

THE FIRST AMENDMENT RIGHT OF ACCESS TO SEX CRIME TRIALS

Various state statutes and constitutions grant trial court judges discretion to exclude spectators from criminal trials involving sex crimes. For example, section 4 of New York Judiciary Law permits a court to exclude persons without a direct interest in the trial when the proceeding involves divorce, seduction, rape, sodomy, bastardy, or filiation.¹ The Mississippi Constitution has a similar provision, under which a court, in its discretion, may bar individuals from the courtroom in prosecutions for rape, adultery, fornication, sodomy, or crimes against nature.² In jurisdictions without specific statutory or constitutional authorization, trial court judges often have used their inherent judicial discretion to exclude spectators from sex crime trials.³ Through closure, courts and legislatures have attempted to protect sex crime victims from the ordeal of a trial before curious and unrelated observers.⁴ It is thought that fewer spectators in the courtroom lessen the victim's trauma and allow him or her to testify more fully and accurately, thus promoting the fair administration of justice.⁵

¹ N.Y. JUD. LAW § 4 (McKinney 1968). See also N.C. GEN. STAT. § 15-166 (during testimony of prosecutrix in a trial for rape or attempted rape, court may exclude all except court officers and those engaged in the trial itself); UTAH CODE ANN. § 78-7-4 (court may exclude all not directly interested in a trial of rape or other sex-related case).

² MISS. CONST. art. III, § 26. See also ALA. CONST. 1901, art. VI, § 169 (conferring discretionary authority upon a trial court to exclude from the courtroom all persons not necessary to the trial in cases of rape and assault with intent to ravish).

³ See, e.g., *State v. Santos*, 413 A.2d 58, 62 (1980). See generally *Globe Newspaper Co. v. Superior Court*, 1980 Mass. Adv. Sh. 485, 496 n.8, 401 N.E.2d 360, 367 n.8 (1980). The Massachusetts Supreme Judicial Court engaged in an extensive discussion of the closure problem, but it eventually dismissed *Globe Newspaper's* appeal as moot. *Globe Newspaper* then appealed the decision to the United States Supreme Court and the Supreme Court remanded the case, 101 S. Ct. 259 (1980), to the Massachusetts Supreme Judicial Court for reconsideration of the issue in light of the intervening Supreme Court case *Richmond Newspaper Inc. v. Virginia*, 100 S. Ct. 2814 (1980). As of the date of the publication of this article, the Massachusetts Supreme Judicial Court had not redecided *Globe Newspaper*. See text and notes at notes 134-36 *infra*. Cf. *Lexington Herald Leader Co. v. Tackett*, 601 S.W.2d 905, 906 (Ky. 1980) (The trial court used its discretion to exclude all spectators from the courtroom during the testimony of several young sodomy victims. *Id.* The Kentucky Supreme Court acknowledged the trial court's authority to close portions of sex crime trials to certain individuals, *id.*, but held that the closure order may not exclude all members of the press and public. *Id.* at 907.).

⁴ See text and notes at notes 13-22 *infra*. These closure orders affect the general public and members of the press, but they do not affect necessary court personnel, the defendant, his counsel, or his relatives and close friends. See *In re Oliver*, 333 U.S. 257, 271-72 (1948) ("[A]ll courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged."). But see *Commonwealth v. Wright*, 255 Pa. Super. 512, 388 A.2d 1084 (1978), where the Superior Court of Pennsylvania upheld the trial court's discretionary exclusion of all spectators, including the defendant's family, during the testimony of a 59-year-old rape victim. The court determined that the inability of the victim to testify, combined with the threat she received from the defendant's family, provided a compelling basis for clearing the entire courtroom during the victim's testimony. *Id.* at 515, 388 A.2d at 1086.

⁵ See text and notes at notes 13-22 *infra*.

Until recently, the primary barrier to the closure of a sex crime trial was the accused's sixth amendment right to a public trial.⁶ In a number of cases, courts held that the state interest in closing a sex crime trial must be subordinated to the accused's constitutional right to public scrutiny of the proceeding.⁷ Actions by excluded spectators to compel access to these trials via the Constitution did not similarly impede closure. Although some courts seemed to recognize a common law protection of the public's asserted right of access to criminal trials,⁸ few, if any, accepted the argument of an excluded member of the public that the Constitution is an independent source of a public right of access.⁹

Nevertheless, in a recent decision, *Richmond Newspapers, Inc. v. Virginia*,¹⁰ the Supreme Court of the United States recognized the strong public interests in open trials¹¹ and held that the first amendment supports a public right of access to criminal trials.¹² *Richmond* makes clear that the public now has a right, comparable to that of the accused, to object on constitutional grounds to closure of a criminal trial. Henceforth, when a member of the public moves to compel access to a sex crime trial, courts must balance his first amendment right recognized in *Richmond* against the state interest in closing the trial.

This note will examine the impact of a first amendment right of access on the validity of orders closing sex crime trials. Initially, the conflicting interests underlying such closure orders will be presented. Then, the article will outline three possible bases of a public right of access to criminal trials including the common law and the first and the sixth amendments. This survey will culminate with an examination of *Richmond's* delineation of a first amendment right of access. Following the discussion of *Richmond*, this note will review the manner in which courts, prior to *Richmond*, dealt with the problem of closure in a sex crime case. During this review, this note will attempt to determine when a court may close a sex crime trial after *Richmond*. It will be submitted that a closure order withstands first amendment scrutiny if it excludes only a limited

⁶ The sixth amendment to the United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI. The sixth amendment applies to the states through the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968). All states also recognize the accused's right to a public trial as a matter of state law. Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. REV. 1138, 1140 n.11 (1966).

⁷ See, e.g., *Cumbee v. Commonwealth*, 219 Va. 1132, 1137, 254 S.E.2d 112, 115 (1979).

⁸ See, e.g., *Johnson v. Simpson*, 433 S.W.2d 644, 646 (Ky. 1968); *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 151, 161-67, 125 N.E.2d 896, 899-903 (1955). But see *United Press Ass'n v. Valente*, 308 N.Y. 71, 123 N.E.2d 777, 778-83 (1954). See generally text and notes at notes 39-56 *infra*.

⁹ This author has been unable to find a decision in which a court has weighed a constitutional public right of access to a sex crime trial against the state interest in protecting the victim of the crime. For a discussion of a first amendment public right of access, see text and notes at notes 76-132 *infra*. For a discussion of a sixth amendment public right of access, see text and notes at notes 60-75 *infra*.

¹⁰ 100 S. Ct. 2814 (1980).

¹¹ *Id.* at 2821-30 (Burger, C.J., plurality opinion); 2833-39 (Brennan, J., concurring).

¹² *Id.* at 2829. The decision allows that this first amendment right is not absolute. See text and notes at notes 124-31 *infra*.

number of spectators and operates only during the victim's testimony. The order must allow some members of the press and the public to remain in the courtroom throughout the trial in order to serve certain public trial concerns.

I. CONFLICTING INTERESTS

A. *Interests Favoring Closure of a Sex Crime Trial*

Initially, closure was justified in sex crime trials by the perceived need to protect public morality. In 1897, the Supreme Court of Michigan reasoned that it may be proper under certain circumstances to exclude portions of the community from trials which might degrade public morals or shock public decency.¹³ Statutes enacted during this period reflect a similar concern.¹⁴

Protection of the public morality has since diminished in importance as a justification for closure.¹⁵ Many courts and legislatures now focus on protection of the victim as the basis for the exclusion of spectators.¹⁶ The decisions indicate that protecting the victim advances two related interests. First, a victim's trial ordeal may be mitigated by closing the trial to members of the public. Testifying in an open, crowded courtroom may deleteriously affect the health and emotions of the victim.¹⁷ A victim forced to recount details of a sex

¹³ *People v. Yeager*, 113 Mich. 228, 230, 71 N.W. 491, 492 (1897). The *Yeager* court suggested that young people may be excluded from certain trials in order to protect public morality, but held that a defendant's right to a public trial requires that all others be allowed to attend. *Id.*

¹⁴ See, e.g., ALA. CODE § 12-21-202 (originally enacted in the Alabama Code 1907 § 4019); GA. CODE § 81-1006 (originally enacted in the Georgia Acts 1890-1, p. 111). Both statutes allow the exclusion of spectators in all cases where the evidence is vulgar, obscene, or relates to the improper acts of the sexes and tends to "debauch the morals of the young." *Id.*

¹⁵ In *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949), the defendant had been convicted in a closed courtroom for transporting a minor in interstate commerce for prostitution purposes. The Court of Appeals for the Third Circuit reversed, explaining:

Moreover, whatever may have been the view of an earlier and more formally modest age, we think that the franker and more realistic attitude of the present day toward matters of sex precludes a determination that all members of the public, the mature and experienced, as well as the immature and impressionable, may reasonably be excluded from the trial of a sexual offense upon the ground of public morals.

Id. at 923.

¹⁶ In *Globe Newspaper*, 1980 Mass. Adv. Sh. 485, 401 N.E.2d 360 (1980), the Massachusetts Supreme Judicial Court noted that the stated purpose of the Massachusetts closure statute, MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1972), is "[t]o spare girls of juvenile age the embarrassment, humiliation and demoralization of testifying to all the sordid details of rape, incest, carnal abuse or other crime involving sex, incidental to open trial with examination and cross-examination." 1980 Mass. Adv. Sh. at 496-97, 401 N.E.2d at 368. The court concluded that the statute is intended both to promote sound and orderly administration of justice and to protect the victim's privacy. *Id.* at 499-500, 401 N.E.2d at 369. In *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977), the court stated that the primary justification for closing a trial during the testimony of a rape victim "lies in the protection of the personal dignity of the complaining witness." *Id.* at 694.

¹⁷ See generally L. BRODYAGA, M. GATES, S. SINGER, M. TUCKER & R. WHITE, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES, ch. 8 (1975); C. BOHMER, JUDICIAL ATTITUDES TOWARD RAPE VICTIMS (D. Chappell, R. Geis & G. Geis eds. 1977).

crime before a curious and unrelated audience can be expected to experience shame and loss of dignity, however unjustified.¹⁸ Indeed, a trial can create as much psychological trauma for a rape victim as can the crime itself.¹⁹ As far as minors are concerned, many psychiatrists agree that the traumatic psychological effect of a sex crime on a child is at least as dependent on the youth's treatment after discovery of the injury as it is on his treatment at the time of the offense itself.²⁰ The interest in mitigating these harms through closure of a trial is thus substantial.

The second interest served through protecting a victim of a sex crime is the more effective administration of justice. Victims who anticipate humiliation or embarrassment from a trial may decide not to prosecute.²¹ As a result, assailants often may go free. Closing a trial to protect a victim may mitigate this effect. If a victim does decide to prosecute, a crowded courtroom may deter that witness from testifying in an uninhibited manner.²² Testifying before many individuals who seek largely to be entertained would seem to be a far more intimidating experience than testifying before only those who have legitimate interests in the trial. As a result, a victim may be less willing to relate certain details of the experience when testifying before extraneous spectators. Incomplete testimony can be expected to hinder the state's prosecutorial efforts and to taint the trial result. Closing a trial should also moderate this effect. Thus, excluding spectators from a sex crime trial to protect a victim serves two interests; it decreases a victim's emotional trauma and it also furthers the judicial process.

B. Public Interests in Public Trials

Despite the arguments in favor of closing sex crime trials, members of the public maintain significant interests in securing access to these trials. Indeed,

¹⁸ *United States ex rel. Latimore*, 561 F.2d at 694. See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 88-89 (1977) [hereinafter cited as Berger].

¹⁹ L. HOLMSTROM & A. BURGESS, *THE VICTIM OF RAPE* 229 (1975), cited in *Globe Newspaper*, 1980 Mass. Adv. Sh. at 498 n.12, 401 N.E.2d at 368 n.12.

²⁰ Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 980-81 (1969). Several state statutes permitting closure of sex crime trials protect only victims below a certain age. See, e.g., MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1972). Many courts, however, have refused to use age as a limiting factor in sex crime trial closure decisions. For example, in *Bivins v. State*, 313 So. 2d 471 (Fla. Dist. Ct. App. 1975), the court examined a Florida statute allowing closure during the testimony of a sex crime victim under 16 years old, and held that the statute's protection could extend to the non-minor victim in *Bivins*. *Id.* at 472. The court stated that age should not be the determining factor in deciding whether closure should be ordered. *Id.* See also *Commonwealth v. Wright*, 255 Pa. Super. 512, 514-15, 388 A.2d 1084, 1085-86 (1978) (The court excluded spectators to protect a 59-year-old rape victim.); *State v. Santos*, 413 A.2d 58, 64 (1980) (The court excluded spectators to protect a twenty-two-year-old rape victim and stated that "age and experience of the witness, though important factors in deciding whether to exclude the public, are not controlling.").

²¹ See, e.g., Berger, *supra* note 18, at 92.

²² See, e.g., *Globe Newspaper Co. v. Superior Court*, 1980 Mass. Adv. Sh. at 499, 401 N.E.2d at 369.

the public has substantial interests in gaining access to all criminal trials.²³ To a large extent, the public's interests in open criminal trials are co-extensive with those of the accused. Both the public and the accused are concerned with fairness. The public has an interest in maintaining a fair and effective judicial process; the accused seeks a fair trial. With respect to these aims, courts have noted that public trials protect against abuses to which secret trials are prone by subjecting the police, prosecutors, judges, and judicial processes to public scrutiny and criticism.²⁴ Courts also have suggested that open trials discourage perjury, since increased publicity heightens the opportunity for discovery of the false testimony.²⁵ Finally, courts have submitted that the increased publicity inhering in an open court may produce relevant evidence from persons who otherwise would not be aware of the trial.²⁶ With respect to the issue of fairness at an individual trial, the accused's interest in a public trial appears to exceed the public's interest, since trial abuses may deprive the defendant of his liberty. Nevertheless, to the extent that the public interest in fair and open criminal trials encompasses all criminal proceedings, it is broader than that of the accused. Thus, a requirement of open trials serves public interests beyond those shared with a particular defendant.

In another important sense, the public's interest in open trials is broader than that of the accused. Public trials serve wide political and educational functions.²⁷ More specifically, the freedom to observe criminal trials serves political ends by reducing suspicions of prejudice and arbitrariness, which may develop through closed proceedings and which may invite contempt for law.²⁸ Thus, open courtrooms tend to foster a sense of trust in the government. By attending criminal trials, members of the public also may gain a better understanding of the judicial process.²⁹ This, it is hoped, increases confidence in and respect for

²³ See Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899 (1978) [hereinafter cited as *Trial Secrecy*]; Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 (1978) [hereinafter cited as *The Right to Attend Criminal Hearings*]; *In re Oliver*, 333 U.S. 257, 268-72 (1948); *Richmond Newspapers Inc. v. Virginia*, 100 S. Ct. 2814 (1980).

²⁴ See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

²⁵ See, e.g., *Tanksley v. United States*, 145 F.2d 58, 59-60 (9th Cir. 1944) (The accused raised the defense of prostitution to his rape charge. The court stated that because of this defense the trial should remain open. The presence of "another man who had had such paid intercourse . . . might arouse in her a fear or sense of shame that would alter or weaken her testimony against the accused.").

²⁶ See, e.g., *In re Oliver*, 333 U.S. at 270 n.24.

²⁷ See generally *Richmond*, 100 S. Ct. at 2824-25 (Burger, C.J., plurality opinion), 2837-39 (Brennan, J., concurring); 6 J. WIGMORE, EVIDENCE § 1834, at 438 (Chadbourn rev. ed. 1976).

²⁸ See generally *Richmond*, 100 S. Ct. at 2837 (Brennan, J., concurring); Fenner & Koley, *The Rights of the Press and the Closed Court Criminal Proceeding*, 57 NEB. L. REV. 442, 478-79 (1978) [hereinafter cited as Fenner & Koley].

²⁹ See *Richmond*, 100 S. Ct. at 2825 (Brennan, J., concurring); *State v. Schmit*, 273 Minn. 78, 87-88, 139 N.W.2d 800, 807 (1966) ("It is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice.").

the criminal justice system.³⁰ It also has been noted that an open trial may provide an emotional outlet to a community shocked by a violent crime,³¹ and can provide a cathartic sense that the guilty are ultimately punished.³²

Thus, the public has several significant interests in maintaining a system of public trials. While recognizing these strong public interests in open trials, courts often have closed criminal proceedings to members of the public for a variety of purposes. Among other reasons, trial judges have closed courtrooms to avoid prejudicial pre-trial publicity,³³ to conceal the identity of informants,³⁴ to preserve trade secrets,³⁵ and to enable witnesses to testify to sensitive matters such as sex crimes. In response to closure orders, members of the public have sought to safeguard their interests in open trials by asserting both common law and constitutional rights of access.³⁶ Until *Richmond*, the public had been unsuccessful in securing protection of its interests via a generally recognized public right of access.

II. ASSERTED PUBLIC RIGHTS OF ACCESS TO CRIMINAL TRIALS

A. A Common Law Right of Access to Criminal Trials

Open criminal proceedings are deeply rooted in the common law. As one author has stated, "[o]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial."³⁷ In 1948, the United States Supreme Court could not identify a single secret criminal trial in England since the court of the Star Chamber in 1641.³⁸ The Court also observed that no federal, state, or municipal court in the history of this country had ever conducted a criminal trial in camera.³⁹

No solid evidence exists to pinpoint the original intended beneficiaries of open trials.⁴⁰ It may be, however, that the open trial right developed in favor of the public, as opposed to the accused. By today's standards, the seventeenth and eighteenth century English criminal defendant enjoyed few protections.

³⁰ *Id.* See also *United States v. Cianfrani*, 573 F.2d 835, 848 (3d Cir. 1978).

³¹ *Richmond*, 100 S. Ct. at 2824-25; *Globe Newspaper*, 1980 Mass. Adv. Sh. at 495, 401 N.E.2d at 367.

³² *Id.*

³³ *Gannett Co. v. DePasquale*, 443 U.S. 368, 370-71 (1979).

³⁴ *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1274 (2d Cir. 1975), *cert. denied*, 423 U.S. 937 (1975) (closure to conceal the identities of undercover agents).

³⁵ *State ex rel. Ampco Metal, Inc. v. O'Neill*, 273 Wis. 530, 532, 78 N.W.2d 921, 922 (1956).

³⁶ See text and notes at notes 39-132 *infra*.

³⁷ E. JENKS, *THE BOOK OF ENGLISH LAW* 73-74 (6th ed. 1967), *cited in Richmond*, 100 S. Ct. at 2822.

³⁸ *In re Oliver*, 333 U.S. at 266. The Court of the Star Chamber apparently disregarded many common law rules of criminal procedure and often tortured the accused to obtain a confession. There is some dispute, however, as to whether the Star Chamber trials were public. *Id.* at 269 n.22.

³⁹ *Id.* at 266.

⁴⁰ See *Gannett*, 443 U.S. at 418-23 (1979) (Blackmun, J., dissenting); Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381-84 (1932) [hereinafter cited as Radin].

The accused was kept in confinement, not given notice of evidence against him, and denied counsel.⁴¹ This lack of interest for the defendant's rights indicates that the criminal justice system was not concerned with giving the defendant a right to an open trial. Yet, throughout this period, courts required open trials.⁴² These facts suggest that open trials developed to protect the public's interests.⁴³ In any event, the open trial interests of both the public and the accused eventually received explicit protection in various early charters of the American colonies. For example, the Pennsylvania Declaration of Rights of 1776 read that "in all prosecutions for criminal offenses, a man hath a right to . . . a speedy public trial."⁴⁴ The 1677 Concessions and Agreements of West New Jersey similarly protected the *public's* rights by explicitly allowing that "any person . . . may freely come into, . . . all or any such tryals, . . . that justice may not be done in a corner nor in any covert manner."⁴⁵

While the early charters gave protection to the open trial interests of both the public and the accused, the public did not fare so well under the United States Constitution. The drafters of the Constitution safeguarded the accused's public trial right in the sixth amendment.⁴⁶ They included no analogous provision, however, explicitly securing a public right of access to criminal trials. This lack of explicit constitutional protection left the status of the public's common law open trial rights unclear. After the passage of the sixth amendment, courts had to determine whether the public's common law right of access was left unaffected by the Constitution, or whether the accused's sixth amendment protection abrogated a need for a public right of access to criminal trials. The decisions reflect a split of authority on this issue.

Many courts addressing the issue prior to *Richmond* continued to recognize a public right of attendance at criminal trials.⁴⁷ For example, in *Johnson v. Simpson*,⁴⁸ the Kentucky Court of Appeals upheld a reporter's challenge of an order excluding him from a trial of an adult who allegedly had contributed to the delinquency of a minor.⁴⁹ The court noted that members of the public are parties to all criminal proceedings.⁵⁰ In determining that excluded individuals hold

⁴¹ Radin, *supra* note 40, at 383-84. In addition, the accused was not given the right to confront witnesses, and the originals of documents were not required to be produced. *Id.*

⁴² *Id.*

⁴³ See, e.g., *The Right to Attend Criminal Hearings*, *supra* note 23, at 1322. Conversely, these facts could indicate that open trials arose to guard the accused's interest in order to provide at least a minimum of fairness.

⁴⁴ Pennsylvania Declaration of Rights of 1776, ¶ IX, cited in *Gannett*, 443 U.S. at 425 (Blackmun, J., dissenting).

⁴⁵ The 1677 concessions and agreements of West New Jersey was the charter or collection of fundamental laws. Reprinted in *SOURCES OF OUR LIBERTIES* 188 (R. Perry ed. 1959), cited in *Richmond*, 100 S. Ct. at 2823.

⁴⁶ See note 6 *supra*.

⁴⁷ See text and note at note 8 *supra*.

⁴⁸ 433 S.W.2d 644 (Ky. 1968).

⁴⁹ *Id.* at 647.

⁵⁰ *Id.* at 646. The court stated that to rely entirely on a defendant to determine whether a proceeding was public or secret "would take from the public its right to be informed of a proceeding to which it is an interested party." *Id.*

an enforceable right to attend criminal trials,⁵¹ the *Johnson* court explained that a public right of access is "so well settled that it requires little amplification."⁵²

A few courts, however, denied any common law protection to members of the public excluded from the courtroom.⁵³ In *United Press Association v. Valente*,⁵⁴ the Court of Appeals of New York held that reporters excluded from a trial have no right or privilege of which they may complain.⁵⁵ The court reasoned that the public interest is protected adequately by the power of the accused to assert his constitutional public trial right and the discretionary ability of the judge to deny closure.⁵⁶ Thus, in some cases courts have viewed the public access issue entirely in terms of the accused's right to a fair and open trial. These courts have not displayed an equal respect for the significant public interests in open proceedings and the common law history of a public right of access to criminal trials.

B. Asserted Constitutional Rights of Access

Due in part to the uncertain status of a common law right, members of the public have sought to identify a constitutional right of access to criminal trials. Assertions that the sixth amendment protects such a right initially met with slight success at the lower court level,⁵⁷ but were rebuffed in a recent Supreme Court decision.⁵⁸ There was some lower court precedent prior to *Richmond* supporting a first amendment right of access.⁵⁹ *Richmond* marks the first time, however, that the Supreme Court has recognized a constitutional foundation for a public right of access. This section of the article will consider both the sixth and first amendment as bases of a public right of access.

1. Sixth Amendment Right of Access

One court has held that the public may demand access to a trial through the sixth amendment. In *United States v. Cianfrani*,⁶⁰ the Court of Appeals for the Third Circuit determined that the sixth amendment protects a public right of access to pre-trial proceedings.⁶¹ In reaching this conclusion, the court noted the accrual of benefits to both the public and the accused through open trials⁶² and reasoned that members of the public, like the accused, should be able to

⁵¹ *Id.* at 646-47.

⁵² *Id.* at 646.

⁵³ *Geise v. United States*, 265 F.2d 659 (9th Cir. 1959) (per curiam), cert. denied, 361 U.S. 842 (1959); *United Press Association v. Valente*, 308 N.Y. 71, 123 N.E.2d 777, 778-83 (1954). Cf. *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949), cert. denied, 338 U.S. 868 (1949) (the court stated that the defendant may waive his right to a public trial and compel the exclusion of spectators).

⁵⁴ 308 N.Y. 71, 123 N.E.2d 777 (1954).

⁵⁵ *Id.* at 81, 123 N.E.2d at 783.

⁵⁶ *Id.*

⁵⁷ See text and notes at notes 60-64 *infra*.

⁵⁸ See text and notes at notes 65-75 *infra*.

⁵⁹ See text and notes at notes 89-94 *infra*.

⁶⁰ 573 F.2d 835 (3d Cir. 1978).

⁶¹ *Id.* at 853-54.

⁶² *Id.*

protect their public trial interests constitutionally via the sixth amendment.⁶³ This unprecedented holding in *Cianfrani* has been criticized as "straining even flexible constitutional language beyond its proper bounds."⁶⁴ Indeed, the United States Supreme Court recently rejected the sixth amendment as a source of a public right of access. In *Gannett Co. v. Depasquale*,⁶⁵ the Court determined that the sixth amendment protection accrues in favor of the accused only⁶⁶ and, consequently, that it offers the public no independent right to attend criminal trials.⁶⁷

Because *Gannett* involved access to a pre-trial hearing, a narrow reading of the decision would limit its holding to a pre-trial situations. By using the term "trial" several times in discussing his sixth amendment ruling,⁶⁸ however, Justice Stewart's majority opinion suggests a broader reading than the limited fact situation might warrant. Justice Stewart first acknowledged a right at common law for the public to attend trials.⁶⁹ He then rejected the contention that the sixth amendment embodies this common law right.⁷⁰ Justice Stewart added, however, that even if the sixth amendment does embrace the common law rule, the present case involved a pre-trial closure order.⁷¹ He contended that no common law tradition exists with respect to pre-trial hearings.⁷² The opinion concluded, however, by stating broadly that the public enjoys no sixth and fourteenth amendment rights to attend criminal trials.⁷³ This conclusion makes the pre-trial/trial distinction unnecessary. Justice Stewart's majority opinion thus does not clarify whether the closure order was upheld due to the distinction between pre-trial and trial closure orders, or whether the Supreme Court believes that the public enjoys no sixth amendment right to attend criminal trials.⁷⁴ Although the Court's rejection of a sixth amendment public access

⁶³ *Id.* at 852-54.

⁶⁴ See *The Right to Attend Criminal Hearings*, *supra* note 23, at 1321.

⁶⁵ 443 U.S. 368 (1979). In *Gannett*, the Court upheld a trial court order excluding the public and the press from a pre-trial suppression hearing. *Id.* at 394. The defendants argued that the adverse publicity surrounding the confessions that were the subject of the hearing would jeopardize their ability to receive a fair trial. *Id.* at 375. The trial court granted the defendant's motion after finding of a reasonable probability of prejudice. *Id.* at 376. The state did not oppose the motion, *id.* at 375, but *Gannett Newspapers* challenged its exclusion on first, sixth, and fourteenth amendment grounds. *Id.* at 376.

⁶⁶ *Id.* at 379-80.

⁶⁷ *Id.* at 391. Justice Stewart's majority opinion reserved the question of whether the combination of the first and fourteenth amendments offers the public a right of access. *Id.* at 392. Justice Stewart explained that if such a right exists it was given "all appropriate deference by the state *nisi prius* court in the present case." *Id.*

⁶⁸ In *Richmond*, Justice Blackmun noted that Justice Stewart used the term "trial" no less than twelve times in the *Gannett* decision. 100 S. Ct. at 2841 (Blackmun, J., concurring).

⁶⁹ 443 U.S. at 384.

⁷⁰ *Id.* at 384-87. The Court stated that "[i]n conspicuous contrast with some of the early state constitutions that provided for a public right to open civil and criminal trials, the Sixth Amendment confers the right to a public trial only upon a defendant and only in a criminal case." *Id.* at 386-87.

⁷¹ *Id.* at 387.

⁷² *Id.* at 387-91.

⁷³ *Id.* at 391.

⁷⁴ Many commentators noted this ambiguity in the months following the *Gannett* deci-

right to criminal trials was contained in dicta, *Gannett* heavily burdens any future attempt to recognize this right.⁷⁵

2. First Amendment Right of Access

Although *Gannett* represented a set-back to the public's efforts to gain recognition of a constitutionally protected right of access to criminal trials, it by no means closed the door. The first amendment remained an attractive potential source of such a right. The Supreme Court had indicated in past decisions that it might be receptive to recognizing a first amendment right of access to criminal trials. For example, in *Landmark Communications Inc. v. Virginia*,⁷⁶ the Court determined that at least in the absence of a clear and present danger,⁷⁷ the first amendment forbids criminal punishment of persons who report truthful information concerning pending cases or grand jury investigations.⁷⁸ The Court resolved that protection of the reporting of judicial proceedings lies near the core of first amendment protections.⁷⁹ In a similar decision, *Craig v. Harney*,⁸⁰ the Court refused to uphold a contempt order for the publishing of an editorial concerning a pending case.⁸¹ Explaining that a trial is a public event and that what occurs in a courtroom is public property,⁸² the *Craig* majority determined that the contempt order violated the publisher's right to freedom of the press guaranteed by the first amendment.⁸³

Both *Landmark Communications* and *Craig* demonstrate the Court's willingness to protect the reporting of trial information. Neither decision, however, resolves any issues of access rights to that information. Rather, the decisions deal only with restraints on publication of already gathered news. For the Supreme Court to recognize a first amendment right of access to criminal trials, it would have to take these two decisions a step further. The Court would have to extend the first amendment right to report trial information to a first

sion. See, e.g., Stephenson, *Fair Trial-Free Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39, 63 (1979); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 65 (1979).

⁷⁵ In his concurring opinion in *Gannett*, Justice Powell placed a public right of access within the first amendment. 443 U.S. at 397. In finding this first amendment right, Powell recognized "the importance of the public's having accurate information concerning the operation of its criminal justice system." *Id.* He specifically stated that this right accrues in favor of the press. *Id.* He wrote that he "would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments: . . . [T]his constitutional protection derives, not from any special status of members of the press. . . . [The press] 'acts as an agent of the public at large,' each individual member of which cannot obtain for himself 'the information needed for the intelligent discharge of his political responsibilities.'" *Id.* at 396-97 (quoting *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974)).

⁷⁶ 435 U.S. 829 (1978).

⁷⁷ *Id.* at 845-46. To constitute a clear and present danger, the court required that the danger to the judicial system must not be remote but, rather, it must immediately imperil. *Id.* at 845. The court determined that the interest in protecting the confidentiality of a state judicial review commission fell short of this requirement. *Id.*

⁷⁸ *Id.* at 837-42.

⁷⁹ *Id.* at 838.

⁸⁰ 331 U.S. 367 (1947).

⁸¹ *Id.* at 375-78.

⁸² *Id.* at 374.

⁸³ *Id.* at 368-70, 375-78.

amendment right to be present at the trial to view or gather that information.⁸⁴ Rights of access to information, however, have rarely received first amendment protection.⁸⁵ Prior to *Richmond*, one of the Supreme Court's most extensive recognitions of such a right occurred in *Branzburg v. Hayes*.⁸⁶ In *Branzburg*, the Court noted that general news gathering qualifies for first amendment protection,⁸⁷ for "without some protection for seeking out the news, freedom of the press could be eviscerated."⁸⁸

At least one lower court used *Branzburg* to find a first amendment right of access to criminal trials. In *State ex rel. Dayton Newspapers, Inc. v. Phillips*,⁸⁹ the Supreme Court of Ohio overruled the trial court's order excluding the press from a hearing on a motion to suppress evidence.⁹⁰ The Ohio Supreme Court reasoned that *Branzburg* suggests the existence of a first amendment right to gather trial information.⁹¹ The *Phillips* court concluded that exclusion from the courtroom directly impaired or curtailed plaintiff Dayton Newspaper's ability to gather news concerning the trial,⁹² and thereby abridged its first amendment right to freedom of the press.⁹³ It cannot be discerned from the court's discussion whether a member of the non-press public can maintain a first amend-

⁸⁴ As Justice Brennan noted in *Richmond*, "[t]he First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information. . . ." *Richmond*, 100 S. Ct. at 2832.

Prior to *Richmond*, the Supreme Court had noted the importance of public access to a courtroom, but had never recognized a first amendment protection of that interest. See *In re Oliver*, 333 U.S. at 266-70. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court reviewed a habeas corpus petition, in which the petitioner alleged he had been deprived of his constitutional right to a fair trial, on account of the massive prejudicial publicity generated by the press who had been allowed to cover the proceedings by the trial judge. The Court granted the petition, concluding that the trial court ought to have more strictly controlled the press' coverage of the proceedings. *Id.* at 358-63. In the course of its opinion, though not recognizing a first amendment right of access to criminal trials, the Court noted: "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Id.* at 350. See generally *Estes v. Texas*, 381 U.S. 532 (1965); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

⁸⁵ For general discussions of a public right of access to information, see Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974); Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975) [hereinafter cited as *The Right of the Press to Gather Information*].

See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

⁸⁶ 408 U.S. 665 (1972). In *Branzburg*, The Court rejected a claim that reporters possess a constitutional right to refuse to reveal confidential sources to a grand jury.

⁸⁷ *Id.* at 707.

⁸⁸ *Id.* at 681.

⁸⁹ 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).

⁹⁰ *Id.* at 469, 351 N.E.2d at 135.

⁹¹ *Id.* at 459-60, 467-68, 351 N.E.2d at 130, 134.

⁹² *Id.* at 459, 351 N.E.2d at 129.

⁹³ *Id.* at 469, 351 N.E.2d at 135.

ment action to gain access to a criminal trial.⁹⁴ Regardless, the combined effect of *Branzburg*, *Landmark Communications*, and *Craig* laid the foundation for the Supreme Court to recognize either a press or a general public right of access to criminal trials based on the first amendment.

Indeed, in 1980 the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*⁹⁵ explicitly identified a first amendment right of access for the public and the press to attend criminal trials.⁹⁶ In *Richmond*, the Virginia trial court had approved defense counsel's motion for a closed proceeding during the defendant's fourth trial on a murder charge.⁹⁷ The defense hoped that a closed trial could avoid technical problems that might lead to a mistrial, necessitating yet another new trial.⁹⁸ Reporters for *Richmond Newspapers* objected to their exclusion. Both the trial court and the Virginia Supreme Court, however, rejected their motions.⁹⁹ Upon a petition for certiorari, the United States Supreme Court reviewed and reversed the closure order.¹⁰⁰ The Supreme Court decision consists of seven opinions. Seven of the eight Justices participating found that the first amendment granted the public a right of access to criminal trials.¹⁰¹ Justice Rehnquist, the lone dissenter, rejected any constitutional protection of the public's right.¹⁰²

Although a majority of the Court agreed that the public enjoys a first amendment right of access to criminal trials, the different opinions do not agree on its foundation within the first amendment. Specifically, the concurring opinions of Justices Brennan, Blackmun, and Stevens all identify this open trial right as a relatively unprecedented first amendment right of access to important information.¹⁰³ In contrast, Chief Justice Burger's plurality opinion and Justice Stewart's concurring opinion view *Richmond* as a fairly traditional first amendment decision.¹⁰⁴ They perceive the right to attend criminal trials, at least in part, as protected by the first amendment freedom to assemble in a public place.¹⁰⁵ Each interpretation should be carefully analyzed and distinguished.

⁹⁴ The court's explanation of the right of access is limited to a discussion of the first amendment freedom of the press. The opinion does not mention a correlative first amendment public right of access to, or assembly in, a courtroom.

⁹⁵ 100 S. Ct. 2814 (1980).

⁹⁶ *Id.* at 2828-29.

⁹⁷ *Id.* at 2816. The defendant's conviction in the first trial was reversed on appeal. *Id.* Two subsequent retrials ended in mistrials. *Id.*

⁹⁸ *Id.* Defense counsel stated that he did not "want any information being shuffled back and forth when we have a recess as to . . . who testified to what." *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2830.

¹⁰¹ *Id.* at 2829 (Burger, C.J., plurality opinion); *id.* at 2830 (White, J., concurring); *id.* at 2830-31 (Stevens, J., concurring); *id.* at 2832-39 (Brennan, J., concurring); *id.* at 2839-41 (Stewart, J., concurring); *id.* at 2841-42 (Blackmun, J., concurring); Justice Powell took no part in the opinion.

¹⁰² *Id.* at 2842-44 (Rehnquist, J., dissenting).

¹⁰³ *Id.* at 2830 (Stevens, J., concurring); *id.* at 2832 (Brennan, J., concurring); *id.* at 2842 (Blackmun, J., concurring).

¹⁰⁴ *Id.* at 2828 (Burger, C.J., plurality opinion); *id.* at 2840 (Stewart, J., concurring).

¹⁰⁵ *Id.*

Through Justices Brennan, Blackmun, and Stevens' opinions, *Richmond* significantly expands earlier recognitions of first amendment rights to gather information. In his concurring opinion, Justice Stevens labeled *Richmond* "a watershed case,"¹⁰⁶ since never before had the Court determined that an arbitrary denial of access to information infringes on the first amendment.¹⁰⁷ Similarly, Justice Blackmun interpreted this decision as a recognition of first amendment rights of access to information.¹⁰⁸ Justice Brennan expanded upon this point by distinguishing traditional first amendment rights from freedom of access to information.¹⁰⁹ He noted that in the past the Court had protected the freedom of expression much more stringently than the correlative freedom of access to information.¹¹⁰ In order to develop this distinction further, he placed freedom of access to information in a separate first amendment analytical context.¹¹¹ When first amendment protections move from bans on prior restraints of expression to protections of rights of access to information, Justice Brennan viewed the amendment as playing a "structural" role in preserving a republican system of self-government.¹¹² He stressed that the structural protections of the first amendment not only guard expression, but they also insure that valuable debate over public questions is informed.¹¹³ Justice Brennan hoped that freedom of access to criminal trials and the resulting dissemination of trial information would inform the public and serve to alleviate many fair trial concerns.¹¹⁴

It is difficult to determine from these three concurring opinions whether the right of access indentified accrues to each individual member of the public or whether the right accrues only to the public generally. For example, when Justice Stevens explained the open trial right as a public right to acquire newsworthy matter, he never maintained that this right allows each individual member of the public to enter any courtroom to gather information.¹¹⁵ Similarly, neither Justice Brennan nor Justice Blackmun explicitly stated that this first amendment public right of access accrues to members of the public individually.¹¹⁶ If this open trial right does not accrue to members of the public individually, the right may be protected adequately by allowing only certain members of the public to attend trials to gather and disseminate the trial information. The essential purpose of this right of access would still be served where only a limited number of spectators are present, since the public, through it's "agents," will be informed of all trial events. Interpreting the right of access as

¹⁰⁶ *Id.* at 2830 (Stevens, J., concurring).

¹⁰⁷ *Id.* at 2831.

¹⁰⁸ *Id.* at 2842.

¹⁰⁹ *Id.* at 2832 (Brennan, J., concurring).

¹¹⁰ *Id.* Justice Brennan cited several decisions to support this point including: *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849 (1974); *Zemel v. Rush*, 381 U.S. 1, 16-17 (1965). 100 S. Ct. at 2832.

¹¹¹ 100 S. Ct. at 2833.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 2834-39.

¹¹⁵ *Id.* at 2830-31 (Stevens, J., concurring).

¹¹⁶ *Id.* at 2832-39 (Brennan, J., concurring); *id.* at 2841-42 (Blackmun, J., concurring).

accruing only to the public generally would allow greater flexibility to trial court judges, who, for various reasons, may wish to exclude only some spectators from the courtroom.¹¹⁷

In contrast, both Chief Justice Burger's plurality opinion and Justice Stewart's concurring opinion specifically indicate that the first amendment right to attend criminal trials accrues to each member of the public individually.¹¹⁸ In the plurality opinion, Chief Justice Burger determined that the first amendment must be read as protecting the right of individuals to attend criminal trials, so as to give significance to the express first amendment guarantee of freedom of assembly.¹¹⁹ Significantly, he seemed unwilling to characterize this first amendment right to attend criminal trials as part of a distinct line of first amendment access rights.¹²⁰ Instead, he viewed the first amendment right of assembly as having long protected access rights to areas traditionally open to the public.¹²¹ By equating courtrooms with streets, sidewalks, parks, and other places customarily open to the public, he placed the right of access to a courtroom on par with the right of peaceable assembly in other public places.¹²² Justice Stewart took this point a step further when he noted that due to the important role the public plays in criminal proceedings, the right of assembly is more significant in a courtroom than in such places as streets and parks.¹²³

Consequently, two distinct characterizations of the first amendment right of access to criminal trials emerge from *Richmond*. The position of Justices Brennan, Stevens and Blackmun is that *Richmond* develops new first amendment rights to gather information which may accrue to individual members of the public or, alternatively, may accrue only to the public generally. The view of Chief Justice Burger and Justice Stewart perceives *Richmond* as a somewhat conventional first amendment decision allowing individual members of the public to assemble to view criminal trials.

In addition to this divergence, the various opinions in *Richmond* do not agree on the extent of this open trial right. While the entire *Richmond* Court recognized that the right is not absolute, the decision does not offer a unified approach to balance the interests that may override this first amendment right.¹²⁴ Chief Justice Burger would require an overriding interest articulated in findings to justify closure of a trial.¹²⁵ In a footnote, he explained further that

¹¹⁷ See text and notes at notes 155-59 *infra*.

¹¹⁸ 100 S. Ct. at 2828, 2830 n.18 (Burger, C.J., plurality opinion); *id.* at 2840 (Stewart, J., concurring).

¹¹⁹ *Id.* at 2828 (Burger, C.J., plurality opinion).

¹²⁰ *Id.* at 2827-28.

¹²¹ *Id.* at 2828.

¹²² *Id.*

¹²³ *Id.* at 2840 (Stewart, J., concurring).

¹²⁴ The trial court in *Richmond* made no findings to support, and offered no justification for, its closure order. Moreover, it made no inquiry whether alternative solutions would have provided the defendant with a fair trial. 100 S. Ct. at 2829-30. Thus the Supreme Court, on review, was not presented with any interest to balance against the *Richmond* first amendment right and had no opportunity to refine a standard by which to conduct such balancing.

¹²⁵ *Id.* at 2830.

this standard would allow reasonable limitations upon the unrestricted occupation of a courtroom by members of the press and public when courtroom order or capacity demanded it.¹²⁶ In his concurring opinion, Justice Stewart revealed that he also would allow trial court judges to impose reasonable limitations upon the unrestricted occupation of a courtroom by members of the press and public.¹²⁷ He mentioned the preservation of trade secrets and the sensibilities of a youthful prosecution witness in a rape trial as interests that he perceived to satisfy his standard for closure.¹²⁸ Justice Brennan stated that he would balance the structural interest in gathering information against closure by considering "the information sought and the opposing interests invaded."¹²⁹ He refused to speculate, however, as to what countervailing interests might be sufficiently compelling to reverse the presumption of openness.¹³⁰ In his concurring opinion, Justice Blackmun noted the variety of approaches presented by the Court and lamented that "uncertainty marks the nature — and strictness — of the standard of closure the Court adopts."¹³¹

Thus, several Justices offer language intended to serve as a balancing standard when trial courts rule on closure motions. Nevertheless, because the decision does not present a unified analytical framework within which to solve the balancing problem,¹³² trial judges can be expected to have great difficulty in translating the various proposed standards into concrete tests with which to rule on closure motions. As a result, a court's first reaction might be to look to the balancing approaches developed in sex crime cases prior to *Richmond*. If so, the court then must decide whether the tests developed to reconcile the competing interests recognized in the pre-*Richmond* cases will continue to apply, in light of *Richmond*'s articulation of public trial interests and of a first amendment right intended to safeguard those interests. The next section of this note surveys the resolution of the sex crime trial closure issue in cases decided before *Richmond*. It will be shown that several compromises were developed. Each compromise will be examined to determine if it can now be utilized in a manner consistent with *Richmond*.

III. ALTERNATIVE COMPROMISES TO THE CLOSURE PROBLEM IN SEX CRIME TRIALS

A. *Three Solutions Offered in Pre-Richmond Decisions*

Prior to *Richmond*, most courts allowed the dangers to the sex crime victim and to the judicial process to limit both the accused's sixth amendment right to

¹²⁶ *Id.* at 2830 n.18. While allowing reasonable limitations on access, Chief Justice Burger maintained that a trial judge may impose these limitations only "so as not to deny or unwarrantedly abridge . . . opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.*

¹²⁷ *Id.* at 2840 (Stevens, J., concurring).

¹²⁸ *Id.* at 2840-41 n.5.

¹²⁹ *Id.* at 2834 (Brennan, J., concurring).

¹³⁰ *Id.* at 2839.

¹³¹ *Id.* at 2842 (Blackmun, J., concurring).

¹³² See text and notes at notes 124-31 *supra*.

a public trial and the public's common law right of access to that trial.¹³³ Courts disagreed, however, on the extent of the allowable deprivation of these public trial rights. As a result, courts generally offered one of three widely ranging compromise solutions. These solutions should be analyzed to ascertain which, if any, satisfy the first amendment requirements as articulated in the *Richmond* decision.

At one end of the spectrum is a solution that intrudes heavily on public trial concerns by allowing the exclusion of all spectators during the entire trial. A few months prior to *Richmond*, the Massachusetts Supreme Judicial Court indicated that under certain circumstances it would uphold such a closure order. In *Globe Newspaper Co. v. Superior Court*,¹³⁴ the court stated that Massachusetts General Laws chapter 278 section 16A requires the exclusion of both the press and the general public from trials of certain sex crimes while the minor victims of those crimes are testifying.¹³⁵ The court interpreted the statute to allow the closure order to extend the length of the trial if the exclusion of spectators is necessary to preserve evidence required for a just trial.¹³⁶ Thus, the court in *Globe Newspaper Co.* sanctioned orders that exclude all members of the press and public during the entire trial.

In post-*Richmond* decisions, a closure order excluding from a courtroom all members of the press and public during an entire sex crime trial, is overbroad¹³⁷ and appears to contravene *Richmond* in at least one important respect. By operating for the length of the trial, the order extends in time beyond what is required to protect a sex crime victim. Spectators to a sex crime trial present the greatest danger to the emotional health of the victim and to the accuracy of his or her testimony during the period of such testimony.¹³⁸ The added value of a closure order prolonged beyond a victim's testimony is merely speculative. Thus, it would be difficult to assert a sufficiently compelling interest in favor of closing a trial during that portion of the trial in which the victim is not testify-

¹³³ See, e.g., *Globe Newspaper Co. v. Superior Ct.*, 1980 Mass. Adv. Sh. 485, 401 N.E. 2d 360 (1980); *State v. Santos*, 413 A.2d 58 (1980); *Commonwealth v. Wright*, 255 Pa. Super. 512, 515, 388 A.2d 1084, 1086 (1978); *United States ex rel. Smallwood v. LaValle*, 377 F. Supp. 1148, 1150-53 (E.D.N.Y. 1974).

¹³⁴ *Globe Newspaper*, 1980 Mass. Adv. Sh. at 489-505, 401 N.E.2d at 364-72.

¹³⁵ *Id.* at 501-03, 401 N.E.2d at 370-71. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1972) provides 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.

Id.

¹³⁶ *Globe Newspaper*, 1980 Mass. Adv. Sh. at 504, 401 N.E.2d at 372.

¹³⁷ "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). For a discussion of the overbreadth doctrine, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

¹³⁸ See text and notes at notes 140-56 *infra*.

ing.¹³⁹ Absent such an interest, it seems clear that a closure order extending the length of a sex crime trial does not override the public's right of access, and thus cannot stand after *Richmond*.

Most courts prior to *Richmond* required a more compromising solution to the sex crime closure problem than did the *Globe* court. Typically, courts allowed closure orders only if the order was limited to the victim's testimony.¹⁴⁰ These courts reasoned that the victim experiences the most humiliation and embarrassment during his or her testimony, and noted that the dangers to the victim and to the judicial process are less acute during other parts of the trial.¹⁴¹ For example, in *State v. Santos*,¹⁴² the Rhode Island Supreme Court allowed that a trial court may exclude all spectators from at least a portion of a sex crime trial.¹⁴³ The court noted, however, that the limited purpose of such a closure order is to enable a victim to testify as ac-

¹³⁹ Closure of an entire trial may be necessary if a court wishes to conceal a victim's identity and the trial proceedings to protect a victim's privacy. The Supreme Court has not completely foreclosed this possibility. In *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), a rape victim's father brought a damages action against a television station for broadcasting his daughter's name. *Id.* at 474. The broadcast violated a Georgia statute that made it a misdemeanor to broadcast a rape victim's name. *Id.* at 471. The Supreme Court ruled that the first amendment forbids the punishment of the publication of a rape victim's name that was obtained from court records open to public inspection. *Id.* at 496. The Court allowed, however, that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." *Id.*

It may be that a rape victim at a trial has such a significant privacy interest. Several Supreme Court cases have recognized a constitutionally protected right of privacy. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-56 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965). Many of these cases involve privacy interests relating to sexual matters. In *Eisenstadt*, the Supreme Court struck down a Massachusetts statute that made it a crime to distribute contraceptives with the intent that they be used for the purpose of preventing contraception, unless distributed by doctors or druggists to married persons. *Eisenstadt*, 405 U.S. at 454-55. The *Eisenstadt* Court protected the individual's privacy right to procreational choice. *Id.* It would not be an illogical extension to recognize that the rape victim's privacy interest involves the need to protect the victim during a trial that concerned an event allegedly denying her such a choice.

Yet even if a court recognizes a victim's constitutional right to privacy, an order secreting entire proceedings would meet considerable barriers. The combination of *Richmond's* first amendment right of access to criminal trials and a defendant's sixth amendment right to a public trial would make it unlikely that such an order could withstand a balancing of constitutional rights.

¹⁴⁰ *See, e.g., State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1979), in which the court noted that spectators were excluded only during the victim's testimony, and observed: "The period of exclusion, therefore cannot be said to have exceeded the scope that was necessary to achieve the legitimate purpose of preserving the victim's dignity." *Id.* at 250, 599 P.2d at 206. *See also State v. Santos*, 413 A.2d 58 (1980); *Douglas v. State*, 328 So. 2d 18 (Fla. 1976).

¹⁴¹ *See, e.g., State v. Santos*, 413 A.2d at 63, in which the Rhode Island Supreme Court stated that "the need to close the courtroom will often be acute when, because the witness is young, emotionally upset, or the victim of a sex crime, he cannot bring himself to testify in open court." *Id.*; *Commonwealth v. Stevens*, 237 Pa. Super. 457, 467-68, 352 A.2d 509, 514 (1975).

¹⁴² 413 A.2d 58 (1980).

¹⁴³ *Id.* at 63.

curately and under as little emotional stress as possible.¹⁴⁴ The court determined that this purpose may be achieved by limiting the duration of the closure order to the period of the victim's testimony.¹⁴⁵ The Rhode Island Supreme Court explained that an order so limited, even if it excluded all spectators, would strike "an acceptable balance between the accused's right to a public trial and the need to protect the witness. . . ." ¹⁴⁶

In post-*Richmond* decisions, it is necessary to determine whether the Rhode Island Supreme Court's solution, whereby all spectators are excluded from the courtroom, but only during the victim's testimony,¹⁴⁷ can withstand first amendment scrutiny. For first amendment purposes, this type of order is overbroad in terms of whom it affects. By excluding all members of the press and the general public, the order unduly infringes on both the first amendment right of assembly recognized by Chief Justice Burger¹⁴⁸ and the first amendment right to gather information noted by Justice Brennan.¹⁴⁹ Under such an order no one is allowed to assemble in the courtroom and no one is allowed to gather trial information directly for one of the most important portions of the trial. The public could scrutinize this portion of the trial only secondarily through court records or interviews with court personnel or family members. This loss of immediate communication between the trial and the public limits the usefulness of the trial information. Transcripts are not "news, but history,"¹⁵⁰ and they do not reflect unspoken actions that can aid in interpreting the proceedings.¹⁵¹ Thus, such secondary sources do not help expose trial abuses to an observer as effectively as his presence at the trial. By substantially lessening the public's opportunity to scrutinize and learn from the trial proceedings, this loss of immediate communication infringes upon first amendment interests.¹⁵² Such an order should not issue if a reasonable, less intrusive solution is available.¹⁵³

¹⁴⁴ *Id.* at 63-64.

¹⁴⁵ *Id.* at 63.

¹⁴⁶ *Id.*

¹⁴⁷ See text and notes at notes 140-46 *supra*.

¹⁴⁸ See text and notes at notes 118-22 *supra*.

¹⁴⁹ See text and notes at notes 109-14 *supra*.

¹⁵⁰ Fenner & Koley, *supra* note 28, at 454.

¹⁵¹ See *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 471, 351 N.E.2d 127, 136 (1976) (Stern, J., concurring) ("[A] transcript of a proceeding is a sterile substitute for observing the actual conduct of a hearing, as reviewing courts are well aware. Actual observation of the demeanor, voice, gestures of the participants in a hearing must be as informative to the press and public as those same matters are to juries during trial."); *Richmond Newspapers*, 100 S. Ct. at 2839 n.22 (Brennan, J., concurring) ("the availability of a trial transcript is not substitute for a public presence at the trial itself").

¹⁵² "Indeed it is the hypothesis of the First Amendment that injury is inflicted upon our society when we stifle the immediacy of speech." A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975).

¹⁵³ See note 137 *supra*. See also *Village of Schaumburg v. Citizens for a Better Environment*, 100 S. Ct. 826, 836 (1980) (Legitimate state interests may be served, but only by narrowly drawn regulations designed to serve those interests without unnecessary interference with first amendment freedoms).

Alternatives less intrusive on public trial rights are available. In fact, most courts prior to *Richmond* required a compromise more protective of public trial interests. To better protect open trial concerns, courts allowed members of the press to remain in the courtroom throughout the trial and excluded only non-press members of the public and only during the victim's testimony.¹⁵⁴ In so doing, courts effectively limited the operation of the order to the minimum time necessary to accomplish the order's purpose — allowing the victim to testify openly and with less fear of emotional harm. In addition, since the press can preserve many public trial interests by keeping open throughout the proceeding the instantaneous channels of communication between the courtroom and the public,¹⁵⁵ it is arguable that these orders still maintained the contact necessary to ensure a "public" trial. Indeed, some courts would state simply that a proceeding attended by the press or a "non-secret" trial,¹⁵⁶ constitutes a public trial, thus satisfying sixth amendment and common law requirements.¹⁵⁷ Other courts rejected this reasoning, yet reached the same result, excluding the general public but not the press from the victim's testimony. These courts conceded that the exclusion of non-press spectators infringed upon the defendant's right to a public trial, but concluded that this right is not absolute and may be overridden by the state interest in protecting the victim of a sex crime.¹⁵⁸

Although courts used different analyses, the generally accepted compromise closure order prior to *Richmond* excluded only the non-press public and only during the testimony of the victim. This solution worked a balance between the public's common law and the accused's sixth amendment open trial interests on the one hand, and the interests in protecting the victim of a sex crime on the other. Eliminating these spectators from this portion of the trial was intended to mitigate the victim's ordeal. At the same time, the on going presence of members of the press maintained the essential qualities of an open trial. There was no indication in the pre-*Richmond* cases of whether such a compromise could withstand first amendment scrutiny.

It should now be examined whether the compromise generally accepted in the pre-*Richmond* cases — allowing the press to remain in the courtroom while spectators are excluded during the testimony of the victim — remains a reasonable alternative after *Richmond*. This solution should be analyzed for its

¹⁵⁴ See, e.g., *Douglas v. State*, 328 So. 2d 18 (Fla. 1976); *State v. Smith*, 123 Ariz. 243, 599 P.2d 199 (1979).

¹⁵⁵ In *Johnson v. Simpson*, 433 S.W.2d 644 (Ky. 1968), the Kentucky Court of Appeals stated that:

there is nothing that better protects the rights of the public than their [the press'] presence in [trial] proceedings. . . . The news media should be accorded some priority in this respect for they have the facilities to disseminate the information of what transpires to a much broader audience than those who can gather in a crowded courtroom.

Id. at 646.

¹⁵⁶ *Bivins v. State*, 313 So. 2d 471, 472 (Fla. Dist. Ct. App. 1975).

¹⁵⁷ See, e.g., *id.*; *Keddington v. State*, 19 Ariz. 457, 459, 172 P. 273, 247 (1918).

¹⁵⁸ See, e.g., *State v. Smith*, 123 Ariz. 243, 249-250, 599 P.2d 199, 205-06 (1979); *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977).

protection both of the victim and of public trial concerns. Although the exclusion of the general public should aid the victim significantly by decreasing the inhibiting effect of a large and curious crowd, it is arguable that because of the continued presence of the press this solution does not provide adequate protection to a sex crime victim. It appears that the presence of the press would maintain a high level of anxiety in a victim who is aware of the press' ability to disseminate potentially embarrassing trial information.¹⁵⁹ The presence of the press during the victim's testimony also affords the victim less privacy than if members of the press were also excluded from the trial. Upon closer analysis, however, the apparent benefits of excluding the press lose their significance. Excluded members of the press still will have access to court records and court personnel and will be able to publish trial news from these sources. In addition, the increase in privacy that would result from the absence of the press is of speculative value. The victim in any case will be forced to testify before court personnel, the defendant, his counsel, his relatives, and his close friends. The only possible benefit the added exclusion of the press can offer a victim is a false sense of security through the unfounded belief that his or her testimony will be kept secret.

This compromise, whereby non-press spectators are kept out of the courtroom during the testimony of the victim, might also be attacked from the other side as not sufficiently safeguarding first amendment access rights. As courts reasoned in decisions prior to *Richmond*, however, the presence of the press maintains the essential characteristics of a public trial.¹⁶⁰ Indeed, several opinions in *Richmond* mention that even without a closure order, members of the press often act as "agents" of the public in providing trial news.¹⁶¹ For example, Chief Justice Burger's plurality opinion admits that people acquire information concerning trials primarily from the print and electronic media.¹⁶² Thus, this type of order minimizes the disruption of the ordinary flow of trial information to the public.

One interpretation of *Richmond* supports this type of compromise closure order. Under the view that the first amendment right to gather trial information inheres in the public generally, as opposed to each member of the public individually,¹⁶³ the public's right is safeguarded. Although this kind of order hinders individual access, it essentially provides for a general public right to gather trial information during the victim's testimony through the presence of its most qualified representative, the press.¹⁶⁴ Not dissimilar to the pre-

¹⁵⁹ See *Globe Newspaper*, 1980 Mass. Adv. Sh. at 503, 401 N.E.2d at 371. In determining that the press should be excluded from the sex crime trial, the court stated that "the [victim's] knowledge that those few extra persons were reporters who might publish her testimony to thousands would probably increase by orders of magnitude her sense of exposure, vulnerability, and alarm." *Id.*

¹⁶⁰ See text and notes at notes 156-58 *supra*.

¹⁶¹ *Richmond*, 100 S. Ct. at 2825 (Burger, C.J., plurality opinion); *id.* at 2832-33 n.2 (Brennan, J., concurring); *id.* at 2840 n.3 (Stewart, J., concurring).

¹⁶² *Id.* at 2825.

¹⁶³ See text and notes at notes 115-17 *supra*.

¹⁶⁴ In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court noted

Richmond decisions holding that a "non-secret" trial is enough to satisfy sixth amendment and common law public trial rights,¹⁶⁵ this analysis suggests that, notwithstanding the protests of excluded individuals, this type of order does not violate the general public's first amendment right of access.

A closure order which is limited to the victim's testimony and which operates to exclude the general public, but not the public's representative, the press, thus has surface appeal and seems in accord with one possible interpretation of *Richmond*. This solution, however, presents three interrelated problems. First, the interpretation of *Richmond* that sanctions it is drawn from the concurring opinions of Justices Brennan, Stevens, and Blackmun.¹⁶⁶ These opinions might just as easily be read to recognize a first amendment right of access inhering in individual members of the public.¹⁶⁷ Under this view, a closure order excluding non-press spectators would violate individual first amendment rights.

Second, according to Chief Justice Burger's plurality opinion and Justice Stewart's concurring opinion in *Richmond*, members of the public possess personal rights of assembly in criminal courtrooms.¹⁶⁸ Although both opinions permit time, place, and manner restrictions¹⁶⁹ and allow that individuals' access may be restricted based on the seating capacity of a courtroom,¹⁷⁰ their language makes clear that exclusions of individuals to protect sex crime victims would be an infringement of individual rights of assembly.¹⁷¹

As a third related barrier to this type of closure order, there is a recent line of Supreme Court cases reinforcing the interpretation of *Richmond's* first amendment right of access as inhering in each individual member of the public.¹⁷² In these cases, the Supreme Court has stated that the first amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.¹⁷³ For example, in *Nixon v. Warner Communications, Inc.*,¹⁷⁴ television networks and other members of the

the important role of the press in disseminating trial information when it stated that:
in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. . . . Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Id. at 491-92.

¹⁶⁵ See text and notes at notes 115-17 *supra*.

¹⁶⁶ See text and notes at notes 106-16 *supra*.

¹⁶⁷ See text and notes at notes 115-17 *supra*.

¹⁶⁸ See text and notes at notes 118-22 *supra*.

¹⁶⁹ *Richmond*, 100 S. Ct. at 2830 n.18, 2840.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 2828, 2840.

¹⁷² See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

¹⁷³ *Houchins*, 438 U.S. at 16; *Nixon*, 435 U.S. at 609-10; *Pell*, 417 U.S. at 833-34; *Saxbe*, 417 U.S. at 850.

¹⁷⁴ 435 U.S. 589 (1978).

media sought to make copies of certain tape recordings introduced as evidence at a trial but not yet physically accessible to either the press or the public.¹⁷⁵ The Court noted that it may use its discretion to override the public's common law right of access to judicial records and documents¹⁷⁶ and concluded that these tapes need not be made available to the press for copying.¹⁷⁷ The Court stated that the first amendment grants the press no right to trial information superior to that of the general public, and that within the confines of a courthouse, the press' first amendment rights are no greater than those of any other member of the public.¹⁷⁸ Thus, *Nixon* represents an obstacle to the sex crime closure compromise whereby only the press is granted first hand access to the victim's testimony.

Each of these three barriers to a compromise closure order that would allow the press, but not the general public, to observe the victim's testimony, reflects the Supreme Court's reluctance to establish a preferred first amendment position for the press. The Court commendably has sought to avoid placing individuals in a position where they are confined to receive only that information deemed important by members of the press. When an individual is not forced to rely on others to provide trial information, she is likely to feel more secure knowing that the criminal justice system can be scrutinized personally.¹⁷⁹ In this important respect, individual rights of access to a courtroom, far more than a general public right of access, should promote a sense that courtrooms are freely accessible public institutions.

Thus, none of the pre-*Richmond* compromises fits well under the preferable interpretation of *Richmond*'s first amendment right, by which each member of the public — press and individual alike — may assert a right of access. Accordingly, a solution that meets the foregoing objections and that will both protect the victim adequately and withstand first amendment scrutiny is needed.

B. A Proposed Solution

A court seeking to balance the interests in protecting a sex crime victim against first amendment public trial concerns should engage in a well defined process to determine whether a closure order is required.

First, to determine whether closure is appropriate, a court should conduct a pre-closure hearing. Such a hearing would satisfy due process concerns by providing an opportunity to be heard and a prompt final judicial determina-

¹⁷⁵ *Id.* at 591-94.

¹⁷⁶ *Id.* at 597-99.

¹⁷⁷ *Id.* at 610. In rejecting the argument that the sixth amendment public trial guarantee required the release of the tapes for copying, the Court stated that "the requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Id.*

¹⁷⁸ *Id.* at 609-10.

¹⁷⁹ To this end, Justice Brennan stated in *Richmond*, 100 S. Ct. at 2832, that public access to criminal trials seeks to maintain "public confidence in the administration of justice," *id.* at 2837, and to insure that its members "share the conviction that they are governed equitably." *Id.*

tion.¹⁸⁰ At the hearing, the court should ascertain whether the interest in protecting the sex crime victim overrides individual first amendment rights. Concern for the sex crime victim becomes overriding when it appears that, without closure, the victim will experience serious psychological harm and trouble in testifying accurately.¹⁸¹ A court should consider such factors as the relative maturity of the victim, the emotional state of the victim, and the likelihood that the victim will be called upon to testify to matters that will cause significant trauma, embarrassment, and difficulty in testifying.

If a court finds closure appropriate, the court should exclude all but a small group of randomly selected members of the press and the public during the testimony of the victim. Such an order would protect the victim by decreasing the intimidating size of the courtroom crowd during the difficult period of his or her testimony. This type of order also satisfies the concerns of *Richmond* regarding a public trial¹⁸² and the concerns of both *Richmond* and *Nixon* regarding the equal treatment of the press and the public.¹⁸³

This order meets *Richmond's* public trial demands by operating in a manner least restrictive of first amendment rights. As previously discussed, in tailoring an order that infringes on first amendment rights to its least oppressive form, a court should limit its effect to the victim's testimony and should avoid closing a trial to all members of the press and the public. More extensive orders overly intrude on the interests *Richmond* attempts to protect. The type of closure order proposed here, however, allowing a small number of press and non-press spectators to remain in the courtroom effectively limits the intrusion on first amendment rights by maintaining the essential characteristics of a public trial.¹⁸⁴

A closure order excluding all but a small group of members of the press and public during the victim's testimony also complies with the concern, expressed in both *Richmond* and *Nixon*, for the ordinary individual's right of access to information. While the inclusion of additional members of the press and fewer non-press spectators would, perhaps, better facilitate the dissemination of trial information, placing non-press individuals in a less preferred position

¹⁸⁰ See *Southeastern Promotions v. Conrad*, 420 U.S. 546, 558-62 (1975). In *Southeastern Promotions*, the Court stated that the settled rule is that a prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 559. The Court then determined that "only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id.* at 560. See *Procunier v. Martinez*, 416 U.S. 369, 417-19 (1974) (The Court determined that prisoners, whose letters are censored, must be given a reasonable opportunity to protest censorship decisions. *Id.*)

Accordingly, at the hearing to decide whether to close a sex crime trial during a victim's testimony, members of the press and the general public who are attending the trial or who present themselves at the hearing with an interest in attending the trial, should be given an opportunity to assert their first amendment rights of access to the courtroom.

¹⁸¹ Cf. *Richmond*, 100 S. Ct. at 2840-41 n.5 (Stewart, J., concurring) ("the sensibilities of a youthful prosecution witness, for example, might justify . . . exclusion [of the public] in a criminal trial for rape, . . ."). See, e.g., *Trial Secrecy*, *supra* note 23, at 1918-19.

¹⁸² See text and notes at notes 95-133 *supra*.

¹⁸³ See text and notes at notes 166-79 *supra*.

¹⁸⁴ See text and notes at notes 154-58 *supra*.

violates a substantial purpose of this first amendment protection. Such an order would tend to create a sense of detachment and lack of concern for the average spectator. In contrast, a closure order that accommodates both members of the press and individual members of the public conveys a respect for a citizen's desire and need to study the judicial system personally.

Thus, if a court finds closure necessary to protect a sex crime victim, the compromise whereby all but a small group of both press and non-press spectators are excluded from the courtroom during the testimony of a victim offers a viable alternative to the closure problem. This solution guards a victim by eliminating any crowd-like atmosphere from the courtroom. It also maintains consistency with the public access concerns of *Richmond* and *Nixon*.

CONCLUSION

The interests in protecting a sex crime victim from the trauma of testifying in a crowded courtroom are substantial. Closing a courtroom decreases the inhibiting size of the crowd, which protects the victim from embarrassment and trauma. Closure also furthers the judicial process by lowering a barrier to the prosecution of a sex crime and by helping to enable those victims who do prosecute to testify accurately to the details of the crime. The interests in maintaining trial publicity, however, are also considerable. The public's first amendment right of access requires not only that courts maintain the flow of trial information to the public, but that they create a sense of courtroom availability and openness to individual members of the public. Closing the courtroom to all but a small number of members of the press and general public during the testimony of sex crime victims serves the interests of both the victim and the public. The victim is protected through a decrease in the size of the courtroom crowd. Open trial interests are protected by the inclusion of enough members of the press and public to keep the channels of communication open between the public and the trial. In addition, this solution maintains some degree of accessibility to both the press and the general public.

DONALD M. KELLER, JR.