

Clarifying the First Amendment Right of Access to Criminal Trials: *Globe Newspaper Co. v. Superior Court*¹—Statutes in many states contain provisions allowing a trial judge to close a courtroom to the public during all or part of a criminal proceeding.² Faced with exclusion, members of the press have challenged these statutes, asserting that the general public, including the press, has a right to attend criminal trials.³ In three recent cases, the United States Supreme Court has considered whether public access to a criminal trial enjoys constitutional protection. In *Gannett v. DePasquale*,⁴ the Court determined that the guarantee of a public trial contained in the sixth amendment protects only criminal defendants, and confers no right upon the general public to attend a pretrial hearing.⁵ In *Richmond Newspapers v. Virginia*,⁶ the Court found that the first amendment did afford an access right to criminal murder trials.⁷ In the most recent case, *Globe Newspaper Co. v. Superior Court*,⁸ the Supreme Court pursued the course begun by *Richmond* and considered the parameters of this new first amendment right. *Globe* struck down a state statute mandating closure of certain types of criminal trials, finding a presumption of public access which inheres in all criminal trials.⁹ This presumption of openness, the *Globe* Court stated, may be overcome only where closure in a particular trial serves a compelling state interest and is narrowly tailored to prevent unnecessary infringe-

¹ 102 S. Ct. 2613 (1982).

² See, e.g., GA. CODE § 81-1006 (1950 & Supp. 1982); MISS. CONST. art. 3, § 26 (1972); N.Y. JUD. LAW § 4 (McKinney 1967); N.C. GEN. STAT. § 15-166 (1978); UTAH CODE ANN. § 78-7-4 (1953).

³ See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Gannett v. DePasquale*, 443 U.S. 368 (1979).

Conflict between those seeking information about criminal trials and those concerned with the efficacious working of the criminal trial process has arisen in other contexts as well. See generally Hirst, *Silence Orders—Preserving Political Expression by Defendants and their Lawyers*, 6 HARV. C. R.-C. L. L. REV. 595-608 (1971) (discussing restraints upon extra-judicial statements by counsel); Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Ass'n: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393-410 (1977) (discussing attempts to limit pretrial publicity); Reznick, *Gannett v. DePasquale and Richmond Newspapers v. Virginia: Reopening Courtroom Doors and Constitutional Windows*, 10 CAP. U. L. REV. 101-28 (1980) (analyzing Supreme Court treatment of questions involving access to government institutions); Schmidt & Schmidt, *Some Observations on the Swinging Courthouse Doors of Gannett and Richmond Newspapers*, 59 DEN. L.J. 721-65 (1981-82) (considering closure of courtrooms to protect defendants from prejudicial publicity).

⁴ 443 U.S. 368 (1979).

⁵ *Id.* at 379-80.

⁶ 448 U.S. 555 (1980).

⁷ *Id.* at 580 (plurality opinion); *id.* at 582 (White, J., concurring); *id.* at 584 (Stevens, J., concurring); *id.* at 585 (Brennan, J., concurring in the judgment); *id.* at 599 (Stewart, J., concurring in the judgment).

For a discussion of the *Richmond* decision and of litigation prior to *Richmond* in the area of access to trials, see generally Note, *The First Amendment Right of Access to Sex Crime Trials*, 22 B.C. L. REV. 361-84 (1981).

⁸ 102 S. Ct. 2613 (1982).

⁹ *Id.* at 2619.

ment of first amendment rights.¹⁰ Thus, the *Globe* Court concluded, a state may not by statute mandate closure of any part of a criminal trial.¹¹

The litigation in *Globe* arose in April of 1979, when Albert Aladjem went on trial in Massachusetts Superior Court for the forced unnatural rape of three minor girls.¹² At hearings on preliminary motions in the case, the trial court judge ordered that the courtroom be closed to the public.¹³

Upon being excluded from the hearings on April 24, 1979, the Boston *Globe*, a major metropolitan daily newspaper, filed a motion to intervene in order to assert its right to attend.¹⁴ The judge denied the *Globe*'s motion,¹⁵ and ordered the courtroom closed to the public and the press for the duration of the trial.¹⁶ The trial court based the order on Massachusetts General Laws chapter 278, section 16A (hereinafter section 16A),¹⁷ which provides that at the trial of a defendant charged with a sexual crime against a minor victim, the trial judge "shall exclude the general public from the courtroom."¹⁸ The trial judge construed section 16A as mandating the exclusion of the public and the press from the Aladjem trial,¹⁹ and he invoked closure over the defendant's objection.²⁰ The prosecutor, moreover, stated for the record that the order was issued "on the court's own motion and not at the request of the Commonwealth."²¹

After denial of its motion opposing closure of the trial, the *Globe* immediately sought injunctive relief from a single justice of the Supreme Judicial Court of Massachusetts.²² At a hearing before the justice the next day, the prosecuting assistant district attorney, on behalf of the victims, waived "whatever rights [the Commonwealth] may have to exclude the press."²³

¹⁰ *Id.* at 2620.

¹¹ *Id.* at 2621 & n.20.

¹² *Globe Newspaper Co. v. Superior Court*, 379 Mass. 846, 848, 401 N.E.2d 360, 362 (1980), (citing *Commonwealth v. Albert Aladjem*, Norfolk Sup. Ct. No. 73102-9 (1979)).

¹³ *Globe Newspaper*, 379 Mass. at 848, 401 N.E.2d at 362-63 ("The court caused a sign marked 'closed' to be placed on the courtroom door, and court personnel turned away people seeking entry").

¹⁴ *Id.* at 848, 401 N.E.2d at 363. *Globe* also filed two other motions, one requesting that the court revoke its closure order, the other requesting that the court hold hearings on all future orders. *Id.*

¹⁵ *Id.* The trial court judge issued his order without benefit of a hearing and without argument of counsel. *Id.*

¹⁶ *Id.*

¹⁷ Section 16A reads, in pertinent part:

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.

MASS. ANN. LAWS ch. 278, § 16A (Michie/Law Coop. 1980).

¹⁸ *Id.*

¹⁹ *Globe*, 379 Mass. at 849, 401 N.E.2d at 363.

²⁰ *Id.* at 848, 401 N.E.2d at 363.

²¹ *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. at 2616.

²² *Id.*

²³ *Id.*

Nevertheless, the single justice denied relief to the *Globe*.²⁴ While the *Globe* appealed to the full Supreme Judicial Court, the criminal trial proceeded and Aladjem was eventually acquitted.²⁵

Nine months after the rape trial's conclusion, the Supreme Judicial Court dismissed the *Globe*'s appeal as moot.²⁶ The court proceeded to consider the issues raised by the newspaper, however, since the issues presented were "significant and troublesome, and . . . 'capable of repetition yet evading review.'" ²⁷

Before the Supreme Judicial Court, the *Globe* attacked the exclusion on two grounds. First, the newspaper argued, contrary to the interpretation of the trial judge, that section 16A did not require closure of the Aladjem trial.²⁸ In the alternative, the *Globe* contended that mandatory closure violated the right of the public to attend criminal trials under the first and sixth amendments.²⁹ Believing that the issue could be resolved on nonconstitutional grounds, the Supreme Judicial Court declined to address the constitutional questions.³⁰ The Massachusetts court noted, moreover, that a case involving the similar issue of public access to a criminal trial, *Richmond Newspapers v. Virginia*, was currently pending before the United States Supreme Court.³¹

Turning to the *Globe*'s statutory argument, the court agreed that section 16A did not require closure of the entire criminal trial.³² The statute, the court ruled, was enacted to serve two purposes: "[first,] to encourage young victims of sexual offenses to come forward. . . . [and second,] to preserve their ability to testify by protecting them from undue psychological harm at trial."³³ Reading the statute in light of these purposes, the court determined that it required mandatory closure only during the testimony of the minor victim.³⁴

²⁴ *Id.* The justice's reasons for denying *Globe*'s petitions were stated orally and were not reported. See *Globe*, 379 Mass. at 847, 401 N.E.2d at 362.

²⁵ *Globe*, 102 S. Ct. at 2616-17.

²⁶ *Globe*, 379 Mass. at 847-48, 401 N.E.2d at 362. The court apparently concluded that since the trial court's closure order, the basis of *Globe*'s challenge before the single justice, had expired with the termination of the criminal trial, no live controversy remained. See *id.*

²⁷ *Id.* at 848, 401 N.E.2d at 362 (citing *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). The language of the Supreme Judicial Court appears to be inexact. The "capable of repetition, yet evading review" standard is usually invoked to remove cases from the mootness category, thereby permitting consideration of the merits. See *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498 at 514-16. The *Globe*'s appeal having been dismissed, the Massachusetts court's consideration of the issues appears more in the nature of an advisory opinion. See *Globe*, 102 S. Ct. 2613 at 2627-29 (Stevens, J., dissenting).

²⁸ *Globe*, 379 Mass. at 849, 401 N.E.2d at 363.

²⁹ *Id.* at 849-50, 401 N.E.2d at 363. *Globe* also challenged the order under article 16 of the Declaration of Rights of the Massachusetts Constitution, which is similar to the first amendment. *Id.* The court did not reach the state constitutional issue because, in the court's view, the issue had not been adequately argued in the plaintiff's brief. *Id.* at 854, 401 N.E.2d at 366.

³⁰ *Id.* at 854, 401 N.E.2d at 366.

³¹ *Id.*

³² *Id.* at 861, 401 N.E.2d at 370.

³³ *Id.* at 860, 401 N.E.2d at 369.

³⁴ *Id.* at 861, 401 N.E.2d at 370.

Closure of the entire trial, the court ruled, was not required to satisfy section 16A.³⁵ The court concluded, however, that other portions of such trials could be closed at the discretion of the trial judge.³⁶

The Globe appealed the decision of the Supreme Judicial Court to the United States Supreme Court,³⁷ pressing its first and sixth amendment claims.³⁸ The newspaper contended that section 16A, even as construed by the Supreme Judicial Court, was unconstitutional.³⁹ To the extent that the statute mandated closure without a hearing, the Globe argued, it impermissibly infringed the constitutional right of the public to attend a criminal trial.⁴⁰ This right of access, the Globe maintained, emanates from either the speech protections of the first amendment or the public trial right of the sixth amendment.⁴¹

Before the Globe's appeal was heard, the Supreme Court rendered its decision in *Richmond*.⁴² In *Richmond*, a newspaper had challenged a Virginia state court order excluding the public and press from a murder trial.⁴³ Acting upon a request for closure by the defendant, the Virginia trial court had apparently relied upon a state statute which granted a trial judge discretion to exclude persons from a criminal trial.⁴⁴ The Virginia Supreme Court denied an appeal, and the United States Supreme Court reversed, finding insufficient justification for closure.⁴⁵ Although the *Richmond* decision contained seven separate opinions, a majority of the Justices concluded that the first amendment embraces a right in the general public to attend at least some criminal trials, including murder trials.⁴⁶ The Supreme Court did not, however, determine under what circumstances this access right could be defeated or infringed.⁴⁷ Following its decision in *Richmond*, the Court vacated the Supreme Judicial Court's judgment in *Globe* and remanded for further consideration.⁴⁸

On remand, the Supreme Judicial Court affirmed its original decision, deciding that *Richmond* did not require invalidation of section 16A as construed

³⁵ *Id.*

³⁶ *Id.* at 864-65, 401 N.E.2d at 372. Such closure, stated the court, would be initiated by the Commonwealth. Before entering the order, the judge must hold an expeditious hearing at which any person to be excluded has an opportunity to state his objections for the record. An appropriate order would follow the findings of fact. *Id.* at 865, 401 N.E.2d at 372.

³⁷ *Globe*, 102 S. Ct. at 2617.

³⁸ See Brief of Petitioner at 9, *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982) (reprinted in 13 Law Reprints, Criminal Law Series (BNA) No. 22 (1982)).

³⁹ Brief of Petitioner, *supra* note 38, at 9.

⁴⁰ *Id.* at 24-25.

⁴¹ *Id.* at 12, 27.

⁴² 448 U.S. 555 (1980).

⁴³ *Id.* at 560-62 (plurality opinion); see *infra* notes 136-39 and accompanying text.

⁴⁴ *Richmond*, 448 U.S. at 560 (plurality opinion).

⁴⁵ *Id.* at 580-81 (plurality opinion); see *infra* notes 141-63 and accompanying text.

⁴⁶ See *infra* notes 142-63 and accompanying text.

⁴⁷ *Richmond*, 448 U.S. at 581 n.18 (plurality opinion); *id.* at 598 (Brennan, J., concurring in the judgment); *id.* at 600 nn.3-5 (Stewart, J., concurring in the judgment).

⁴⁸ *Globe Newspaper v. Superior Court*, 449 U.S. 894 (1980).

in its original decision.⁴⁹ While recognizing that *Richmond* established a first amendment right of access to criminal trials, the court found that that right rested upon "an unbroken tradition of openness" in criminal trials.⁵⁰ The Massachusetts court then identified "at least one notable exception" to this tradition in cases involving sexual assaults upon minors or adults.⁵¹ This exception, the court noted, is particularly strong where the closed portion of a trial involves the testimony of minor victims.⁵² Having distinguished *Richmond*, the Supreme Judicial Court balanced the interest of the state in passing the statute against the interest of the public in attending the trial.⁵³ The statute, the court concluded, furthered the "genuine state interests" identified in its original decision.⁵⁴ Those interests, the court reasoned, would be defeated if a closure determination were made on a case-by-case basis.⁵⁵ Balancing these interests against the temporary infringement of first amendment rights caused by closing the trial during the testimony of minor victims, the court found the scales tipped decisively in favor of the statute.⁵⁶

Following the Supreme Judicial Court's affirmation of its closure decision, the *Globe* again appealed to the United States Supreme Court.⁵⁷ The Court, in a six to three decision, reversed the Massachusetts court and, in doing so, struck down the mandatory closure statute.⁵⁸ The *Globe* Court held that a presumption of openness applies to every criminal trial,⁵⁹ and that attempts to close even a part of any particular trial must survive strict scrutiny.⁶⁰

Globe Newspaper re-affirms and expands upon the first amendment right of access to criminal trials recognized by the Supreme Court in *Richmond*. In *Globe*, a majority of the Court for the first time embraced the position that a presumption of openness inheres in every criminal trial.⁶¹ Moreover, the *Globe* Court resolved the issue not considered by *Richmond*—the conditions under which the access right may be infringed or defeated—by applying strict scrutiny to the statute in question.⁶² The decision in *Globe Newspaper* thus clarifies and strengthens the first amendment right of access established in *Richmond*.

⁴⁹ *Globe Newspaper v. Superior Court*, 1981 Mass. Adv. Sh. 1493, 1507, 423 N.E.2d 773, 781.

⁵⁰ *Id.* at 1501, 423 N.E.2d at 778.

⁵¹ *Id.*

⁵² *Id.* at 1503, 423 N.E.2d at 779.

⁵³ *Id.* at 1503-04, 423 N.E.2d at 779-81.

⁵⁴ *Id.* See *supra* note 33 and accompanying text.

⁵⁵ *Globe Newspaper v. Superior Court*, 1981 Mass. Adv. Sh. 1493, 1503-04, 423 N.E.2d at 779-81.

⁵⁶ *Id.* at 1507, 423 N.E.2d at 780-81.

⁵⁷ *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 594 (1981).

⁵⁸ *Globe*, 102 S. Ct. 2613, 2622 (1982).

⁵⁹ *Id.* at 2619 & n.13.

⁶⁰ *Id.* at 2620.

⁶¹ *Id.* at 2619 & n.13.

⁶² *Id.* at 2620.

This casenote will first present the reasoning of the various opinions in *Globe Newspaper*. Next it will trace the first amendment right of access from its origin in *Richmond*. By considering Supreme Court decisions in the areas of press rights at criminal trials and restrictions on freedom of speech, the casenote will then analyze the two questions left open by *Richmond* and addressed in *Globe*. First, the casenote will examine whether the presumption of openness applies to all criminal trials and to all parts of all criminal trials. Second, it will discuss what level of scrutiny is appropriate in evaluating attempted restrictions upon the first amendment access right. The casenote submits that the *Globe* case is a logical extension of the *Richmond* decision and rests solidly upon first amendment jurisprudence involving the press, criminal trials and the disclosure of sensitive information.

I. THE *GLOBE* DECISION

Writing for the five-member majority in *Globe*, Justice Brennan first decided that the case presented was not moot.⁶³ Although the closure order contested by the *Globe* expired with the completion of the criminal trial, the majority reasoned that the underlying dispute was "'capable of repetition, yet evading review.'" ⁶⁴ The Court noted that previous cases involving the rights of the press at criminal trials had not been rendered moot by the termination of the particular trial to which access had been limited.⁶⁵

Having determined that the case was not moot, the majority then turned to the merits of the *Globe*'s first amendment challenge to section 16A. The decision in *Richmond*, the *Globe* Court stated, firmly established for the first time that the press and the public possess a constitutional right of access to criminal trials.⁶⁶ While no one opinion carried a majority in *Richmond*, the *Globe* majority pointed out that seven Justices in *Richmond* located the right of access within the first amendment.⁶⁷ The *Globe* majority also noted that Justice Powell, who

⁶³ *Id.* at 2618. Justice Stevens dissented in *Globe* because he felt that the case was moot. *Id.* at 2627-29 (Stevens, J., dissenting). In Justice Stevens' opinion, after the original trial court closure order expired by its own terms, the Supreme Judicial Court of Massachusetts materially narrowed the statute—section 16A—on which the order was based. *Id.* at 2628. Although the Massachusetts court upheld the narrowly construed statute in the abstract, the petitioner had never been subject to an order under the new interpretation, and would never be subjected to another closure order as broad as the one which prompted the suit. *Id.* The Court, in Justice Stevens' view, was offering an advisory opinion by prematurely considering a constitutional claim where no live controversy existed. *Id.*

⁶⁴ *Id.* at 2618 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). The Court stated that, as publisher of a Boston newspaper, *Globe* would reasonably be subject to another mandatory closure order based upon section 16A. *Id.* Since criminal trials are usually of short duration, the Court reasoned that such an order would consistently evade Supreme Court review if the termination of a trial mooted any challenge to the order. *Id.*

⁶⁵ 102 S. Ct. 2613 at 2618 (citing *Richmond*, 448 U.S. at 563; *Gannett*, 443 U.S. at 377-378; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976)).

⁶⁶ 102 S. Ct. 2613 at 2618.

⁶⁷ *Id.*

was not involved in the *Richmond* decision, had discussed the possibility of a first amendment access right in the earlier case of *Gannett v. DePasquale*.⁶⁸ Although the right of access is not explicitly stated in the first amendment, the majority reasoned that the first amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."⁶⁹ Free discussion of governmental affairs constitutes a core purpose of the first amendment, the majority stated, and as recognized in *Richmond*, public access to criminal trials helps ensure that such discussion is an informed one.⁷⁰

Having established that the lack of an express provision for an access right in the first amendment was not conclusive, the *Globe* majority noted that the Court in *Richmond* had identified two reasons for affording a right of access to criminal trials protection under the first amendment.⁷¹ First, *Richmond* had found that criminal trials have historically been open to the press and the public.⁷² This "presumption of openness," in the opinion of the *Globe* Court, was significant both because "the Constitution carries the gloss of history,"⁷³ and because "a tradition of accessibility implies the favorable judgment of history."⁷⁴ Second, the *Globe* Court re-affirmed the finding in *Richmond* that access to criminal trials serves to further democratic self-government in two respects. According to the *Globe* Court, public scrutiny acts as a check on the judicial process, improving the quality of the court system,⁷⁵ and public participation "fosters an appearance of fairness, thereby heightening public respect for the judicial process."⁷⁶ These considerations led the *Globe* Court to conclude that the first amendment encompasses as public right of access to criminal trials.⁷⁷

While deciding that the right of access to criminal trials fell within the first amendment, the *Globe* Court acknowledged that this right is not absolute.⁷⁸ The Court then considered the conditions under which the right can be restricted.⁷⁹ Where the state attempts to restrict access to "inhibit the disclosure of sensitive information," as in the instant case, the majority ruled

⁶⁸ *Id.* at n.11.

⁶⁹ *Id.* at 2619.

⁷⁰ *Id.*

⁷¹ *Id.* at 2619-20.

⁷² *Id.* at 2619.

⁷³ *Id.* (quoting *Richmond*, 448 U.S. 555 at 589 (Brennan, J., concurring in the judgment)).

⁷⁴ *Id.* (quoting *Richmond*, 448 U.S. 555 at 589 (Brennan, J., concurring in the judgment)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 2618.

⁷⁸ *Id.* at 2620.

⁷⁹ *Id.*

that the state's action must be subject to strict scrutiny analysis.⁸⁰ Limitations upon this first amendment right, the majority decided, must further a compelling state interest and be narrowly tailored to serve that interest in order to be upheld.⁸¹ According to the *Globe* Court, the same standard applies to all criminal trials, regardless of whether the particular type of trial in question—such as those involving sex crimes against minor victims—has been open to the public historically.⁸²

Turning to the justifications for the statute offered by the Commonwealth—protection of minor victims of sexual assaults from further trauma and embarrassment, and encouraging those minor victims to come forward and testify in a truthful and credible manner—the *Globe* Court found only protection of minor victims compelling.⁸³ The majority dismissed the asserted interest in encouraging testimony by minor victims as “speculative in empirical terms” as well as “open to serious question as a matter of common sense.”⁸⁴ The majority pointed out that while section 16A barred the press and general public from the courtroom during the testimony of the minor victim, the press still had access to the transcript, court personnel and any other source with knowledge of the minor's testimony.⁸⁵ To the extent that encouraging victims depends upon guaranteeing the secrecy of the minor's identity, the Court reasoned that the statute failed as an effective protection against publicity.⁸⁶ Moreover, the Court noted that minor victims of sex crimes are not the only crime victims who are reluctant to testify for reasons of publicity.⁸⁷ The state interest, the *Globe* Court concluded, could therefore be used to support a host of mandatory closure statutes, in derogation of the historical “presumption of openness” inherent in all criminal trials.⁸⁸

The majority did agree that the second interest articulated by the Commonwealth, protection of the minor victim of a sex crime from further trauma and embarrassment, was compelling.⁸⁹ As promoted by the Massachusetts statute, the Court decided, this compelling interest was not a general interest in protecting the minor victim from all the trauma of testifying.⁹⁰ The interest, the Court stated, was limited to shielding the minor witness from the incremental injury suffered by testifying in the presence of the press and the general public.⁹¹ While that state interest was compelling, however, the majority found

⁸⁰ *Id.* & n.17.

⁸¹ *Id.*

⁸² *Id.* at 2619 & n.13.

⁸³ *Id.* at 2621-22.

⁸⁴ *Id.* at 2622.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 2621.

⁹⁰ *Id.* at 2621 & n.19.

⁹¹ *Id.*

that section 16A was not narrowly tailored to serve that interest.⁹² According to the *Globe* Court, the significance of the state's interest may be affected by the particular circumstances of each case.⁹³ As a mandatory closure statute, the Court noted, section 16A required closure during a minor's testimony even where the victim did not desire the exclusion of the press and the general public, and would not be harmed by their presence.⁹⁴ Specifically, the record below suggested to the Court that the minor victims would have testified despite the presence of the press.⁹⁵ In such a case, the Court concluded, the compelling interest necessary to justify closure may not exist and, therefore, a statute which mandates closure in all circumstances is not justified.⁹⁶ The *Globe* Court concluded that a case-by-case determination, in which the trial court judge evaluates the significance of the interest in protecting the minor witness in the particular case before him, would better protect the first amendment rights of the press and the public from unnecessary restriction.⁹⁷

The majority did not establish precise guidelines for effectuating the case-by-case determination, but did state that a meaningful hearing would include an opportunity for the press and the public to present their arguments against exclusion.⁹⁸ The *Globe* Court also noted that the trial judge would be free to exercise discretion in structuring the hearing to prevent any frustration before the trial itself of the compelling state interest in protecting a minor victim from trauma.⁹⁹ In addition, the majority enumerated a number of factors to be considered by the trial judge at an exclusion hearing in deciding whether to exclude the press and the general public: the minor victim's age, his or her psychological maturity and understanding, the nature of the crime, the wishes of the victim and the interests of parents and relatives.¹⁰⁰

The majority, in sum, identified a first amendment right of access to criminal trials.¹⁰¹ The *Globe* majority determined that before the press and public may be excluded from any part of a criminal trial, the trial court must determine that closure in that particular case serves a compelling state interest and is narrowly tailored to further that interest.¹⁰² While the state's interest in *Globe*—protecting the minor victim of a sexual assault from the additional trauma of public testimony—was compelling,¹⁰³ the mandatory closure statute failed, according to the Court, as a sufficiently narrow means to accomplish the

⁹² *Id.* at 2621-22.

⁹³ *Id.* at 2621.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 2621-22.

⁹⁷ *Id.*

⁹⁸ *Id.* at 2621, 2622, n.25.

⁹⁹ *Id.* at 2622, n.25.

¹⁰⁰ *Id.* at 2621.

¹⁰¹ *Id.* at 2618.

¹⁰² *Id.* at 2620.

¹⁰³ *Id.* at 2621 & n.19.

state's intent.¹⁰⁴ The *Globe* Court concluded that a case-by-case consideration would be necessary.¹⁰⁵

Justice O'Connor concurred in the judgment,¹⁰⁶ agreeing that *Richmond* established a first amendment right of access to criminal trials in the press and in the general public.¹⁰⁷ She disagreed, however, with the sweeping language of the majority opinion, which stated that *Richmond* endorsed the proposition that the first amendment protections encompass every right "necessary to the enjoyment of other first amendment rights."¹⁰⁸ Justice O'Connor would limit the *Richmond* and *Globe* decisions to their facts, the context of criminal trials.¹⁰⁹

Chief Justice Burger, joined by Justice Rehnquist, dissented.¹¹⁰ In concluding that the mandatory closure statute should be upheld over the *Globe*'s challenge, the Chief Justice argued that the majority had misinterpreted *Richmond*.¹¹¹ Chief Justice Burger, who had authored the plurality opinion in *Richmond*, understood *Richmond* to provide a first amendment right of access only to those criminal trials which have traditionally been open to the public.¹¹² Both case law and long-standing state statutes, he reasoned, demonstrate that trials involving sexual assaults, particularly against minors, do not share this "unbroken, uncontradicted" history of openness.¹¹³ An examination of the historical record indicated to him a clear practice of excluding the public from sexual assault trials.¹¹⁴ Thus, the Chief Justice would not apply the presumption of access to criminal trials involving sex offenses against minors.¹¹⁵

The Chief Justice further objected to the standard of scrutiny which the majority applied in *Globe*.¹¹⁶ Assuming *arguendo* a first amendment access right was implicated upon the facts presented, Chief Justice Burger disagreed with the majority's assertion that section 16A in either purpose or effect inhibited the flow of sensitive information.¹¹⁷ He reasoned, therefore, that strict scrutiny was inappropriate.¹¹⁸ In his view, the appropriate analysis in *Globe* would evaluate the reasonableness of the restrictions on access and balance the state interests served against the "very limited incidental effects on the law of first amendment rights."¹¹⁹

¹⁰⁴ *Id.* at 2621.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2621-22 (O'Connor, J., concurring in the judgment).

¹⁰⁷ *Id.* at 2623.

¹⁰⁸ *Id.* (quoting *Globe*, 102 S. Ct. 2613 at 2619 (majority opinion)).

¹⁰⁹ *Id.* at 2623.

¹¹⁰ *Id.* at 2623 (Burger, C.J., dissenting).

¹¹¹ *Id.* at 2624.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *Id.* at 2624-25.

¹¹⁷ *Id.* at 2625. The Chief Justice noted that the public had prompt *post* access to the trial transcript of the victim's testimony, as well as to other sources of information about the minor witness. *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

In the case before him, the Chief Justice found the scales tipped decisively in favor of the statute.¹²⁰ He noted that the press and public had "prompt and full access to all of the victim's testimony,"¹²¹ and a minimal additional interest in being present during the testimony itself.¹²² The state, on the other hand, the Chief Justice observed, had a number of strong interests in a mandatory closure statute.¹²³ The first, he indicated, protecting the minor victim from psychological damage, even the majority had found compelling.¹²⁴ Moreover, the Chief Justice saw the statute as a rational response to the under-reporting of sex offenses.¹²⁵ Child victims and their families, he maintained, should be entitled to assurance that the minor will not be forced to recite the details of his or her ordeal in front of television cameras or a crowd which includes "voyeuristic strangers."¹²⁶

According to the Chief Justice, in order to protect these important state interests, the state should be allowed to experiment.¹²⁷ He argued that a state possesses the authority to mandate closure in order to promote these important interests effectively.¹²⁸ The Massachusetts statute, in his view, was a reasonable attempt to further these interests and was not unconstitutional.¹²⁹

Striking down the Massachusetts statute, the Chief Justice asserted, created a distressing paradox: while states may, and do, provide extensive protections to minors charged with crimes, they may not close any part of a criminal trial to protect a minor victimized by a crime.¹³⁰ He chastised the majority for its "gross invasion of state authority and . . . duty to protect its citizens," and for what he perceived as a "cavalier rejection" of the interests supporting the Massachusetts statute.¹³¹

Chief Justice Burger, in sum, found the Massachusetts statute constitutional. Agreeing with the Supreme Judicial Court of Massachusetts, he declined to extend the presumption of access inherent in criminal trials to cases involving sex crimes against minors. Believing section 16A to present only a reasonable restriction on the public's first amendment rights, moreover, he found the majority's strict scrutiny analysis inappropriate. In his view, a balancing test similar to those used in analyzing time, place and manner restrictions on the exercise of first amendment rights was sufficient.

II. CLARIFYING THE FIRST AMENDMENT ACCESS RIGHT

The majority opinion and the Burger dissent in *Globe* differ on two central

¹²⁰ *Id.* at 2625.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 2625-27.

¹²⁴ *Id.* at 2625.

¹²⁵ *Id.* at 2626.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 2626-27.

¹²⁹ *Id.*

¹³⁰ *Id.* at 2623, 2627.

¹³¹ *Id.* at 2624.

issues. First, the majority stated that a presumption of openness applies to criminal trials generally,¹³² while the Burger dissent would limit that presumption to those criminal trials which have been open historically.¹³³ Second, the majority ruled that upon the facts presented the statute mandating closure must satisfy strict scrutiny analysis,¹³⁴ while the Chief Justice argued for a balancing test weighing the impact on first amendment rights against the interests offered by the state to justify closure.¹³⁵ Both the majority opinion and Burger dissent invoke *Richmond* as support for their contrary propositions. The next section of this casenote will examine the *Richmond* opinions in an effort to trace the foundations of the first amendment right of access. This analysis will then consider whether the majority opinion or the Burger dissent in *Globe* comports more fully with *Richmond*.

A. *The Emergence of a Right of Access: Richmond Newspapers v. Virginia*

Two years before the *Globe* ruling, the Supreme Court decided *Richmond Newspapers v. Virginia*.¹³⁶ In that case, a murder defendant moved to exclude the press and public from his trial, claiming a possible danger of prejudicing potential jurors.¹³⁷ At a hearing to contest the closure order, counsel for a newspaper covering the trial argued that constitutional considerations required the court to determine whether any other less restrictive alternative means were available for protecting the defendant's rights.¹³⁸ The newspaper argued that closure would be permissible only if the defendant's rights could be protected in a manner no less restrictive than excluding the public and the press from trial. The trial judge denied the newspaper's motion to vacate his closure order, ruling that closure was appropriate if the defendant's rights were infringed "in any way . . . and [closure] doesn't completely override all rights of everyone else."¹³⁹ The trial continued with the public and press excluded.¹⁴⁰ The Virginia Supreme Court denied the newspaper's appeal from the closure order,¹⁴¹ and the United States Supreme Court reversed.¹⁴²

No one opinion commanded a majority of the Court in *Richmond*.¹⁴³ Each

¹³² *Id.* at 2619 & n.13.

¹³³ *Id.* at 2624 (Burger, C.J., dissenting).

¹³⁴ *Id.* at 2620.

¹³⁵ *Id.* at 2625 (Burger, C.J., dissenting).

¹³⁶ 448 U.S. 555 (1980). For a discussion of pre-*Richmond* decisions on access to trials, see Note, *supra* note 7 at 375-82.

¹³⁷ *Id.* at 559-60 (plurality opinion).

¹³⁸ *Id.* at 560.

¹³⁹ *Id.* at 561.

¹⁴⁰ *Id.* at 561-62.

¹⁴¹ *Id.* at 562.

¹⁴² *Id.* at 581.

¹⁴³ Chief Justice Burger announced the judgment of the Court and authored the plurality opinion, in which Justices White and Stevens joined. 448 U.S. 555 at 558-81 (plurality opinion). Justice White and Justice Stevens also filed concurring opinions. *Id.* at 581-82 (White, J., concurring); *id.* at 582-84 (Stevens, J., concurring). Justice Brennan, joined by Justice Marshall,

of the seven Justices voting for reversal, however, agreed that the first amendment, as applied to the states through the fourteenth amendment, affords constitutional protection for access to a criminal trial by the general public.¹⁴⁴ The *Richmond* Court established this right of access by first applying historical analysis. Writing for the plurality, Chief Justice Burger traced the origins of the modern trial back to its roots before the Norman Conquest in England.¹⁴⁵ "From these early times," the Chief Justice observed, "one thing remained constant: the public character of the trial at which guilt or innocence was decided."¹⁴⁶ This tradition, the Chief Justice noted, continued as well in the American colonies, and this "unbroken, uncontradicted history"¹⁴⁷ conclusively demonstrated that "at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open."¹⁴⁸ Justice Brennan, continuing in his concurrence the historical thread begun by the Chief Justice, found abundant support for public access to criminal trials in the Court's own opinions concerning a defendant's right to a public trial and the right of the press to print information obtained in judicial proceedings.¹⁴⁹

Having discovered an historical tradition of openness in criminal trials, the plurality and Justice Brennan considered the ways in which publicity furthers the purposes of the trial process.¹⁵⁰ The public trial, according to these Justices, helps assure a fair and accurate adjudication for the defendant.¹⁵¹ They also noted that it reduces the likelihood of perjury.¹⁵² Publicity, according to Justice Brennan, acts as well as a check on the judiciary.¹⁵³ Furthermore, the Justices stated, open courtrooms inspire confidence in the judicial system by "satisfying the appearance of justice,"¹⁵⁴ have a therapeutic effect on the com-

and Justices Stewart and Blackmun, each filed opinions concurring in the judgment. *Id.* at 584-98 (Brennan, J., concurring in the judgment); *id.* at 598-601 (Stewart, J., concurring in the judgment); *id.* at 601-04 (Blackmun, J., concurring in the judgment). Justice Rehnquist dissented. *Id.* at 604-06 (Rehnquist, J., dissenting). Justice Powell took no part in the case. *Id.* at 581.

¹⁴⁴ 448 U.S. at 580 (plurality opinion); *id.* at 582 (White, J., concurring); *id.* at 584 (Stevens, J., concurring); *id.* at 585 (Brennan, J., concurring in the judgment); *id.* at 599 (Stewart, J., concurring in the judgment); *id.* at 604 (Blackmun, J., concurring in the judgment).

Some of the Justices suggested that access protection may extend to civil as well as criminal trials. *Id.* at 580 n.17 (plurality opinion); *id.* at 596 (Brennan, J., concurring in the judgment); *id.* at 586 (Stewart, J., concurring in the judgment).

¹⁴⁵ *Id.* at 565 (plurality opinion).

¹⁴⁶ *Id.* at 566.

¹⁴⁷ *Id.* at 573.

¹⁴⁸ *Id.* at 569.

¹⁴⁹ *Id.* at 590-93 (Brennan, J., concurring in the judgment).

¹⁵⁰ *Id.* at 569-73 (plurality opinion); *id.* at 593-97 (Brennan, J., concurring in the judgment).

¹⁵¹ *Id.* at 569 (plurality opinion); *id.* at 593 (Brennan, J., concurring in the judgment).

¹⁵² *Id.* at 569 (plurality opinion).

¹⁵³ *Id.* at 596 (Brennan, J., concurring in the judgment).

¹⁵⁴ *Id.* at 571-72 (plurality opinion); *id.* at 594 (Brennan, J., concurring in the judgment) (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

munity,¹⁵⁵ and play an important role in educating the public.¹⁵⁶ Finally, Justice Brennan noted that judges under the American legal system are in some respects lawmakers, with their decisions in particular cases having practical consequences for society in general.¹⁵⁷ In light of this impact of the trial on the public generally, Justice Brennan concluded that public scrutiny of trials is desirable to check possible judicial abuses and to promote accurate factfinding.¹⁵⁸

While discerning a history of openness and a host of beneficial results from open trials, a majority of the Justices in *Richmond* conceded that a right of access to criminal trials lacks explicit constitutional support.¹⁵⁹ Nevertheless, these Justices read the first amendment as extending "beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."¹⁶⁰ Public access to trials, the Justices determined, ensures informed discussion of the aspect of government most important to the general public—the criminal trial.¹⁶¹ Thus, the Justices concluded that the right of access falls within the first amendment protections.¹⁶²

The right of access emerging from the various opinions in *Richmond* was that stated by the plurality opinion of the Chief Justice: "We are bound to conclude that a presumption of openness inheres in the very nature of the criminal trial under our system of justice."¹⁶³ The first question presented in *Globe Newspapers* was whether that "presumption of openness" applies to all criminal trials or only to those criminal trials which have been open historically.

B. Clarification of the "Presumption of Openness"

The majority in *Globe Newspaper* reiterated the reasoning in *Richmond* in

¹⁵⁵ *Id.* at 570-72 ("Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution.").

¹⁵⁶ *Id.* at 572 ("When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.").

¹⁵⁷ *Id.* at 595 (Brennan, J., concurring in the judgment).

¹⁵⁸ *Id.* at 596-97 (Brennan, J., concurring in the judgment).

¹⁵⁹ *Id.* at 575 (plurality opinion); *id.* at 585, 588 n.4 (Brennan, J., concurring in the judgment). The Justices impliedly recognized the access right through discussion of the process of deriving specific protections from the general language of constitutional provisions. *Id.* at 575 (plurality opinion); *id.* at 585, 588 n.4 (Brennan, J., concurring in the judgment).

¹⁶⁰ *Id.* at 575 (plurality opinion) (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)); *id.* at 587-88 n.4 (Brennan, J., concurring in the judgment).

¹⁶¹ *Id.* at 575 (plurality opinion) ("Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted. . . .").

¹⁶² *Id.* at 575 (plurality opinion); *id.* at 587-88 (Brennan, J., concurring in the judgment).

¹⁶³ *Id.* at 573 (plurality opinion). See also *id.* at 597-98 (Brennan, J., concurring in the judgment).

finding a right of access to the rape trial involved.¹⁶⁴ The rationale supporting *Richmond* led the *Globe* majority to conclude that the "presumption of openness" applies at a macro level: all criminal trials, regardless of their individual nature, begin with access to them presumed.¹⁶⁵ Examination of the *Richmond* opinions reveals that the *Globe* majority correctly construed *Richmond* as applying to all criminal trials. Although the Chief Justice authored the plurality opinion in *Richmond*,¹⁶⁶ his argument that the "presumption of openness" announced in *Richmond* does not apply to sex crimes involving minors undersells the broad language used by the Justices in that case.

While the Justices voting for reversal in *Richmond* announced their decision in six separate opinions, each considered the right of access question in terms of criminal trials generally.¹⁶⁷ Although *Richmond* concerned a murder trial, none of the Justices mentioned the type of criminal trial involved as an important consideration in finding a public right of access.¹⁶⁸ None, in fact, so much as mentioned the nature of the specific criminal proceeding involved in analyzing the constitutional question.¹⁶⁹ The access problem was considered and decided by all of the Justices with respect to criminal trials generally.¹⁷⁰

Language employed by Chief Justice Burger in his plurality opinion demonstrates that the *Richmond* plurality's approach drew no distinction between types of criminal proceedings. The Chief Justice framed the issue presented in *Richmond* as whether the United States Constitution guarantees the right of the public and the press to attend *criminal trials*.¹⁷¹ The lesson of history respecting criminal proceedings, wrote the Chief Justice, reveals that *criminal trials* have always been open to all who wished to attend.¹⁷² He concluded that a presumption of openness inhered in the nature of an American

¹⁶⁴ *Globe*, 102 S. Ct. 2613 at 2618, 2619-20.

¹⁶⁵ *Id.* at 2619 n.13. See *supra* notes 143-58 and accompanying text.

¹⁶⁶ *Richmond*, 448 U.S. 555 at 558-81 (plurality opinion).

¹⁶⁷ See *id.* at 564-69, 573-78, 580 (plurality opinion); *id.* at 581-82 (White, J., concurring); *id.* at 589-98 (Brennan, J., concurring in the judgment); *id.* at 599 (Stewart, J., concurring in the judgment); *id.* at 601, 604 (Blackmun J., concurring in the judgment). See also *infra* notes 168-76 and accompanying text (Public right of access discussed as applying to criminal trials generally).

¹⁶⁸ See *supra* note 143. 448 U.S. 555 at 558 (plurality opinion); *id.* at 581 (White, J., concurring); *id.* at 582 (Stevens, J., concurring); *id.* at 584 (Brennan, J., concurring in the judgment); *id.* at 598 (Stewart, J., concurring in the judgment); *id.* at 601 (Blackmun, J., concurring in the judgment).

¹⁶⁹ See *supra* note 167. Justice Stewart did state that "the trial judge appears to have given no recognition to the right of representatives of the press and members of the public to be present at the Virginia murder trial over which he was presiding. . . ." 448 U.S. at 600-01 (Stewart, J., concurring in the judgment). Nothing else in his opinion, however, suggests that the type of criminal trial was in any way dispositive in the case. *Id.* at 598-601. In fact, several Justices suggested that the access right extended to civil as well as criminal cases. See *supra* note 144.

¹⁷⁰ See *supra* note 167.

¹⁷¹ *Richmond*, 448 U.S. 555 at 558 (plurality opinion) (emphasis added).

¹⁷² *Id.* at 569 (emphasis added).

criminal trial.¹⁷³ Finally, the plurality ruled that absent an "overriding interest, . . . the trial of a criminal case must be open to the public."¹⁷⁴ The opinions of the other Justices similarly refer to criminal trials generically.¹⁷⁵

Had the Supreme Court intended to limit the right of access it established in *Richmond*, one would have expected the various opinions to carry the constitutional analysis a step further. After determining that a tradition of openness inhered in criminal trials generally, the Justices logically would have addressed whether the particular type of criminal trial in the *Richmond* case—a murder trial—shared in that tradition. The *Richmond* opinions, however, universally omit this final step necessary to the conceptual framework the Chief Justice purports to derive from that case.¹⁷⁶ *Richmond* reversed the exclusion of the public and the press because all criminal trials begin with a presumption of openness, not just murder trials.

Chief Justice Burger, in his *Globe* dissent, argues that *Richmond* does not preclude a determination that sex trials involving minors represent an exception to the criminal trial presumption of openness.¹⁷⁷ He cites case law and several statutes to demonstrate a "long history of exclusion of the public from trials involving sexual assaults, particularly those against minors."¹⁷⁸ The authority employed by the Chief Justice, however, does not support the tradition of exclusion he discerns.

The Burger dissent presents six cases to support the proposition that the tradition with respect to sex trials runs counter to that of criminal trials generally.¹⁷⁹ The six cases arose under the sixth amendment, with the defendant in each case appealing his conviction on the theory that the trial court's exclusion order denied him a public trial.¹⁸⁰ In each case the trial judge had excluded the general public from the trial of a defendant charged with a sexual assault upon a minor female.¹⁸¹ In two of the cases, the courtroom was closed for the entire trial;¹⁸² in the other four it was closed only during the testimony of the minor victim.¹⁸³ In half of the cases the press was allowed to remain while the general

¹⁷³ *Id.* at 573 (emphasis added).

¹⁷⁴ *Id.* at 581 (emphasis added).

¹⁷⁵ See *supra* note 167.

¹⁷⁶ See *supra* note 167.

¹⁷⁷ *Globe*, 102 S. Ct. 2613 at 2624 (Burger, C.J., dissenting).

¹⁷⁸ *Id.* at 2624. See *infra* notes 179 and 190.

¹⁷⁹ 102 S. Ct. 2613 at 2624 (Burger, C.J., dissenting), citing *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967); *Reagan v. United States*, 202 F. 488 (9th Cir. 1913); *United States v. Geise*, 158 F. Supp. 821 (D. Alaska), *aff'd*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); *Hogan v. State*, 191 Ark. 437 (1935); *State v. Purvis*, 157 Conn. 198 (1968), *cert. denied*, 395 U.S. 928 (1969); *Moore v. State*, 151 Ga. 648 (1921), *appeal dismissed*, 260 U.S. 702 (1922).

¹⁸⁰ See *supra* note 179.

¹⁸¹ *Harris*, 361 F.2d at 891; *Reagan*, 202 F. at 488-89; *Geise*, 158 F. Supp. at 822-23; *Hogan*, 191 Ark. at 438; *Purvis*, 157 Conn. at 206-07; *Moore*, 151 Ga. at 651-52.

¹⁸² *Reagan*, 202 F. at 489; *Geise*, 158 F. Supp. at 823.

¹⁸³ *Harris*, 361 F.2d at 891; *Hogan*, 191 Ark. at 438; *Purvis*, 157 Conn. at 207; *Moore*, 151 Ga. at 652, 658-59.

public was excluded.¹⁸⁴ The important common denominator among the cases, however, is that in each case closure apparently resulted from an exercise of the trial judge's discretion.¹⁸⁵ None of the cited authorities appears to involve a mandatory statute requiring closure, as was the case in *Globe*.¹⁸⁶

At best, the authority presented by the Chief Justice indicates that trials may be closed more often in cases involving minor victims of sexual assaults.¹⁸⁷ As the *Globe* majority agrees that the right of access is not absolute,¹⁸⁸ these examples of discretionary closure are consonant with a general tradition of openness. Discretionary closure upon circumstances surrounding a particular trial, in fact, implies that the presumption of openness still obtains.¹⁸⁹ As stated in one of the cases invoked by Chief Justice Burger—"Ordinarily the [Sixth Amendment] precludes the general exclusion of the public from the trial of a case over the objection of the defendant, and limits the trial judge to the exclusion of those persons or classes of persons whose particular exclusion is justified by lack of space or for reasons particularly applicable to them."¹⁹⁰

The statutes cited by the Chief Justice likewise do not support the proposition for which he offers them. All but two of the eight state laws cited are discretionary, permitting but not requiring a trial judge to close the courtroom in sex trials involving victims.¹⁹¹ Discretionary closure statutes, like case law supporting discretionary closure, imply a general rule of openness even in those sexual assault cases. The only two state statutes which reverse the presumption of public access to a presumption of closure were both passed within the past six years,¹⁹² belying the claim that the statutes represent "long-standing provi-

¹⁸⁴ *Geise*, 158 F. Supp. at 823; *Purvis*, 157 Conn. at 207; *Moore*, 151 Ga. at 658-59.

¹⁸⁵ See *Harris*, 361 F.2d at 890, 891; *Reagan*, 202 F. at 489-90; *Geise*, 158 F. Supp. at 824; *Hogan*, 191 Ark. at 440; *Purvis*, 157 Conn. at 206-07; *Moore*, 151 Ga. at 651-59.

¹⁸⁶ See cases cited *supra* at note 185.

¹⁸⁷ See, e.g., *Harris*, 361 F.2d at 891 ("[T]he closing of the courtroom to spectators during the testimony of the victim . . . is a frequent and accepted practice when the lurid details of such a crime must be related by a young lady.").

¹⁸⁸ *Globe*, 102 S. Ct. 2613 at 2620.

¹⁸⁹ Absent an affirmative exercise of judicial discretion, in other words, the trial would remain open.

¹⁹⁰ *Geise*, 158 F. Supp. at 824. Further, courtrooms have been closed in whole or in part by judges exercising their discretion for reasons other than protecting minor victims of sexual assault. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (prevention of disruption at trial); *Lloyd v. Vincent*, 520 F.2d 1272, 1274 (2d Cir. 1975) (protection of undercover agents while testifying). Under the Burger analysis, repeated closures for such reasons might also present exceptions to the general presumption of openness. *Globe*, 102 S. Ct. 2613 at 2623-24 (Burger, C.J., dissenting). Resorting to case authority evidencing closure in times past might well defeat the presumption of openness in a host of trials.

¹⁹¹ The statutes permitting discretionary closure are: ALA. CONST. art. VI, § 169 (repealed; Amend. 328, 1973); GA. CODE ANN. § 81-1006 (1956; Supp. 1982); MISS. CONST. Art. 3, § 26; N.Y. JUD. LAW § 4 (McKinney, 1967); N.C. GEN. STAT. § 15-166 (1978); UTAH CODE ANN. § 78-7-4 (1953).

¹⁹² See FLA. STAT. ANN. § 918.16 (West Supp. 1982); N.H. REV. STAT. ANN. § 632-A:8 (Supp. 1981).

sions."¹⁹³ One of these two statutes, moreover, specifically exempts the press from an exclusionary order.¹⁹⁴

Chief Justice Burger, in short, appears to misread his own plurality opinion in *Richmond*, which speaks to criminal trials generically.¹⁹⁵ Moreover, his observation that sex trials involving minors have been closed on occasion reflects not an exception to the general rule of access, but a type of criminal case in which the presumption may be more regularly overcome.

The *Globe* majority, on the other hand, reaffirms and clarifies the *Richmond* presumption of openness by applying it to all criminal trials.¹⁹⁶ Such an interpretation seems more consonant with the language in *Richmond*, which speaks of a tradition of access to criminal trials without limitation as to type.

The *Globe* majority and the Burger dissent also differ on the circumstances under which the presumption of openness may be overcome. The next section will examine these competing theories in *Globe* and determine which best comports with existing principles of first amendment jurisprudence and the policies which underlie them.

C. Adoption of the Strict Scrutiny Test for Government Infringement of the Access Right

While *Richmond* established that the public right of access to criminal trials warrants constitutional protection, it left open the question of when that right may be infringed by a judge or by statute. Several of the opinions in *Richmond*, however, offered some general guidance. The plurality would require an "overriding interest articulated in the findings."¹⁹⁷ Justice Brennan suggested that sufficiently powerful countervailing considerations would be required.¹⁹⁸ Several Justices agreed that reasonable time, place and manner restrictions similar to those found in the first amendment areas of speech and assembly would be permissible.¹⁹⁹ Justice Stewart specifically mentioned protection of minor victims at a rape trial as a possible justification for restraining access.²⁰⁰

Having established that the presumption of openness applied in the case before it, the *Globe* Court considered the proper test to apply in order to override the presumption.²⁰¹ The majority agreed that reasonable time, place and manner restrictions on access do not require a strict level of scrutiny.²⁰² Section 16A, however, the *Globe* Court found, imposed more than a reasonable time,

¹⁹³ *Globe*, 102 S. Ct. 2613 at 2624 (Burger, C.J., dissenting).

¹⁹⁴ See FLA. STAT. ANN. § 918.16 (West Supp. 1982).

¹⁹⁵ See *supra* notes 143-63, 171-76 and accompanying text.

¹⁹⁶ *Globe*, 102 S. Ct. 2613 at 2619 & n.13.

¹⁹⁷ *Richmond*, 448 U.S. 555 at 581 & n.18 (plurality opinion).

¹⁹⁸ *Id.* at 598 & n.24 (Brennan, J., concurring in the judgment).

¹⁹⁹ *Id.* at 581 n.18 (plurality opinion); *id.* at 598 n.23 (Brennan, J., concurring in the judgment); *id.* at 600 (Stewart, J., concurring in the judgment).

²⁰⁰ *Id.* at 600 n.5 (Stewart, J., concurring in the judgment).

²⁰¹ *Globe*, 102 S. Ct. 2613 at 2620.

²⁰² *Id.* at 2620 n.17.

place and manner restriction.²⁰³ The mandatory closure statute, the *Globe* Court stated, was designed to inhibit the disclosure of sensitive information.²⁰⁴ In such a case, the Court held, strict scrutiny would apply.²⁰⁵ The statute was accordingly required to be narrowly tailored to serve a compelling state interest.²⁰⁶

In his dissent, Chief Justice Burger maintained that strict scrutiny was inappropriate in the *Globe* case.²⁰⁷ He argued that the situation in *Globe* was substantially different from those cases in which state statutes thwarted the dissemination of information or discussion of ideas.²⁰⁸ According to Chief Justice Burger, because *Globe* had subsequent access to the trial transcript as well as all other sources of information, the statute represented merely a reasonable restriction on time, place and manner.²⁰⁹ The proper analysis, he stated, would balance the interests of the Commonwealth against the incidental effects on first amendment rights.²¹⁰

Upon the facts presented in *Globe*, the Court could have ruled the statute a reasonable time, place and manner restriction, as the Chief Justice advocated. The information concerning the minor victim's testimony could be deemed simply delayed and not denied. The public and press had complete *post* access to the transcript, the witness herself and all other sources of information.²¹¹ In light of the narrow construction of the statute by the Massachusetts Supreme Judicial Court,²¹² moreover, the *Globe* would have access to all other portions of such trials in the future. Such an interpretation of the Massachusetts statute, however, would have represented a substantial departure from previous time, place and manner restrictions and resulted in a severely restricted right of access.

Time, place and manner restrictions upon the freedoms of speech and association have been upheld where the restrictions are reasonable and only incidentally burden first amendment rights.²¹³ The Supreme Court has recognized that legitimate state concerns of protecting the rights of all militate against total freedom in expression and association.²¹⁴ Thus a city may require a permit to use the public streets for a parade or demonstration,²¹⁵ or ban the

²⁰³ *Id.* at 2620.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 2625 (Burger, C.J., dissenting).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See *supra* notes 32-36 and accompanying text.

²¹³ *Grayned v. City of Rockford*, 408 U.S. 104, 115-16 (1971); *Adderly v. Florida*, 385 U.S. 39, 47-48 & n.6-7 (1966); *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953); *Cox v. New Hampshire*, 312 U.S. 569, 574-76 (1941).

²¹⁴ See *Cox*, 312 U.S. at 574; *Kovacs v. Cooper*, 336 U.S. 77, 86-88 (1949).

²¹⁵ *Cox*, 312 U.S. at 575-76.

use of sound trucks which emit loud and offensive noise among city thoroughfares,²¹⁶ or proscribe picketing in front of a courthouse.²¹⁷ Such regulations do not deny exercise of first amendment rights, but exert some control over their expression in deference to countervailing rights of others.

The analogous restrictions upon access envisioned by the various *Richmond* opinions appear similarly designed to mesh exercise of the access right with the other interests involved in a criminal trial. The Justices spoke of the need to preserve decorum,²¹⁸ and of the physical limitations of the courtroom²¹⁹ as justifying reasonable restrictions. Previous Supreme Court decisions, in fact, recognize the right of a trial court to exclude an unruly defendant from the courtroom,²²⁰ to limit the number of spectators,²²¹ and to restrict the use of television cameras to ensure a fair and orderly trial.²²² These cases, as well as the justifications for closure in the *Richmond* opinions, concern situations in which, for reasons of decorum or courtroom space, "not every person who wishes to attend can be accommodated."²²³ In such cases, reasonable regulation affecting the exercise of first amendment rights only incidentally is allowed.

Where a state activity directly interferes with exercise of first amendment rights, by contrast, the Supreme Court has invoked strict scrutiny.²²⁴ Under this test, the infringement of first amendment rights will be upheld only where the restriction serves a compelling state interest and is narrowly tailored to promote that interest without unnecessarily trammeling first amendment rights.²²⁵ Thus a state statute which prohibited a candidate from promising to lower his salary if elected was deemed an unconstitutional restriction on the free exchange of ideas under strict scrutiny.²²⁶ Similarly, a state could not by statute punish the publishing of truthful information obtained at trial where the state interest in nondisclosure was not compelling and the statute did not cover other media.²²⁷

²¹⁶ *Kovacs*, 336 U.S. at 87-89.

²¹⁷ *Cox v. Louisiana*, 379 U.S. 559, 562, 564 (1965).

²¹⁸ *Richmond*, 448 U.S. 555 at 598 n.23 (Brennan, J., concurring in the judgment).

²¹⁹ *Id.* at 581 n.18 (plurality opinion); *id.* at 600 & n.5 (Stewart, J., concurring in the judgment).

²²⁰ *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

²²¹ *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966).

²²² *Estes v. Texas*, 381 U.S. 532, 539-40 (1965).

²²³ *Richmond*, 448 U.S. 555 at 581 n.18 (plurality opinion).

In such situations, the press is entitled to preferential seating. *Id.* at 581 n.18 (citing *Gannett*, 443 U.S. at 397-98 (Powell, J., concurring)); *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (Stewart, J., concurring); *id.* at 32 (Stevens, J., dissenting) (1978).

²²⁴ *Brown v. Hartlage*, 102 S. Ct. 1523, 1529 (1982); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101-03 (1979); *NAACP v. Buttons*, 371 U.S. 415, 438 (1963).

²²⁵ See, e.g., *Brown v. Hartlage*, 102 S. Ct. at 1529; *Smith v. Daily Mail*, 443 U.S. at 101-02.

²²⁶ *Brown*, 102 S. Ct. at 1532.

²²⁷ *Smith v. Daily Mail*, 443 U.S. at 104-05.

Like the prior cases in which the Court has applied strict scrutiny, *Globe* presents a case in which first amendment rights are directly infringed. The first amendment right embraced by the Supreme Court in both *Globe* and *Richmond* is the right to "see, hear and communicate observations" concerning criminal trials.²²⁸ The Court has recognized that in most instances the general public allows the press to exercise this right as its surrogate, thereby justifying preferential treatment of the media when reasonable restrictions on access are imposed.²²⁹ Nevertheless, the right protected is direct access to the trial itself, not subsequent access to secondary sources.²³⁰ It is that access itself which enjoys the historical support documented by the Court in *Richmond*.²³¹ When the *Richmond* opinions describe the salutary effects of public access, they speak to public viewing of the trial and not to *post*-trial review of a transcript.²³² In *Globe*, this public access is at one point completely terminated.²³³ Rather than determining which members of the public will be allowed to view the trial, the Massachusetts statute in *Globe* revoked the right of access altogether.²³⁴ This direct infringement warrants a higher level of justification than mere regulation of spectator flow.

Availability of the trial transcript, as recognized in *Richmond*, "is no substitute for a public presence at the trial itself. . . . [t]he 'cold' record is a very imperfect reproduction of events which transpire in the courtroom."²³⁵ To the extent that publicity serves as a check upon trial officials, the *Richmond* plurality recognized, "[r]ecordation . . . would be found to operate rather as [a] cloak than [a] check."²³⁶ A transcript does not describe the nonverbal aspects of a proceeding, nor does it preserve statements not made to the record. Even though the courtroom may be closed for only a small portion of the trial, that portion may be highly important to the final determination. Particularly in the case of a rape trial, it seems evident as a matter of logic that the testimony of the minor victim is often the most important evidentiary matter in the case. Suspending the public's first amendment right to view this portion of the trial may well be necessary to protect the minor victim from additional trauma. Complete albeit temporary infringement upon the access right, however, should require stronger justification than is required to preserve decorum or accommodate the seating limitations of a courtroom.

Chief Justice Burger would require only that the trial court balance in

²²⁸ *Richmond*, 448 U.S. 555 at 576; *Globe*, 102 S. Ct. 2613 at 2618.

²²⁹ *Richmond*, 448 U.S. 555 at 577 n.12, 581 n.18 (plurality opinion).

²³⁰ See *supra* note 228 and accompanying text.

²³¹ See *supra* notes 145-49 and accompanying text.

²³² See *supra* notes 150-58 and accompanying text.

²³³ *Globe*, 102 S. Ct. 2613. See *supra* notes 14-21, 32-36 and accompanying text.

²³⁴ *Globe*, 102 S. Ct. 2613 at 2616. See *supra* notes 32-36 and accompanying text.

²³⁵ *Richmond*, 448 U.S. 555 at 569 (plurality opinion); *id.* at 597 n.22 (Brennan, J., concurring in the judgment); citing in part 1 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).

²³⁶ 448 U.S. at 569 (plurality opinion), citing 1 BENTHAM, *supra* note 235.

each case the state interest in closing the courtroom against the need of the press for instant access.²³⁷ The need for instant access, however, is the need to exercise a right protected by the first amendment. *Richmond* and *Globe* protect the public's right to be at the trial, not to read about it at some future date. The balancing test advocated by the Chief Justice is simply inappropriate to the first amendment right involved.²³⁸

Globe, following the path cleared by *Richmond*, identifies the first amendment right of access to protect access by the general public and the press to the trial itself. When a criminal trial is completely closed, in whole or in part, to the public and press, the infringement goes far beyond that of a reasonable limitation on time, place and manner. As the *Globe* majority correctly ruled, absolute closure for any portion of a criminal trial warrants compelling justification and must be accomplished in the manner which infringes least upon first amendment rights.

III. THE QUESTIONS REMAINING

As demonstrated above, *Globe Newspapers* clarifies the first amendment right of access derived in *Richmond*. Although the case was argued by a press organization, the right of access applies to the public generally and confers no

²³⁷ *Globe*, 102 S. Ct. 2613 at 2625 (Burger, C.J., dissenting).

²³⁸ See *supra* notes 228-37 and accompanying text.

Throughout his dissent, the Chief Justice argues that the result reached by the majority presents a disturbing anomaly. 102 S. Ct. 2613 at 2623-24, 2627. States are free to protect minors charged with a crime, he maintains, while powerless in light of *Globe* to protect minor victims of sexual assaults. *Id.* While this argument possesses seductive appeal, it glosses over the substantive differences in the two situations.

In *Globe*, the state interest implicated involved the protection of a minor victim of a sexual assault. *Id.* at 2621 (majority opinion). That interest was found by the *Globe* Court to be compelling. *Id.* The *Globe* Court ruled that a state may override the access right to protect that compelling interest where its order or statute does not sweep too broadly. *Id.* at 2621-22. Although minors accused of crimes have also been protected by state statutes, the Court has never viewed the state's interest in sheltering minors accused of crimes from publicity as compelling. See, e.g., *Smith v. Daily Mail*, 443 U.S. 97, 104 (1979). Where protection of youthful offenders has clashed with the first amendment right to publish information, the protective statute has been struck down. *Id.* Protection of the minor victim thus stands as a more important state interest than protection of the minor offender.

Court decisions which suggest that minor offenders obtain greater protection result from the particular fact situations in which the cases arise. Challenges to orders protecting youthful offenders usually arise in the context of juvenile proceedings, which the Court has consistently viewed as qualitatively different from criminal trials of adults. *Davis v. Alaska*, 415 U.S. 308 (1974). Juvenile proceedings lack the historical tradition of openness found in the criminal trial. *Id.* As a result, the first amendment right of access does not factor into the Court's consideration. Only where the press or public gains entry or otherwise obtains information which it then seeks to disseminate is the first amendment implicated. *Smith v. Daily Mail*, 443 U.S. at 104-06. Minor victims, on the other hand, generally testify at the criminal trials of adults, which both *Globe* and *Richmond* determined possess a constitutional presumption of openness. *Globe*, 102 S. Ct. 2613 at 2618; *Richmond*, 448 U.S. 555 at 580 (plurality opinion). See *supra* notes 144-63 and accompanying text. Thus the differences in the two proceedings, not any perverse ordering of the two state interests in the mind of the Court, lead to any anomalous result Chief Justice Burger perceives.

special privilege upon the press. The *Globe* decision, however, provides no clear answer to questions of the validity of state statutes which permit exclusion of the general public while guaranteeing access to the press.²³⁹ These questions, therefore, must be answered by the suggestion in *Globe* that exclusion of any persons from a criminal trial must be justified by the particular facts of the individual case. For example, a state statute allowing the trial judge, upon a finding that the presence of the public would harm the minor victim, to exclude the general public but permit representatives of the press to attend, appears likely to be upheld.

Another substantial question remaining after *Globe* concerns the nature and extensiveness of the individual hearing required. The important interests involved on each side of the issue, as well as systemic concern for judicial economy, render definition of such a hearing difficult. On the one hand, the individual hearing must be more than perfunctory.²⁴⁰ A nominal consideration would render the first amendment right a nullity and the strict scrutiny analysis little more than an academic exercise. An extensive evidentiary hearing, on the other hand, would consume valuable court time and resources, and delay the defendant's trial. More important, testimony and cross examination of the minor victim on the issue of the additional trauma probable from the presence of the public at trial could itself create tension and trauma for the victim.²⁴¹ Such a traumatic hearing would defeat the same compelling interest which closure would seek to promote.²⁴² An additional and related question concerns who could contest a closure order at the case-by-case hearings: Would the press alone represent the interests of the general public, or would each individual subject to exclusion be afforded the opportunity to present his or her case?

Although subsequent litigation will be required to resolve the essential elements of a hearing, certain broad requirements may be identified. At the very least, representatives of the spectating public should be heard in opposition to a motion for closure. As the access right belongs to the public generally, it is perhaps sufficient for one advocate to present the arguments against closure. The press, representing itself as well as the non-attending public, could serve this function. Upon a motion for closure and the receipt of arguments against, the trial judge should question the minor witness to determine whether closure would serve its asserted purpose—preventing additional trauma from testifying in front of a large audience. This interrogation is necessary to ensure that the minor's desire for closure is not motivated by concerns other than the additional psychological pressure from relating her experience before a sizable group of strangers.²⁴³ To reduce the tension caused by

²³⁹ See, e.g., FLA. STAT. ANN. § 918.16 (West Supp. 1982).

²⁴⁰ *Globe*, 102 S. Ct. 2613 at 2621, 2622 & n.25.

²⁴¹ *Id.* at 2622 n.25.

²⁴² *Id.*

²⁴³ In *Globe*, for example, the record suggests that the victims were most concerned that publicity about the trial would reach their grandparents, who were apparently ignorant of the

the hearing itself, the questioning could be conducted *in camera*, perhaps by the judge alone upon questions submitted by the adverse parties on the closure issue.²⁴⁴ If the authenticity of the minor's relevant concerns is established to the court's satisfaction, the judge should then consider alternatives to complete closure. In some situations a limited audience, press pooling or closed-circuit viewing arrangement may be sufficient and feasible.²⁴⁵ Finally, the trial judge's decision, the basis thereof, as well as the arguments of counsel and questioning of the witness, should be included in the trial record to allow for immediate and considered appeal.²⁴⁶

In any closure situation, a successful determination will depend in large measure on a trial judge sensitive to the competing interests involved. The trial begins with access presumed. The judge must discern when the minor victim's legitimate concerns override that presumption, and determine when suspending the public's first amendment right will alone assuage those compelling concerns.

CONCLUSION

Globe Newspaper clarifies and strengthens the first amendment right of access to criminal trials first established in *Richmond Newspapers*. The *Globe* majority logically read *Richmond* as discerning a "presumption of openness" in all criminal trials, and then extended to this nascent access right the strict scrutiny analysis traditionally afforded first amendment protections. After *Globe*, closure of any part of a criminal trial to the public must both further a compelling state interest and be narrowly tailored to serve that interest. The application of strict scrutiny analysis to trial closures implies that the decision to invoke closure in any particular trial must be based on a consideration of the specific facts of that trial. Statutes mandating closure in all trials of a particular

alleged incident. *Id.* at 2621 n.5. Such a concern does not fall within the compelling state interest underlying the Massachusetts statute.

²⁴⁴ See, e.g., *Onconta Star Div. v. Mogavero*, 77 A.D.2d 376, 378-79, 434 N.Y.S.2d 781, 782-83 (1980) (quoting *Matter of Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 442, 423 N.Y.S.2d 630, 399 N.E.2d 518 (1979)) ("If, during the course of the argument [on closure], it becomes necessary for counsel to introduce [evidence], the public disclosure of which would create the very prejudice sought to be avoided . . . this portion of the argument [may] be continued *in camera*. . .").

²⁴⁵ See Reply Brief of Appellant at 8, *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982) (reprinted in 13 LAW REPRINTS, CRIMINAL LAW SERIES (BNA) No. 22 1981/82 Term 1982). See also Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1014-18 (1969) (discussing the use of one-way mirrors for the examination of minor victims).

Some states, by statute, permit the use of videotaping of the minor witness's examination in chambers as an alternative to a public appearance before the jury. See ARIZ. REV. STAT. ANN. § 12-2312 (1982); FLA. STAT. ANN. § 918.7 (West Supp. 1982); MONT. CODE ANN. § 46-15-401 (1981); N.M. STAT. ANN. § 30-9-17 (1978).

²⁴⁶ See, e.g., *Onconta*, 77 A.D.2d at 379, 434 N.Y.S.2d at 782-84 (quoting *Leggett*, 48 N.Y.2d 442, 423 N.Y.S.2d 630, 399 N.E.2d 518) ("[A]ll proceedings on the motion, whether in open court or *in camera*, should be recorded for appellate review.").

type cannot stand. Whether these procedural guarantees constitute effective safeguards to access or mere formalities to closure is the question awaiting future litigation.

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