

January 1983

Globe Newspaper: Sounding the Death Knell for Closure in Courtroom Proceedings

John C. Hearn

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

Recommended Citation

John C. Hearn, *Globe Newspaper: Sounding the Death Knell for Closure in Courtroom Proceedings*, 3 Pace L. Rev. 395 (1983)

DOI: <https://doi.org/10.58948/2331-3528.1643>

Available at: <https://digitalcommons.pace.edu/plr/vol3/iss2/8>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Globe Newspaper: Sounding the Death Knell for Closure in Courtroom Proceedings?

I. Introduction

In *Globe Newspaper Co. v. Superior Court of Norfolk*,¹ the United States Supreme Court took its first step toward clarifying the first amendment right of access to criminal trials. The right, first recognized by the Supreme Court in 1980,² was the product of a recent conflict in interpretation of the first³ and sixth⁴ amendments to the United States Constitution, as applied through the fourteenth amendment⁵ to the states.⁶ While the sixth amendment guarantees the accused the right to a speedy and public trial,⁷ the first amendment has been construed to give the press and public the right to attend criminal trials.⁸

In *Globe*, a Massachusetts trial judge, pursuant to a mandatory state closure statute,⁹ excluded the press and the

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

2. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

3. U.S. CONST. amend. I, provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ."

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

5. U.S. CONST. amend. XIV, § 1, provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

6. See, e.g., *Bridges v. California*, 314 U.S. 252, 263 n.6 (1941); *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968).

7. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-80 (1979) (sixth amendment is a right personal to the accused, not to the public).

8. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion). This note will deal only with the right of access to criminal proceedings, not civil proceedings. For consideration of the right in the civil context, see *In re L.*, 24 Or. App. 257, ___, 546 P.2d 153, 155 n.1 (1976) (juvenile court judge acted properly within his discretion in allowing a reporter to be present during a hearing to determine a treatment plan for a 13-year-old child with severe emotional problems).

9. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981) provides in relevant part: "At the trial of a complaint or indictment for rape, . . . where a minor under eighteen years

general public from the courtroom during the testimony of the three minor victims at a rape trial.¹⁰ The United States Supreme Court struck down the statute as violative of the first amendment, refusing to uphold a *mandatory* state closure statute. Instead, the Court applied a balancing test to closure statutes which considers several factors, such as the victim's age, maturity, and understanding.¹¹ This holding affects legal practitioners, the media, the public, and victims of crime.¹² Significantly, *Globe* has triggered uncertainty as to which, if any, traditionally sensitive, closed portions of proceedings¹³ will still be afforded that protection.

Part II of this note presents an historical overview of the public trial and the controversies which surround it. Part III discusses the *Globe* opinions, and Part IV analyzes the impact of the Supreme Court decision on sex crime victims, the press, and the public. In addition, Part IV analyzes the implications of *Globe* in relation to other traditionally closed portions of proceedings. After evaluating the Supreme Court's application of the balancing test set forth in *Globe*, Part V concludes that it is highly unlikely that closure in the trials of sex crimes will ever again be allowed. This note further concludes that closure is highly unlikely in any case other than one in which there is a threat to human life.

II. Background

The public trial has been a tradition deeply rooted in the English common law since the time of William the Conqueror.¹⁴

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." *Id.*

10. See *infra* notes 55-58 and accompanying text.

11. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2620-22. See *infra* notes 82-90 and accompanying text.

12. See Goodale, *Globe Newspaper Case Expands Media Right of Access to Trials*, NAT'L L.J., July 19, 1982, at 24-25.

13. As to these proceedings, see *infra* notes 22-32 and accompanying text.

14. See generally E. JENKS, A SHORT HISTORY OF ENGLISH LAW (2d ed. 1922) (background on common law public trials). See also Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 381 (1932); *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2617; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73 (1980) (plurality opinion).

The same tradition was also evident in early American legal history, and the public trial was expressly provided for in the sixth amendment to the United States Constitution.¹⁵ Legal scholars have offered a variety of reasons for this tradition of openness and its continued necessity. Professor David M. O'Brien wrote:

The publicity of trials is principally viewed as deterring judicial arbitrariness, thereby ensuring the accused a right to a fair trial. . . . The presence of members of the public is also thought to reduce the possibility of a witness's perjury while at the same time encouraging individuals who possess relevant information to come forth and testify. Finally, open trials serve important public interests. . . . Publicity both educates people about the operation of the judiciary and provides an opportunity for members of the public to scrutinize the administration of justice.¹⁶

Despite what appears to be an "unbroken, uncontradicted history"¹⁷ of openness in criminal trials, however, several issues

15. The sixth amendment refers only to the *accused*: "In all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI (emphasis added). It has been suggested that this language was not intended by the framers to alter the common law tradition of open trials. *Gannett Co. v. DePasquale*, 443 U.S. 368, 427 (1979) (Blackmun, J., dissenting). See B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971) (an historical approach to individual liberties); *SOURCES OF OUR LIBERTY* 188 (R. Perry ed. 1959) (a documentary history of individual liberties in the United States Constitution).

16. D. O'BRIEN, *THE PUBLIC'S RIGHT TO KNOW* 125-26 (1981). Jeremy Bentham regarded the public trial as a keystone, stating, "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). In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), Chief Justice Burger advanced several important governmental interests in support of the public trial. He saw the public trial as prophylactically providing an outlet for community concern, hostility, and emotion after a particularly heinous crime. He also saw a check on the proper functioning of the judicial system inasmuch as the openness discouraged perjury, misconduct, and biased opinions. The Chief Justice further noted that the educational value of the public trial was an important interest accruing to the public. *Id.* at 569-73.

17. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion). See *In re Oliver*, 333 U.S. 257 (1948), in which Justice Black wrote:

We have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. . . . This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English Common Law

have arisen in recent American jurisprudence concerning the public nature of the criminal trial.¹⁸

A primary issue in the public trials controversy is whether the press and public have any right to gather information. The Supreme Court, having often considered this issue,¹⁹ has generally found that there is a right, albeit a limited right, to gather information from governmental institutions.²⁰ The right was first explicitly recognized by the United States Supreme Court in 1972 in *Branzburg v. Hayes*,²¹ a case involving a newsman's right to withhold confidential information in grand jury proceedings; the right has been continuously refined throughout the 1970's and into the 1980's. Among the governmental institutions to which this limited right to gather information has been extended

Heritage.

Id. at 266. *Accord* Sheppard v. Maxwell, 384 U.S. 333 (1966), in which Justice Clark wrote, "[t]he principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *Id.* at 349 (quoting *In re Oliver*, 333 U.S. at 268).

18. A distinction must be drawn between the issue of the public trial and that of trial publicity. The latter issue involves media coverage of and the dissemination of information from trials while the former involves the openness of the courtroom during a trial. This Note focuses only on the public trial and the right of access to such a trial.

19. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Greer v. Spock*, 424 U.S. 828 (1976); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

20. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972) in which it was stated that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. See also *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (federal limitations on press visitors to prisons upheld because public access was generally limited); *Pell v. Procunier*, 417 U.S. 817, 833 (1974) (California regulation prohibiting press interviews with prisoners upheld because the press had no specially secured right of access not available to the general public). See generally Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166 (1975) (analysis of the constitutional basis for the right to gather information); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974) (analysis of the right to gather and its limitations).

21. 408 U.S. 665 (1972). In *Branzburg*, three reporters, *Branzburg*, Pappas, and Caldwell, had written articles regarding narcotics, Massachusetts' Black Panthers, and California's Black Panthers respectively. All three had refused to disclose the identities of their informants after having been subpoenaed by a grand jury. *Id.* at 667-79. The Supreme Court refused to give these refusals constitutional protection viewing the burden on news-gathering as uncertain and insufficient. *Id.* at 690. Notwithstanding the Court's refusal to give constitutional protection to these particular petitioners, the majority recognized the need for such protection stating that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681.

are prisons,²² jails,²³ military bases,²⁴ and courts.²⁵ In recent years, the courts have been at the center of much of the controversy.

There are certain recognized exceptions to the general right to gather information. These include cases involving undercover agents,²⁶ trade secrets,²⁷ hijacker profiles,²⁸ and sexual abuse.²⁹ In addition, judges have discretion to exclude people from the courtroom to prevent disorder or disturbance,³⁰ control overcrowding,³¹ and protect certain witnesses.³² Notwithstanding

22. See, e.g., *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (press access to prison limited to scope of public access).

23. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (press access recognized, but limited to exclude area of jail in which a suicide occurred).

24. See, e.g., *Greer v. Spock*, 424 U.S. 828 (1976) (federal regulation prohibiting demonstrations on military bases upheld absent prior approval).

25. See *infra* notes 26-32.

26. See, e.g., *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975) (exclusion of courtroom spectators during testimony of two undercover narcotics agents); *People v. Eason*, 40 N.Y.2d 297, 353 N.E.2d 587, 386 N.Y.S.2d 673 (1976) (public excluded during undercover agents' testimony); *People v. Hinton*, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972), *cert. denied*, 410 U.S. 911 (1973) (public excluded during testimony of active undercover narcotics agents). *But see* *People v. Cuevas*, 50 N.Y.2d 1022, 409 N.E.2d 1360, 431 N.Y.S.2d 686 (1980) (exclusion during undercover agents' testimony struck down as trial judge did not adequately investigate the asserted threat of harm).

27. See, e.g., *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974) (exclusion of the press and public permitted during the discussion of a secret process of manufacturing plastics). The *Stamicarbon* court noted that "[t]he need for a sensitive accommodation of both interests involved in this case is emphasized by the fact that no fewer than twenty states . . . have enacted statutes making appropriation on unauthorized disclosed [sic] of trade secrets a crime." *Id.* at 540 n.11.

28. See, e.g., *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972) (press, public, and defendant excluded from a suppression hearing during revelation of hijacker profile criteria and discussion related thereto); *United States v. Lopez*, 328 F.Supp. 1077 (1971) (exclusion of press, public, and possibly of the defendant); *But cf.* *United States v. Clark*, 475 F.2d 240, 248 (1973) (exclusion of the defendant during discussion related to hijacker profile was deemed violative of his sixth amendment rights).

29. See, e.g., *Geise v. United States*, 262 F.2d 151 (1958) (exclusion of general public, but not press, during the testimony of a nine-year-old rape victim disallowed); *Melanson v. O'Brien*, 191 F.2d 963 (1st Cir. 1951) (entire rape trial involving minor victim closed to the public); *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935) (exclusion of public during testimony of minor rape victim permitted).

30. See, e.g., *United States v. Akers*, 542 F.2d 770 (1976) (exclusion of public at rendering of verdict in a bombing case where disruption was threatened if the verdict was unfavorable to the defendants).

31. See, e.g., *United States v. Kobli*, 172 F.2d 919 (1949) (exclusion of persons hav-

these recognized exceptions, courts have restricted public access to criminal trials in very few cases. Indeed, in cases where a courtroom was closed to the press and public, it was done on a temporary, and often partial, basis.³³

Traditionally, courts have employed a common law and sixth amendment analysis to resolve access cases.³⁴ It was often disputed whether the sixth amendment right to a public trial was one personal to the accused or general to the public and press.³⁵ This issue was eventually resolved in *Gannett Co. v. DePasquale*.³⁶

In *Gannett*, the press and public were excluded from a pre-trial suppression hearing in a murder case for fear that adverse publicity would jeopardize the defendants' rights to a fair trial.³⁷ The Supreme Court, in upholding the exclusion, held that the sixth amendment right to a public trial was a personal right of the accused, not one of access to the press and public.³⁸ This holding, although it can be narrowly construed to include only pre-trial proceedings,³⁹ was a major setback in the public's efforts to gain recognition of a constitutional right of access to criminal trials.⁴⁰ Its effect, however, was not as momentous as it

ing no connection with the case to preserve the morals of the courtroom's youthful spectators).

32. See, e.g., *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957 (1970) (menacing of government's sole identification witness was suitable ground for exclusion of menacers); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965) (exclusion of the general public allowed when intimidation and harassment of witnesses occurred).

33. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 430-32 n.11 (1979) (Blackmun, J., dissenting).

34. See generally Note, *The Right to Attend Criminal Hearings*, 78 COLUM. L. REV. 1308 (1978) (examination of asserted rights to attend pre-trial suppression hearings after *Gannett*).

35. See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *United States v. Cianfrani*, 573 F.2d 835 (3d Cir. 1978).

36. 443 U.S. 368 (1979).

37. *Id.* at 375.

38. *Id.* at 391. Justice Stewart, writing for the majority, stated that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its [sixth amendment] guarantee . . . is personal to the accused." *Id.* at 379-80.

39. There was considerable confusion after the *Gannett* opinion as to its scope. Justice Stewart used the words "trial" and "pre-trial" seemingly interchangeably in his opinion thus causing a rash of extrajudicial comments. See Keeffe, *The Boner Called Gannett*, 66 A.B.A. J. 227, 227 (1980).

40. See S. Rudoff and R. Sugarman, *Fair Trial-Free Press - Key Issues Linger*, 184

might have appeared at the time.

In light of *Gannett*, the courts moved more toward applying a first amendment analysis in access cases. Indeed, cases have suggested that the Supreme Court was leaning toward first amendment protection for the right of access to information.⁴¹ Those cases, however, generally dealt with the first amendment right to disseminate information once gathered.⁴² It was not until 1980 that the same protection was afforded the right of access to such information.

In 1980, the Supreme Court finally recognized a general first amendment right of access to criminal trials. In *Richmond Newspapers, Inc. v. Virginia*,⁴³ the press and public were excluded from the courtroom during the fourth attempt to try a defendant for one murder.⁴⁴ In reversing the Virginia Supreme Court's affirmance of the closure order, the Supreme Court held that implicit in the first amendment was a right of access suggested and supported by an "unbroken, uncontradicted history"⁴⁵ of openness and by several important governmental purposes.⁴⁶ The right, however, was not deemed absolute by the Court. It is noteworthy that no standards were set forth by which future cases could be evaluated.⁴⁷ Chief Justice Burger, writing the plurality opinion, merely stated that a closure order would have to be supported by "an overriding interest articu-

N.Y.L.J. Aug. 28, 1980, at 1, col.2.

41. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972). For a discussion of this decision, see *supra* note 21 and accompanying text.

42. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (first amendment protection afforded persons who reported truthful information concerning pending cases or grand jury investigations). See also *Craig v. Harney*, 331 U.S. 367 (1947) (contempt citation issued for publication of editorial pertaining to pending cases struck down). In *Craig*, Justice Douglas wrote: "A trial is a public event. What transpires in the court room is public property." *Id.* at 374.

43. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

44. *Id.* at 559-60.

45. *Id.* at 573.

46. *Id.* at 569-73. See *supra* note 16 for an exposition of the reasons cited.

47. The plurality opinion did not address the issue of standards, stating: [w]e have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public Just as government may impose reasonable time, place, and manner restrictions upon the use of its streets . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

Id. at 581 n.18.

lated in findings" in order for it to be effective.⁴⁸

Although *Richmond Newspapers* was the "watershed case"⁴⁹ in this area of communications and first amendment law, the opinion left several questions unanswered. The most crucial of these questions was the extent of the newly-recognized right of access.⁵⁰ In addition, it was unclear whether the right extended to the civil context⁵¹ or to pre-trial proceedings.⁵² In 1982, the Supreme Court began to clarify *Richmond Newspapers* with *Globe Newspaper Co. v. Superior Court of Norfolk*.⁵³

III. *Globe Newspaper Co. v. Superior Court of Norfolk*⁵⁴

A. *The Facts and the Lower Courts' Decisions*

In April, 1979, a Massachusetts trial judge excluded the press and the general public from a courtroom during a rape trial involving three minor victims.⁵⁵ *Globe Newspaper Company* (*Globe*), a local publisher, moved to compel the court to revoke the closure order and to hold hearings on related preliminary

48. *Id.* at 581.

49. *Id.* at 582 (Stevens, J., concurring). This classification of the *Richmond* case was first coined by Justice Stevens.

50. Despite the uncertainty as to the unanswered questions, it was generally agreed that *Richmond Newspapers* was a major victory for the press. See, e.g., Note, *Public Trials and a First Amendment Right of Access: A Presumption of Openness*, 60 N.E. L. REV. 169 (1981); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 149 (1980) (description of *Richmond Newspapers* as a "significant and salutary recasting of much first amendment doctrine"); *Richmond Decision Seen as Having a Major Effect*, 6 MEDIA L. RPTER. 11 (1980) (characterization of *Richmond Newspapers* as "one of the two or three most important decisions in the history of the first amendment").

51. The *Richmond Newspapers* Court did, however, recognize that civil trials have been historically open. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 580 n.17.

52. The *Richmond Newspapers* Court did not specifically address how the right of access applied to pre-trial proceedings. It is interesting to note, however, that on the same day that *Richmond Newspapers* was decided, the Court denied certiorari to a case involving a challenge to the order of the closure of a pre-trial suppression hearing. See *Merola ex rel. New York v. Bell*, 47 N.Y.2d 985, 393 N.E.2d 1038, 419 N.Y.S.2d 965 (1979), cert. denied, 448 U.S. 910 (1980). There has yet to be a settlement of this issue despite public outcries for a resolution. See, e.g., *Wiping the Graffiti Off the Courtroom*, N.Y. Times, July 3, 1980, at A18, col.1 (calling for the overruling of *Gannett*).

53. 102 S. Ct. 2613 (1982).

54. *Id.*

55. *Globe Newspaper Co. v. Superior Court*, 379 Mass. 846, 848-49, 401 N.E.2d 360, 363 (1980). The defendant was charged with the forcible rape and forced unnatural rape of three girls aged 16, 16, and 17. *Id.* at 849, 401 N.E.2d at 363.

motions.⁵⁶ Relying on a state statute,⁵⁷ the trial court denied Globe's motions and ordered the courtroom closed during the entire trial.⁵⁸

Globe subsequently sought injunctive relief from a single justice of the Supreme Judicial Court of Massachusetts.⁵⁹ After again being denied relief, Globe appealed to the full court.⁶⁰ In the meantime, however, the defendant's trial proceeded, resulting in an acquittal.⁶¹

Several months after the defendant's acquittal, the supreme judicial court issued its judgment, holding that the closure statute⁶² related to the closure of a trial only during the minor victims' testimony.⁶³ The court further noted that the word "shall" in the statute was mandatory in nature, thus requiring such closure.⁶⁴ Closure of the remaining portions of the trial, however, was left to the trial judge's "sound discretion."⁶⁵

56. *Id.* at 848, 401 N.E.2d at 363.

57. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981). *See supra* note 9.

58. *Globe Newspaper Co. v. Superior Court*, 379 Mass. at 848, 401 N.E.2d at 363. Both the defense and the prosecution immediately reacted to this order. The defendant objected and the prosecution stated, for purposes of the record, that the order was issued on the court's own motion and not at the request of the Commonwealth. *Id.*

59. *Globe Newspaper Co. v. Superior Court*, 379 Mass. 846, 847, 401 N.E.2d 360, 362 (1980). Globe's petition was filed pursuant to MASS. GEN. LAWS ANN. ch. 211, § 3 (West 1958 & Supp. 1982) which provides in relevant part: "The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; . . . [T]he justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction" During the hearing on the issue, the Commonwealth waived all rights to exclude the press on behalf of the victims. *Globe Newspaper Co. v. Superior Court*, 379 Mass. at 849, 401 N.E.2d at 363.

60. *Id.* at 847, 401 N.E.2d at 362.

61. *Id.* at 849, 401 N.E.2d at 363. The facts here give rise to the issue of whether the case is moot. Indeed, the Supreme Judicial Court initially considered the case moot. *Id.* at 847-48, 401 N.E.2d at 362. For further discussion of this issue, *see infra* notes 71-74 and accompanying text.

62. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981). *See supra* note 9 for the text of the statute.

63. *Globe Newspaper Co. v. Superior Court*, 379 Mass. 846, 861, 401 N.E.2d 360, 370 (1980).

64. *Id.* at 864, 401 N.E.2d at 370-71.

65. *Id.* at 864, 401 N.E.2d at 371. The court recognized two governmental purposes behind the statute. First, the purpose of encouraging young victims of sexual offenses to report such offenses was furthered by the closure of the trial. Second, the court saw the provision as designed to protect young victims from psychological harm after they have come forward as witnesses. *Id.* at 860, 401 N.E.2d at 369. In addition, the court reserved

Globe subsequently appealed to the United States Supreme Court, which vacated the judgment of the supreme judicial court and remanded the action for consideration in light of the recent decision in *Richmond Newspapers, Inc. v. Virginia*.⁶⁶ The Supreme Judicial Court of Massachusetts, on remand, again dismissed Globe's appeal⁶⁷ noting that sexual assault cases are "one notable exception" to the "unbroken tradition of openness" in criminal trials.⁶⁸ Globe again appealed to the United States Supreme Court, which noted probable jurisdiction.⁶⁹

B. *The Supreme Court Decision*

1. *The majority opinion*⁷⁰

The Court first considered whether the acquittal of the defendant rendered the case moot.⁷¹ It applied the principle of *Southern Pacific Terminal Co. v. ICC*⁷² that "jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute . . . is one 'capable of repetition, yet evading review.'"⁷³ In doing so, the majority found that the

the first and sixth amendment claims made by Globe pending the United States Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). *Globe Newspaper Co. v. Superior Court*, 379 Mass. at 854, 401 N.E.2d at 366.

66. 448 U.S. 555 (1980).

67. *Globe Newspaper Co. v. Superior Court*, ____ Mass. ____, ____, 423 N.E.2d 773, 781 (1981).

68. *Id.* at ____, 423 N.E.2d at 778. In its opinion, the Supreme Judicial Court cited the following sexual assault cases as authority: *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir.), *cert. denied*, 434 U.S. 1076 (1978) (court closed to the public during the testimony of the 21-year-old victim); *Harris v. Stephens*, 361 F.2d 888, (8th Cir.), *cert. denied sub nom.*, *Harris v. Bishop*, 386 U.S. 964 (1967) (closing of rape trial during the testimony of the 23-year-old victim). *Globe Newspaper Co. v. Superior Court*, ____ Mass. at ____, 423 N.E.2d at 778. In addition, the court pointed to the "genuine state interests" in the mandatory-closure rule. *Id.* at ____, 423 N.E.2d at 779.

69. 454 U.S. 1051 (1981).

70. Justice Brennan, writing for the majority, was joined by Justices Marshall, Blackmun, White, and Powell. Justice O'Connor filed an opinion concurring in the judgment. Chief Justice Burger filed a dissenting opinion in which Justice Rehnquist joined. Justice Stevens filed a dissenting opinion.

71. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2618. U.S. CONST. art. III, § 2 limits the Supreme Court's jurisdiction to actual cases and controversies.

72. 219 U.S. 498 (1911). *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2618.

73. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976) (quoting *Southern Pa-*

issue at hand met that standard since it was foreseeable that the publisher would someday be subjected to another trial closure pursuant to Massachusetts' mandatory closure statute.⁷⁴ Thus, the majority proceeded to the merits of the case.

The majority began its analysis noting that "[u]nderlying 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.'"⁷⁵ This protection, the majority stated, ensured effective participation in the American republican form of self-government and informed discussion of governmental affairs.⁷⁶

The Court then analyzed two features of the criminal justice system to demonstrate the propriety of constitutional protection of the right of access to criminal trials. First, it recognized the historical openness of the criminal trial to the press and the general public, stating: "This uniform rule of openness has been viewed as significant in constitutional terms not only 'because the Constitution carries the gloss of history,' but also because 'a tradition of accessibility implies the favorable judgment of experience.'"⁷⁷ Second, the majority commented that "the institutional value of the open criminal trial is recognized in both logic and experience" since public scrutiny "enhances the quality and safeguards the integrity of the factfinding process . . . [and] fosters an appearance of fairness, thereby heightening public respect for the judicial process."⁷⁸

After recognizing the constitutional right of access to criminal trials, the majority warned that the right was not absolute.⁷⁹ Instead, each closure order was to be subjected to a balancing test. This test required a showing that any denial of access to criminal trials is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."⁸⁰ The ma-

cific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911)).

74. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2618.

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

76. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2619.

77. *Id.* (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 589).

78. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2620.

79. *Id.* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581 n.18 (plurality opinion)).

80. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2620. *See Brown v. Hartlage*, 102 S. Ct. 1523 (1980), in which it was stated: "When a State seeks to

jority then examined the two state interests asserted by Massachusetts in support of the mandatory closure rule.

Massachusetts first asserted that the mandatory closure rule was necessary to protect the minor victims of crime from further trauma and embarrassment.⁸¹ While acknowledging the compelling nature of this interest, the majority dismissed it as an insufficient justification of a *mandatory* closure rule. Instead, it recommended a case-by-case analysis considering several factors: the victim's age, psychological maturity and understanding, the desires of the victim, and the interests of the parents and relatives.⁸² The majority commented further that, in the instant case, the victims' names were in the public record, and that there was some indication that they were willing to testify in open court.⁸³ The Court thus determined that the mandatory rule could not be considered "a narrowly tailored means of accommodating the state's asserted interest."⁸⁴

Massachusetts also asserted that its closure rule was designed to encourage minor victims to come forward and provide accurate testimony.⁸⁵ This interest, the majority stated, was "[n]ot only . . . speculative in empirical terms, but . . . also open to serious question as a matter of logic and common sense."⁸⁶ Citing the fact that the statute could not prevent the

restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported not only by a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression." *Id.* at 1529.

81. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2620.

In its opinion . . . , the Supreme Judicial Court of Massachusetts described the interests in the following terms: '(a) to encourage minor victims to come forward to institute complaints and give testimony . . . ; (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage . . . ; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright or embellishment; (d) to promote the sound and orderly administration of justice . . . ; (e) to preserve evidence and obtain just convictions.'

Id. at 2621 n.18 (quoting *Globe Newspaper Co. v. Superior Court*, ____ Mass. at ____, 423 N.E.2d at 779).

82. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2621.

83. *Id.*

84. *Id.*

85. *Id.* at 2622.

86. *Id.*

publication of the substance of the minors' testimony,⁸⁷ the majority posited that the statute did not effectively advance the asserted interest.⁸⁸ Even if the interest was effectively advanced, the Court doubted that it was sufficient to withstand constitutional attack because it could be used in various situations and thus "proves too much."⁸⁹

Thus, since the state's interests did not meet the majority's test, the mandatory closure statute was held unconstitutional as violative of the first amendment.⁹⁰

ii. *Chief Justice Burger's dissent*

Chief Justice Burger, joined by Justice Rehnquist, began his dissent by characterizing the majority's holding as advancing "a disturbing paradox."⁹¹ He noted that while the states were allowed to protect minors charged with crimes,⁹² they were not allowed to protect minors who were the innocent victims of crime.⁹³ This paradox, coupled with what the Chief Justice considered "a cavalier rejection of the serious interests supporting [the] mandatory closure rule,"⁹⁴ contributed to the majority's alleged misrepresentation of the historical record of open proceedings in cases involving sexually abused minors.⁹⁵

Chief Justice Burger initially balanced the state's interest in protecting victims against the first amendment rights of press and public. He was unable to find more than a "minimal impact"⁹⁶ on the first amendment right. On the other hand, he rec-

87. *Id. Cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (invasion of privacy action brought by father of deceased rape victim after publication of the victim's name). *See also Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (statute punishing publication of the name of a minor convicted of a crime declared unconstitutional).

88. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2622.

89. *Id.*

90. *Id.* at 2622. In a brief concurring opinion, Justice O'Connor stressed that neither the Court's decision in *Globe* nor the *Richmond Newspapers* decision extended beyond the criminal context. *Id.* at 2623.

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

92. *Id. See, e.g., MASS. GEN. LAWS ANN. ch. 119, § 60A* (West 1970 & Supp. 1982) (protection of minor offenders from public inspection of delinquency records).

93. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2623 (Burger, C.J., dissenting).

94. *Id.* at 2624.

95. *Id.*

96. *Id.* at 2625. In his characterization of the impact of the closure statute as mini-

ognized Massachusetts' interest in protecting a minor from certain psychological damage as overriding such first amendment concerns.⁸⁷

The Chief Justice next attacked the majority's characterization of the state's latter argument as "'open to serious question as a matter of logic and common sense.'" ⁸⁸ He argued that the majority had misperceived the crux of the state's argument. Instead of focusing on the prevention of the humiliation of the victim by having to testify before a courtroom of strangers, he contended, the majority mistakenly viewed the issue as one of confidentiality.⁸⁹ He concluded: "Many will find it difficult to reconcile the concern so often expressed for the rights of the accused with the callous indifference exhibited today for children who, having suffered the trauma of rape . . . are denied the modest protection the Massachusetts legislature provided."¹⁰⁰

IV. Analysis

The *Globe* decision was a much needed clarification of the first amendment right of access to criminal trials. The effects of the decision will be felt, to varying degrees, by the press, the public, and victims of rape. The question remains, however, whether the case should have been heard by the Supreme Court.

In its dismissal of the mootness claim,¹⁰¹ the majority used

mal, Chief Justice Burger contended that both the press and the public would have prompt and full access to all of the victims' testimony after it was given in the closed courtroom. *Id.* Furthermore, the Chief Justice noted that there was a strong indication that the victims would only have testified upon certain guarantees of strict privacy. *Id.* at 2623 n.1.

97. *Id.* at 2626. See generally BOHMER & BLUMBERG, *Twice Traumatized: The Rape Victim and the Courtroom*, 58 JUDICATURE 390 (1975) (report of study of rape trials and their effects on victims); LIBAI, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977 (1969) (analysis of the rights and needs of the child victim before and during trial).

98. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2622 (Burger, C.J., dissenting) (quoting majority opinion at 2622). See *supra* text accompanying note 87.

99. *Id.* at 2626.

100. *Id.* at 2627. In a brief dissent, Justice Stevens contended that the Court never should have reached the merits of the case because the case was moot. *Id.* at 2629. Indeed, Justice Stevens saw the majority's decision as an expansion of the mootness doctrine in cases "capable of repetition, yet evading review." *Id.* at 2627 (quoting *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911)).

101. See *supra* notes 71-74 and accompanying text.

the "capable of repetition, yet evading review" standard¹⁰² to justify the Court's assertion of jurisdiction in *Globe*. The reliance on this standard in this instance, as Justice Stevens pointed out in dissent,¹⁰³ expands this exception to the mootness doctrine. This expansion is demonstrated in that the statute, "as presently construed," had never been applied in a live controversy.¹⁰⁴ *Globe* was appealing closure of the entire trial. It could not have appealed the supreme judicial court's mandatory partial closure construction, because this construction had not been applied to the rape trial in question. This suggests that *Globe* was a mere advisory opinion, and, thus, the Court's assertion of jurisdiction was erroneous.¹⁰⁵ The Court was apparently overzealous in its desire to resolve the ambiguities which followed *Richmond Newspapers*.

Notwithstanding the dubious assertion of jurisdiction in this case, the *Globe* Court set forth a balancing test which may be instrumental in the future construction of the first amendment right of access to criminal trials. The majority stated: "Where . . . 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.*"¹⁰⁶ This strict standard was justified by the *Globe* Court through its references to the historical openness of the criminal trial and the public policy value of providing a check on the criminal justice system.¹⁰⁷ The balancing test finally gives meaning to the *Richmond Newspapers* Court's requirement of "an overriding inter-

102. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

103. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2627-28 (Stevens, J., dissenting). See also *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. at 515.

104. *Id.* at 2627. Justice Stevens pointed out that after the initial closure order of the entire trial, the Supreme Judicial Court of Massachusetts construed the word "shall" in the statute as mandating closure only during the testimony of the minor victim. *Globe Newspaper Co. v. Superior Court*, 379 Mass. at 864, 401 N.E.2d at 370-71.

105. The Supreme Court is without the power to give advisory opinions. See *Stearns v. Wood*, 236 U.S. 75 (1915); *Muskra v. United States*, 219 U.S. 346 (1911); *United States v. Evans*, 213 U.S. 297 (1909). It has long been considered practice not to decide abstract, hypothetical, or contingent questions. See *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937); *District of Columbia v. Brooke*, 214 U.S. 138 (1909).

106. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2620 (emphasis added).

107. See *supra* notes 77-79 and accompanying text.

est articulated in findings."¹⁰⁸

The *Globe* decision will have its gravest effect on the victims of sex crimes. The protection of these victims has indeed been "one notable exception"¹⁰⁹ to the historical openness of the criminal trial.¹¹⁰ The test provided by the *Globe* majority, however, effectively destroys this exception. In its place, the Court proposed a case-by-case analysis of such factors as the victim's age, psychological maturity and understanding, the desires of the victim, the nature of the crime, and the desires of the parents and relatives.¹¹¹

In the context of the *Globe* factual situation, the Court purported to apply this balancing test. There is some doubt, however, as to whether the facts as analyzed were an accurate representation of the situation. For instance, the majority indicated that the victims "may have been willing to testify despite the presence of the press."¹¹² Chief Justice Burger pointed out in his dissent, however, that the victims' willingness to testify in open court was based largely on guarantees of anonymity which are rarely given.¹¹³ The omission of this fact in the majority opinion demonstrates the majority's anxiousness to strike down the closure statute and to effectively create a virtually irrebuttable presumption of openness in the trials of sex crimes. The majority did, however, create the balancing test which, theoretically, would permit closure when the factors weighed evidenced a se-

108. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581. The *Richmond Newspapers* plurality expressly reserved the question of standards, thereby creating the need for cases like *Globe*. See *supra* notes 47-48 and accompanying text.

109. *Globe Newspaper Co. v. Superior Court*, ___ Mass. at ___, 423 N.E.2d at 778. See, e.g., *United States v. Geise*, 262 F.2d 151 (1958) (exclusion of public, but not press, from trial for rape of minor a valid exercise of judicial discretion). See also *The First Amendment Right of Access to Sex Crime Trials*, 22 B.C.L. Rev. 361 (discussion of rationales behind such closure and suggested compromises between the rights of victims and the rights of press and public).

110. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2619.

111. *Id.* at 2621.

112. *Id.*

113. *Id.* at 2623 n.1. Chief Justice Burger wrote:

It certainly cannot be said that the victims . . . consented to testifying in open court "Each of [the three victims] indicated that they had the same [privacy] concerns And they stated that if it were at all possible to obtain a guarantee that this information [names, photographs, or personal data] would not be used, then they wouldn't object to the press being included."

Id.

vere threat of harm. In doing so, the Supreme Court set the tone for future applications of the *Globe* test by its application of the test to the particular facts of this case. By placing such great emphasis on the benefits which would accrue to the government and the public and so little weight on the interests of the victims, the Court has implicitly approved future unbalanced applications of its own balancing test.

The majority's creation of such a strict standard will also have an effect on the press and public. Both groups will now be able to know not only the substance of the victims' testimony, but also the manner in which the victims testified. It is difficult to see what legitimate interest the press and public have in witnessing this testimony, and the risk of media sensationalism is greatly enhanced. Additionally, it can be contended that the deprivation of first-hand observation has only an incidental impact on the right to gather information, since closure was mandated during only one portion of the trial. Furthermore, in answering the state's assertion that closure protects the victim, the majority noted that the victims' names were already in the public record and that transcripts of the trial were available.¹¹⁴ This very response should have answered the majority's concern that "free discussion" would be impeded. As Chief Justice Burger emphasized in dissent, the purpose of the closure statute was not to preserve confidentiality, but to prevent the victim from trauma or embarrassment. Thus, *Globe* merely gives the press and the public the additional right of *being present in the courtroom*, since their first amendment right to know was never abridged.

In addition to the effects that *Globe* will have on the sex crime exception, it will have vast implications for other traditionally closed portions of criminal proceedings. A categorization of the various interests to be balanced pursuant to *Globe* will suggest a hierarchy of interests and their corresponding weight on the *Globe* scale.

The first category would consist of those cases involving a threat to human life. The undercover agent,¹¹⁵ hijacker profile,¹¹⁶

114. *Id.* at 2621.

115. In *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (1975), the court stated that "shielding the identity of a police witness, preserving his future usefulness,

and witness protection¹¹⁷ exceptions will all fall into this category. After *Globe*, it remains unlikely that courts will deny closure in the first two of these exceptions.¹¹⁸ Although not expressly stated in the *Globe* opinion, the majority implied that had the victims' ages, psychological maturity, and understanding been such that they would suffer additional trauma or embarrassment in open court, then closure would be allowed. By implication, then, the Court would allow the protection of one's life as well as one's psychological state. It seems safe to posit that the lives of agents and potential passengers far outweigh the "institutional value"¹¹⁹ of the public trial on the *Globe* scale. As to the third exception, witness protection, the answer is not as clear. If the identity of the witness is to be preserved, closure will most likely be allowed if human life is at stake. If, however, the mere harassment or embarrassment of the witness is involved, the court is likely to be more reticent in granting closure orders for any portion of the trial.

A second category of interests would include those cases dealing with the threat of economic harm. An exception that falls within this category is trade secrets.¹²⁰ These cases fall

and safeguarding his life provides an adequate justification for excluding the public " *Id.* at 1274-75.

116. In *United States v. Bell*, 464 F.2d 667 (1972), the court wrote: "We need no citation of authority or statistics to establish that . . . hijacking . . . poses a continuing hazard to public travel." *Id.* at 669.

117. In *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), *cert. denied*, 397 U.S. 957 (1970), the trial judge, after learning that the government's sole identification witness was in mortal fear of certain courtroom spectators, cleared the courtroom. In permitting that closure, the circuit court stated that "[a]bsent quite extraordinary circumstances, the trial counsel and trial judge then on the scene should be presumed to be the best qualified to appraise the situation requiring trial rulings." *Id.* at 129.

118. Throughout its opinion, the majority stressed that its holding was limited. In fact, James Goodale, a prominent communications lawyer, pointed out that "there are many limiting features to the [*Globe*] opinion. There are 27 footnotes that almost act as a counterpoint to the main theme of the opinion, most of which seek to narrow the opinion." Goodale, *Globe Newspaper Case Expands Media Right of Access to Trials*, NAT'L L.J., July 19, 1982, at 25. He then suggests that the footnotes were inserted only to persuade the Chief Justice to join the opinion as he was the author of the landmark *Richmond Newspapers* opinion. *Id.* These limiting features of the opinion and the proposed case-by-case analysis suggest that the Court might allow closure if sufficiently justified by the state.

119. *Globe Newspaper Co. v. Superior Court of Norfolk*, 102 S. Ct. at 2620.

120. *See, e.g., Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir.

lower in the hierarchy of interests because they do not approach the import of protection of human life or prevention of psychological trauma. In *Stamiecarbon, N.V. v. American Cyanamid Co.*,¹²¹ for instance, the court stated that "[t]he precarious balance between private claims and the constitutional right to a public trial may be struck more easily when the accused is not faced with loss of liberty."¹²² Thus, the court willingly subordinated even the rights of the defendant when the only consideration was economic. In light of *Globe*, the trade secret exception will be available only upon a showing of greater than economic harm, effectively destroying this exception.

The third category of interests includes those cases where closure is allowed to preserve the decorum and dignity of the courtroom. This exception has two parts: overcrowding and courtroom disruption. In cases of overcrowding, the Court is likely to continue to permit closure under the protection of human life rationale. In the second part of this exception, however, closure is not likely to result.

Judges have traditionally been allowed to take certain steps to prevent courtroom disruption.¹²³ When press coverage or public behavior has proved disruptive, convictions have been overturned by the Supreme Court. The defendant's right to a fair trial is superior to the press' and public's right to gather information.¹²⁴ Considering the Court's recognition of the constitutional right of access in *Richmond Newspapers*, one would expect increased judicial tolerance of media coverage of trials. After *Globe*, a more stringent burden of proof is imposed upon those moving for closure. Whether closure to prevent courtroom

1974).

121. *Id.*

122. *Id.* at 540.

123. See, e.g., *United States v. Akers*, 542 F.2d 770 (9th Cir. 1976) (limited exclusion of spectators from courtroom during verdict delivery in a bombing case permitted).

124. Cases in this area bring forward another very important line of thought as to the precarious balance between media coverage of the trial and the fair trial rights of the defendant. The landmark cases in this area, however, are illustrative of the issue dealt with in this Note, the right of access. See *Estes v. Texas*, 381 U.S. 532 (1965) (conviction for swindling overturned when the Court determined that the televising of pre-trial and trial proceedings prevented defendant from receiving a fair trial). See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (murder conviction overturned when Court found that the publicity surrounding the trial prevented the defendant from receiving a fair trial).

disruption will be necessary in the future is uncertain. An electronically discreet media is rapidly evolving. Eventually, the public will view criminal trials in their own homes.¹²⁵ This would remove any disruption from the courtroom and effectively destroy the decorum exception.

V. Conclusion

Although the United States Supreme Court recognized the first amendment right of access to criminal trials in *Richmond Newspapers*, the *Globe* decision was its first attempt to define this right. The Court set forth a balancing test which, if applied properly, could provide constructive guidance in determining closure. The *Globe* Court's application of this test, however, has arguably placed an insurmountable burden on the state to justify closure in cases which do not involve a threat to the life or safety of any participant in the courtroom drama. If this application is an indication of future judicial treatment of closure, the *Globe* Court has perhaps opened the courtroom doors even wider than had been intended by the *Richmond Newspapers* Court.

John C. Hearn

125. See generally Abrahams, *New Efforts in States to Expand Camera Coverage of Courts*, 65 JUDICATURE 116-18 (Aug. 1981).