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First Amendment--The Right of Access to Criminal Trials Extended

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FIRST AMENDMENT—THE RIGHT OF ACCESS TO CRIMINAL TRIALS EXTENDED

Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982).

In *Globe Newspaper Co. v. Superior Court*,[1] the Supreme Court reaffirmed the public's first amendment right of access to criminal trials, first established two years before in *Richmond Newspapers v. Virginia*.[2] Five Justices joined Justice Brennan in overturning a Massachusetts statute which required that the public be excluded from the courtroom during the testimony of a minor victim in a sex-offense trial.[3] Although the state's purpose of protecting minor victims of sex crimes was held to be compelling, the Court found this interest did not justify a mandatory closure law. Instead, the Court held that a state which is concerned for the welfare of the minor should determine on a case-by-case basis whether circumstances necessitate closure.[4]

The *Globe Newspaper* Court, however, failed to identify the circumstances in which exclusion of the public from the trial would be proper, and it was similarly unclear about any possible extension of the public's right of access beyond the criminal trial context. Nevertheless, the opinion is valuable because Justice Brennan's functional analysis of the first amendment right of access, which he first articulated in *Richmond Newspapers*, received the support of a majority of the Justices. Justice Brennan's analysis may become the basis for broader rights of public access in the future.

I. PROCEDURAL AND PRECEDENTIAL HISTORY OF *GLOBE NEWSPAPER*

Globe Newspaper Company initiated this suit after it was denied access to a rape trial in the Superior Court for the County of Norfolk,

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[1] 102 S. Ct. 2613 (1982).

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

[3] Justices White, Marshall, Blackmun, and Powell joined Justice Brennan's opinion. Justice O'Connor concurred in the judgment.

[4] *Globe Newspaper*, 102 S. Ct. at 2621.

Commonwealth of Massachusetts.[5] The three complaining witnesses who accused the defendant of forcible rape and forced unnatural rape were minors: two of them were sixteen and the other seventeen years old at the time of the trial.[6] When the hearings on preliminary motions began, the presiding judge, acting on his own initiative, ordered the proceedings closed to the public and press, pursuant to a Massachusetts statute.[7] Before the trial began, Globe moved that the court revoke the closure order, hold hearings before issuing similar future orders, and permit Globe to intervene "for the limited purpose of asserting its rights to access to both the trial and hearings on related preliminary motions."[8] The trial judge denied Globe's motion.

Globe immediately sought injunctive relief from a single justice of the Supreme Judicial Court of Massachusetts.[9] At the hearing before the justice, the Commonwealth did not argue for a closed trial, but rather waived any rights it might have had to exclude the press.[10] The justice nevertheless denied Globe's request to attend the trial and related proceedings.[11] Before Globe appealed to the full court, the rape trial proceeded and the defendant was acquitted.[12]

When Globe's appeal was heard by the full Supreme Judicial Court, it held that the case was moot because the rape trial had already concluded.[13] However, the court decided to reach the merits because the closure issue was "capable of repetition, yet evading review,"[14] and held that the statute mandated closure only during the testimony of minor complainants. According to the court, requests to exclude the pub-

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[5] Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 401 N.E.2d 360 (1980). The rape trial was Commonwealth v. Albert Aladjem, No. 73102-9 (Norfolk Super. Ct. May 10, 1979).

[6] *Globe Newspaper*, 379 Mass. at 848-49, 401 N.E.2d at 363.

[7] MASS. ANN. LAWS ch. 278, § 16A (Michie/Law. Co-op. 1980) provides in 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 court room, admitting only such persons as may have a direct interest in the case.

[8] *Globe Newspaper*, 102 S. Ct. at 2616.

[9] *Id.* Globe's request was contained in a petition for extraordinary relief filed pursuant to MASS. ANN. LAWS ch. 211, § 3 (Michie/Law. Co-op. 1980).

[10] 102 S. Ct. at 2616.

[11] The justice's decision was unreported.

[12] 102 S. Ct. at 2616-17.

[13] *Globe Newspaper*, 379 Mass. at 847, 401 N.E.2d at 362.

[14] *Id.* at 848, 401 N.E.2d at 362. The "capable of repetition, yet evading review" doctrine, which originated in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911), is a well-established exception to the mootness doctrine. Under this exception, a moot case will be adjudicated if the contested issue is likely to reappear and the parties would not have sufficient time to argue the case before the issue became moot. *See* Roe v. Wade, 410 U.S. 113, 125 (1973).

lic from other segments of the trial are within the discretion of the trial judge, after the judge holds a hearing at which any person to be excluded can be heard.[15]

Globe then appealed to the United States Supreme Court. However, in light of its decision in *Richmond Newspapers*, announced after the decision of the full Massachusetts court, the Court vacated the judgment of the Massachusetts Supreme Judicial Court, and remanded the case for further consideration.[16]

In *Richmond Newspapers*, the Court held that a state trial judge's order closing a murder trial to the public at the request of the accused violated the first and fourteenth amendments.[17] Seven Justices agreed that the first amendment embodies a constitutional right of access to criminal trials.[18] The rationale for this conclusion, however, was disputed. Chief Justice Burger, writing a plurality opinion in which two other Justices joined, based his analysis on the history of open trials in the United States and England.[19] After an extensive review of the history of the jury trial from the time of the Norman Conquest through the American Colonial period,[20] the Chief Justice noted that the underlying reason for the historic openness of trials was that an open courtroom helped ensure the proper functioning of the trial; openness "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."[21] Chief Justice Burger also suggested that open trials have a therapeutic effect on the community by providing an outlet for community concern, hostility and emotion.[22] He concluded that since criminal trials have been traditionally open, for reasons that are as valid today as they were centuries ago, the first amendment prohibits the summary closing of courtroom doors.[23] "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[24]

Justice Brennan, on the other hand, wrote a concurring opinion,

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15 379 Mass. at 865, 401 N.E.2d at 372.

16 449 U.S. 894 (1980).

17 *Richmond Newspapers*, 448 U.S. at 580-81.

18 *See id.* at 558-81 (plurality opinion written by Burger, C.J., and joined by Justices White and Stevens); *Id.* at 584-98 (Brennan, J., concurring, joined by Justice Marshall); *Id.* at 598-601 (Stewart, J., concurring); *Id.* at 601-04 (Blackmun, J., concurring).

19 *Id.* at 575.

20 *Id.* at 564-68.

21 *Id.* at 569.

22 *Id.* at 571. The Chief Justice explained that unless the public is aware of processes that are underway to punish criminal conduct, natural human reactions of outrage could manifest themselves in some form of vengeful self-help.

23 *Id.* at 576.

24 *Id.* at 581.

joined by Justice Marshall, in which he argued history is only one consideration in determining whether the public has a right of access to governmental information.[25] His opinion stressed the functional aspect of the press as the institution which disseminates information: "[t]he first amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government."[26] According to Justice Brennan, because public debate must be informed to ensure that a democracy functions effectively, the first amendment protects not only communication itself, but also the conditions necessary for meaningful communication.[27] Therefore, since public access to criminal trials is important to the proper functioning of the judicial process and the government as a whole,[28] he reasoned that the first amendment protects the openness of criminal trials.[29]

When the Supreme Judicial Court of Massachusetts faced the case on remand, it adopted Chief Justice Burger's reasoning and decided that *Richmond Newspapers* applied only to trials historically open to the

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[25] *Id.* at 585-89.

[26] *Id.* at 587.

[27] *Id.* at 588.

[28] Justice Brennan explained that openness was important to the judicial process because open trials assure the public that procedural rights are respected, and that justice is afforded equally to all. "Publicity serves . . . to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *Id.* at 593. Moreover, because "judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*," *id.* at 595, what serves the judiciary also serves the government.

[29] *Id.* at 597-98. Because Justice Brennan recognized that extending first amendment protection to all "the indispensable conditions of meaningful communication" could include virtually anything, he limited the protection by weighing it against "the opposing interests invaded." *Id.* at 588. He offered two considerations which he believed helpful in the balancing process: whether the particular proceeding or information was traditionally open to the public, and what importance public access has to the process itself. *Id.* at 589. Applying these principles to the case at hand, Justice Brennan found that criminal trials have a history of openness and that access is important to the functioning of the judicial process; therefore, the first amendment protects the openness of criminal trials. *Id.* at 597-98.

There were several other opinions filed in *Richmond Newspapers*. Justice White filed a separate concurrence noting that the decision would have been unnecessary had the Court followed his view in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), that the sixth amendment forbids exclusion of the public from criminal proceedings. *Id.* at 581-82. Justice Stevens filed a separate concurrence in which he emphasized the importance of the Court's decision. "Today, . . . for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the first amendment." *Id.* at 583. Justice Stevens indicated he would extend *Richmond Newspapers* to hold that the first amendment protects the public and press from abridgment of their rights of access to information about the operation of any branch of the government. *Id.* at 584. Justice Blackmun filed a separate concurrence to emphasize his belief that the right to a public trial can be found in the sixth amendment, as well as the first amendment. *Id.* at 601-04. Justice Rehnquist dissented, stating that neither the first nor the sixth amendment requires public access to a trial. *Id.* at 604-06.

public.[30] Since rape trials involving testimony of minors were not traditionally open,[31] the Massachusetts court held that *Richmond Newspapers* did not dictate a reversal of its previous ruling.[32] The court also emphasized that the mandatory nature of the statute's closure rule was necessary to further the state interests which underlie the statute. Those interests include encouraging minor victims to come forward to report their complaints and give testimony, protecting minor victims of sex crimes from psychological damage or public degradation and enhancing the likelihood of credible testimony from such minors, free of confusion or embellishment.[33] According to the court, these interests would be defeated if each trial judge had to make a case-by-case determination of whether the courtroom should be closed during a minor's testimony. To make such a decision, the judge would require a detailed psychological examination of the minor, and the court feared such an in-depth examination would force the victim to relive the experience.[34] "Given the statute's narrow scope in an area of traditional sensitivity to the needs of victims,"[35] the court held that the statute's mandatory-closure requirement was constitutional, and accordingly it dismissed Globe's appeal.[36]

II. THE SUPREME COURT DECISION IN *GLOBE NEWSPAPER*

The United States Supreme Court reversed the decision of the

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[30] *Globe Newspaper*, 1981 Mass. Adv. Sh. —, 423 N.E.2d 773 (1981).

[31] There is at least one notable exception to this history [of open criminal trials]. In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult (citation omitted).

1981 Mass. Adv. Sh. at —, 423 N.E.2d at 778. After citing a group of cases in which courts have sustained closure orders, the court stated, "Whatever the disagreement among the courts about specific closure orders, it is clear that the majority of the courts have upheld decisions to close parts of trials when a minor victim of a sexual assault is testifying." *Id.* at —, 423 N.E.2d at 779.

[32] *Id.* at —, 423 N.E.2d at 781.

[33] *Id.* at —, 423 N.E.2d at 779. The court also noted that the statute promoted the state's interest in securing the sound and orderly administration of justice, preserving evidence and obtaining just convictions.

[34] Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. Only the most exceptional minor would be sanguine about the possibility that the details of an attack may become public. An examiner would have to distinguish between natural hesitancy and cases of particular vulnerability. To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience. So too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial.

Id. at —, 423 N.E.2d at 779-80.

[35] *Id.* at —, 423 N.E.2d at 781.

[36] *Id.*

Supreme Judicial Court of Massachusetts.[37] It held that the statute which mandated closure of a portion of a criminal trial unconstitutionally violated the public's first amendment right of access to criminal trials.[38] The different approaches taken by Justice Brennan in his majority opinion and Chief Justice Burger in his dissent are of particular interest; although their analytical approaches led to the same result in *Richmond Newspapers*, the Justices reached diametrically opposed conclusions in *Globe Newspaper*.

Justice Brennan re-articulated his view that the first amendment was intended primarily to assure freedom of communication on matters relating to the functioning of government.[39] By protecting this class of speech, the amendment ensures each citizen the right to participate in our republican system of self-government.[40] He noted that the first amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the amendment, are nonetheless necessary to the enjoyment of other first amendment rights."[41]

As in his *Richmond Newspapers* opinion, Justice Brennan identified two features of criminal trials which explain why access to criminal trials is properly afforded constitutional protection. First, criminal trials have historically been open to the public, and second, such openness is important to the proper functioning of the trial itself.[42] Justice Brennan did not, however, hold that these two features must both be present before the Court will recognize a first amendment right of access. Although he alluded to the importance of a tradition of openness in *Globe Newspaper*, one can draw an inference that Justice Brennan considers historical practice to be of secondary importance in light of his opinion, which disregards Chief Justice Burger's observation that criminal trials have not traditionally been open during the testimony of minor sex victims. In fact, Justice Brennan openly disparaged the historical argument when he stated: "[w]hether the first amendment right of access to criminal trials can be restricted in the context of any particular criminal trial . . . depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction."[43] It appears, therefore, that the majority was less concerned about the tradition of openness of criminal trials as an indicator of

37 *Globe Newspaper*, 102 S. Ct. 2613.

38 *Id.* at 2622.

39 *Id.* at 2619. Chief Justice Burger filed a dissenting opinion joined by Justice Rehnquist. Justice Stevens wrote a separate dissent.

40 *Id.*

41 *Id.*

42 *Id.* at 2619-20. *See supra* note 25 and accompanying text.

43 *Id.* at 2619-20 n.13.

whether a public right of access exists than it was about whether the state's interest in closing the trial were compelling enough to outweigh the value of allowing public access.

In order to determine whether the state's interest outweighs the first amendment value of public access, Justice Brennan concluded that any court which reviews restriction of the public's access to a criminal trial must apply exacting scrutiny: "[w]here, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[44] In applying this test to the instant case, Justice Brennan began by examining the two interests which the state asserted were compelling: the protection of minor victims from further trauma and embarrassment, and the encouragement of such victims to come forward and testify in a truthful and credible manner.[45] The Court held that the latter interest was not compelling because the Commonwealth offered no empirical evidence to support the claim that the closure rule actually caused more victims to report crimes.[46] The Court also doubted the state's asserted interest as a matter of common sense.[47] According to the Court, if the Commonwealth was trying to encourage minor victims to come forward by keeping such matters secret, the statute's failure to bar access to both the transcript of the victim's testimony and to court personnel present during the victim's testimony gravely undermined the efficacy of the closure rule.[48]

The Court did rule, however, that the state's interest in safeguarding the physical and psychological well-being of a minor victim was compelling.[49] But, under the analysis employed by Justice Brennan, the statute was nevertheless unconstitutional because it was not narrowly

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[44] *Id.* at 2620.

[45] *Id.* at 2620-21.

[46] *Id.* at 2622.

[47] *Id.* The Court stated, "[n]ot only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense." *Id.*

[48] *Id.* Justice Brennan further stated that even if the statute was shown to advance the state's interest in encouraging the reporting of crime, the interest would probably not be deemed compelling "[f]or that same interest could be relied on to support an array of mandatory-closure rules designed to encourage victims to come forward." *Id.* In other words, because there are many crimes in which victims may be reluctant to come forward and testify, the statute which protects only victims of sex crimes is under-inclusive.

[49] *Id.* at 2621. The Court did not explain this ruling, probably because the importance of this interest is well-established. See Prince v. Massachusetts, 321 U.S. 158, 168 (1944), where the Court stated, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection." *See also* New York v. Ferber, 102 S. Ct. 3348, 3354 (1982).

tailored to serve that interest.[50] The Court reasoned that some minor victims would not be adversely affected by allowing public access to the courtroom during their testimony and, therefore, the mandatory closure rule unduly infringed upon the public's first amendment rights.[51] The Court thus held that trial judges must hold a hearing and weigh the circumstances of each case before deciding whether to close the courtroom when a minor victim of a sex crime is testifying.[52]

Chief Justice Burger filed a strong dissent, joined by Justice Rehnquist, in which he applied the same historical analysis he used in *Richmond Newspapers*. In *Richmond Newspapers*, the Chief Justice recognized a first amendment " 'right of access to places traditionally open to the public.' "[53] In *Globe Newspaper*, however, he concluded that the first amendment does not require an open courtroom when a minor victim of a sex crime is testifying because that type of case does not have a tradition of openness.[54]

Chief Justice Burger further argued that even if *Richmond Newspapers* required that the public have access to the testimony of minor victims of sex crimes, that right was not infringed in *Globe Newspaper* since

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50 102 S. Ct. at 2621.

51 *Id.*

52 *Id.* Justice O'Connor concurred in judgment, using elements of both the majority and dissenting opinions to reach her conclusion. *Id.* at 2623. She agreed with Justice Brennan's ruling that the statute violated the first amendment because Massachusetts had not demonstrated an interest weighty enough to justify a mandatory closure order. But she supported Justice Brennan only in the criminal trial context, otherwise agreeing with Chief Justice Burger that the first amendment right of access is limited to proceedings with a long history of openness. "*Richmond Newspapers* rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness." *Id.* Because *Globe Newspaper* did concern a criminal trial, Justice O'Connor agreed with the majority that exacting scrutiny should be applied to the Massachusetts statute, but she disagreed with Justice Brennan's broad rule that the first amendment protects every right that is " 'necessary to the enjoyment of other First Amendment rights.' " *Id.*

53 *Id.* at 2624 (Burger, C.J., dissenting) (quoting *Richmond Newspapers*, 448 U.S. at 577).

54 102 S. Ct. at 2624. The Chief Justice stated:

> Today Justice Brennan ignores the weight of historical practice. There is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors. . . .
>
> Absent such a history of openness, the positions of the Justices joining reversal in *Richmond Newspapers* gives no support to the proposition that closure of the proceedings during the testimony of the minor victim violates the First Amendment.

In support of his assertion that trials have not been open historically, Chief Justice Burger cited cases in which the courtrooms of sex trials were closed: Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967); Reagan v. United States, 202 F. 488 (9th Cir. 1913); United States v. Geise, 158 F. Supp. 821 (D. Alaska), *aff'd*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); Hogan v. State, 191 Ark. 437, 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* Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 539-40 (2d Cir. 1974), and cases cited therein.

the Massachusetts statute allowed the press access to the trial transcript and placed no restrictions on other sources of information about the victim's testimony.[55] Because neither the purpose nor the primary effect of the law was to infringe upon the exchange of information, Chief Justice Burger argued that *Richmond Newspapers* merely required the Court to examine whether the interests of the state outweighed the effect on first amendment rights.[56] The Chief Justice proceeded to balance the statute's goal of combatting the problem of the under-reporting of sex crimes against its "very limited incidental effects,"[57] on the freedoms of speech and press, and concluded that Massachusett's statute was constitutional.[58]

III. THE PHILOSOPHICAL DEBATE

In *Globe Newspaper*, the Supreme Court rejected Chief Justice Burger's restrictive interpretation of the first amendment which extended a constitutional right of access only to those places traditionally open to the public. Instead, a majority of the Court adopted Justice Brennan's broader framework which focuses on the function of the first amendment in a democratic society. Upon examining Chief Justice Burger and Justice Brennan's analyses in turn, it is evident that the latter's theory is more consistent with Supreme Court precedent and the underlying purposes of the first amendment.

A. CHIEF JUSTICE BURGER'S ANALYSIS

Chief Justice Burger attempted to restrict the range of the first amendment right of access to cover only situations that have been so consistently open in the past as to carry a presumption of openness to-

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[55] *Globe Newspaper*, 102 S. Ct. at 2624. Additional sources include court officials, attorneys and others present during the testimony.

[56] See *infra* text accompanying notes 63-80 for a discussion of the correct standards to apply to evaluate state action that infringes on speech activity in public places.

[57] 102 S. Ct. at 2625.

[58] Justice Stevens also filed a dissent, in which he argued that the Court should not have invoked jurisdiction of the case. *Id.* at 2627-28 (Stevens, J., dissenting). He argued that this case was moot and did not fall within the "capable of repetition, yet evading review" exception because the statute in question, as construed by the Supreme Court of the state, had never actually been applied to a live controversy. Since the new interpretation of the statute had never been employed by a trial court and since the first amendment right of access to newsworthy material had only recently been recognized he noted that there was a special importance in deciding the case only upon a set of concrete facts:

> Only in specific controversies can the Court decide how this right of access to criminal trials can be accommodated with other societal interests, such as the protection of victims or defendants. . . .
>
> [T]he Court's comment on the First Amendment issues implicated by the Massachusetts statute [was] advisory, hypothetical, and at best, premature. . . .

Id. at 2628-29.

day.[59] A close reading of Chief Justice Burger's opinion in *Richmond Newspapers* demonstrates that he was not arguing that the first amendment grants any affirmative rights of access to government information or proceedings. Rather, the Chief Justice was attempting to preserve the "unbroken, uncontradicted history" of open trials in this country.[60] In commenting on the *Richmond Newspapers* case, Professor Archibald Cox noted, "[c]losing the door of a courtroom that has always been open can be realistically viewed as interference with observation and public reporting rather than as preservation of the confidentiality of . . . official business. . . . [T]his is the gist of the decision [in *Richmond Newspapers*]."[61]

As Cox suggested, in *Richmond Newspapers* the Chief Justice transformed the traditional openness of criminal trials into a circumstance the first amendment protects by citing a previous statement the Court made: " '[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.' "[62] In other words, the first amendment does not permit the government to limit the public's access to information it has traditionally been privy to.

To support his reasoning, Chief Justice Burger drew an analogy between public forums and criminal trials. The Supreme Court has often held that streets, sidewalks and parks are "public forums" — places which are open to the public where people may express themselves through speeches, demonstrations, parades and the like, under the protection of the first amendment.[63] In *Richmond Newspapers*, Chief Justice Burger compared these traditional public forums to courtrooms, where the public has also historically had the right to be present.[64]

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59 *Id.* at 2624.

60 *Id.*

61 Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 22-23 (1980). Cox supported his statement by quoting a sentence from Chief Justice Burger's opinion in *Richmond Newspapers*, 448 U.S. at 576: "[t]he First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."

62 *Richmond Newspapers*, 448 U.S. at 575-76, quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). This quotation was taken somewhat out of context—the *Bellotti* Court held that the first amendment secures the right of a banking corporation to spend money for political advertising, and did not discuss the public's right to information supplied by the government. *See* Cox, *supra* note 61 at 22.

63 For the history of the public forum doctrine, see generally B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 87-100 (1976); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11-12; Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 248-52 (1976).

64 *Richmond Newspapers*, 448 U.S. at 578.

However, while the analogy between the courtroom and the public forum is an apt one, the Chief Justice's application of the historical argument in *Globe Newspaper* cannot draw support from those cases because in *Globe* he sought unduly to restrict the class of places that should be considered public forums. An examination of the public forum cases demonstrates that the Court was not concerned exclusively in those cases with a tradition of openness, but rather it concentrated on the role of the public forum in the exchange of ideas.

The concept of the public forum was first introduced by Justice Roberts in *Hague v. Committee for Industrial Organization*.[65] A passage from Justice Roberts' opinion has become the accepted statement of the public forum concept:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[66]

Another early public forum case which helped define the doctrine was *Martin v. Struthers*.[67] In that case, the Supreme Court invalidated a statute which prohibited any person distributing handbills from ringing doorbells or otherwise summoning residents to the door to receive the literature. The opening sentence of the opinion declared, "[f]or centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings."[68] But the Court did not base its holding on history; rather it looked to the purpose of the first amendment. It said the founding fathers wanted to protect new and unconventional ideas; therefore, the first amendment covers both the right to distribute literature and the right to receive it.[69] The Court then discussed the widespread use of door-to-door distribution of circulars, and noted that this method of communication was particularly important to less wealthy individuals.[70] It is clear, therefore, that the Court considered not only historical practice, but the value that practice had in maintaining a system of free expression.

In the mid-1960's, the Supreme Court extended the rights to use

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65 307 U.S. 496 (1939).

66 *Id.* at 515. *See also* Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1289 (1979).

67 319 U.S. 141 (1943).

68 *Id.* at 141.

69 *Id.* at 143.

70 *Id.* at 146.

public property for free expression beyond sidewalks, parks and doorsteps to include statehouse grounds in *Edwards v. South Carolina*.[71] In holding that a student rally at the state capitol was constitutionally protected, the Court relied on both the traditional right under the Constitution to express grievances to fellow citizens and legislators, and the important purpose such speech serves in our system of government.[72]

Even when the Court has refused to extend the public forum doctrine, it has not relied upon an historical argument; instead, its decisions have been based upon the incompatibility of the expression with the normal functioning of the forum. In *Adderley v. Florida*,[73] the Court held that the public can be restrained from picketing on jailhouse grounds. The Court distinguished *Edwards* by noting that, traditionally, state capitol grounds are open to the public, while jails, built for security purposes, are not.[74] This does not mean that because jails have traditionally been closed to the public, there is no right of access to jail grounds. Rather, the Court considered the main purpose of the facility—security—to be incompatible with public demonstrations, so it permitted restrictions on speech in that particular place.[75]

The Supreme Court also upheld a statute which disallowed picketing on courthouse grounds in *Cox v. Louisiana*.[76] In explaining its ruling, the Court said that the legislature has the right to determine that some judges will be consciously or unconsciously influenced by demonstrations in or near their courtrooms. The Court did not consider whether courthouse grounds have been open for demonstrations historically, but rather focused on the fact that proper functioning of the courts is basic to our democracy.[77]

As the public forum cases illustrate, the Supreme Court has enforced a first amendment right to conduct speech-related activity in certain public places because of the importance of these forums to the proper functioning of the exchange of ideas, provided the expressive activities do not interfere with the important operations of those places.

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71 372 U.S. 229 (1963).

72 *Id.* at 235, 238. Quoting Chief Justice Hughes in Stromberg v. California, 283 U.S. 359, 369 (1931), the Court stated:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principal of our constitutional system.

73 385 U.S. 39 (1966).

74 *Id.* at 41.

75 Similar reasoning was applied in Grayned v. City of Rockford, 408 U.S. 104 (1972). The Court stated, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116.

76 379 U.S. 559 (1965).

77 *Id.* at 562.

Yet Chief Justice Burger has attempted to modify the public forum doctrine by limiting the class of protected public forums to those places traditionally open to the public.[78] The Chief Justice has simply failed to acknowledge that the Court did not recognize the right to communicate in these "public forums" simply because these places were open to the public at the time the Constitution was written, but because freedom to communicate is "important to the preservations of the freedoms treasured in a democratic society,"[79] and essential to " 'the security of the Republic.' "[80]

B. JUSTICE BRENNAN'S ANALYSIS

By adopting Justice Brennan's approach in *Globe Newspaper*, the Supreme Court embraced the notion that the public must have access to information in order effectively to maintain a stable self-government. Justice Brennan explained that the basis for the first amendment right of access to criminal trials is the understanding that a major purpose of the first amendment is to protect the free discussion of political issues.[81] Thus, Justice Brennan adopted the democratic process model of the first amendment that is commonly associated with Alexander Meiklejohn.[82] The democratic process model declares that the purpose of the first

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[78] The Chief Justice's narrow view of the public's right of access to governmental information is also evident in Houchins v. KQED, 438 U.S. 1 (1978), in which several journalists sued for the right to inspect and take pictures of a county jail. Chief Justice Burger, writing a plurality opinion, stated that the first amendment does not compel government to supply information to the public. *Id.* at 11. The Chief Justice recognized that jails and prisons are matters of great public importance, and that with greater information, the public can form opinions more intelligently about prison conditions. *Id.* at 8. However, he did not believe this meant that the right to prison information falls within the first amendment:

> The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.

Id. at 9.

[79] 379 U.S. at 574.

[80] *Adderley*, 385 U.S. at 55 (quoting De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

[81] Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," (citation omitted). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

Globe Newspaper, 102 S. Ct. at 2619.

[82] *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948). Meiklejohn believed:

> The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

Id. at 26-27.

amendment is to serve as a tool of democracy in promoting an informed citizenry.[83] This is not the first time the Supreme Court has invoked this model.[84] For example, in *New York Times Co. v. Sullivan*,[85] the Supreme Court extended special protection to the discussion of public issues by holding that the press would not be liable for defaming public officials unless it could be proved that the libelous material was printed with actual malice.[86] In making its decision, the Court relied upon the need for debate about public questions, the very need which led to the creation of the first amendment. "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[87]

Justice Brennan's analytical approach allowed him to treat the issues in *Globe Newspaper* and *Richmond Newspapers* in a flexible manner. Since he emphasized the importance of the first amendment to a system of self-government instead of the public's historical access to the courtroom, he was able to analyze the circumstances of the cases and the needs of modern society in making his decision. Unlike Chief Justice Burger, Justice Brennan sought to allow the first amendment to continue its effective functioning by adapting it to modern conditions.

Both Justices purport to follow the intention of the Framers of the first amendment.[88] But the underlying intent of the first amendment

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83 *See* Cass, *supra* note 66, at 1311 n.147. Other jurists and first amendment commentators have identified different purposes underlying the first amendment. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (to provide unrestrained marketplace of ideas which will lead to the discovery of truth); Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978) (to serve as a vehicle for personal expression and individual development); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884 (1963) (to facilitate orderly, non-violent social change). *See also* Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 268-73 (1978).

84 *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 10-20 (1965).

85 376 U.S. 254 (1964).

86 *Id.* at 279-80. Actual malice was defined as publishing false information "with knowledge that it was false or with reckless disregard of whether it was false or not."

87 *Id.* at 270. *See also* Garrison v. Louisiana, 379 U.S. 64 (1964), where the Court held that a state could not impose criminal sanctions on people who defame public officials without actual malice. "[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth." *Id.* at 73.

88 Justice Brennan's concern for the framer's intent in *Globe Newspaper*, 102 S. Ct. at 2619, is evident: "[W]e have long eschewed any 'narrow, literal conception' of the Amendment's terms, . . . for the Framers were concerned with broad principles, and wrote against a background of shared values and practices." More narrowly, Chief Justice Burger stated, "The Bill of Rights was enacted against the backdrop of the long history of trials being presump-

has been very difficult to discern.[89] The two Justices have resolved this interpretive dilemma quite differently. Chief Justice Burger has attempted to determine and carry out the specific intention of the Framers. He therefore looks to the Founding Fathers' operation of the government; if a governmental process was open when the Framers wrote the Constitution, the process retains a first amendment guarantee that it will be open today.[90] Justice Brennan, however, is more concerned with the general intent of the Framers. He has argued that the Court should consider the reasons the first amendment was included in the Constitution, and extend first amendment protection to those things which need to be protected to promote the amendment's function.[91]

It is not clear whether the Framers intended a specific or general interpretation of the first amendment,[92] but if one believes in the need for the first amendment to promote free and open expression, the first amendment must go beyond what the Framers specifically intended. Historical practice cannot adequately determine what should be open to the public today, for in 1789 there were fewer people, no extensive governmental bureaucracy and secret governmental information was often exposed for partisan purposes.[93] Because we live in a different society today, a better framework for deciding questions regarding the public right of access is that which the Court created in *Thornhill v. Alabama*:

> The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.[94]

Justice Brennan followed the *Thornhill* Court's lead by adopting a broad view of the first amendment in order to ensure that the public will be supplied with information it needs. Because Justice Brennan looked beyond historical practice in an attempt to further the goals of the first

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tively open," *Richmond Newspapers*, 448 U.S. at 575, thus implying that the Framers' intent can be evidenced by the historic practice.

89 *See* Cass, *supra* note 66, at 1309 & n.142.

90 For example, prisons have not been open to the public historically, so the public has no constitutional right of access today. *See Houchins*, 438 U.S. 1.

91 "The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper*, 102 S. Ct. at 2619.

92 *See generally* Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 298 (1981).

93 *See* Comment, *The Right of the Press to Gather Information after Branzburg and Pell*, 124 U. PA. L. REV. 166, 169 (1975).

94 310 U.S. 88, 102 (1940).

amendment, his approach in *Globe Newspaper* was superior to that employed by Chief Justice Burger.

IV. THE PRACTICAL CONSIDERATIONS

Although *Globe Newspaper* may have clarified the Court's position on an important philosophical debate about the public's right of access to criminal trials, it is unclear how the Court's adoption of Justice Brennan's functional analysis will affect the actions of trial judges. Mandatory closure statutes such as the one struck down in *Globe Newspaper* are relatively rare. The appellee Superior Court's brief identified only two others in the country:[95] Iowa's bar of the general public from paternity trials,[96] and West Virginia's requirement that the trial of divorce suits be conducted in chambers.[97] While at first glance it might appear that the *Globe Newspaper* decision will have little effect on the number of criminal trials that are closed, by declaring that the public has a constitutional right of access to all criminal trials, the *Globe Newspaper* court re-emphasized the importance open trials play in our society. Following this case, trial court judges must be especially careful about the restraints they place on the press and public when conducting a criminal trial. Unfortunately, Justice Brennan did not provide any explicit guidance to help trial courts in determining when trials should be closed, leaving it to the individual judges to decide when the interests supporting closure outweigh the societal interest in public access.[98]

Trial judges have been on notice since *Nebraska Press Association v. Stuart*,[99] that they must look for the least restrictive means to ensure a fair trial in order to avoid unnecessarily restricting the freedom of the press. *Nebraska Press* involved a court order prohibiting the reporting of information "strongly implicative" of an accused murderer.[100] The Supreme Court struck down the "gag order," judging it to be an unconstitutional prior restraint, and held that judges cannot employ a prior restraint unless they can demonstrate that without it, a fair trial would be denied.[101] The Court also declared that restraints on the press' right to publish were permissible only if less restrictive alternatives would not suffice. Alternatives suggested were the granting of a continuance, a vig-

95 *See* Brief for Appellee at 37 n.61, *Globe Newspaper v. Superior Court*, 102 S. Ct. 2613 (1982).

96 IOWA CODE ANN. § 675.20 (West 1950).

97 W. VA. CODE § 48-2-24 (1976). Seven states have statutes permitting discretionary closure in cases involving sexual assaults. *See infra* note 103, 104. Nineteen states have developed non-statutory judicial rules that permit trial judges to close parts or all of trials involving sexual assaults, *see infra* note 105.

98 *See infra* note 102 and accompanying text.

99 427 U.S. 539 (1976).

100 *Id.* at 541.

101 *Id.* at 569.

orous voir dire, a change of venue, sequestration of the jury or the use of emphatic jury instructions.[102]

Although *Nebraska Press* concerned a "gag order" to protect the defendant from receiving prejudicial publicity, its reasoning applies equally well to judicial attempts to protect complaining witnesses. Six states have statutes specifically providing courts with the discretionary power to close proceedings pertaining to sexual assaults,[103] and another state has a statute which has the same effect.[104] Nineteen have judge-made, non-statutory rules that grant trial judges the ability to close parts or all of a sex-related criminal trial.[105] But the Supreme Court has never explained how judges should use this discretionary closure power. In *Richmond Newspapers* and *Globe Newspaper*, the Court has held that absent an articulated finding of an overriding interest, criminal trials must be open to the public. Since it held that the overriding interest must be "articulated in findings," the *Richmond Newspapers* court implied that a hearing is necessary to determine whether closure is proper.[106] In a subsequent footnote, however, the Court said it would not attempt to

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[102] *Id.* at 563-64.

[103] ALA. CONST. art. VI, § 169; GA. CODE ANN. § 81-1006 (1956) (§ 9-10-3 under proposed 1981 Code); MICH. COMP. LAWS § 766.9 (1968); N.Y. JUD. LAW § 433 (McKinney 1975); N.C. GEN. STAT. § 15-166 (Supp. 1981); UTAH CODE ANN. § 78-7-4 (1953).

[104] COLO. R. CIV. P. 42(c) (1970) ("All sessions of court shall be public, except that when it appears to the court that the action will be of such character as to injure public morals, or when orderly procedure requires [closure]. . . .").

[105] 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) *(but see* State v. Sheppard, 7 MEDIA L. REP. (BNA) 1140 (Conn. 1980)); Bivins v. State, 313 So.2d 471 (Fla. App. 1975); Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944); People v. Latimore, 33 Ill. App. 3d 812, 342 N.E.2d 209 (1975); Marshall v. State, 254 Ind. 156, 258 N.E.2d 628 (1970); State v. Croak, 167 La. 92, 118 So. 703 (1928); State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907); Riley v. State, 83 Nev. 282, 429 P.2d 59 (1967); State v. Blake, 113 N.H. 115, 305 A.2d 300 (1973); State v. Padilla, 91 N.M. 800, 581 P.2d 1295 (1978); State v. Nyhus, 19 N.D. 326, 124 N.W. 71 (1909); Commonwealth v. Stevens, 237 Pa. Super. 457, 352 A.2d 509 (1975); State v. Santos, 413 A.2d 58 (R.I. 1980); State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981); State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933); Price v. State, 496 S.W.2d 103 (Tex. Crim. App. 1973); State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936); State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950).

[106] The Globe Newspaper Company's brief noted that the necessity for a hearing is reflected in each reported decision concerning closure of a trial after the Supreme Court's decision in *Richmond Newspapers*. Brief for Appellant at 22 n.12. *See, e.g.*, Sacramento Bee v. United States Dist. Court, 656 F.2d 477 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2257 (1982); *In re* United States *ex rel.* Pulitzer Publishing Co., 635 F.2d 676 (8th Cir. 1980); *In re* P.R., 7 MEDIA L. REP. (BNA) 2277 (Colo. 1981); State v. Sheppard, 7 MEDIA L. REP. (BNA) 1140 (Conn. 1980); United States v. Edwards, 7 MEDIA L. REP. (BNA) 1324 (D.C. Cir. 1981); State v. Green, 395 So. 2d 532 (Fla. 1981); People v. March, 95 Ill. App. 3d 46, 419 N.E.2d 1212 (1981); Ashland Publishing Co. v. Asbury, 612 S.W.2d 749 (Ky. Ct. App. 1980); Patuxent Publishing Corp. v. State, 48 Md. App. 689, 429 A.2d 554 (1981); Detroit Free Press v. Recorder's Court Judge, 409 Mich. 364, 294 N.W.2d 827 (1980); State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981); State v. Wahle, 298 N.W.2d 795 (S.D. 1980).

define the circumstances in which all or part of a criminal trial may be closed, but that the right of access was not absolute. The trial judge may impose reasonable limitations on access to a trial.[107]

The Supreme Court in *Globe Newspaper* was similarly frugal in giving advice on trial closure. It provided several factors which should be considered: the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim and the interest of the parents and relatives.[108] What the Court did not indicate, however, was how much weight each of these factors should be given.

Appellate and trial court judges from various jurisdictions have placed different weights on these factors. For example, in *United States ex. rel. Latimore v. Sielaff*,[109] the court affirmed the clearing of spectators from the courtroom during the testimony of the complaining witness in a rape trial. The court explained the trial court's action by stating that the main purpose of closing the trial is the protection of the personal dignity of the complaining witness.[110] On the other hand, in *Lexington Hearld Leader Co. v. Tackett*,[111] the Supreme Court of Kentucky held that the press and public cannot be excluded from the courtroom merely to save the witness from the embarrassment and emotional trauma that testifying in open court would cause.[112]

Not only have courts disagreed on what constitutes sufficient cause to close a trial, but they also differ in deciding whom should be excluded. While some closure orders exclude everyone but the court attendants and the attorneys,[113] many judges have attempted to accomodate both the victim and the press by excluding only the public but not the press. In *Geise v. United States*,[114] a case which involved a nine-year-old complaining witness, the court held that excluding all spectators except relatives and close friends of the defendant, and members of the press and bar was a proper exercise of the trial judge's discretion.[115]

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107 *Richmond Newspapers*, 448 U.S. at 581 n.18.

108 *Globe Newspaper*, 102 S. Ct. at 2621.

109 561 F.2d 691 (7th Cir. 1977).

110 *Id.* at 694.

111 601 S.W.2d 905 (Ky. 1980).

112 *Id.* at 907.

113 *See, e.g.*, Price v. State, 496 S.W.2d 103, 107-08 (Tex. Crim. App. 1973).

114 262 F.2d 151 (9th Cir. 1958).

115 *See also* United States v. Latimore, 561 F.2d 691 (7th Cir. 1977), *cert denied*, 434 U.S. 1076 (1978); Douglas v. State, 328 So. 2d 18 (Fla.), *cert. denied*, 429 U.S. 871 (1976).

Allowing the press but not the general public to be admitted to the courtroom conflicts with the Supreme Court's well-established holding that the press may not be granted rights which are unavailable to the general public. *See, e.g.*, Nixon v. Warner Communications, 435 U.S. 589, 609 (1978) (the first amendment grants the press no right to trial information superior to that of the general public). The court in *Lexington Herald Leader*, had a better

V. CONCLUSION

In *Globe Newspaper*, the Supreme Court re-emphasized the importance of the openness of criminal trials. The decision extends the holding of *Richmond Newspapers*, where the Court initially recognized a first amendment right of access to criminal trials, but limited the right to trials "traditionally open to the public." In *Globe Newspaper*, a majority of Justices adopted Justice Brennan's functional analysis of the first amendment, agreeing that the first amendment goes farther than merely protecting a right of public access to places consistently open in the past. The Court held that the first amendment embraces a right of access to criminal trials in order to ensure an informed discussion of governmental affairs. Although it is doubtful the Supreme Court will be willing to extend the right of access to all governmental procedings which would further an informed public discussion of governmental affairs, *Globe Newspaper* signifies that the Court will recognize a broader right of ac-

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suggestion on how to minimize the harm to the victim while still protecting the freedom of the press. It held that a court should accommodate the media, since the press has a superior ability to disseminate information, and allow only limited attendance by the public. 601 S.W.2d at 907.

Further disagreement concerning access to criminal trials has surfaced when the media has sued for access to recorded evidence presented at trial. In Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981), broadcasters filed requests to copy audio tapes of discussions between defendants allegedly taking bribes from FBI agents. The Fifth Circuit Court of Appeals held there is no first amendment right to access to the tapes; broadcasters simply had to be content with transcripts of the conversations. For support, the court cited *Warner Communications*, in which the Supreme Court rejected a similar claim of a constitutional right of access to trial exhibits: "[w]e have carefully considered the argument that *Richmond Newspapers* has altered the firm 'no constitutional right of access' holding of *Warner Communications* and thus breathed new life into the broadcasters' claim of first amendment entitlement to copy and broadcast these tapes. We find it unpersuasive." *Id.* at 427.

On the other hand, the Third Circuit Court of Appeals was persuaded by a similar argument in United States v. Criden, 648 F.2d 814 (3rd Cir. 1981). The court reversed a decision refusing to allow NBC to copy video and audio tapes admitted into evidence during a criminal trial. Although the court disposed of the case on non-constitutional grounds, it stated:

> We need not speculate on whether the *Richmond Newspapers* case betokens a more expansive view of the First Amendment's application to the right to copy evidence introduced at trial than was followed by the Court in *Warner Communications* two years before, but we believe the analyses in *Richmond Newspapers* of the public's right to an open trial provide strong support for reliance on the common law right of access to trial materials in this case.

Id. at 821-22.

The *Criden* court seems to have been correct in light of *Globe Newspaper*. Allowing broadcasters to have the right to copy tapes in order to show them to the public would promote the functioning of the first amendment because the general public no longer attends trials, but rather acquires information through the media. Allowing broadcasters access to the tapes would, therefore, further the cause of an informed citizenry.

cess to information which the public needs in order to make intelligent electoral decisions.

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