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## Constitutional Law—First Amendment Right of Access to Criminal Trials

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CONSTITUTIONAL LAW—FIRST AMENDMENT RIGHT OF ACCESS TO CRIMINAL TRIALS. *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982).

The Globe Newspaper Company (Globe) made an unsuccessful attempt to gain access to a rape trial conducted in a Massachusetts Superior Court. The trial judge closed the courtroom relying on a Massachusetts statute<sup>1</sup> that required trial judges to exclude the general public in cases of sexual offenses involving a victim under the age of eighteen. The defendant in this case had been charged with the forcible rape of three minor females.

Globe made a motion requesting that the trial court revoke the closure order but it was denied. Injunctive relief was then requested from the Supreme Judicial Court of Massachusetts and that request was also denied. Globe appealed to the United States Supreme Court which remanded for consideration in light of the Court's holding in *Richmond Newspapers, Inc. v. Virginia*,<sup>2</sup> a case establishing that the press has a first amendment constitutional right of access to criminal trials. Again Globe was denied relief, and on appeal from that decision the United States Supreme Court reversed. The United States Supreme Court conceded that the State's interest in protecting the physical and psychological well-being of minors was compelling. However, it held that the mandatory-closure statute was overly broad and not sufficiently tailored to the State's interest to withstand a first amendment attack. The Court further held that the statute violated the first amendment<sup>3</sup> of the United States Constitution. *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982).

Open public trials are part of the common law tradition. Before the Norman Conquest, cases in England were brought before

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1. MASS. GEN. LAWS ANN., ch. 278, § 16A (West 1981), 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.

2. 448 U.S. 555 (1980).

3. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

local courts and attended by the free men of the community.<sup>4</sup> At first, such attendance was mandatory,<sup>5</sup> but even after this duty was released it appears criminal trials remained public.<sup>6</sup>

In 1829 the King's Bench in *Daubney v. Cooper*,<sup>7</sup> acknowledging the public's right to be present for the purpose of hearing what goes on, declared the presumptive openness of the trial as one of the essential qualities of a court of justice. Early records in colonial America suggest that the presumptive openness of criminal trials<sup>8</sup> was an early feature and became a standard attribute of the American judicial system.<sup>9</sup> The openness of trials was expressly recognized as part of the fundamental law of the colonies in some instances.<sup>10</sup> Researchers have been "unable to find any English or American cases since 1641 in which a trial occurred in total secrecy."<sup>11</sup>

A public interest is recognized by both state<sup>12</sup> and federal<sup>13</sup>

4. Pollock, *English Law Before the Norman Conquest*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 88, 89-90 (1968).

5. *Id.* at 89-90.

6. "[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 . . ." E. JENKS, *THE BOOK OF ENGLISH LAW* 73-74 (6th ed. 1967).

7. 10 B. & C. 237, 240, 109 Eng. Rep. 438, 440 (K. B. 1829).

8. This note involves only criminal and not civil trials. The reason, as expressed by Justice O'Connor in her concurring opinion in *Globe*, is that the manner in which criminal trials are conducted is of such great importance to the people.

9. See A. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 128-29 (1930).

10. See generally 1677 Concessions and Agreements of West New Jersey providing: That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner. . . .

Reprinted in *SOURCES OF OUR LIBERTIES* 188 (R. Perry ed. 1959). The Pennsylvania Frame of Government of 1682 also provided "[t]hat all courts shall be open . . ." *Id.* at 217. See also 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 129, 140, 271 (1971).

11. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 10 (1961).

12. Nearly every state that has considered the issue has recognized that the public has a strong interest in maintaining open trials. Most of these cases involved state constitutional provisions modeled on the sixth amendment where the public trial right is phrased in terms of a guarantee to the accused. See, e.g., *Jackson v. Mobley*, 157 Ala. 408, 411-12, 47 So. 590, 592 (1908); *Commercial Printing Co. v. Lee*, 262 Ark. 87, 93-96, 553 S.W.2d 270, 273-74 (1977); *Lincoln v. Denver Post*, 31 Colo. App. 283, 285-86, 501 P.2d 152, 154 (1972); *Gannett Pacific Corp. v. Richardson*, 59 Haw. 224, 230-31, 580 P.2d 49, 55 (1978); *State v. Beaudoin*, 386 A.2d 731, 733 (Me. 1978); *Cox v. State*, 3 Md. App. 136, 139-40, 238 A.2d 157, 158-59 (1968); *State v. Schmit*, 273 Minn. 78, 86-88, 139 N.W.2d 800, 806-07 (1966); *State v. Keeler*,

courts in maintaining open trials. Public access to criminal trials provides an opportunity to observe the criminal justice system, and affords citizens a form of legal education that hopefully encourages a more positive attitude about the system.<sup>14</sup> Open trials provide an outlet for community concern, hostility and emotion, supporting a "significant community therapeutic value."<sup>15</sup> Public access to trials increases respect for the law and the judicial system,<sup>16</sup> enhances the integrity and quality of proceedings within the courtroom<sup>17</sup> and promotes confidence in the fair administration of justice.<sup>18</sup> The judge, the jury and the lawyers are all under public scrutiny which is seen by many as tending to insure the fairness of the trial.<sup>19</sup>

In addition to a generally recognized public interest, the public has the right to be informed about what occurs in the courtroom.<sup>20</sup> "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."<sup>21</sup>

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52 Mont. 205, 218-19, 156 P. 1080, 1083-84 (1916); *Keene Publishing Corp. v. Keene District Court*, 117 N.H. 959, 962-63, 380 A.2d 261, 263-64 (1977); *State v. Allen*, 73 N.J. 132, 157-60, 373 A.2d 377, 389-90 (1977); *Neal v. State*, 86 Okla. Crim. 283, 289, 192 P.2d 294, 297 (1948); *State v. Holm*, 67 Wyo. 360, 382-85, 224 P.2d 500, 508-09 (1950). *Cf.* *English v. McCrary*, 348 So. 2d 293 (Fla. 1977).

13. *See, e.g.*, *United States v. Cianfrani*, 573 F.2d 835, 852-54 (3d Cir. 1978); *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532, 540-42 (2d Cir. 1974); *United States v. Clark*, 475 F.2d 240, 246-47 (2d Cir. 1973); *Lewis v. Peyton*, 352 F.2d 791, 792 (4th Cir. 1965).

14. 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 525 (reprint New York 1978) (London 1827); 6 J. WIGMORE, *Evidence* § 1834, at 438 (J. Chadbourne rev. 1976).

15. *Richmond Newspapers*, 448 U.S. at 570. *See also* 1 J. BENTHAM, *supra* note 14, at 522-25.

16. "Conducting trials behind closed doors might engender an apprehension and distrust of the legal system which would, in the end, destroy its ability to peacefully settle disputes." *United States v. Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971). *See also* *People v. Hartman*, 103 Cal. 242, 37 P. 153 (1894) (agreeing that the doors of the courtroom should be kept open and that the public is entitled to be admitted).

17. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948).

18. *State v. Schmit*, 273 Minn. 78, 87-88, 139 N.W.2d 800, 807 (1966).

19. "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827); *see also* Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 9 (1961).

20. *Estes v. Texas*, 381 U.S. 532, 541-42 (1965). *See also id.* at 583-84 (Warren, C.J., concurring). The court ruled, however, that televising the criminal trial over the defendant's objection violated his due process right to a fair trial.

21. *Richmond Newspapers*, 448 U.S. at 575.

However, today people often depend on representatives of the media to distribute information. Accordingly, the right to attend trials may be exercised by people less frequently today when information about trials is generally available to them through print and electronic media.<sup>22</sup> This in no way alters the basic right.<sup>23</sup> Our modern democratic society demands that the press communicate the activities occurring in the courts for public evaluation of the fairness of our judicial system.<sup>24</sup>

Historically, two rights have been considered in the discussion of public trials: a criminal defendant's sixth amendment right to a public trial<sup>25</sup> and the first amendment right to access held by the press.<sup>26</sup> In early trials the criminal defendant's sixth amendment right, instead of the first amendment right of the press, had been the one protected in cases involving exclusion of the public.<sup>27</sup> "[T]he public trial provision of the Sixth Amendment is a 'guarantee to an accused' designed to safeguard against any attempt to employ our courts as instruments of persecution."<sup>28</sup> This sixth amendment guarantee of a public trial apparently confers no special benefit on the press.<sup>29</sup>

Decisions involving exclusion orders developed into three categories over the years. The first category of decisions excluded the public and press, allowing only those connected with the case to remain.<sup>30</sup> The second category excluded the general public but permitted the press to remain.<sup>31</sup> All of the cases in these two categories

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22. *Id.* at 572.

23. *Id.* at 577 n.12.

24. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950).

25. U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

26. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

27. *Infra* note 32.

28. *Estes*, 381 U.S. at 583 (Warren, C.J. concurring) (quoting *In re Oliver*, 333 U.S. 257, 266, 270 (1948)).

29. U.S. CONST. amend. VI speaks of the rights of the accused, not of the press or anyone else; see also *Estes*, 381 U.S. at 583.

30. See, e.g., *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); *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935); *People v. Swafford*, 65 Cal. 223, 3 P. 809 (1884); *State v. Callahan*, 100 Minn. 63, 110 N.W. 342 (1907); *Grimmett v. State*, 22 Tex. App. 36, 2 S.W. 631 (1886).

31. See, e.g., *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978); *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); *Keddington v. State*, 19 Ariz. 457, 172 P. 273 (1918); *State v. Purvis*, 157 Conn. 198, 251 A.2d 178 (1968), *cert. denied*, 395 U.S. 928 (1969); *Moore v. State*, 151 Ga. 648, 108 S.E. 47 (1921); *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E.2d 455 (1949).

allowed some form of exclusion, and the courts said the defendant's sixth amendment right to a public trial was not violated by the exclusion. A third category of decisions developed where both types of exclusion orders allowed in categories one and two were overruled because they violated the defendant's sixth amendment right.<sup>32</sup>

In the first category of decisions, which exclude the general public and the press, several reasons for allowing exclusion have been given. Audiences may become disorderly and warrant exclusion<sup>33</sup> or spectators may be so obtrusive that the witness is embarrassed.<sup>34</sup> If the crime committed was of a sexual nature the public has been excluded during testimony of a particular witness.<sup>35</sup> Because of the age and emotional condition of the witness,<sup>36</sup> in both state and federal courts, closing the courtroom is an accepted practice when details of a sexual crime must be revealed by a minor.<sup>37</sup> The Eighth Circuit has allowed exclusion of public and press in a rape prosecution during the victim's testimony.<sup>38</sup> The Supreme Court of the United States has either denied certiorari or not reviewed those cases involving complete exclusion and the defendant's sixth amendment right.<sup>39</sup>

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32. *See, e.g.*, *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *Davis v. United States*, 247 F. 394 (8th Cir. 1917); *Stewart v. State*, 18 Ala. App. 622, 93 So. 274 (1922); *People v. Hartman*, 103 Cal. 242, 37 P. 153 (1894); *People v. Letoile*, 31 Cal. App. 166, 159 P. 1057 (1916); *Tilton v. State*, 5 Ga. App. 59, 62 S.E. 651 (1908); *People v. Yeager*, 113 Mich. 228, 71 N.W. 491 (1897); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (1955); *Neal v. State*, 86 Okla. Crim. 283, 192 P.2d 294 (1948); *State v. Osborne*, 54 Ore. 289, 103 P. 62 (1909).

33. *Grimmett v. State*, 22 Tex. App. 36, 2 S.W. 631 (1886) (when audiences become so disorderly so as to prevent the regular process of the trial, the benefit of their presence is outweighed by the burden of their disorderliness).

34. *State v. Callahan*, 100 Minn. 63, 110 N.W. 342 (1907). *See also* *Reagan v. United States*, 202 F. 488 (9th Cir. 1913) (defendant in a rape prosecution was not deprived of a public trial by an order clearing the courtroom of spectators but permitting all persons connected with the case to remain).

35. *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967); *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935).

36. *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935). The public was excluded from the courtroom for ten minutes during the examination of a ten-year-old prosecuting witness who, while previously on the stand, made an unsatisfactory witness because she was frightened, embarrassed and humiliated because of the crowd's presence.

37. *Harris*, 361 F.2d at 891; *Hogan*, 191 Ark. 437, 86 S.W.2d 931.

38. *Harris*, 361 F.2d 888.

39. *Harris*, 361 F.2d 888; *Reagan v. United States*, 202 F. 488 (9th Cir. 1913); *Hogan*, 191 Ark. 437, 86 S.W.2d 931; *State v. Callahan*, 100 Minn. 63, 110 N.W. 342 (1907); *Grimmett v. State*, 22 Tex. App. 36, 2 S.W. 631 (1886).

The second category of decisions, which exclude the general public but allow the press to remain, has also been upheld by the courts.<sup>40</sup> As early as 1918, public attendance in an Arizona state court was restricted to newspaper reporters.<sup>41</sup> In this context, the Massachusetts statute cited in *Globe*, which allowed exclusion of the public in cases involving sex crimes committed against a minor, has been upheld as constitutional.<sup>42</sup> Limited exclusions have been allowed to protect the victim of a sexual crime from further embarrassment and possible psychological harm. However, those who have a substantial interest in the proceeding may be allowed to remain.<sup>43</sup> Spectators have been excluded with the exception of those who were members of the press, members of the bar, or relatives or close friends of the defendant or minor witnesses.<sup>44</sup> The trend evidenced by these cases allows exclusion of the general public in trials involving sexual crimes in which the victim's testimony may be of a sensitive nature. Generally, the press has been allowed to remain in the courtroom when a partial exclusion is ordered.<sup>45</sup>

The third category of decisions highlights the individual sixth amendment right of the defendant. An 1894 case<sup>46</sup> found unconsti-

40. See cases cited *supra* note 31.

41. *Keddington v. State*, 19 Ariz. 457, 172 P. 273 (1918) (involved a prosecution for contributing to the dependency [sic] of a minor where it was obvious that indecent language would be repeated and she would be subjected to a gruelling cross-examination).

42. *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950). However, the press was not excluded in this case and the court did not decide whether the statute could be interpreted as permitting such exclusion.

43. *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978).

44. *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) (exclusion proper in a rape trial where prosecutrix was nine years old and two other witnesses were girls seven and eleven years of age). *State v. Purvis*, 157 Conn. 198, 251 A.2d 178 (1968), *cert. denied*, 395 U.S. 928 (1969) (a limited exclusion of the public from the courtroom was permissible when a sixteen year old girl was called to testify to all the details of a particularly violent rape). See also *Moore v. State*, 151 Ga. 648, 108 S.E. 47 (1921), *appeal dismissed*, 260 U.S. 702 (1922) (trial judge may clear the courtroom during examination in a rape trial when the victim, on account of her youth and highly nervous condition, is unable to give her testimony before a crowd of spectators).

*United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 693-94 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978). The press and others with a substantial interest in knowing what transpired were permitted to remain in the courtroom. Petitioners, appealing from an Illinois court order excluding them, were seeking habeas corpus relief on the ground that their right to a public trial was denied by exclusion of spectators during testimony of the twenty-one year old victim. The judge justified exclusion as a protection of the personal dignity of the complaining witness, making it clear that members of the press were welcome to stay.

45. *Supra* note 44.

46. *People v. Hartman*, 103 Cal. 242, 37 P. 153, (1894); see also *People v. Yeager*, 113

tutional an order that excluded all persons except the defendant and officers of the court. The order was considered error because it violated the defendant's sixth amendment right to a public trial. In the early 1900's, an order excluding the public from the courtroom during a criminal trial, in the absence of a showing to the contrary, was presumed to have prejudiced the defendant.<sup>47</sup> Other cases during the early 1900's held that the exclusion of everyone not connected with the case, without any reason other than that the testimony related to matters ordinarily too indecent to be mentioned, and over the objection of the defendant, was an abuse of discretion and violated defendant's right to a public trial.<sup>48</sup> During the mid-1900's, courts continued to hold certain exclusion orders unconstitutional because they denied the defendant his right to a public trial.<sup>49</sup> Moreover, some courts have held that orders excluding the public generally but allowing the press to remain deny the defendant his sixth amendment right. A distinction is made when exclusion orders are more restrictive in their application and have not been found to violate defendant's right to a public trial.<sup>50</sup> More recently the focus has begun to shift from the individual right of the defendant to the right of the press and public to know.<sup>51</sup> For example, in Ohio, an order excluding the press from a judicial hearing and prohibiting news reports of what would transpire at the hearing was not upheld because the order abridged the freedom of the press.<sup>52</sup>

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Mich. 228, 71 N.W. 491 (1897) (order in rape trial excluding all persons not legitimately interested in the case (defendant did not object), excepting members of the press and friends of defendant, held by the Supreme Court of Michigan to be a denial of defendant's sixth amendment right to a public trial).

47. *State v. Osborne*, 54 Ore. 289, 295-97, 103 P. 62, 64-66 (1909).

48. *Tilton v. State*, 5 Ga. App. 59, 62 S.E. 651 (1908). *See also* *Davis v. United States*, 247 F. 394 (8th Cir. 1917) (reversed and remanded a case in which the lower court excluded members of the public with the exception of relatives of defendant, members of the bar and newspaper reporters); *People v. Letoile*, 31 Cal. App. 166, 159 P. 1057 (1916) (in trial involving incest the court said the judge does not have the right to wholly exclude the public).

49. *Neal v. State*, 86 Okla. Crim. 283, 192 P.2d 294 (1948). *See also* *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (1955).

50. *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949). *See also* *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (1955) (when sole ground for total exclusion of public from pandering trial was request of defendant based on claim that they might be able to compel state witness to tell the truth on cross-examination, exclusion order was without legal foundation and judge would be prohibited from enforcing it).

51. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Mills v. Alabama* 384 U.S. 214 (1966); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).

52. *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).



This shift in emphasis is unusual and the reasons for the shift are vague and unclear. Although the first amendment to the United States Constitution prohibits Congress from making laws abridging the freedom of the press, the right of the press to access to criminal trials is not explicitly protected. The Supreme Court has, however, found that this right is implied.<sup>53</sup> The reasoning utilized to bridge the gap between express and implied rights of access is that it is necessary to maintain the first amendment interest "in protect[ing] the free discussion of governmental affairs."<sup>54</sup> News gathering qualifies for first amendment protection because, without a source from which to obtain information, the protected right to publish the news would be of little value.<sup>55</sup>

The issue involving the first amendment right of access to the courtroom held by the press has not been litigated by lower courts because most of the courts were awaiting an instructive decision of the United States Supreme Court.<sup>56</sup> In *Nebraska Press Association v. Stuart*<sup>57</sup> the Court discussed the possible conflict between a state's interest in assuring criminal defendants a fair and impartial trial and the first amendment guarantee of freedom of the press.<sup>58</sup> The issue, however, was not resolved in *Stuart*. The Court did not directly begin to discuss the connection between general first amendment protections and the right of access held by the press until 1979 in *Gannett Co. v. DePasquale*.<sup>59</sup> In this case the Court implied that it might recognize a first amendment right of access to members of the

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53. *First National Bank v. Bellotti*, 435 U.S. 765, 783 (1978) ("[F]irst 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."); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (right to receive information and ideas is fundamental to our free society); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (press rights are protected under first amendment by viewing the press as an instrument for implementing the general public's first amendment interest in newsworthy matters). Cf. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (Court implied that it might recognize a first amendment right of access to criminal trials, but that issue was not actually decided). See generally Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899 (1978).

54. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Court held an Alabama statute making it a crime to solicit votes on election day in support of or in opposition to any proposition being voted on during that day violated the first amendment guaranty of freedom of speech and press.

55. *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 459-60, 351 N.E.2d 127, 129-30 (1976).

56. The decision came in *Richmond Newspapers*, 448 U.S. 555 (1980).

57. 427 U.S. 539 (1976).

58. *Id.* at 547. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-11, at 625 (1978).

59. 443 U.S. 368 (1979).

press and public to attend criminal trials, but expressly reserved decision on that issue.<sup>60</sup>

Other cases dealing with the first amendment right of access did not involve criminal trials. Two Supreme Court decisions in 1974<sup>61</sup> and one in 1978<sup>62</sup> upheld prison regulations which prohibited news reporters from conducting personal interviews with specific prison inmates who were willing to be interviewed. In *Pell v. Procunier*,<sup>63</sup> the Court said the "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."<sup>64</sup> The Supreme Court later qualified this denial of access in *Richmond Newspapers, Inc. v. Virginia*,<sup>65</sup> holding that penal institutions do not share the long tradition of openness held by criminal trials and are institutions where public access is generally limited.<sup>66</sup>

Not until 1980, in *Richmond Newspapers*, did the Supreme Court directly address the question of whether the right of the public and press to attend criminal trials was guaranteed under the United States Constitution.<sup>67</sup> The Court concluded that the right was guaranteed under the first and fourteenth amendments<sup>68</sup> and that "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."<sup>69</sup>

After *Richmond Newspapers* recognized a constitutional right of the press to attend trials, the Court was then presented, in *Globe Newspaper Co. v. Superior Court*,<sup>70</sup> with the question of whether a statute containing a mandatory-closure provision for certain types of trials unconstitutionally violated this right.

In *Globe*, Justice Brennan, speaking for the Court, recognized that *Richmond Newspapers* was the first decision to expressly hold that the press and general public have a constitutional right of ac-

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60. The issue in *Gannett* was whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding. The Court stated that the constitutional guarantee of a public trial was for the benefit of the defendant. Discussion of a possible first amendment right of access was present but the Court refused to decide that issue. *Gannett*, 43 U.S. at 392.

61. *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

62. *Houchins v. KQED*, 438 U.S. 1 (1978).

63. 417 U.S. 817 (1974).

64. *Id.* at 834.

65. 448 U.S. 555 (1980).

66. *Id.* at 576 n.11.

67. *Id.* at 558.

68. *Id.* at 580.

69. *Id.* at 581.

70. 102 S. Ct. 2613 (1982).

cess to criminal trials embodied in the first amendment.<sup>71</sup> The Court also reaffirmed that, although this right is not explicitly stated, it is necessary for the enjoyment of other first amendment rights.<sup>72</sup> A major purpose of the first amendment was "to protect the free discussion of governmental affairs,"<sup>73</sup> allowing individual citizens to participate in our system of government. The right of access to criminal trials included in the first amendment ensures that this constitutionally protected "discussion of governmental affairs" is an informed one.<sup>74</sup>

The Court cited two basic reasons why a right of access to criminal trials is protected under the first amendment. First, historically, criminal trials have been open to the press and general public.<sup>75</sup> Second, the right of access enhances the integrity of the judicial process by fostering the appearance of fairness and allowing the public to participate more in the process by serving as a check on the system.<sup>76</sup> Participation elevates the level of respect held by the public for the judicial process. The Court conceded that this right of access is not absolute. However, the majority continued, a denial of access must be necessitated by a compelling governmental interest, narrowly tailored to serve that interest, and not merely to inhibit disclosure of sensitive information.<sup>77</sup>

Massachusetts enumerated two interests served by the statute: first, the protection of minor victims from further trauma and embarrassment and second, the encouragement of minor victims to come forward and testify.<sup>78</sup> The Court conceded that the first interest was a compelling one but was not convinced that a mandatory-closure statute, barring the press in all cases of this type, was necessary.<sup>79</sup> The Court proposed that the state's interest could be met as effectively by trial court determination on a case-by-case basis of the necessity of closure in order to protect the welfare of the minor victim. This approach, if properly applied, would not deny the right of access to the press unless it was necessary to protect a compelling state interest.<sup>80</sup> The second concern of Massachusetts was consid-

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71. *Id.* at 2618.

72. *Id.* at 2619.

73. *Id.* at 2619 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

74. *Id.*

75. *Id.*

76. *Id.* at 2620.

77. *Id.*

78. *Id.* at 2620-21.

79. *Id.* at 2621.

80. *Id.* at 2621-22.

ered speculative and not supported in empirical terms, according to the majority. The statute did not seem to be tailored to meet this second concern because, according to the opinion, the press is not denied access to the transcript or other sources where the victim's testimony could be obtained. If secrecy is the key in encouraging these victims to come forward, then the statute is not effective toward that end.<sup>81</sup> The majority concluded that the Massachusetts statute, section 16A, violated the first amendment to the Constitution.<sup>82</sup>

Chief Justice Burger, joined by Justice Rehnquist, dissented, contending that the historical practice of courts is exactly the opposite of the majority's claims. Burger stated that "[t]here is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors."<sup>83</sup> The dissenters balanced the minimal impact which section 16A has on the first amendment right of access, since the information can be obtained from other sources,<sup>84</sup> and the interest Massachusetts has in protecting the minor victims of sexual crimes.<sup>85</sup> The dissent firmly supported the state's interest and contended that the risk of severe psychological damage, caused by having to relate the details of such a crime publicly, justified the statute.<sup>86</sup> Further, if the closure procedure were handled on a case-by-case basis, as suggested by the majority, the determination would be left to the "idiosyncrasies of individual judges subject to the pressures available to the media."<sup>87</sup>

The statute declared unconstitutional in *Globe* required trial judges to exclude the press and general public from the courtroom during trials for specified sexual offenses involving a victim under the age of eighteen. Statutes in other states allow exclusion but do

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81. *Id.* at 2622.

82. *Id.* Justice O'Connor concurred in the judgment in a separate opinion expressing that the Court's decision should not carry any implications outside the context of criminal trials. *Id.* at 2623.

83. *Id.* at 2624. The dissenters cited *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967); *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); *Reagan v. United States*, 202 F. 488 (9th Cir. 1913); *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935); *State v. Purvis*, 157 Conn. 198, 251 A.2d 178 (1968), *cert. denied*, 395 U.S. 928 (1969); *Moore v. State*, 151 Ga. 648, 108 S.E. 47 (1921), *appeal dismissed*, 260 U.S. 702 (1922). *See also supra* text accompanying notes 35-39.

84. *E.g.*, trial transcript; *but cf. supra* note 19.

85. 102 S. Ct. at 2625.

86. *Id.* at 2626.

87. *Id.* at 2627.

not require it.<sup>88</sup> Based on the reasoning in *Globe*, these statutes would withstand a constitutional attack. Presumably, the judge would use his own discretion in granting exclusion orders on a case-by-case basis. Standards to be used in deciding whether an exclusion order should be issued are not spelled out, however. Future exclusion orders may be challenged by the press based on the constitutionality of the statute; but, it is unclear whether a challenge will be successful on the basis of a single exclusion order or if several exclusion orders would be necessary to show that the statute is being applied unconstitutionally.

Another question left undecided by *Globe* is the scope of the right to access claimed by the press. The press may conceivably argue that the right should extend beyond criminal trials to civil cases,<sup>89</sup> even to pretrial hearings<sup>90</sup> and other governmental information. Almost certainly the time will come when it will be necessary to decide where to draw the line.

Finally, the courts must balance the interest of the individual defendant in receiving a fair trial with the interests of the public in scrutinizing the criminal process to insure its fairness for all defendants. Presently no factors have been set out by the United States Supreme Court as a basis for such a balancing process. Publicity may sometimes be prejudicial to an individual defendant both before and during the trial proceedings. Society will indicate by the direction taken in the future which value or interest is more important. If any imbalance exists, it is presently in favor of the public's right to know.

*C. Lyn Peebles*

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88. See, e.g., ALA. CODE § 12-21-202 (1975); ARIZ. R. CRIM. P. 9.3 (1973); GA. CODE 17-8-53 (1982); LA. REV. STAT. ANN. § 15:469.1 (West 1981); MISS. CONST., art. 3, § 26; N.H. REV. STAT. ANN. § 632-A:8 (Supp. 1979); N.Y. JUD. LAW § 4 (McKinney 1983); N.C. GEN. STAT. § 15-166 (Supp. 1981); N.D. CENT. CODE § 27-01-02 (1974); UTAH CODE ANN. § 78-7-4 (1953); VT. STAT. ANN., title 12, § 1901 (1973); WIS. STAT. § 970.03(4) (West Supp. 1982). See also FLA. STAT. ANN. § 918.16 (West Supp. 1983) (providing for mandatory exclusion of general public but not press during testimony of minor victims).

89. See, e.g., *supra* notes 8 and 82.

90. See, e.g., *supra* note 60.