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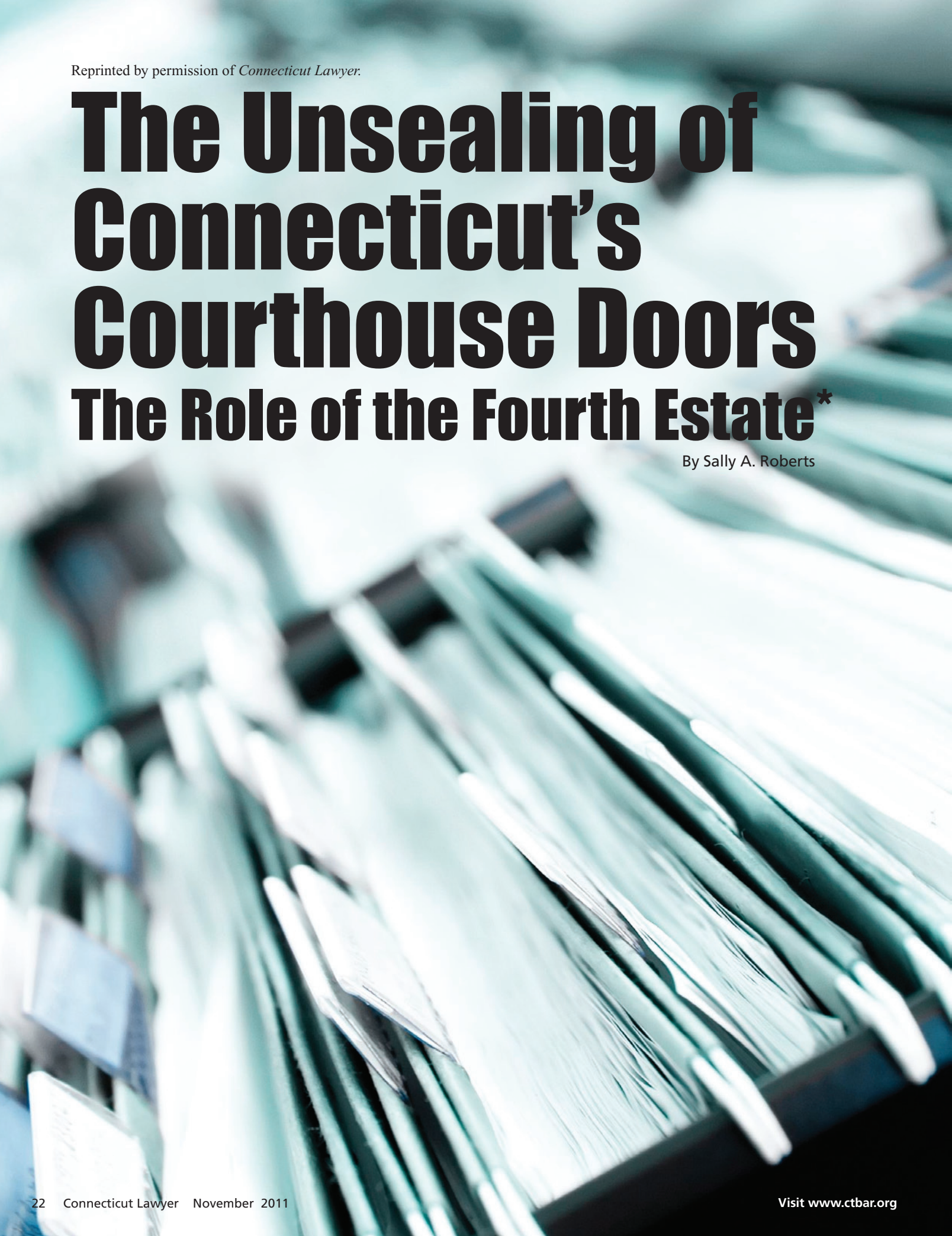
The Unsealing of Connecticut's Courthouse Doors

The Role of the Fourth Estate*

By Sally A. Roberts



Over the last several years, there has been much front page news over the sealing of files in the Connecticut court system. It is important to place the current publicity regarding court closure in the fabric of the history of access to court documents, and examine the historical significance of the First Amendment.

The U.S. Supreme Court has recognized that the tradition of open trials derives from both English common law and American legal history. Early Americans were wary of the newly established federal government. This fear pervaded the drafting of the Constitution and led the first Congress to adopt the Bill of Rights, which further limited federal power. Thus, Congress created the First Amendment, commanding, "Congress shall make no law…abridging the freedom of speech, or of the press…"[1] The U.S. Supreme Court has interpreted the First Amendment broadly and has granted the press wide latitude to serve as a governmental "watchdog."

Against this history, the Supreme Court addressed the right of access to judicial records in *Nixon v. Warner Communications, Inc.*[2] where the media had petitioned for access to tapes of President Nixon's secretly recorded conversations regarding the Watergate scandal. The Court acknowledged the common law "right to inspect and copy public records and documents, including judicial records and documents." After a brief discussion of the historical presumption of openness, the Court declared that the common law right of access was "not absolute" and held that the press was not entitled to any greater right of access than the general public.[3]

In *Gannett Co. v. DePasquale*,[4] the Supreme Court found that history demonstrates the existence of a common law rule of open criminal trials. Significantly, the Court also recognized the historical existence of a common law rule of open *civil* proceedings. Citing seventeenth-century commentators, the Court observed that both civil and criminal trials traditionally have been open to the public: "English commentators…assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two….The experience in the American Colonies was analogous. From the beginning, the norm was open trials."[5] The Court concluded that "there is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than [by] the text and structure of the Constitution."[6] While the *Gannett* Court declined to elevate the common law right of public access to a constitutional level, its historical observations are important. In later cases, the Court relied heavily upon this English and colonial history to find an implicit First or Sixth Amendment right of public and press access to criminal proceedings.

One year later the Court decided the watershed case of *Richmond Newspapers, Inc. v. Virginia*,[7] in which the press was challenging the legality of the closure of a criminal trial by agreement of the parties. The Court traced the history of open criminal proceedings from the "days before the Norman Conquest" through colonial America. The Court found that the public, including the press, must first be entitled to attend trials before they are able to exercise the First Amendment freedom to discuss them. The plurality stated that "free speech carries with it some freedom to listen…" Accordingly, "the First Amendment guarantee of speech and press, standing alone, prohibit the government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." [8]

In *Richmond*, seven Justices for the first time concluded that the First Amendment guarantees the public and press a right to attend criminal trials. As a result, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[9] The opinion reversed a closure order in which the trial judge had made no findings to support closure and had not considered whether alternatives, such as the exclusion of witnesses from the courtroom or the sequestration of the jurors, would have sufficed to ensure the defendant's Sixth Amendment right to a fair trial.[10]

The *Richmond Newspapers* plurality also invoked the express First Amendment right of assembly, "an independent right but also…. a catalyst to augment the free exercise of the other First Amendment rights."[11] It argued that "a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place."[12] Although the question of public access to civil cases was not raised in *Richmond Newspapers*, the Court volunteered that historically, civil and criminal trials have been presumptively open.[13] Justice Stewart went further, explicitly opining that the First Amendment clearly gives the press and public a right of access to trials, civil as well as criminal.[14]

Two years later, the Supreme Court decided *Globe Newspaper Co. v. Superior Court*.[15] *Globe* involved the constitutionality of a Massachusetts law that required exclusion of the press and the public from a courtroom when testimony was given by a sexual assault victim under the age of 18. Despite the willingness of all parties (including the three minor rape victims whose testimony was forthcoming) to permit the courtroom to remain open, the trial judge

ordered the courtroom closed. The Supreme Court held that the statute was unconstitutional and granted a right of access grounded in the First Amendment. To the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that the constitutionally protected "discussion of governmental affairs" is an informed one.[16]

Holding that the Supreme Court's justifications for open criminal proceedings applied to civil proceedings, lower courts extended the First Amendment right of access to civil proceedings. The Second Circuit, in *Westmoreland v. Columbia Broadcasting System, Inc.*,[17] in considering whether a First Amendment right existed to televise civil trials, endorsed a First Amendment right of access to civil trials. The underlying case examined "whether the high United States military command in Vietnam willfully distorted intelligence data to substantive optimistic reports on the progress of the war," an issue of "considerable" national importance.[18] Relying on the Supreme Court's decisions in *Richmond Newspapers* and *Globe Newspaper*, the court stated that public access to civil trials "enhances the quality and safeguards the integrity of the fact finding process, fosters an appearance of fairness," and heightens "public respect for the judicial process" while permitting "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government"[19]

While explicitly recognizing the First Amendment right to attend civil trials, the court declined to extend that right to the television screen.

The Third Circuit, in *Publicker Industries, Inc. v. Cohen*, [20] has also held the public and press enjoy a right of access to attend trials in civil as well as criminal cases and, in addition, held that this guarantee of open public proceedings in civil trials applies to the sealing of court documents. In *Publicker*, plaintiff newspapers appealed from orders closing to the press and public a hearing on preliminary injunction motions, sealing portions of the closed hearing transcript relating to confidential information, and ordering the newspapers' counsel not to disclose this information to their clients, even though the party seeking confidentiality had revealed the information in its opposition memorandum. The Third Circuit reversed the district court's orders. The court first held that the newspapers had a common law right of access to civil trials,[21] but it rested its decision on the First Amendment. Based on English and American legal history,[22] on the values served by openness, and on the important role played by access to civil trials in the free discussion of government affairs, the court concluded that "the public right of access to civil trials in inherent in the nature of our democratic form of government."[23] The Third Circuit also discussed the qualified nature of the trial of access as a right that may be limited when an overriding interest in closure is demonstrated, supported by findings, and when the closure imposed is narrowly tailored to meet that overriding interest.[24] Under this test, the Third Circuit reversed the trial court.

Connecticut's Sealed Dockets

In recent years, media plaintiff lawsuits have revealed that courts seal dockets in a variety of civil matters. In perhaps the most prominent of these suits, the *Hartford Courant* and the *Connecticut Law Tribune* challenged a longstanding Connecticut state court practice of sealing certain docket sheets as well as entire case files. In late 2002, the two newspapers uncovered a dual-docketing policy in the Judicial Department that even many of the state's judges did not know about. Certain litigants could conceal the very existence of cases in which they were involved (Level One sealing); others were given complete secrecy except for disclosure of the captions of their cases and their docket numbers (Level Two sealing). In the former instance, court personnel were forbidden from disclosing any information regarding a case, including the docket number and case caption, and such cases were not allowed to appear on any calendars. In the latter instance, entire case files were sealed from the press and the public, but court personnel could disclose a case's caption and docket number. It was unclear whether superior court judges had, in any of the secret cases, issued sealing orders. As the plaintiffs noted, though, if any sealing orders had been issued, they were likely themselves concealed in the sealed files of the cases. The media plaintiffs sought an injunction requiring, on First Amendment grounds, disclosure of the sealed docket sheets.

In June 2004, the Second Circuit ruled, in *Hartford Courant Co. v. Pellegrino*,[25] that "the press and public possess a qualified First Amendment right of access to docket sheets."[26] The Second Circuit used Justice Brennan's "logic" and "experience" test to justify a First Amendment right of access to docket sheets. The court found "logic" in the familiar tenets of judicial integrity and procedural fairness. For "experience," the court turned to early nineteenth-century publications, such as dictionaries, to find that the purpose of docket sheets was to put people on notice.[27] The Second Circuit emphasized an often forgotten justification for opening judicial proceedings—public education. By permitting the public to see the inner workings of the judiciary, the public has an "opportunity both for understanding the system in general and its working in a particular case."[28]

In response to public outcry over the system of sealed docketing in the Connecticut courts, the state Senate introduced legislation to limit secrecy in the court system. The proposed bill required that "the names of the parties and the docket number in any civil or criminal matter in the Superior Court shall not be kept confidential" in any future or pending cases. The legislature did not enact the bill, mainly because the judiciary preempted the legislation by enacting it own rules to reduce secrecy.

Recognizing the impropriety of the practice of sealing files indiscriminately, the Rules Committee of the Superior Court swiftly ended the practice by amending the Rules in May 2003.[29] The amended rule allows for the sealing of an entire court file only "upon a finding that there is not available a more narrowly tailored method of protecting the overriding interest, such as redaction, sealing a portion of the file, or authorizing the use of pseudonyms."[30] **CL**

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Notes

*The phrase the "Fourth Estate" was originally used as a synonym for newspapers. But with the advent of radio, television, news magazines, etc., its meaning has been broadened to include all of what is known as the mass media.

Its coinage, with its present meaning, has been attributed to Edmund Burke (1729–1797), a British politician. It comes from a quote in Thomas Carlyle's book, *Heroes and Hero Worship in History* (1841) in which he attributed the origin of the term to Burke who had used the term in a parliamentary debate in 1787: "Burke said that there were three Estates in Parliament, but in the Reporters Gallery yonder, there sat a Fourth Estate more important far than they all." The term "three Estates" refers to the British parliament: the Lords Temporal, the Lords Spiritual, and the Commons. The Lords Temporal and the Lords Spiritual combined being The House of Lords, the upper House of Parliament. And the Commons is The House of Commons, the British lower House.

Supreme Court Justice Potter Stewart also used the term "Fourth Estate," referring to the media during an address to the Sesquicentennial Convocation at Yale Law School in 1975. He said that the Free Press clause of the First Amendment is a "structural provision" operating to create "a fourth institution outside the government to check the potential excesses of the other three branches." *See* Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* 44-47 (1991). Beyond the three branches of government, which serve as the government's internal checks and balances system, the media, in its role as the Fourth Estate, provides an additional external check and balance on governmental processes.

1. U.S. Const. Amend. I. The First Amendment, ratified in 1791, states in pertinent part: "Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." First Amendment rights are protected "against invasion" by the states through the Fourteenth Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599 n.2 (1980) (citing *Gitlow v. New York*, 268 U.S. 652 (1925).
2. 435 U.S. 589 (1978). *Nixon* was decided before the Court held that there is a First Amendment right to attend criminal trials, and the Court conceded that even the common-law right of access had not been delineated with any precision.
3. *See generally* Daniel Lombard, "Top Secret: A Constitutional Look at the Procedural Problems Inherent in Sealing Civil Court Documents," 55 DePaul L. Rev. 1067 (Spring 2006).
4. 443 U.S. 368 (1979).
5. *Id.* at 386.
6. *Id.*
7. 448 U.S. 555 (1980).
8. *Id.* at 576
9. *Id.* at 581.
10. U.S. Const. Amend. VI. The Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…."
11. *Richmond*, *supra*, at 577.
12. *Id*. at 578.
13. *Id.* at 580.
14. *Id.* at 599.
15. 457 U.S. 596 (1982).
16. *Id*. 604-605.
17. 752 F.2d 16 (2d Cir. 1984).
18. *Id*. at 18.
19. *Id.* at 23.
20. 733 F.2d 1059 (3d Cir. 1984).
21. *Id.* at 1067.
22. The Third Circuit reviewed English legal history, and noted that: "Sir Edward Coke declared in the early Seventeenth century that the Statute of Marlborough of 1267 required court proceedings to be held in public…. *2 E. Coke*, *Institute of the laws of England 103* (6th ed. 1681). The court then cited other renowned legal authorities, including *William Blackstone's Commentaries.*
23. *Id.* at 1068-70.
24. *Id.* at 1071.
25. 380 F.3d 83 (2d Cir. 2004).
26. *Id*. at 86.
27. *Id.* at 94-95.
28. *Id.*
29. Portions of the Practice Book regarding sealing of documents in Rule 11-20 were amended and transferred to Practice Book § 11-20A, adopted May 14, 2003.
30. Practice Book § 11-20A(f)(2). In addition, the newly adopted § 11-20A also requires that the public take part in and have access to the court's findings regarding the sealing of court files. Practice Book §§ 11-20A(e)-(j).