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Mass. statute is mandatory - which is worrisome. But Mass Court, a strong one, reversed this case twice, & once following Rd Newspapers

PRELIMINARY MEMORANDUM

November 13, 1981 Conference
List 1, Sheet 1

No. 81-611

GLOBE NEWSPAPER CO.

v.

SUPERIOR COURT for the COUNTY OF NORFOLK (Mass.)

Appeal from Sup Jud Ct Mass (Liacos for the ct; Wilkins, concurring)

State/Civil

Timely

SUMMARY: This appeal challenges a Massachusetts statute barring the public and the press from portions of criminal trials involving rape or other sexual abuse of a minor.

FACTS: A Massachusetts statute requires the exclusion of the general public (including the press) from the court room at a criminal trial "for rape, incest, carnal abuse or other crime

I would Affirm, though dicta in Richmond Newspapers indicate a need for specific findings, thus suggesting that law is being made here. RP

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 exclusion is mandatory; no trial court discretion is involved.

Appt's reporters were barred from the courtroom during the trial of a man charged with the forcible rape of three minors. The prosecutor told the trial judge prior to trial that the victims did not mind inclusion of the press provided that no photographs, interviews, or articles containing personal information were permitted. The criminal defendant and appt both objected to the exclusion, but the trial court, finding the language of the statute to be mandatory, denied the objections and closed the trial. The defendant was acquitted of the charges before the first appeal of the press exclusion ruling; he is no longer involved in the case.

In its first hearing of the case (Globe I), The Supreme Judicial Court of Massachusetts affirmed the trial court's decision, but held that the statute only required exclusion from that portion of the trial in which a minor victim was actually testifying. The court stated that the law gave the trial court discretion to close other portions of the trial. On appeal, this Court vacated the judgment and remanded for further consideration in light of Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

HOLDING BELOW: On remand, the Sup Jud Ct again affirmed. The court noted that there was no opinion for the Court in Richmond Newspapers, but that all of the opinions of the Jus-

tices in the majority admitted that closure might be required in some circumstances. In particular, Justice Stewart's opinion mentioned that "the sensibilities of a youthful prosecution witness, for example, might justify similar exclusion in a criminal trial for rape . . . ." 445 U.S. at 600 n.5. There has been a considerable history of exclusion of the public and in some cases the press from trials involving rape, especially when the victim is a minor. Most appellate courts have upheld such exclusions particularly when they only involve closure during the testimony of the victim. There are five significant state interests involved here: 1) encouraging minors to report sexual offenses, 2) protecting minor victims from humiliation and embarrassment, 3) enhancing credibility of juvenile witnesses by avoiding confusion, fright and embarrassment, 4) promoting the administration of justice, and 5) preserving evidence and obtaining convictions. Contrary to appt's contention, closure need not be evaluated case-by-case. The closure hearing itself would have severe psychological costs and even the possibility of press coverage might deter victims from reporting crimes or agreeing to testify.

The court noted that this statute is part of the state's "traditional and accepted solicitousness toward minors." "It would be anomalous indeed if a State Legislature could protect juvenile offenders by closed hearings but was deemed to lack the power to protect juvenile victims of crime." Given the narrow scope of the statute as interpreted, the interests of the state outweigh those of the press and its readership. Jus-

tice Wilkins, concurring, would require specific findings by the trial court before closure but apparently would not require a hearing.

CONTENTIONS: Appt raises the same contentions raised below and discussed by the state court. Its first argument is that criminal trials must be fully open to the press and public unless closure in a particular case is the least drastic means of accomplishing an overriding governmental interest. Appt does not argue that closure is never permitted, only that it must be justifierd by the facts and circumstances of each particular case. Richmond Newspapers prohibits closure "[a]bsent an overriding interest articulated in findings." 448 U.S. lt 581. To justify infringement on First Amendment rights, governmental action must be closely tailored to the state's interest and must avoid any unneccessary infringement. The interests identified by the Sup Jud Court do not warrant closure of all of the testimony of all minor victinms in all cases. The Massachusetts statute is unique in that it requires closure rather than merely giving the trial court discretion to close the trial. Even Richmond Newspapers involved only the discretionary exclusion of the press and public by a trial judge. The paternalistic state interests are insufficient to support the blanket rule. The statute is unnecessarily broad because it does not provide for a hearing before the trial is closed. Every decision rendered since Richmond Newspapers has required such a hearing. The hearing need not be elaborate or cumbersome and may afford the victim sufficient protection. The state

already requires an expeditious hearing when additional portions of the trial are to be closed.

The appt's second argument is that closure violates the defendant's Sixth Amendment right to a public trial. The Sup Jud Ct did not discuss this issue because it found that appt could not raise the defendant's claim. However, the defendant himself opposed the exclusion of the public and the press. The defendant's rights are "inextricably bound up" with those of appt, so appt should be allowed to raise those rights.

The state's motion to dismiss or affirm reiterates the points made by the state court. First, it argues that the appt does not have "standing" to raise the defendant's Sixth Amendment claims. Even if the defendant himself were a party to this case, the claims would be moot because of the acquittal. The next contends that the statute, as modified by the state court's interpretation, accomodates appts First Amend interests and does not raise the problems encountered in Richmond Newspapers. Only a small portion of trials must be closed. All of the opinions in Richmond Newspapers acknowledged that closure might be justified in some cases. The statute is not void under the overbreadth doctrine. That doctrine does not apply here because the statute does not block any expression; it only temporarily blocks one source of information. Appt had access to transcripts of all testimony. If the doctrine did apply, the statute would still be valid because it implements overriding state concerns in the least restrictive manner. Appt ignores one important interest: in order to encourage victims to

come forward, the state must be allowed to assure them in advance that they will be absolutely protected from exposure. Under appt's proposal, there is no certainty of privacy. The hearing itself could be stressful and damaging to the victim.

DISCUSSION: The Massachusetts court's determination that appt cannot raise the Sixth Amendment claim of the defendant seems correct. This might be a much different case if the defendant himself had pursued his objections to the exclusion of the public and press, but he did not. Gannett Co. v. DePasquale is still good authority for the proposition that the press cannot raise the Sixth Amend claims of criminal defendants .

The First Amendment issue is not insubstantial. The several Richmond Newspapers opinions seem to contemplate exceptions to the rule of press and public inclusion; exclusion of the press and public from the courtroom while a minor victim of rape is testifying seems a likely candidate for such an exception. The issue here is whether closure can be mandated by the legislature for the general class of cases or must be decided case-by-case after a hearing or at least after specific findings. There is dicta in the plurality opinion in Richmond Newspapers that at least specific articulated findings are required. The state claims several strong interests in favor of exclusion, one of which supports closure without a hearing or findings more specific than that the crime involves a sexual offense against a minor: the state argues that if it is to encourage minor victims to report sexual offenses, it must

guarantee protection from public exposure in advance and not merely leave the matter to the discretion of the trial court. There is also weight to the argument that if the First Amendment permits closure of the trials of juvenile offenders it must also permit protection of juvenile victims from having to testify in public and before the press. Appt has pointed to several state cases where courts have required hearings before allowing closure. See, e.g., State v. Sheppard, ____ A.2d ____ , 42 Conn.L.J. No. 23 at 6 (1980) (evidentiary hearing required before press can be excluded from portion of trial in which minor rape victim testified); State v. Sinclair, 274 S.E. 2d 411 (S.C. 1981) (press exclusion during testimony of 9-year-old victim of sex crime permissible "after balancing the interests of all parties.") These cases do not involve mandatory closure statutes, however, and I do not they present a sufficient conflict to require oral argument.

I recommend that the Court affirm. ?

There is a response.

11/05/81 Holzhauer Opns in petn

Court ..... Voted on....., 19...

Argued ....., 19... Assigned ....., 19... No. 81-611

Submitted ....., 19... Announced ....., 19...

GLOBE NEWSPAPER CO.

vs.

SUPERIOR CT., CTY. OF NORFOLK

Byron Harvie
Rd Newspapers
appellee.
But have only -
juveniles involved.

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.						✓							
Brennan, J.				✓									
White, J.				✓									
Marshall, J.						✓							
Blackmun, J.				✓									
Powell, J.						✓							
Rehnquist, J.						✓							
Stevens, J.				✓									
O'Connor, J.				✓									
.....													

81-611 GLOBE NEWSPAPER CO. v. SUPERIOR COURT Argued 3/29/82

McHugh (for Petr - ~~Globe~~ Globe Newspaper)

Statute doesn't presume privacy

No transcript in this case, though proceedings (trial) are transcribed

Mass. has a "shield law" that prevents ev. of prior [redacted] sexual conduct of a prosecutrix.

Sikora (Asst AG of Mass)

Rape is most unreported crime — only 2 out of 7.

Globe II — unlike Globe I — construed statute as requiring closure only ~~to~~ during testimony of prosecutrix.

Not moot because is capable of repetition & evading review — as ~~Globe~~ Globe will have same issue.

(But what order/party are we asked to review)

Sikora (cont.)

Noted that Press defends its position, ~~Wrote~~ sources of news by arguing it furthers public interest of identifying crime

Main statute at issue serves policy of ~~[illegible]~~ identifying rapists.

Juveniles are tried privately — mandatorily until 14.

dfl 03/30/82

To: Justice Powell

From: David

Re: Globe Newspaper: NO. 81-611

I think that you can go either way in this case. It is clear--and not contested--that the state's interest in protecting juvenile victims will in some cases outweigh the public's first amendment rights. The question is whether the State can exclude the public and press from a juvenile victim's testimony in all cases in the absence of specific factfindings by the trial judge.

You have written several concurring and dissenting opinions that bear upon this issue. Indeed, you are the progenitor of the first amendment right of public/press access to trials, prisons, etc. The difficulty with this approach--as you recognize--is to develop some middle ground where the right of access does not turn into a constitutional version of the Freedom of Information Act.

In Saxbe v. Washington Post Co., 417 U.S. 843 (1974), you argued that the press--as agent of the public--had

a first amendment right to newsgathering at a prison. You argued that the FBI's absolute ban on press interviews with prisoners could not meet the "heavy burden of justification" appropriate when a first amendment interest is restricted. However, you would not have required a case-by-case determination by prison officials: "While I agree ... that the First Amendment requires the Bureau to abandon its absolute ban against press intereviews, I do not believe that it compels the adoption of a policy of ad hoc balancing of the competing interest involved in each request for an interview. ... Thus, the Bureau could meet its obligation under the First Amendment and protect its legitimate concern for effective penal administration by rules drawn to serve both purposes without undertaking to make an individual evaluation of every intereview request." You suggested that time, place and manner restrictions would certainly be appropriate. So would some limit on the number of interviews any single inmate might give.

On the basis of your position in Saxbe you could go either way depending on how you characterize the regulation here. If you characterize the regulation as an "absolute ban" on open courtrooms during juvenile testimony--regardless of whether the juvenile victim would permit the press to stay--then you reverse. If you characterize the regulation as the sort of rule that reasonably accommodates competing interests-

-such as you urged the FBI to adopt--then you affirm. It is not hard to characterize this rule in non-absolute terms: (1) it only bars the public during the victim's testimony; (2) it only applies to juvenile victims in sex crimes; (3) it does not block eventual release of a transcript; (4) it does not bar the press from directly interviewing the victim at some point.

Need not view of in "absolute terms"

In Gannett Co. v. DePasquale, 443 U.S. 368 (1978), you concurred, again urging a first amendment approach. You suggested that trial judges could order closure of pretrial hearings but only after careful weighing of competing considerations and after providing the press an opportunity to object to closure. Your concurrence can be read as requiring a close, case by case consideration by the trial judge--rather than permitting any general prohibition such as existed in this case.

Yes

I tend to think that just as juvenile trials may be shut without a case by case determination, so, too, the state may shut a juvenile victim's testimony in a rape case. Requiring the judge to hold a hearing in every case would seem to rather defeat the purpose of the law. Moreover, the statute is quite narrow as construed by the Supreme Judicial Court. On the other hand it can be said--ironically--that such a minimal restriction on the press is not likely to provide the juvenile victim with any assurance of privacy and thus does not serve any genuine state interest.

Yes

No. 81-611, Globe Newspaper v. Superior Court — aff'm 2 Dismiss 1 — Conf. 3/31/82

The Chief Justice Aff'm.

Public interest in protecting minors & encouraging victims to ~~re~~report in substantial.

Wishes of victims as to presence of press is not controll. issue

Public hearing vs "closed" would often frustrate the interests the Mass. Legislature sought to further.

"No right to" "instantaneous coverage"

I am inclined to agree unless press is excluded

Justice Brennan Rev.

Mass. Ct construed statute invalid to extent it closes entire trial.

As limited only to testimony of victims, there must be circumstances where press need not be excluded

Would leave courts free to decide in case by case basis.

Justice White Rev.

Agree with W.J.B.

7

Justice Marshall Rev.

Agree with W.J.B.

Justice Blackmun Rev.

Victims are hesitant to testify but
makes no difference whether
trial is open or closed
Rd Newspaper controls.

Justice Powell Rev

But only if we make clear
that the trial judge may determine,
in each case, whether the interest
of the victim - and of the public -
requires closure during
testimony of victim. This decision normally
~~should~~ should be made in camera
- with press excluded.

Justice Rehnquist Affirm

Agree with C.J.

Justice Stevens Dismiss

We are being asked for advisory opinion.

If we reach merits, agree with Thurgood

Justice O'Connor [redacted] Rev.

In Rd Newspapers, Court recognized right of press to attend trial. It controls.

Would not reach Q as to conduct of the 1st preliminary "closure" hearing that I would reach

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 5/24/82

Recirculated: _____

Renewed 5/24 Join Good Opinion

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-611

GLOBE NEWSPAPER COMPANY, APPELLANT *v.* SUPERIOR COURT FOR THE COUNTY OF NORFOLK

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[May —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

Section 16A of Chapter 278 of Massachusetts General Laws,[1] as construed by the Massachusetts Supreme Judicial Court, requires trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim. The question presented is whether the statute thus construed violates the First Amendment as applied to the States through the Fourteenth Amendment.

I

The case began when appellant, Globe Newspaper Co. (Globe), unsuccessfully attempted to gain access to a rape trial conducted in the Superior Court for the County of Norfolk, Commonwealth of Massachusetts. The criminal defendant in that trial had been charged with the forcible rape

[1] Mass. Gen. Laws, ch. 278, § 16A (West), which 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 court room, admitting only such persons as may have a direct interest in the case."

and forced unnatural rape of three girls who were minors at the time of trial—two sixteen years of age and one seventeen. In April 1979, during hearings on several preliminary motions, the trial judge ordered the courtroom closed.[2] Before the trial began, Globe moved that the court revoke this closure order, hold hearings on any future such orders, and permit appellant to intervene "for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions." App. 12a–14a. The trial court denied Globe's motions,[3] relying on Mass. Gen. Laws Ann., ch. 278, § 16A (West), and ordered the exclusion of the press and general public from the courtroom during the trial. The defendant immediately objected to that exclusion order, 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." App. 18a.

Within hours after the court had issued its exclusion order, Globe sought injunctive relief from a justice of the Supreme Judicial Court of Massachusetts.[4] The next day the justice conducted a hearing, at which the Commonwealth, "on behalf of the victims," waived "whatever rights it [might] have [had] to exclude the press." App. 28a.[5] Nevertheless,

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[2] "The court caused a sign marked 'closed' to be placed on the courtroom door, and court personnel turned away people seeking entry." *Globe Newspaper Co.* v. *Superior Court*, —— Mass. ——, ——, 401 N.E. 2d 360, 362–363 (1980) (footnote omitted).

[3] The court refused to permit Globe to file its motion to intervene and explicitly stated that it would not act on Globe's other motions. App. 17a–18a.

[4] Globe's request was contained in a petition for extraordinary relief filed pursuant to Mass. Gen. Laws Ann., ch. 211, § 3 (West).

[5] The Commonwealth's representative stated:

"[O]ur position before the trial judge [was], and it is before this Court, that in some circumstances a trial judge, where the defendant is asserting his right to a constitutional, public trial, . . . may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth [acts] on behalf of the victims, and this is literally on behalf of

Globe's request for relief was denied. Before Globe appealed to the full court, the rape trial proceeded and the defendant was acquitted.

Nine months after the conclusion of the criminal trial, the Supreme Judicial Court issued its judgment, dismissing Globe's appeal. Although the court held that the case was rendered moot by completion of the trial, it nevertheless stated that it would proceed to the merits, because the issues raised by Globe were "significant and troublesome, and . . . 'capable of repetition yet evading review.'" —— Mass. ——, ——, 401 N.E. 2d 360, 362, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). As a statutory matter, the court agreed with Globe that § 16A did not require the exclusion of the press from the entire criminal trial. The provision was designed, the court determined, "to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial." —— Mass., at ——, 401 N.E. 2d, at 369. Relying on these twin purposes, the court con-

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the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press." App. 28a.

Some time after the trial began, the prosecuting attorney informed the judge at a lobby conference that she had "spoke[n] with each of the victims regarding . . . excluding the press." App. 48a. The prosecuting attorney indicated that the victims had expressed some "privacy concerns" that were based on "their own privacy interests, as well as the fact that there are grandparents involved with a couple of these victims." *Ibid.* But according to the prosecuting attorney, the victims "wouldn't object to the press being included" if "it were at all possible to obtain a guarantee" that the press would not attempt to interview them or publish their names, photographs, or any personal information. *Ibid.* In fact, their names were already part of the public record. See *Globe Newspaper Co.* v. *Superior Court*, —— Mass. ——, ——, 423 N.E. 2d 778, 780 (1981). It is not clear from the record, however, whether or not the victims were aware of this fact at the time of their discussions with the prosecuting attorney.

cluded that § 16A *required* the closure of sex-offense trials only during the testimony of minor victims; during other portions of such trials, closure was "a matter within the judge's sound discretion." *Id.*, at ——, 401 N.E. 2d, at 371. The court did not pass on Globe's contentions that it had a right to attend the entire criminal trial under the First and Sixth Amendments, noting that it would await this Court's decision—then pending—in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980).[6]

Globe then appealed to this Court. Following our decision in *Richmond Newspapers*, we vacated the judgment of the Supreme Judicial Court, and remanded the case for further consideration in light of that decision. 449 U. S. 894 (1980).

On remand, the Supreme Judicial Court, adhering to its earlier construction of § 16A, considered whether our decision in *Richmond Newspapers* required the invalidation of the mandatory-closure rule of § 16A. —— Mass. ——, 423 N.E. 2d 773 (1981).[7] In analyzing the First Amendment issue,[8] the court recognized that there is "an unbroken tradition of openness" in criminal trials. *Id.*, at 778. But the court discerned "at least one notable exception" to this tradi-

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[6] Justice Quirico dissented, being of the view that the mandatory-closure rule of § 16A was not limited to the testimony of minor victims, but was applicable to the entire trial.

[7] The court again noted that the First Amendment issue arising from the closure of the then-completed trial was "capable of repetition yet evading review." —— Mass., at ——, n. 4, 423 N.E. 2d, at 775, n. 4, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). But in contrast to the view it had taken in its prior opinion, *supra*, at 3, the court held that the case was *not moot* because of this possibility of repetition without opportunity for review.

[8] The court found it unnecessary to consider Globe's argument that the mandatory-closure rule violated the Sixth Amendment rights of the criminal defendant who had been acquitted in the rape trial. Those Sixth Amendment rights, the court stated, were "personal rights" that, "at least in the context of this case, [could] only be asserted by the original criminal defendant." —— Mass., at ——, 423 N.E. 2d, at 776 (footnote omitted).

tion: "In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult." *Ibid.* The court also emphasized that § 16A's mandatory-closure rule furthered "genuine State interests," which the court had identified in its earlier decision as underlying the statutory provision. These interests, the court stated, "would be defeated if a case-by-case determination were used." *Id.*, at 779. While acknowleging that the mandatory-closure requirement results in a "temporary diminution" of the "the public's knowledge about these trials," the court did not think "that *Richmond Newspapers* require[d] the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims." *Id.*, at 781. The court accordingly dismissed Globe's appeal.[9]

Globe again sought review in this Court. We noted probable jurisdiction. —— U. S. —— (1981). For the reasons that follow, we reverse, and hold that the mandatory-closure rule contained in § 16A violates the First Amendment.[10]

II

In this Court, Globe challenges that portion of the trial court's order, approved by the Supreme Judicial Court of Massachusetts, that holds that § 16A requires, under all circumstances, the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial. Because the entire order expired with the completion of the rape trial at which the defendant was acquitted, we must consider at the outset whether a live controversy remains.

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[9] Justice Wilkins filed a concurring opinion in which he expressed concern whether a statute constitutionally could require closure "without specific findings by the judge that the closing is justified by overriding or countervailing interests of the Commonwealth." —— Mass., at ——, 423 N.E. 2d, at 782.

[10] We therefore have no occasion to consider Globe's additional argument that the provision violates the Sixth Amendment.

Under Art. III, § 2, of the Constitution, our jurisdiction extends only to actual cases or controversies. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546 (1976). "The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Ibid.*, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911).

The controversy between the parties in this case is indeed "capable of repetition, yet evading review." It can reasonably be assumed that Globe, as the publisher of a newspaper serving the Boston metropolitan area, will someday be subjected to another order relying on § 16A's mandatory-closure rule. See *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 377–378 (1979); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 563 (1980) (plurality opinion). And because criminal trials are typically of "short duration," *ibid.*, such an order will likely "evade review, or at least considered plenary review in this Court." *Nebraska Press Assn.* v. *Stuart*, *supra*, at 547. We therefore conclude that the controversy before us is not moot within the meaning of Art. III, and turn to the merits.

III

A

The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment. *Id.*, at 558–581 (plurality opinion); *id.*, at 584–598 (BRENNAN, J., concurring in the judgment); *id.*, at 598–601 (Stewart, J., concurring in the judgment); *id.*, at 601–604 (BLACKMUN, J., concurring in the

judgment).[11]

Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment.[12] But we have long eschewed any "narrow, literal conception" of the Amendment's terms, *NAACP* v. *Button*, 371 U. S. 415, 430 (1963), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights or are implicit in the very structure of self-government established by the Constitution. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 579–580, and n. 16 (plurality opinion) (citing cases); *id.*, at 587–588, and n. 4 (BRENNAN, J., concurring in the judgment).[13] Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. See

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[11] JUSTICE POWELL took no part in the consideration or decision of *Richmond Newspapers*. But he had indicated previously in a concurring opinion in *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), that he viewed the First Amendment as conferring on the press a right of access to criminal trials. *Id.*, at 397–398.

[12] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amdt. 1.

[13] See also *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 30–38 (1978) (STEVENS, J., dissenting); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 861–864 (1974) (POWELL, J., dissenting).

Thornhill v. *Alabama*, 310 U. S. 88, 95 (1980); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 587–588 (BRENNAN, J., concurring in the judgment). See also *id.*, at 575 (plurality opinion) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.

Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 569 (plurality opinion). And since that time, the presumption of openness has remained secure. Indeed, at the time of this Court's decision in *In re Oliver*, 333 U. S. 257 (1948), the presumption was so solidly grounded that the Court was "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." *Id.*, at 266 (footnote omitted). 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." *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 589 (BRENNAN, J., concurring in the judgment).[14]

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[14] Appellee argues that criminal trials have not always been open to the press and general public during the testimony of minor sex victims. Brief

Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.[15] Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.[16] And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.[17] In sum, the institutional value of the

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for Appellee 13–22. Even if appellee is correct in this regard, but see *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 423 (1979) (BLACKMUN, J., concurring in part and dissenting in part), the argument is unavailing. In *Richmond Newspapers*, the Court discerned a First Amendment right of access to *criminal trials* based in part on the recognition that as a general matter criminal trials have long been presumptively open. Whether the First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction. See Part III-B *infra*.

[15] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 569 (plurality opinion); *id.*, at 596–597 (BRENNAN, J., concurring in the judgment); *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 383 (1979); *id.*, at 428–429 (BLACKMUN, J., concurring in part and dissenting in part).

[16] See *Levine* v. *United States*, 362 U. S. 610, 616 (1960); *In re Oliver*, 333 U. S. 257, 268–271 (1948); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 570–571 (plurality opinion); *id.*, at 595 (BRENNAN, J., concurring in the judgment); *Gannett Co.* v. *DePasquale*, *supra*, at 428–429 (BLACKMUN, J., concurring in part and dissenting in part).

[17] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 570–571 (plurality opinion); *id.*, at 596 (BRENNAN, J., concurring in the judgment); *Gannett Co.* v. *DePasquale*, 443 U. S., at 394 (CHIEF JUSTICE BURGER, concurring); *id.*, at 428 (BLACKMUN, J., concurring in part and dissenting in part).

open criminal trial is recognized in both logic and experience.

B

Although the right of access to criminal trials is of constitutional stature, it is not absolute. See *Richmond Newspapers, Inc.* v. *Virginia, supra*, at 581, n. 18 (plurality opinion); *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 570. But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. See, *e. g.*, *Brown* v. *Hartlage*, —— U. S. ——, —— (1982); *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 101–103 (1979); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963). See also *Richmond Newspapers, Inc.* v. *Virginia, supra*, at 580–581 (plurality opinion).[18] We now consider the state interests advanced to support Massachusetts' mandatory rule barring press and public access to criminal sex-offense trials during the testimony of minor victims.

IV

The state interests asserted to support § 16A, though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and

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[18] Of course, limitations on the right of access that resemble "time, place, and manner" restrictions on protected speech, see *Young* v. *American Mini Theatres*, 427 U. S. 50, 63, n. 18 (1976), would not be subjected to such strict scrutiny. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 581–582, n. 18 (plurality opinion); *id.*, at 598, n. 23 (BRENNAN, J., concurring in the judgment); *id.*, at 600 (Stewart, J., concurring in the judgment).

embarassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner.[19] We consider these interests in turn.

We agree with respondent that the first interest—safeguarding the physical and psychological well-being of a minor[20]—is a compelling one. But as compelling as that interest is, it does not justify a *mandatory*-closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.[21] Among the factors to be weighed are the minor victim's age, psychological maturity, and understanding, the nature of the crime, the desires of the victim,[22] and the interests of parents and relatives. Section

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[19] In its opinion following our remand, 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." —— Mass., at ——, 423 N.E. 2d, at 779.

[20] It is important to note that in the context of § 16A, the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying *in the presence of the press and the general public.*

[21] Indeed, the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are *always* required before the right of access may be denied: "Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." 448 U. S., at 581 (footnote omitted).

[22] "[I]f the minor victim wanted the public to know precisely what a heinous crime the defendant had committed, the imputed legislative justifications for requiring the closing of the trial during the victim's testimony would in part, at least, be inapplicable." *Globe Newspaper Co.* v. *Supe-*

16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.[23] In the case before us, for example, the names of the minor victims were already in the public record,[24] and the record indicates that the victims may have been willing to testify despite the presence of the press.[25] If the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary. In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary

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rior Court, —— Mass. ——, ——, 423 N.E. 2d 773, 782 (Wilkins, J., concurring).

[23] It appears that while other States have statutory or constitutional provisions that would *allow* a trial judge to close a criminal sex-offense trial during the testimony of a minor victim, no other State has a *mandatory* provision excluding both the press and general public during such testimony. See, *e. g.*, Ala. Code § 12–21–202 (1975); Ariz. R. Crim. P. 9.3 (1973); Ga. Code § 81–1006 (1956 Rev.); La. Rev. Stat. Ann. § 15:469.1 (West 1981); Miss. Const., Art. 3, § 26; N.H. Rev. Stat. Ann. § 632–A:8 (Supp. 1979); N.Y. Jud. Law § 4 (McKinney 1968); 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). See also Fla. Stat. § 918.16 (Supp. 1982) (providing for mandatory exclusion of *general public* but not *press* during testimony of minor victims). Of course, we intimate no view regarding the constitutionality of these state statutes.

[24] The Court has held that the government may not impose sanctions for the publication of the names of rape victims lawfully obtained from the public record. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975). See also *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979).

[25] See *supra*, at 2–3, and n. 5.

to protect the State's interest.[26]

Nor can § 16A be justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities.[27] Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense. Although § 16A bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony.

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[26] Of course, for a case-by-case approach to be meaningful, representatives of the press and general public "must be given an opportunity to be heard on the question of their exclusion." *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 401 (1979) (POWELL, J., concurring). This does not mean, however, that for purposes of this inquiry the court cannot protect the minor victim by denying these representatives the opportunity to confront or cross-examine the victim, or by denying them access to sensitive details concerning the victim and the victim's future testimony. Such discretion is consistent with the traditional authority of trial judges to conduct in camera conferences. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 598, n. 23 (BRENNAN, J., concurring in the judgment). Without such trial court discretion, a State's interest in safeguarding the welfare of the minor victim, determined in an individual case to merit some form of closure, would be defeated before it could ever be brought to bear.

[27] To the extent that it is suggested that, quite apart from encouraging minor victims to testify, § 16A improves the quality and credibility of testimony, the suggestion also is speculative. And while closure may have such an effect in particular cases, the Court has recognized that, *as a general matter*, "*[o]penness* in court proceedings may *improve* the quality of testimony." *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 383 (1979) (emphasis added). In the absence of any showing that closure would improve the quality of testimony of *all* minor sex victims, the State's interest certainly cannot justify a *mandatory*-closure rule.

Thus § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner. And even if § 16A effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory-closure rules designed to encourage victims to come forward: Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*: namely, "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." 448 U. S., at 573 (plurality opinion).

V

For the foregoing reasons, we hold that § 16A, as construed by the Massachusetts Supreme Judicial Court, violates the First Amendment to the Constitution.[28] Accordingly, the judgment of the Massachusetts Supreme Judicial Court is

Reversed.

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[28] We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1982

RE: 81-611 - Globe Newspaper Co. v. Superior Court for the County of Norfolk

MEMORANDUM TO THE CONFERENCE:

In due course I will circulate a dissent.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 24, 1982

Re: No. 81-611 - Globe Newspaper Co. v. Superior Court for the County of Norfolk

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

dfl 05/24/82

To: Justice Powell
From: David
Re: Globe Newspapers, No. 81-611

I think that Justice Brennan has done a good job in this case and that you can join the opinion.

You may remember that you and I did not agree on this case. I still think that the State may take the position that it wishes to protect all minors from courtroom publicity--even those minors who would not object to the public's presence. I'm not sure why the state must delegate the question to a judge. And I'm concerned that some juveniles might not seem to care about the publicity, but find testifying to be a much more traumatic event than they had expected.

But I guess it's a balance of values and so long as an individual judge can still exclude the press and public in individual cases, I suppose that juvenile victims will be adequately protected on the whole.

Perhaps you might ask Justice Brennan to add a note saying that nothing in the opinion pertains to juvenile proceedings which traditionally have not been open to the public.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 25, 1982

Re: 81-611 - Globe Newspaper Co. v.
Superior Court for the County of Norfolk

Dear Bill,

I am satisfied with your opinion and join it except for the words "or are implicit in the very structure of self-government established by the Constitution" in the middle of page 7 and except for note 13 on the same page. Perhaps these items are not critical to your opinion. If they are, I shall indicate my disagreement.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

cpm

May 25, 1982

81-611 Globe Newspaper Company v. Superior Court

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1982

Re: No. 81-611 Globe Newspaper Company v. Superior Court for the County of Norfolk

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
	4/2/82							
will dissent 5/24/82 typed draft 6/9/82 1st draft 6/10/82 2nd draft 6/15/82 3rd draft 6/17/82 4th draft 6/21/82	1st draft 5/24/82 2nd draft 6/17/82 3rd draft 6/21/82	Join WJB	Join WJB 5/24/82	Join WJB 6/17/82	Join WJB 5/25/82	Join WJB 6/10/82	1st draft 6/8/82 2nd draft 6/18/82	1st Draft Conc in judgment. 6/17/82 2nd draft 6/18/82

81-611 Globe Newspaper v. Superior Court