or the litigation leading up to the sentencing. In some circumstances, the sentencing memoranda may very well maintain the functioning of both the hearing and the trial overall; however, if there was a situation that made the memoranda so far removed from the hearing, it would not make sense to ask a court to line it up to one specific hearing (e.g. if a reporter reviews a memorandum long after a defendant is serving a sentence in jail).

This inquiry should be specifically related to the case at hand. Courts would determine in which cases it is proper to evaluate whether access aids the functioning of a specific, correlated proceeding, or the litigation overall, depending on the circumstances. The logic prong is especially important because it allows for discussion of the policy goals outlined in Section B. This allows for "checks" on proceedings and assures the public that the system rests on justice, not arbitrary principles.

Finally, if a request for access passes through the first three steps, the last prong would require balancing the factors the Fourth Circuit formulated from the dicta of *Nixon*. This would be a non-exhaustive list of factors that would provide judges with more discretion if there seemed to be an unfair, or questionable request.[102] Factors to weigh include: "(i) whether the records are for a proper or improper purpose; (ii) if release would assist the public in its understanding of important events; and (iii) whether the public had access to that information previously."[103]

102. This may come up in cases that are particularly shocking to a community, when catharsis progresses.

103. *In re* Knight Pub. Co., 743 F.2d 231, 235 (4th Cir. 1984).

The first factor allows for a second consideration of the defendant's rights. For example, a court may recognize an attempt to villainize a defendant that goes beyond reporting and undermines the purpose of the press as informer rather than propagandist. The second factor, however, relates back to the policies outlined in the beginning of this Part and may grant a request for access in light of journalistic standards and canons to report the truth to the public. These two factors seem to complement each other in analysis and can be used to ensure fairness. The final consideration relates to a particular type of concern discussed in Justice Powell's *Gannett* concurring opinion where he recognized one limit to access would be confidential information.[104] Certain practical considerations would have a place in this prong.

This proposed test attempts to cover all areas of advocacy and concerns addressed in the cases relating to accessing judicial proceedings. It allows for a presumptive right of access to ensure that journalists fulfill their historic duty to facilitate conversation on newsworthy events, as well as institutional standards to report accurately. This right is qualified, however, by the experience prong that would flag risky areas, and by the logic prong that preserves the public's ability to provide checks and balances on proceedings. The final balancing test would act as a filter to catch any final considerations the court deems necessary, including weighing policy arguments on both the side of access and privacy rights to achieve total fairness.

### *D. Case Study: Using the Proposed Test for Colorado Independent*

Independent, in response to *People v. Owens*, requested four specific documents: the motion to disqualify the district attorney, the state's response, the transcript of the closed hearing on the motion, and the order denying the motion.[105] The defendant filed the motion to disqualify the attorney as an attempt to reverse his conviction and alleged prosecutorial misconduct.[106] In fact, the court found misconduct but held that it was not prejudicial.[107] Using the proposed test as a case study, this note will determine whether the press should be permitted to access these sealed documents. After implementing the test, this note's conclusion favors permitting access to the records in *People v. Owens*.

The first step is determining whether the four requested documents are judicial records. Interpreting this practically, and broadly in consideration of the entire situation, compels a finding that each document is a judicial

104. Gannett Co. v. DePasquale, 443 U.S. 368, 397-98 (1979).

105. People v. Owens, 420 P.3d 257 (Colo. 2018).

106. *Id.*

107. *Id.* at 258.

record. In adopting the First Circuit definition of a judicial record, the key question is whether the judge used the record in determining a litigant's substantive right.[108] The defendant here submitted the first record as an attempt to reverse his conviction, and the following three records relate to that issue.[109] The conclusion the judge reached—denial of the motion—resulted in affirmance of the defendant's deprivation of a substantive right: his life.[110]

The next step requires evaluation of whether the press has historically been afforded access to this type of proceeding, i.e. a post-trial proceeding. Since the press has traditionally attended these hearings, this step is satisfied. Unlike the *Gannett*-esque cases, this is not a pretrial hearing and does not pose any of the conventional risks that courts are wary of. This is not a case in which a defendant is awaiting trial and has his name associated with victims before a jury is chosen; he has already been convicted, and any appeal will not be before a jury. Thus, the risks of allowing access are far lower in this situation than other cases have previously failed this this prong.

The third step gauges any increased functioning of the proceeding. Independent requested these documents after hearings, so access to the records did not directly impact the proceeding *per se*. However, it did have an impact on the defendant's judicial proceeding as a whole. This factor proves to be the weightiest in this situation, as the considerations are particularly impactful due to the nature of this controversy: prosecutorial misconduct.

The public undoubtedly has an interest in acting as a "check" on the judicial system in every case, but especially here after an allegation of prosecutorial misconduct. If there is severe prosecutorial misconduct, the public has an unmatched interest in knowing of such wrongdoing in order to promote justice in both the case at hand and other cases more generally. Further, the very aspect of being permitted access promotes appearance of justice because it shows transparency from the court. The Colorado Supreme Court, in only a few pages, determined that the public had no right to access these documents that clearly contain vital information.[111] Even worse, the court apparently *found* misconduct and essentially condoned the behavior by finding that it was not prejudicial.[112] This is an instance that would benefit from highlighting the value of appearance of justice. This policy justification alone might permit access; if ever the

108. United States v. Kravetz, 706 F.3d 47, 55 (1st Cir. 2013).

109. *Owens*, 420 P.3d at 257.

[110] U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment prohibits the deprivation of life without due process of law.

111. *Owens*, 420 P.3d at 257.

112. *Id.* at 258.

public was concerned about a judge excusing misconduct by an overzealous advocate, this would be such a circumstance. Gaining access to these records would undoubtedly maintain the functioning of the court system in Colorado, as a whole, and specifically the functioning of Defendant Owens' trial.

Finally, the balancing test would build off the previous element (as it is the heaviest) and round out the analysis. Here, access is likely for a proper purpose, compounded by the policy reasons listed above. Access to these documents can provide details of the misconduct and educate the public fully about Owens's case. This release would undoubtedly help the public understand why a trial judge found prosecutorial misconduct, excused it, and declined to reveal to the public the basis for his conclusion.

Using this test, Independent should be permitted access to these documents. The analysis was not particularly difficult, and included opportunities for discretion and evaluation of outside factors to reach the fairest result in light of all the circumstances. A test using the elements endorsed by the Supreme Court in cases permitting access to judicial proceedings serve as a useful guideline for journalists to follow, and expands the permissible rights to do the job the press was intended to do. A First Amendment presumed right of access, determined on a case-by-case basis involving these factors, will further those goals.

## IV. CONCLUSION

Journalism has evolved over centuries, stemming from simple conversations under a tree in Paris to a 24-hour news cycle covering everything from politics, to sleeping cats, to crime—all of which serve the public that consumes it. Policy, institutional standards and constitutional underpinnings require a presumptive First Amendment right to judicial records. Without a solid First Amendment right, reporters in states that do not allow a presumptive right of access at common law—such as Colorado—are faced with the unsavory dilemma of either reporting half-truths or not reporting the story at all. In either instance, the reporter has not acted as an adequate agent for the public, and the citizenry loses valuable information that may be pertinent to their community and the justice system overall. Guaranteeing a presumptive right of access in the First Amendment rights to freedom of the press is the solution to such an issue.

Because access to court documents pose many of the same benefits and concerns as attending judicial proceedings, this note recommends using that jurisprudence to guide setting forth a test permitting access to be employed on a case-by-case basis. Using the First Circuit's definition of a judicial record ensures that the documents are actually relevant to the

trial, in that it requires the judge to *use* that record relating to a determination of a party's substantive legal right. *Press Enterprise II* set out two "complementary considerations" for allowing attendance at a proceeding, namely whether (i) the press traditionally was allowed to attend, and (ii) whether allowing such attendance would maintain the proceeding's functioning. These prongs, as discussed above, both allow a court to consider any prejudice to the parties as well as the benefits that access would bring to the justice system. A final balancing test of non-exclusive factors permits courts to consider the entire case to determine if access is proper.

Ultimately, the structure of the press and its role as an agent of the public compels a finding that, under the First Amendment, there is a presumptive right of access to court records in cases where parties to the litigation are not prejudiced. Because the proposed test in this note strikes a comprehensive balance the competing interests of the parties at suit, the reporters' duties, and the public, this test should be adopted in future cases.