

## THE PRESS' RIGHT OF ACCESS TO CRIMINAL TRIALS: *GLOBE NEWSPAPER CO. v. SUPERIOR COURT*

The free press in America promotes meaningful democracy by informing the public about government conduct.<sup>1</sup> Because freedom of the press is a first amendment guarantee,<sup>2</sup> courts rigorously scrutinize<sup>3</sup> governmental attempts to encroach on press activities.<sup>4</sup> Media

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1. The Supreme Court has recognized, on several occasions, the press' role in aiding public supervision of government. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring) (the press as "agent of interested citizens"); *Saxbe v. Washington Post Co.*, 417 U.S. 863, 864 (1974) (Powell, J., dissenting) (the press as "agent of the public at large"). *See generally* *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (because individuals have limited time and resources, they rely on the press to provide them with information about governmental activity). Further, the Court has made numerous references to the role the press should theoretically play in the operation of democracy. *See, e.g.*, *Houchins v. KQED, Inc.* 438 U.S. 1, 8-9 (1978) (characterizing the media as an institution separate from the government yet instrumental in prompting remedial action within the government); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (referring to media as "constitutionally chosen means" for insuring faithfulness of elected officials to the public); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (calling the press a "mighty catalyst in awakening public interest in governmental affairs"). *See also* A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) (arguing that the first amendment is aimed at preventing bad public planning which often results from insufficient public awareness); Stewart, *Or of the Press*, 26 *HASTINGS L.J.* 631, 633-34 (1975) (explaining the structural essence of the press as a strong extra-governmental "branch" providing an overall check of the tri-partite governmental checks-and-balances scheme).

2. The first amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I. "Press," in this Comment, refers to all forms of news media.

3. For examples of the application of strict scrutiny in a variety of first amendment contexts, see *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982) (state must show substantial relationship between restrictions on political associations and a compelling state interest); *Shelton v. Tucker*, 364 U.S. 479 (1960) (associational restrictions may be imposed only via the least restrictive means); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (statute restricting religious freedom must address specific conduct considered to be dangerous).

In every case before the Supreme Court in which first amendment interests conflict, the issue becomes whether to balance first amendment rights against other interests guaranteed by the Constitution or to consider first amendment rights absolute. *See*

coverage of criminal trials provides an important check on the judiciary,<sup>5</sup> yet the coverage occasionally conflicts with the trial partici-

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Near v. Minnesota, 283 U.S. 697, 716 (1931) ("protection even as to previous restraint of free speech is not unlimited"). See also Gunther, *In Search of Judicial Duality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972). Perhaps the most vocal extra-judicial proponent of absolute protection for freedom of expression is Professor A. Meiklejohn. See, e.g., Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 464-66 (1953).

Rather than attempt to balance one constitutional interest against another, the Warren Court tested restrictive legislation for potential overbreadth. The Warren Court found overbroad those statutes which potentially invaded the first amendment rights of individuals whose behavior the state did not directly seek to punish. Under this theory, a less restrictive means could avoid the overbroad statute's "chilling effect" on an individual's exercise of personal liberties. See *United States v. Robel*, 389 U.S. 258 (1967) (federal act forbidding members of Communist organizations from employment in defense facilities encroached on both proscribable and permissible activity).

The Burger Court has criticized this approach as "too speculative." It has developed a narrower "substantial overbreadth" test. See, e.g., *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (discussing at length why organizations that do not use 75% of their income for charitable purposes cannot be barred from soliciting); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (rejecting overbreadth attack on a federal act permitting the discharge of employees to "promote the efficiency of the service"); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (emphasizing substantial overbreadth theme in upholding a statute which affected "conduct" rather than "speech"). See also Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) (purpose of the overbreadth doctrine is to avoid restricting the first amendment rights of parties whose conduct the legislature did not contemplate regulating). Cf. Gunther, *Reflections on Robel: It's Not What the Court Did But the Way That It Did It*, 20 STAN. L. REV. 1140, 1147-48 (1968) (criticizing the Court's failure to discuss viable, less restrictive alternatives to "overbroad" statutes). For general discussions of the overbreadth and substantial overbreadth doctrines, see G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1185-95 (1980) and L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 710-14 (1978).

4. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (rejecting Florida's state interest justification of a "right of reply" law that encroached on press freedom by allowing political candidates equal space to respond to criticism); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (declining to restrain publication of Pentagon Papers for lack of convincing national security arguments); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (refusing to find libel liability without a showing of malicious publication of a damaging untruth).

The press may be subject to criminal or civil sanctions for printing false and defamatory information. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (upheld civil liability for libelous publication); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (upheld civil liability for invading privacy); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upheld criminal libel statute).

5. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966):

A responsible press has always been regarded as the handmaiden of effective

pants' rights and interests.<sup>6</sup> In 1923, the Massachusetts Legislature enacted a statute mandating courtroom closure during testimony by juvenile sex offense victims.<sup>7</sup> The United States Supreme Court held in *Globe Newspaper Co. v. Superior Court*<sup>8</sup> that the Massachusetts statute's mandatory operation reached beyond the state's compelling interests in protecting the victim. The statute impermissibly restricted the press' constitutionally protected right of access to criminal trials.<sup>9</sup>

In *Globe*, a trial judge ordered courtroom closure of an entire rape trial<sup>10</sup> pursuant to the Massachusetts statute.<sup>11</sup> Unable to gain access to the courtroom,<sup>12</sup> the *Globe* attacked the statute as an unconstitutional encroachment on freedom of the press.<sup>13</sup> The Superior Court of Massachusetts dismissed the constitutional issues as moot.<sup>14</sup> To avoid future confusion, the Massachusetts court narrowed the stat-

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judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

*Id.* at 350. See also J. BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 67 (1825) (publicity "is the soul of justice").

6. See *infra* note 39 and accompanying text.

7. MASS. GEN. LAWS ANN. 278, § 16A (West 1923), provides in pertinent part: At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.

*Id.*

8. 457 U.S. 596 (1982).

9. *Id.* at 602.

10. *Id.* at 598.

11. MASS. GEN. LAWS ANN. 278, § 16A (West 1923).

12. 457 U.S. at 598. The *Globe* first moved that the trial court revoke the closure order, hear arguments, and allow the *Globe* to intervene. The Court denied these motions. The *Globe* then petitioned the Supreme Judicial Court of Massachusetts for extraordinary relief. A single Justice held a hearing at which the Commonwealth waived whatever right it had to exclude the press. Nevertheless, the justice denied access. The *Globe* then appealed to the full Supreme Judicial Court. *Id.* at 600.

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

14. *Id.* at 847-48, 401 N.E.2d at 362. The court dismissed the constitutional issues as moot because the trial was over, yet formally construed the statute in order to prevent a similar conflict in the future. *Id.*

ute's scope, construing it to mandate closure only during the juvenile complainant's testimony.<sup>15</sup> The Massachusetts court also noted that the statute promoted compelling state interests.<sup>16</sup> First, closure arguably reduced the emotional stress that often accompanies testifying before an unfamiliar audience.<sup>17</sup> Second, closure may abate the natural reluctance of sex offense victims to report crimes and testify for the state.<sup>18</sup>

The Massachusetts court subsequently reconsidered the Globe's challenge<sup>19</sup> in light of the United States Supreme Court's intervening

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15. 379 Mass. at 853, 401 N.E.2d at 365. The court listed principles of statutory construction, stressing its intent to interpret the statute consistently with the legislature's purpose. *Id.* Since the statute states merely that "at the trial . . . the presiding justice shall exclude the general public from the courtroom," MASS. GEN. LAWS ANN. 278, § 16A (West 1923), one justice read the statute to mandate closure of the entire trial. 379 Mass. at 866, 401 N.E.2d at 372 (Quirico, J., dissenting). The Massachusetts court grappled with the ambiguous meaning of "at the trial," and decided that since the state's previous case law offered no assistance in construing the phrase, the court should focus on the legislative policies behind the statute. *Id.* at 851-53, 861, 401 N.E.2d at 364-65, 370. The court then balanced the historical and constitutional arguments for open public trials against the psychological and evidentiary value derived from protecting a young sex offense victim from undue public scrutiny. *Id.* at 855-61, 401 N.E.2d at 366-69. The court concluded that despite the strong historical presumption in favor of open criminal trials, the state had a valid interest in mandating courtroom closure, but only during the victim's testimony. *Id.* at 861-63, 401 N.E.2d at 370-71. Further, in defining the class of "distinguished persons" who could be lawfully denied admission during testimony, the court held that the psychological harm which press attendance could impart on the victim outweighed its legitimate, non-voyeuristic purpose. *Id.* at 863-65, 401 N.E.2d at 371-72.

16. 379 Mass. at 857-63, 401 N.E.2d at 367-70.

17. *Id.* at 857-63, 401 N.E.2d at 367-70. See generally Librai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 984 (1969) (psychiatrists have found the "official atmosphere" in the courtroom capable of inflicting severe and prolonged emotional harm in children). Librai recommends technical innovations during testimony such as closed circuit television cameras and one-way mirrors in order to reduce the stress of having to testify before a "live audience." *Id.* at 1003.

For a thorough discussion of the criminal justice system's insensitivity toward rape victims, see Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977). Berger advocates closure as a means of "mitigating trauma." *Id.* at 88-89.

18. 379 Mass. at 857-61, 401 N.E.2d at 367-70. For a discussion of the frustration and inconvenience imposed upon crime victims when they are reduced to the status of mere witness, see H. BROWNELL, *THE FORGOTTEN VICTIMS OF CRIME* (1976); T. MCCAHILL, L. MEYER & A. FISCHMAN, *THE AFTERMATH OF RAPE* 211-12 (1979); Bohmer and Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 390 (1975).

19. 449 U.S. 894 (1980). Globe appealed the state decision to the United States

decision *Richmond Newspapers, Inc. v. Virginia*.<sup>20</sup> In *Richmond*, the Supreme Court ruled that the first amendment affords the press a protected right of access to criminal trials.<sup>21</sup> The Massachusetts court, applying the *Richmond* rule, nevertheless maintained that the statute did not unjustifiably restrict the press' right of access, because of the compelling nature of the state's interests.<sup>22</sup> The United States Supreme Court reversed this holding,<sup>23</sup> concluding that the statute's mandatory operation rendered it overly restrictive regardless of the state's admittedly compelling goals.<sup>24</sup>

In a series of cases decided in the mid-1970's dealing with press access to prisons and inmates,<sup>25</sup> the Supreme Court established that the press may claim no greater right of access to information than the

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Supreme Court. The Supreme Court remanded the case back to the state court for reconsideration. *Id.*

20. 448 U.S. 555 (1980). For a discussion of *Richmond Newspapers*, see *infra* notes 55-69 and accompanying text.

21. 448 U.S. at 575-81.

22. *Globe Newspaper Co. v. Superior Court*, 383 Mass. 838, 848-52, 423 N.E.2d 773, 779-81 (1981), *rev'd*, 457 U.S. 596 (1982). The Massachusetts court summarized the compelling aspects of the state's interests:

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 848, 423 N.E.2d at 779.

23. 457 U.S. 596 (1982).

24. *Id.* at 602. Although the state court's construction of the statute limited mandatory closure to the victim testimony segment, the Supreme Court invoked the overbreadth doctrine and declared the statute invalid. The majority reasoned that mandatory closure of even small parts of trials might operate in unwarranted situations and would therefore be an exercise of legislative overreach. *Id.* See *supra* note 3 for a discussion of the overbreadth doctrine and *infra* notes 70-90 and accompanying text for further discussion of the *Globe* holding.

25. See *Houchins v. KQED*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974). The factual situations of all three cases are very similar. In *Pell*, a request for prison interviews arose in the aftermath of a violent disruption which state prison officials attributed to certain prisoners that had attained notoriety as subjects of earlier individual interviews. 417 U.S. at 831. While no violence had occurred in the federal prison in *Saxbe*, the Court nevertheless found the *Saxbe* situation "constitutionally indistinguishable from *Pell* . . . and thus fully controlled by that case." 417 U.S. at 850. In *Houchins*, a state prison was the location of a suicide and several physical assaults. Reporters wanted to inspect allegedly adverse living conditions. 438 U.S. at 4-5.

general public.<sup>26</sup> The scope of this doctrine is limited by the non-public nature of prisons.<sup>27</sup> The press' right of access to the criminal courtroom, however, is implicit in the Anglo-American tradition of open trials.<sup>28</sup>

The sixth amendment explicitly grants criminal defendants the right to a public trial.<sup>29</sup> The policy of open criminal trials not only

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26. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (Stewart, J.) (while the first and fourteenth amendments prohibit government interference with the press, the Constitution does not require that government avail the press of information not accessible to the general public). For the theoretical and historical underpinnings of this position, see Stewart, *supra* note 1, at 636.

27. See, e.g., *Houchins*, 438 U.S. at 12; *Pell*, 417 U.S. at 826, 827 (because the function of a prison is to confine sometimes dangerous persons, security considerations are important enough to justify prohibitions of "face-to-face" contact between prisoners and outsiders). See generally L. TRIBE, *supra* note 3, § 12-21, at 688-91 (discussion of public forums, and non-forum government institutions in the context of freedom of speech).

The dissenting opinions in the prison cases urged further limitation of the majority holdings by quoting from the dictum of *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972): "without some protection for seeking out the news, freedom of the press could be viscerated," and "newsgathering is not without its first amendment protections." See, e.g., *Houchins*, 438 U.S. at 28 n.15 (Stevens, J., dissenting); *Pell*, 417 U.S. at 859 (Powell, J., dissenting joined by Brennan, J. and Marshall, J.). This argument resurfaces in the Chief Justice's opinion in *Richmond*. See *infra* notes 64-66 and accompanying text.

28. In both the United States and Great Britain, public trials are the historical norm. Criminal trials, especially, are presumptively open. See, e.g., E. JENKS, *THE BOOK OF ENGLISH LAW 73-74* (6th ed. 1967); A. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA 128-29* (1930); Reinsh, *The English Common Law in the Early American Colonies*, 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 397 (1907). Distrust of secret trials has roots in the Spanish Inquisition, the English Star Chamber, which elicited confessions by torture, and the French Monarchy's abuse of the *lettre de cachet*. See, e.g., *In re Oliver*, 333 U.S. 257, 268-70 (1948). See generally Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932).

29. The sixth amendment guarantees in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI. As incorporated into the due process clause of the fourteenth amendment, sixth amendment rights are guaranteed at the state as well as federal level. U.S. CONST. amend. XIV, § 1. See *In re Oliver*, 333 U.S. 257 (1948) (recognizing state defendant's right to a public trial).

Since *In re Oliver*, the court has had several occasions to interpret the sixth amendment public trial guarantee. See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (only the criminal defendant, not the public or press, may use the sixth amendment to challenge courtroom closure); *Estes v. Texas*, 381 U.S. 532, 538 (1965) (the sixth amendment is a guarantee of the accused). Cf. *Singer v. United States*, 380 U.S. 24, 35 (1965) (the sixth amendment does not give the defendant the converse right to compel courtroom closure) (dictum).

protects the defendant's fourteenth amendment right to a fair trial,<sup>30</sup> but also allows the public to supervise and participate in justice administration.<sup>31</sup> The press serves as agent and educator for members of the general public.<sup>32</sup> Trial judges in most jurisdictions, however, have discretion to limit public access in order to ensure decorum<sup>33</sup>

30. The criminal defendant is guaranteed a "fair trial" by the due process clauses of both the fifth and fourteenth amendments. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV.

31. Open trials promote societal interests beyond the defendant's immediate concerns. When fully informed of the circumstances giving rise to a particular criminal activity, the public may prompt extra-judicial reform through public discussion and political pressure. *See* Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1908 n.45 (1978) (public discussion of the Watergate affair resulted in legislative reforms of campaign practices). Awareness of trial proceedings may also prompt members of the public who possess pertinent information to come forward and testify. 6 J. WIGMORE, EVIDENCE § 1834, at 436 n.2 (J. Chadbourn rev. ed. 1976).

Open trials also help to maintain or increase public confidence in the criminal justice system. *See* Arnold, *The Criminal Trial as a Symbol of Public Morality*, CRIMINAL JUSTICE IN OUR TIME 141-43 (A. Howard ed. 1965); Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961) (open criminal trials culminating with an appropriate penal sentence satisfy the public revenge instinct); H. WEIHOFEN, *THE URGE TO PUNISH* 130-31 (1956). At a minimum, open trials create the appearance of justice. *See, e.g.,* *Levine v. United States*, 362 U.S. 610, 616 (1960) (right to a public trial reflects the common law concept that "justice must satisfy the appearance of justice") (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

Finally, even what appears to be merely morbid curiosity in the more lurid details of a crime may be the outgrowth of legitimate concern that justice is administered properly. *See* Note, *supra*, at 1906. *See also* *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) ("we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism"). *See generally* Stephenson, *Fair Trial-Free Press. Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39, 40 (1979) (noting a "direct link between the potential for sensationalism in a particular case and the extent of press coverage"); Hough, *Felonies, Jury Trial and News Reports*, reprinted in F. SIEBERT, *FREE PRESS AND FAIR TRIAL* 36-48 (1970).

32. *See, e.g.,* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring) (the press as "'agent' of interested citizens"); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (the press as "agent of the public at large"). *See generally* *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (because individuals have limited time and resources, they rely on the press to provide them with information about governmental activity).

33. *E.g.,* *United States v. Akers*, 542 F.2d 770 (9th Cir. 1976) (upheld closure when verdict was returned, in anticipation of protest against an unfavorable verdict), *cert. denied*, 430 U.S. 908 (1977); *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975) (upheld bailiff's exclusionary action during closing arguments); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965) (approving lower court's exclusion order

and the safety of witnesses.<sup>34</sup> Often, trial judges exercise their statutorily granted discretion specifically to protect the emotional well-being of juvenile sex offense victims.<sup>35</sup>

While public access and press coverage of criminal trials generally enhance trial fairness,<sup>36</sup> excessive pretrial publicity often jeopardizes subsequent juror impartiality.<sup>37</sup> In the 1950's and 1960's, the increasing presence of the media at trials led to Supreme Court consideration of the apparent imbalance between trial fairness and press freedom.<sup>38</sup> The Court overturned criminal convictions when defendants showed that publicity had prejudiced their cases.<sup>39</sup> While the

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to prevent a possible attempt by defendant and sympathizers to disrupt orderly presentation), *cert. denied*, 384 U.S. 1008 (1966).

34. *E.g.*, *United States v. Hernandez*, 608 F.2d 741, 746-47 (9th Cir. 1979) (exclusion based on threats to victim, a government agent, and his family); *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir. 1975), (to preserve identity of still active undercover agents), *cert. denied*, 423 U.S. 937 (1975); *United States v. Bell*, 464 F.2d 667, 670 (2d Cir. 1972) (public excluded during discussion of airliner's confidential method for detecting potential hijackers), *cert. denied*, 409 U.S. 991 (1972); *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969) (some spectators removed to avoid harassment of witness), *cert. denied*, 397 U.S. 957 (1970).

35. *See, e.g.*, *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958) (most spectators excluded from rape case in which complainants were "of tender years" to avoid embarrassment and inhibition), *cert. denied*, 361 U.S. 842 (1959); *Melanson v. O'Brien*, 191 F.2d 963, 965 (1st Cir. 1951) (general public excluded by Massachusetts law during a sex crime case involving a minor victim).

State statutes which provide for discretionary closure of cases involving sexual assaults against minors include: ALA. CODE § 12-21-202 (1975); ARIZ. REV. STAT. ANN. § 9.3 (1973); GA. CODE § 81-1006 (1956 Rev.); LA. REV. STAT. ANN. § 15:469.1 (West 1981); N.H. REV. STAT. ANN. § 632-A:8 (Supp. 1981); N.Y. JUD. LAW § 4 (McKinney 1983); N.C. GEN. STAT. § 15-166 (Supp. 1981); N.D. CENT. CODE § 27-01-02 (1974); UTAH CODE ANN. § 78-7-4 (1953); VT. STAT. ANN. tit. 12, § 1901 (1973); WIS. STAT. § 970.03(4) (Supp. 1981). Only Massachusetts has interpreted its statute as mandatory. *See supra* note 15 and accompanying text.

36. *See supra* note 5 for the Court's summary of the press' role in criminal trial coverage as quoted in *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

37. *See infra* note 39.

38. In a landmark case, *Estes v. Texas*, 381 U.S. 532 (1965), the Court held that the disruptive presence of television cameras and reporters in the courtroom and excessive pretrial publicity, all conducted over the defendant's objections, deprived the defendant of due process. *Id.* The Court nevertheless held that because the public has a right to know about criminal proceedings, television reporters may be present in the courtroom in a nonobtrusive manner. *Id.* at 541-42. *See also* A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY* 207-08 (1967) (arguing that the problem with television reporting of criminal matters is not that it reaches a greater audience than the print media, but that it often exhibits a much lower level of taste and restraint).

39. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 543-44 (1965) (rejecting the specific



press and bar responded to the alarming number of reversals with self-imposed guidelines,<sup>40</sup> the judiciary attempted to regulate publicity by employing more stringent measures.<sup>41</sup>

In *Nebraska Press Ass'n v. Stuart*,<sup>42</sup> the Supreme Court declared unconstitutional a trial judge's restrictive order to the press<sup>43</sup> and

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evidence of prejudice test and adopting the standard enunciated in *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963), that a showing of "inherent prejudice" would merit reversal).

*See also* *Sheppard v. Maxwell*, 384 U.S. 333 (1966). *Sheppard* was a murder case which received national publicity. At *voir dire*, all but one juror admitted to having read about the defendant prior to trial. *Id.* at 345. The Supreme Court ordered a new trial, stressing that total lack of judicial supervision of the press is a breach of duty to the defendant. *Id.* at 357-58. *Accord* *Rideau v. Louisiana*, 373 U.S. 723 (1963) (trial court refused to grant a change of venue even though a local television station televised defendant's inadvertent confession); *Irvin v. Dowd*, 366 U.S. 717 (1961) (eight out of twelve jurors read that defendant confessed to committing the six murders and they believed him guilty before trial began); *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam) (several jurors learned from press reports outside the courtroom that defendant had a record of two prior felonies); *Sheppard v. Florida*, 341 U.S. 50 (1951) (per curiam) (Jackson, J., concurring, emphasized that excessive inflammatory publicity provoked hostile public opinion in community during trial of black defendants charged with raping a white girl). *But see* *Stroble v. California*, 343 U.S. 181, 195 (1952) (Court upheld murder conviction, finding heavy publicity not dispositive); *Maryland v. Baltimore Radio Show, Inc.*, 193 Md. 300, 67 A.2d 497 (1949) (broadcasts following arrest of man charged with brutal murders did not render fair trial impossible, and defendant could show no specific evidence of prejudice), *cert. denied*, 338 U.S. 912 (1950). *See generally* A. FRIENDLY & R. GOLDFARB, *supra* note 38, at 28 (discussing the difficulty determining whether a jury was swayed by information in the press, or was adequately convinced of guilt by the evidence at trial).

40. *See, e.g.*, AMERICAN BAR ASSOCIATION LEGAL ADVISORY COMMITTEE ON FAIR TRIAL, FAIR TRIAL/FREE PRESS VOLUNTARY AGREEMENTS (1974) (three-year study of efforts taken by state bar and press associations to develop standards of self-regulation); AMERICAN BAR ASSOCIATION, THE RIGHTS OF FAIR TRIAL AND FREE PRESS: THE AMERICAN BAR ASSOCIATION STANDARDS (L. Andrews ed. 1981). *See generally* A. BARTH, RIGHTS IN CONFLICT (1976) ("Report of the Twentieth Century Fund Task Force on Justice, Publicity, and the First Amendment"); P. REARDON & C. DANIEL, FAIR TRIAL AND FREE PRESS RATIONAL DEBATE SEMINARS (1968) (whether the ABA standards are in fact too restrictive).

41. *See, e.g.*, *People v. Speck*, 41 Ill. 2d 177, 242 N.E.2d 208 (1967) (at the trial of a notorious alleged murderer, the judge issued a strict set of rules designed to limit the chance that jurors might obtain extra-evidentiary information), *modified*, 403 U.S. 946 (1971) (sentence of death vacated).

42. 427 U.S. 539 (1976).

43. *Id.* at 570. The state trial judge issued an order to journalists and broadcasters to refrain from publicizing any of defendant's admissions to law enforcement officials prior to jury impanelment. The state had charged defendant with the sexual assault and murder of six family members in a small, rural Nebraska town. *Id.* at 539, 542.

provided trial courts with a basic framework for balancing the rights of press and defendant.<sup>44</sup> Acknowledging the high level of publicity attending the defendant's prosecution for murder, the *Stuart* trial court ordered the media to refrain from reporting any "strongly implicative" facts or accounts of confessions.<sup>45</sup> The Supreme Court held that the trial court's vague order was an unconstitutional prior restraint on freedom of the press.<sup>46</sup> Further, the Court noted the trial court's failure to consider alternatives to issuing the broad order.<sup>47</sup>

In *Gannett Co., Inc. v. DePasquale*,<sup>48</sup> the Court first considered whether the press has a right of access to criminal proceedings based

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44. 427 U.S. at 564-70. The Court employed Judge Learned Hand's formula: whether "the gravity of 'the evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). Thus, the Court evaluated "(a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." 427 U.S. at 562.

The Court concluded that trial courts must first consider the alternative measures outlined in *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966), *i.e.*, change in venue, postponement of trial, thorough *voir dire* to screen out prejudiced veniremen, strong instructions to the jury to consider only the evidence introduced at trial, and sequestration of jurors. 427 U.S. at 563-64.

45. 427 U.S. at 541.

46. *Id.* at 562-68. In explaining the judicial presumption of invalidity concerning prior restraints, Chief Justice Burger said:

[P]rior restraints on speech and publication are the most serious and least tolerable infringement of First Amendment rights. . . . A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. . . . [T]he protection against prior restraint should have particular force as applied to reporting of criminal proceedings. . . .

The anti-publication order's vagueness operated to make it an overly broad "gag order." Since the press could not determine before publishing an item whether the court might later consider it a "strongly implicative fact," the press was in effect censored from printing any information concerning judicial procedure before the trial's outcome. *Id.* at 565-70. Further, the Court conceded that the trial court judge's belief that publicity would continue to be heavy may have been justified. Nevertheless, the judge's conclusion that the publicity would prejudice jurors was too speculative to merit such a sweeping order against publication. *Id.* at 562-63, 565. *See generally* A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975) (discussing the policy against prior restraints); Note, *Injunctions*, 78 HARV. L. REV. 994, 1064-67 (1965) (discussing the problem of drafting and enforcing non-specific decrees).

47. 427 U.S. at 569. *See supra* note 44 for a list of judicially acceptable alternative routes to prior restraint orders.

48. 443 U.S. 368 (1979).

on the sixth amendment guarantee of public trials.<sup>49</sup> The Court rejected the Gannett newspaper's sixth amendment challenge to an order which closed a pretrial hearing.<sup>50</sup> The plurality opinion, in dictum, limited the right to invoke the sixth amendment public trial guarantee to criminal defendants only.<sup>51</sup> The Court suggested that the first amendment, rather than the sixth, might afford the press a right of access to criminal proceedings.<sup>52</sup> If such a right did exist, the Court noted, the trial court's order in *Gannett* would not have violated the first amendment because the judge adequately balanced the interests of the defendant against those of the press.<sup>53</sup> Further, the Court stressed the greater need to guard against publicity of pretrial matters as opposed to actual trial proceedings.<sup>54</sup>

49. *Id.* at 384-91. See also *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity.").

50. *Id.* at 375. In *Gannett*, the defendants were suspected of second-degree murder, robbery and grand larceny. The defendants moved to suppress from trial allegedly involuntary statements they had made to police, as well as physical evidence seized during their arrest. Further, the trial judge granted a motion for exclusion of the press from the hearing to avoid further excessive adverse publicity. The press did not object until after the suppression hearing concluded, and at that time the judge refused to vacate his order, or to release transcripts of the hearing, although acknowledging the press's right to make the objection. *Id.* at 374-75.

51. 443 U.S. at 387 (Stewart, J.) ("by the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant"). Justice Blackmun, joined by Justices White, Marshall and Brennan, concurred in the judgment but dissented from the holding on the issue of who is meant to benefit from the public trial guarantee. *Id.* at 406, 415. Justice Blackmun wrote that the majority's result allows attorneys and judges to agree too easily to closure without considering the public's interests in access. *Id.* at 406.

52. *Id.* at 391-92 (Stewart, J.). Justice Stewart declined to decide in the abstract whether this right does exist in the first amendment. *Id.* at 392. Justice Powell, in his concurring opinion, however, did find a right of access in the first amendment. *Id.* at 397 (Powell, J., concurring).

53. *Id.* at 392-93. See *supra* note 3 (discusses the conflict over whether the first amendment is absolute or must be balanced against other constitutional rights).

54. 443 U.S. at 387-91. Justice Stevens repeatedly referred to "trials" even though the closure order in the case excluded the press from a pretrial hearing. See, e.g., *id.* at 378 ("the danger of publicity concerning a pre-trial suppression hearing is particularly acute"). Cf. *id.* at 384 (sixth amendment provides no support for the public's "right to attend a criminal trial"). Chief Justice Burger, apparently noticing the ambiguity in Justice Stewart's language, stressed in his concurring opinion that the scope of *Gannett* is limited to pretrial hearings. *Id.* at 394 (Burger, C.J., concurring). See also Stephenson, *supra* note 31, at 63 (expressing uncertainty in the majority opinion's intended reach).

The press, also, expressed uncertainty: See, e.g., Birmingham Post-Herald, Aug.

The following year, in *Richmond Newspapers, Inc. v. Virginia*,<sup>55</sup> the Court squarely addressed the first amendment issue suggested in *Gannett*.<sup>56</sup> The Court determined, contrary to the *Gannett* decision upholding closure of pretrial hearings,<sup>57</sup> that the press has a constitutionally protected right of access to criminal trials.<sup>58</sup> In *Richmond*, the trial court granted the defense attorney's unopposed request for exclusion of the press in order to prevent prejudicial information from reaching jurors during recesses.<sup>59</sup> The judge ordered closure without any consideration of alternative measures.<sup>60</sup> Distinguishing *Gannett*,<sup>61</sup> the Supreme Court stressed that notwithstanding an historical presumption of openness,<sup>62</sup> the sixth amendment does not require courtroom inclusion of the press at criminal trials.<sup>63</sup> The first amendment, on the other hand, implicitly forbids

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21, 1979, at 4, col. 2 (*Gannett* "cloudy"); Baltimore Sun, Sept. 22, 1979, at 14, col. 3 (*Gannett* "incoherent"); Washington Post, Aug. 10, 1979, at 15, col. 3 (*Gannett* "mushy").

55. 448 U.S. 555 (1980).

56. *Id.* at 575-80.

57. *See supra* notes 49-53 and accompanying text.

58. 448 U.S. at 579-80. The Court noted that the factual situation present in *Gannett* did not require the Court to decide whether the press has a right of access to trials, only pretrial suppression hearings. *Id.* at 564.

59. *Id.* at 559-60. Defendant's counsel, without objection from the prosecution, requested closure to prevent "information being shuffled back and forth when we recess . . ." *Id.* at 559-60. This was the fourth trial on a murder charge: the first had been reversed on appeal; the second and third ended in mistrial because jurors had obtained prejudicial information about the defendant through the press. *Id.* at 559. The trial court denied the press' request for a hearing in order to challenge the order as an abridgement of the rights of the public and press. The trial court determined that the defendant's interest in obtaining a fair trial outweighed the interests of the press. *Id.* at 561. The Virginia statute giving the trial court power to close the courtroom provides in part:

In the trial of all criminal cases, whether same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

VA. CODE § 19.2-66 (Supp. 1980).

60. *Id.* at 580-81. The Court embellished this order with a list of manageable alternatives as noted in previous cases such as *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 539, 563-65 and *Sheppard v. Maxwell*, 384 U.S. at 357-62. 448 U.S. at 581. *See supra* note 44 for discussion of measures which avoid courtroom closure.

61. 443 U.S. 368 (1979).

62. 448 U.S. at 564-69.

63. *Id.* at 575. Agreeing with the *Gannett* holding that the sixth amendment guarantee of *inclusion* to criminal trials may be claimed only by the defendant, Chief

courtroom exclusion of the press.<sup>64</sup> The Court reasoned that a protected right of access emanates from the first amendment.<sup>65</sup> Otherwise, freedom of the press would be a meaningless guarantee in the context of criminal trial coverage.<sup>66</sup> Since this right of access is not absolute,<sup>67</sup> trial courts must first consider less restrictive alternatives before ordering courtroom closure.<sup>68</sup> In *Richmond*, the trial court conspicuously neglected to do so.<sup>69</sup>

*Globe Newspaper Co. v. Superior Court*<sup>70</sup> presented the Supreme Court with the first constitutional conflict between the press' newly recognized right of access to criminal trials<sup>71</sup> and a statute requiring courtroom closure.<sup>72</sup> The Court balanced the state's asserted interests concerning juvenile sex assault victims with the rights of the

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Justice Burger, in *Richmond*, then sought constitutional protection of the right of *inclusion* to trials. This he found inuring to the press implicitly through the first amendment. *Id.*

64. *Id.* at 575 (Burger, C.J.) (the first amendment protects "the right of everyone to attend criminal trials" so as to give meaning to the explicit first amendment guaranties which allow the public to discuss government operations). *Id.* at 575, 576.

65. *Id.* at 575. The Chief Justice reasoned that the first amendment, as applied to the states through the fourteenth, forms an assurance that free public discussion of governmental functions must remain unfettered. *Id.* Considering the historical and philosophical underpinnings of the open trial tradition, *id.* at 564-74, the Chief Justice concluded that a free flow of communication concerning criminal trials is of supreme importance, *id.* at 575. Summary closure of courtrooms in situations in which criminal defendants do not request closure for protection of their fourteenth amendment right to due process completely truncates the first amendment's purpose of assuring open communication. *Id.* at 576.

66. 448 U.S. at 575-76. The Court "recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" *Id.* at 576, quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

67. 448 U.S. at 581 n.18 (restrictions on the right of access to criminal trials would be as acceptable as other constitutional restrictions on access to public forums based on time, place and manner considerations).

68. *Id.* at 581. See *supra* note 44 and accompanying text. But see 448 U.S. at 604-05 (Rehnquist, J., dissenting) (discretion of state judges should be unfettered; no formal explanations for closure orders are necessary).

69. 448 U.S. at 581.

70. 457 U.S. 596 (1982).

71. See *supra* notes 55-64 and accompanying text (discusses the *Richmond* holding).

72. 457 U.S. at 610. See *supra* note 7 for the text of the Massachusetts statute. In *Gannett* and *Richmond*, courtroom closure resulted from the trial judges' discretionary exercise, rather than a legislative mandate. See *supra* notes 50 and 59 and accompanying text.

press.<sup>73</sup> First, the Court conceded that the goals of protecting young sex assault victims from undue courtroom stress and encouraging these victims to report crimes and testify at trial were compelling state interests.<sup>74</sup> Nevertheless, the Court held that the statute, as construed, imposed an excessive restriction on the press' right of access to criminal courtrooms.<sup>75</sup> Because the statute mandates closure even when a juvenile sex assault victim might not need or want press exclusion,<sup>76</sup> the Court declared it unconstitutionally overbroad.<sup>77</sup> The Court also doubted the efficacy of the statute since the statute could not constitutionally prevent publication of the victim's name and testimony<sup>78</sup> and therefore failed to eliminate all unwanted publicity. Finally, the Court noted that the state did not offer any empirical evidence that the statute's mandatory operation promoted the state's asserted interests.<sup>79</sup> As an alternative, the Court suggested that trial courts continue to exercise discretionary closure power only after conducting case by case inquiries into the particular complainant's

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73. 457 U.S. at 609 (acknowledging that the right of access to criminal trials is not an absolute constitutional guarantee but that restrictions on this policy must be justified by showing compelling state interests).

74. 457 U.S. at 609. See *supra* notes 17 and 18 and accompanying text (discusses the sex offense victims' courtroom trauma).

75. 457 U.S. at 610.

76. *Id.* at 608 n.21 (the asserted state interest of protecting the victim from embarrassment would be meaningless when the victim wants the public to be aware of the details of the assailant's acts).

77. *Id.* at 609 (mandatory closure serves the state's asserted interests no better than a discretionary, case-by-case approach to closure). See also *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (courts have the discretion to close the courtroom under sensitive circumstances); *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (trial courts must give motions for closure case-by-case consideration).

78. 457 U.S. at 610. Courts have recognized the press' complete freedom to publish information already on public record, regardless of the potential impact on the subject's sensibilities. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (because the press may publish any item of public record with impunity, publication of a deceased rape victim's name is not an act of defamation). See also *WXYZ, Inc. v. Hand*, 463 F. Supp. 1020 (S.D. Mich. 1979) (order to delay publication of names of victim or accused until arraignment is an invalid prior restraint); *Poteet v. Roswell Daily Record, Inc.*, 92 N.M. 170, 172, 584 P.2d 1310, 1318 (1978) (information about a 14-year-old rape victim was privileged). Cf. *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (order to delay publication of information obtained at a juvenile proceeding, but not yet public record is an invalid prior restraint).

79. 457 U.S. at 610. (Chief Justice Burger, in dissent, noted that the purpose of the closure statute is not to eliminate all unpleasant publicity, but to avoid having a large, unfamiliar audience in the courtroom during the victim's testimony).

emotional status.<sup>80</sup>

Chief Justice Burger's dissenting opinion in which Justice Rehnquist joined, attacked the majority's interpretation of *Richmond*.<sup>81</sup> The Chief Justice, author of the Court's opinion in *Richmond*, maintained that *Richmond* did not permit press access to all portions of all trials.<sup>82</sup> The dissent further argued that if the state has shown a compelling interest behind drafting a legislative restriction of a first amendment right, the statute's rational relationship to attaining the stated goal renders it constitutional.<sup>83</sup> The dissent rejected the majority's strict scrutiny requirement that the statute be narrowly tailored to effect nothing more than the asserted goals.<sup>84</sup> As a policy matter, the dissent believed that any small success that mandatory closure has in encouraging victims to help prosecute sex offenders justifies potential statutory overbreadth.<sup>85</sup>

The *Globe* Court's approach to press rights is a consistent application of principles previously established in *Gannett* and *Richmond*.<sup>86</sup> The Court once again recognized that criminal trials are presump-

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80. *Id.* at 609 and n.15 (advocating a case-by-case determination of the need for closure, yet recognizing in footnote that representatives of the public and press should be given the opportunity to protest exclusion from these hearings regarding the need for closure).

81. *Id.* at 613. Justice Stevens dissented in a separate opinion based on his observation that the interpretation of the statute under attack did not exist until after the trial court issued its order based on a different interpretation. *Id.* at 620.

82. 457 U.S. at 614.

83. *Id.* at 616-17. The Chief Justice considered the statute adequately narrow in that it was interpreted to apply only to trials involving juvenile sex assault victims. Further, the Chief Justice noted that the statute did not cut off all press access to pertinent information. Since the trial transcript is public record, available immediately after it is made, the press and public maintain the right to inspect the victim's testimony after it is given. While this procedure lacks the immediacy of courtroom scrutinization, the Chief Justice argued that it would be a realistic approach especially in light of the recently sanctioned practice of allowing television cameras admission to the courtroom. *Id.* at 618.

84. *Id.* at 613. The Chief Justice characterized the majority holding as a "gross invasion of state authority" and a "cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule." *Id.*

85. *Id.* at 616. The Chief Justice also noted that mandatory closure eliminates the possibility that some judges might not close a trial, even though the circumstances warrant such action. If a state has a mandatory closure policy, victims will know better what to expect. The state could thereby minimize the possibility that some sex offense victims would hesitate to report or testify about a sex offense for fear of testifying before a large audience. *Id.* at 618.

86. *See supra* notes 48-69 and accompanying text.

tively open to the public and press.<sup>87</sup> In invalidating the mandatory closure statute as too broad a restriction on the press' right of access, the *Globe* Court affirmed *Richmond*.<sup>88</sup> The Court implied, however, that a statute allowing discretionary closure would pass constitutional muster.<sup>89</sup>

*Globe* reinforced the *Richmond* Court's suggestion that trial courts may impose restrictions on the press if they formally balance the competing interests and consider possible alternatives.<sup>90</sup> While the *Globe* Court appears to take a bold stand in protecting freedom of the press from legislative encroachment, it does not adequately address the problem of protecting innocent victims as well as persons wrongly accused from the harsh results of publicity overkill. Since it is clear from *Globe* that this dilemma cannot be resolved in the state legislatures, trial court judges are required to use extraordinary care in balancing all relevant interests before exercising discretion.

*Joanne Hurd*

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87. 457 U.S. at 603, 605. *But see id.* at 614 (Chief Justice Burger, in dissent, arguing that sex offense trials have traditionally been closed to the public during portions of testimony). *See also supra* notes 33 and 34 and accompanying text (examples of closure cases).

88. 457 U.S. at 610.

89. *Id.* at 608 n.22 (noting that a number of states have enacted statutes providing for discretionary closure).

90. *Id.* at 609. *See supra* notes 44 and 60 for alternative measures.



## **RECENT DEVELOPMENTS**

