Case Comment
Globe Newspaper Co. v. Superior Court

The State of Massachusetts indicted defendant for the sexual assault of three minor females.[1] During preliminary hearings, the trial judge ordered the courtroom closed to the public throughout defendant's trial.[2] Globe Newspaper Company (Globe), intending to provide coverage of the trial, moved to revoke the closure order.[3] The trial judge denied the motion citing a Massachusetts statute that mandated closure in cases involving minor sex crime victims.[4]

Asserting a right of access under the first and sixth amendments, Globe appealed to the Supreme Judicial Court of Massachusetts.[5] During the pendency of the appeal, defendant's trial proceeded to conclusion in an acquittal.[6] The Supreme Judicial Court determined that the conclusion of defendant's trial rendered Globe's appeal moot.[7] Despite this

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1. Commonwealth v. Albert Aladjem, No. 73102-9 (Super. Ct. for the County of Norfolk (Mass.) May 10, 1979). The indictments contained allegations of forcible rape and forced unnatural rape. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 849, 401 N.E.2d 360, 363 (1980) [hereinafter cited as *Globe I*].

2. The court issued the order on its own motion and not at the request of the prosecution. The defendant objected to the order. *Globe I*, 379 Mass. at 847-48, 401 N.E.2d at 362-63.

3. In addition to a motion to revoke the closure order, Globe made motions to intervene and for a hearing on the closure decision. *Id.* at 847, 401 N.E.2d at 362.

4. Mass. Ann. Laws ch. 278, § 16A (Michie/Law. Co-op. 1980), states:

> 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.

In ruling that section 16A required closure, the trial judge stated, "This ruling and Order results from a reading of the statute and from the feeling of the Court that a child-victim of an alleged sexual attack is entitled minimally to at least the same protection that a child-defendant in a case involving sexual matters has." *Globe I*, 379 Mass. at 849, 401 N.E.2d at 363.

5. *Globe I*, 379 Mass. 846, 401 N.E.2d 360 (1980). Globe initially petitioned a single justice of the Supreme Judicial Court for extraordinary relief pursuant to Mass. Ann. Laws ch. 211, § 3 (Michie/Law. Co-op. 1980). After a hearing, the Justice denied Globe's motion. Globe then appealed to the full court. *Globe I*, 379 Mass. at 847, 401 N.E.2d at 362.

6. *Globe I*, 379 Mass. at 847, 849, 401 N.E.2d at 362, 363.

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

finding, the court considered the merits of Globe's arguments because the appeal raised important issues which often evade review.[8] The court declined, however, to reach the constitutional claims which Globe raised because of the pending Supreme Court decision in *Richmond Newspapers, Inc. v. Virginia*.[9]

Resolution of the case focused instead on the statutory construction of section 16A, the Massachusetts closure law.[10] In analyzing section 16A, the Supreme Judicial Court identified two statutory objectives requiring derogation of the common law practice of open trials.[11] First, the legislature intended to promote the administration of justice by encouraging minor sex crime victims to come forward and testify.[12] Second, the legislature sought to enhance the narrative ability of minor victims at trial by minimizing the psychological harm resulting from open testimony.[13] The court held, with one justice dissenting, that these statutory objectives mandated closure only during the victims' testimony, not for the entire trial as the lower court had ordered.[14]

Globe appealed to the United States Supreme Court, which vacated the Supreme Judicial Court's judgment and remanded the case in light of *Richmond Newspapers*.[15] Reversing itself on remand, the Supreme Judicial Court held that the case was not moot as to Globe's first amendment claims.[16] The court applied what it perceived as the *Richmond Newspapers* standard, but concluded that *Richmond Newspapers* did not require the invalidation of section 16A.[17]

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8. The court stated, "The issues raised by this record, however, are significant and troublesome, and are 'capable of repetition yet evading review.' . . . We deem it appropriate therefore to express our views on the issues argued." *Id.* at 848, 401 N.E.2d at 362 (citations omitted).

9. 448 U.S. 555 (1980) [hereinafter cited as *Richmond Newspapers*].

10. *Globe I*, 379 Mass. at 853-55, 401 N.E.2d at 366.

11. *Id.* at 857-61, 401 N.E.2d at 367-69.

12. *Id.* at 857, 401 N.E.2d at 367-68.

13. *Id.* at 859-60, 401 N.E.2d at 369.

14. *Id.* at 861, 401 N.E.2d at 369-70. Moreover, the court found this construction of the statute consistent with the policy favoring publicity. *See id.* at 861, 401 N.E.2d at 370.

15. Globe Newspaper Co. v. Superior Court, 449 U.S. 894 (1980). In *Richmond Newspapers*, a Virginia trial court, pursuant to statute, granted defendant's unopposed motion to close his fourth trial stemming from a single charge of murder. The trial judge denied appellant-newspaper's request to vacate the closure order. After the defendant's acquittal, the trial court granted the newspaper's retroactive motion to intervene. The Virginia Supreme Court denied the newspaper's petition for writs of mandamus and prohibition. On certiorari, the U.S. Supreme Court reversed the decision of the Virginia Supreme Court. The Court held that in the absence of an overriding contrary interest, the first amendment protects the right of the public to attend criminal trials. 448 U.S. 555 (1980).

16. Globe Newspaper Co. v. Superior Court, 1981 Mass. Adv. Sh. 1493, 1496 n.4, 423 N.E.2d 773, 775 n.4 (1981) [hereinafter cited as *Globe II*].

17. The Supreme Judicial Court considered the following three factors in applying the

Globe again appealed to the Supreme Court where it successfully argued that the Supreme Judicial Court's interpretation of section 16A violated the first amendment.[18] Acknowledging that the right of access is not absolute, the Court nonetheless found the state interests advanced by section 16A insufficient to justify denial of the right.[19] *Globe Newspaper Co. v. Superior Court*, 102 S.Ct. 2613 (1982).

I.

History and jurisprudence support the public trial concept.[20] The framers of the Constitution incorporated the common law right of the accused to a public trial into the sixth amendment.[21] Most states followed

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Richmond Newspapers standard: First, the court considered whether closure during the testimony of a minor sex crime victim violated the open trial tradition to the same degree as had the closure of the entire murder trial in *Richmond Newspapers*. The court decided that such an exclusion of the public did not violate the tradition emphasized in *Richmond Newspapers* because the *Globe* case fell under the sex crime exception to the open trial tradition.

Second, the court inquired into section 16A's impact on the functioning of democratic institutions. The court noted that the statute's restriction was limited to immediate public observance of the minor sex crime victim. The *Richmond Newspapers* trial judge, in contrast, had closed the entire trial. The Supreme Judicial Court, therefore, described the statute's impact as only a temporary diminution of information.

Third, the court addressed the question of whether substantial state interests supported the statute. Globe did not dispute that substantial state interests could compel closure of a trial; Globe asserted that a mandatory rule intruded excessively on the constitutional rights of the public. Globe suggested that trial courts should assess the victim's psychological vulnerability to open testimony in each particular case. Globe contended that case-by-case determinations would advance the state's interests efficaciously and with a minimum of infringement upon first amendment concerns. The court rejected Globe's suggestion as cumbersome and pointed out that any such inquiry would be of dubious psychological accuracy. The court further held that a case-by-case approach would destroy the certainty in protection that the statute provides to families and victims. *Globe II*, 1981 Mass. Adv. Sh. at 1501-05, 423 N.E.2d at 777-781.

18. Globe Newspaper Co. v. Superior Court, 102 S.Ct. 2613 (1982) [hereinafter cited as *Globe III*]. Justice Brennan wrote the majority opinion, joined by Justices White, Marshall, Blackmun, and Powell. Justice O'Connor wrote a concurring opinion. Chief Justice Burger wrote a dissenting opinion, joined by Justice Rehnquist. Justice Stevens wrote a dissenting opinion.

19. *Id.* at 2621-22.

20. The *Richmond Newspapers* plurality opinion cited Blackstone, Hale, Bentham, Wigmore, and other authorities in support of the practical benefits accruing to the judicial system as the result of open trials. 448 U.S. at 569-73. Chief Justice Burger observed in *Richmond Newspapers* that the English tradition of open trials predated the Norman Conquest in 1066 A.D. *Id.* at 564-65.

21. This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. . . . Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which

suit in their own constitutions and the open trial has continued as an accepted practice into modern times.[22] This recognized tradition, however, has not prevented trial courts from exercising their inherent authority to limit courtroom access. Trial judges occasionally exclude the public either from the entire trial or from portions of certain proceedings.[23]

In *Gannett Co. v. DePasquale*,[24] the Supreme Court considered whether the public has an independent right to attend pretrial proceedings. The Court held that the sixth amendment does not grant a public right to attend pretrial proceedings or criminal trials.[25] *Gannett* stressed that the sixth amendment's public trial guarantee belongs to the defendant, not the public.[26] The majority refused to discuss a possible first amendment source for the right of access.[27]

Richmond Newspapers addressed the unresolved issue of whether the first amendment guarantees the public right of access to trials. The Court did not issue a majority opinion in *Richmond Newspapers*.[28] Seven

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> commands that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ' most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

In re Oliver, 333 U.S. 257, 266-68 (1948) (citations omitted).

22. *Id.* at 267-68.

23. The public trial concept has . . . never been viewed as imposing a rigid, inflexible straightjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice. . . .

> The authority thus residing in the trial court must be acknowledged as an implicit qualification of the general rule of openness of judicial proceedings. . . .

People v. Jelke, 308 N.Y. 56, 63, 123 N.E.2d 769, 772 (1954).

24. 443 U.S. 368 (1979). *Gannett* involved a pretrial hearing to consider the suppression of evidence in a murder prosecution. Defense attorneys made an unopposed request for closure due to concern with adverse publicity. The court granted the defendant's motion and excluded the public and press, including a newspaper reporter whose publisher then unsuccessfully moved to set aside the closure order. The New York Appellate Division vacated the closure order, but the New York Court of Appeals reinstated the order. On certiorari, the U.S. Supreme Court affirmed.

25. Justice Stewart wrote the majority opinion, joined by Chief Justice Burger, Justices Powell, Rehnquist, and Stevens. Chief Justice Burger, Justices Powell and Rehnquist also wrote separate concurring opinions. Justice Blackmun wrote an opinion, concurring in part and dissenting in part, joined by Justices Brennan, White, and Marshall.

26. 443 U.S. at 381, 391.

27. *Id.* at 392. Justice Powell's concurrence, however, explicitly recognized the public's first amendment right of access to pretrial proceedings. *Id.* at 397 (Powell, J., concurring).

28. Chief Justice Burger wrote the plurality opinion, joined by Justices White and

of the justices did agree, however, that the public possessed an independent right under the first amendment to attend criminal trials.[29]

Chief Justice Burger's plurality opinion devoted considerable attention to the tradition of jury trials in England and America.[30] The Chief Justice traced a historical record which demonstrated that significant policy concerns supported the open trial concept. These concerns included the fostering of public confidence in the legal system,[31] the accuracy of the fact-finding process,[32] and the satisfaction of the community's desire for justice.[33] From this historic practice, Chief Justice Burger concluded that open trials are presumed to be an essential feature of the criminal justice system.[34]

In addition to reliance on historic practice, the Chief Justice derived a textual basis for a first amendment right of access. He reasoned that the express freedoms of speech, press, and assembly share a common goal in guaranteeing open discussion of governmental affairs.[35] Closure of criminal trials denies the public information which otherwise promotes discussion of the criminal justice system. Closure, therefore, undermines the rights of speech, press, and assembly in the context of criminal trials.[36] Chief Justice Burger inferred a public right to attend criminal trials from

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Stevens. Justices White, Stevens, Stewart, and Blackmun all wrote separate concurring opinions. Justice Brennan wrote a concurring opinion, joined by Justice Marshall. Justice Rehnquist wrote a dissenting opinion. Justice Powell took no part in the decision.

29. Chief Justice Burger, and Justices White, Stevens, Stewart, Blackmun, Brennan, and Marshall agreed that the first amendment extended such a right. *Richmond Newspapers*, 448 U.S. at 580; *id.* at 585 (Brennan, J., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 604 (Blackmun, J., concurring).

30. *Id.* at 564-73.

31. *Id.* at 572 (" 'The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.' ") (quoting 6 J. Wigmore, Evidence § 1834 (J. Chadbourn rev. 1976)).

32. Open trials aid in the prevention of perjury and decisions motivated by secret bias. *Richmond Newspapers*, 448 U.S. at 569. The openness of trials also serves notice to possible witnesses who may provide valuable evidence. *Id.* at 570 n.8.

33. When a reprehensible crime is committed, strong emotional reactions take place in all of us. . . . All our ingrained concepts of morality and "justice" come into play, all our ancient tribal fears of anything that threatens the security of the group. It is one of the marks of a civilized culture that it has devised legal procedures that minimize the impact of emotional reactions and strive for calm and rational disposition.

H. Weihofen, The Urge to Punish 130-31 (1956), *cited with approval in* Richmond Newspapers, 448 U.S. at 571.

34. *Richmond Newspapers*, 448 U.S. at 573. *See also id.* at 564-75 and n.9.

35. *Id.* at 575.

36. *Id.* at 576-77. The Chief Justice noted that these express freedoms "would otherwise lose much meaning." *Id.* at 577.

the significance that accessibility holds for express first amendment guarantees.[37]

Unwilling to accept Chief Justice Burger's characterization of the right of access, Justice Brennan wrote a concurring opinion in *Richmond Newspapers*. He found that, in addition to encouraging the rights of individual expression, access to trials promoted democratic government. Justice Brennan contended that the first amendment plays a dual role as guarantor of individual expression[38] and catalyst for self-government.[39] The first amendment performs the latter structural role by ensuring the flow of information that citizens need in order to participate in the democratic process.[40] According to Justice Brennan, when the press publishes information that contributes to meaningful public debate it advances self-government.[41] First amendment protection extends to press activity that is consistent with this structural role.

The ambit of protection under the structural role embraces a theoretically infinite range of information-gathering activities.[42] Justice Brennan recognized the need to limit first amendment protection in access cases by weighing the value of the information sought against the interests invaded.[43] He proposed two principles to aid in qualifying structural role protection for press activity. First, the courts must determine whether the particular proceeding carries a tradition of

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37. The state of Virginia had argued that the Constitution does not expressly recognize access to trials. Chief Justice Burger responded by noting the Court's practice of deriving unexpressed rights by virtue of their necessity. "[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees." *Id.* at 579. As examples, Burger listed the right of association, NAACP v. Alabama, 357 U.S. 449 (1958); the right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to be presumed innocent, Estelle v. Williams, 425 U.S. 501 (1976); the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, *In re* Winship, 397 U.S.358 (1970); and the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969).

38. "Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. When so employed against prior restraints, free speech protections are almost insurmountable." *Richmond Newspapers*, 448 U.S. at 586-87 (citations omitted).

39. *Id.* at 586-87. "[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." *Id.* at 587 (emphasis in the original). Justice Brennan drew support for his first amendment approach from the writings of Professor Zechariah Chafee. *See* Brennan, *Address*, 32 Rutgers L. Rev., 173, 176 (1979). Chafee asserted that the first amendment protects an individual interest in the free expression of views on important issues. *See* Z. Chafee, Free Speech in the United States 33 (1946). The first amendment also advances a societal interest in vigorous debate that ensures the wise administration of government. *Id.*

40. *Richmond Newspapers*, 448 U.S. at 587-88.

41. *Id.*

42. *Id.* at 588.

43. *Id.*

accessibility.[44] Second, the courts must decide whether public access conforms with the structural purposes the proceeding serves in a democratic scheme of government.[45]

Application of Justice Brennan's first principle to the criminal trial proceeding dictated a finding that its tradition of accessibility strongly influenced recognition of the right of access.[46] Accessibility, moreover, satisfied the second principle by advancing policies that benefit the trial institution in terms of its role in the government structure.[47] Justice Brennan concluded that a public right of access to criminal trials is consistent with the structural role of the first amendment.[48]

While Chief Justice Burger and Justice Brennan reached the same outcome on the facts in *Richmond Newspapers*, their views on the nature of the right of access differed significantly. Their divergent opinions in *Globe* reflect this discord.

II.

The *Globe* case presented the narrow issue of whether section 16A violated the first amendment by denying the constitutional right of access.[49] Writing for the majority, Justice Brennan began his perfunctory analysis by restating the considerations that led to the *Richmond Newspapers* holding on a public right of access.[50] Justice Brennan then applied his structural role principles to the *Globe* facts since the challenged regulation had the effect of hampering the ability to gather news.[51]

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44. Consideration of historical practice is justified because history provides a gloss on the constitution and because "a tradition of accessibility implies the favorable judgment of experience." *Id.* at 589.

45. "[T]he value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial . . . is whether access to a particular government process is important in terms of that very process." *Id.*

46. *Id.* at 589-93.

47. Brennan found that open trials ensure the appearance of fairness in the judicial process, *id.* at 594; they foster public confidence in democratic self-government, *id.* at 595-96; they contribute to the accuracy of the fact-finding process. *Id.*

48. *Id.* at 597-98.

49. *Globe III*, 102 S. Ct. at 2615-16 (1982).

50. Brennan noted a broad construction of the first amendment, which encompasses unenumerated rights, the importance to self-government, the gloss of history, and structural value. *Id.* at 2618-20.

51. "The Court's approach in right-of-access cases simply reflects the special nature of a claim of [the] First Amendment right to gather information." *See* Richmond Newspapers, 448 U.S. at 586. The facts in *Globe* did not invoke the traditional first amendment guarantees for free expression because section 16A had not directly abridged speech or publication. *See, e.g., supra* note 38.

Under Justice Brennan's first principle of structural role analysis, Globe's access claim had special force owing to the traditional openness of criminal trials.[52] Justice Brennan determined under his second principle that accessibility enhances integrity and efficiency in the trial process and promotes public respect.[53] By serving these specific structural values, public access plays an important role with regard to the goals of the criminal trial institution.[54] Consequently, Justice Brennan recognized the right of access to the testimony of minor rape victims.

Justice Brennan acknowledged that the right of access was not absolute.[55] Denial of the right, however, requires a compelling state interest opposing access.[56] The state must demonstrate not only that the statute advances a compelling state interest,[57] but also that the statute is narrowly tailored to advance the state interests with a minimum of first amendment infringement.[58]

While Justice Brennan conceded that the protection of victims' psychological health was a compelling interest,[59] he concluded that, because of its mandatory nature, section 16A was not narrowly tailored. The statute mandated closure even when the victim would not suffer psychological harm or when the victim desired publicity.[60] Justice Brennan also found that the state failed to demonstrate empirically that section 16A encouraged minor sex crime victims to come forward and testify.[61] He questioned the statute's efficacy given its failure to restrict

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52. *Globe III*, 102 S. Ct. at 2618-19; *see also* Richmond Newspapers, 448 U.S. at 586.

53. *Globe III*, 102 S.Ct. at 2620.

54. *Id.*, at 2619-20; *see supra* note 47.

55. *Id.* at 2620.

56. Justice Brennan suggested in *Richmond Newspapers* that consideration of national security could outweigh the right of access and justify closure of portions of trials. 448 U.S. at 598 n.24.

57. *Globe III*, 102 S.Ct. at 2620.

58. *Id.*

59. *Id.* at 2621. Justice Brennan implied in a footnote, however, that the injury attributable to open testimony was minimal:

> 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.*

Id. at 2621 n.19 (emphasis in the original).

60. *Id.* at 2621. Justice Brennan did not respond to the observation of the state of Massachusetts that the hypothetical minor rape victim who actually wished publicity would be totally free to pursue it outside the courtroom. *See* Appellee's Brief at 47, Globe Newspaper Co. v. Superior Court, 102 S.Ct. 2614 (1982).

61. *Globe III*, 102 S.Ct. at 2621. The Supreme Judicial Court in *Globe I*, cited numerous social science authorities to support the proposition that closure would advance the statutory purposes of section 16A. *Globe I*, 379 Mass. at 858-60 nn. 11-20, 401 N.E.2d at

access to other sources of information about the victim's testimony.[62] Justice Brennan concluded that this state interest failed to justify denial of the right of access.

In his dissenting opinion, Chief Justice Burger argued that the historical record militates against the claim of access to trials involving minor sex crime victims. He emphasized that society has traditionally safeguarded the interests of minor sex crime victims through closure of trials.[63] Chief Justice Burger contended, as the Supreme Judicial Court had on remand, that section 16A passes constitutional scrutiny due to its minimal effect on the first amendment.[64]

III.

The majority of the Court in *Globe* adopted Justice Brennan's first amendment theory with its specific principles of application over Chief Justice Burger's approach which stressed adherence to historic practice. *Globe* raises questions of whether Justice Brennan's analysis is internally consistent and whether the result satisfies the stated objectives of that analysis.

Justice Brennan identified the particular proceeding at issue in *Globe* as a general criminal trial.[65] He rejected the arguments of the state of Massachusetts and Chief Justice Burger that the Court must distinguish *Globe* from *Richmond Newspapers* because *Globe* involved minor sex crime victims. Justice Brennan asserted that in ascertaining whether a right of access exists in individual cases the Court should not refer to the context of the particular proceeding.[66]

Critics of the legal system's handling of sex crimes denounce those practices that treat rape victims differently from other victims of crime.[67]

368-69 nn. 11-20. The court in *Globe II* reemphasized that empirical research supports the aims of the statute. *Globe II*, 1981 Mass. Adv. Sh. at 1507, 423 N.E.2d at 781.

62. Justice Brennan noted that section 16A did not deny access to the transcript, court personnel, or other sources of information about a victim's testimony. *Globe III*, 102 S.Ct. at 2622.

63. *Id.* at 2624.

64. *Id.* at 2625, *see Globe II*, 1981 Mass. Adv. Sh. at 1507, 423 N.E.2d at 781.

65. *Globe III*, 102 S.Ct. at 2619-20.

66. 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.

Id. at 2619 n.13.

67. Note, *Rape and Rape Laws: Sexism in Society and Law*, 61 Calif. L. Rev. 919, 938-39 (1973); Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 7-12 (1977).

Examples of such inequitable treatment include corroboration requirements,[68] evidentiary use of the victim's sexual history,[69] and special cautionary instructions to the jury.[70] This extraordinary treatment of rape victims is founded in conventional notions about women's status and duplicitous standards of sexual conduct.[71] Society historically has defined rape in male terms.[72] This ignores women's experience of rape as

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68. *See* Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L. J. 1365 (1972).

69. This rule is based upon the theory that a woman who has previously consented to an act of sexual intercourse would be more likely to consent again to such an act, thereby negating the charge that force and violence were used against her in order to accomplish the rape.

People v. Walker, 150 Cal. App. 2d 594, 601, 310 P.2d 110, 114-15 (1957).

70. "[I]t must be remembered, that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 Hale, The History of the Pleas of the Crown 635 (1st Am. ed. 1847).

71. Note, *Sexism in Society*, *supra* note 67 at 938, 939; Berger, *supra* note 67 at 25. One California judge noted:

> The relevance of past sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of her consent to a particular act of sexual intercourse with the defendant is slight at best. The historical rule allowing the evidence may be more a creature of a one-time male fantasy of the "girls men date and the girls men marry" than one of logical inference.

People v. Blackburn, 56 Cal. App. 3d 685, 690-91, 128 Cal. Rptr. 864, 886-67 (Dist. Ct. App. 1976).

72. [T]he crime of rape centers on penetration. . . . But penile invastion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality. This definitive element of rape centers upon a male-defined loss, not coincidentally also upon the way men define loss of exclusive access.

MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 Signs 635, 647 (1983).

> The legal impossibility of rape of a wife by her husband is another indication that rape laws are not aimed at protecting women from sexual assault. If the laws were designed to protect women, this exception would make no sense. . . . [I]f a woman suffers no less pain, humiliation, or fear from forcible sexual penetration by her husband than by a relative, a boyfriend, or a stranger, the difference is not great enough to warrant the total insulation of the former but not the latter from legal sanction.

Note, *Sexism in Society*, *supra* note 67, at 925-26.

> The ancient patriarchs who came together to write their early covenants had used the rape of women to forge their own male power—how then could they see rape as a crime of man against women? . . . Rape could not be envisioned as a matter of female consent or refusal; nor could a definition acceptable to males be based on a male-female understanding of a female's right to her bodily integrity. Rape entered the law through the back door, as it were, as a property crime of man against man. Woman, of course, was viewed as the property.

S. Brownmiller, Against Our Will: Men, Women and Rape 18 (1975).

a violation of personal and bodily integrity and makes prosecution of rape complaints difficult and humiliating.

A primary objective of recent rape law reforms is to induce the legal system to abandon sexist premises and to prosecute rapes in a manner consistent with other crimes. Ostensibly, such reforms seek to shift the focus of prosecution from the victim and toward the offender.[73] Institution of these reforms provides equal treatment to rape victims insofar as the legal system does not impose formal handicaps beyond those imposed on victims of other crimes. This limited goal of consistency, however, fails to address satisfactorily the plight of rape victims. Instead, the legal system must reject male definitions of rape[74] without conceding the crime's distinctiveness.[75]

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73. Berger, *supra* note 67, at 12.

74. That forcible genital copulation is the "worst possible" sex assault a person can sustain, that it deserves by far the severest punishment, equated in some states with the penalties for murder, while all other manner of sexual assaults are lumped together under the label of sodomy and draw lesser penalties by law, can only be seen as an outdated masculine concept that no longer applies to modern crime.

S. Brownmiller, *supra* note 72, at 378. Lorenne M.G. Clark and Debra J. Lewis express the definitional problem in these terms:

> If the laws against rape provided the model of consensual sexuality which some assume they do, serving as much as an ideal to be striven for, as an articulation of the basic standards to be maintained, and if these laws were enforced with that goal in mind, then the inequality of power between the sexes upon which male supremacy rests would disappear.

L. Clark and D. Lewis, Rape: The Price of Coercive Sexuality 27-28 (1977).

75. When rape is placed where it truly belongs, within the context of modern criminal violence and not within the purview of ancient masculine codes, the crime retains its unique dimensions, falling midway between robbery and assault. . . . [y]et the differences between rape and an assault or a robbery are as distinctive as the obvious similarities . . . [I]n rape the threat of force obtains a highly valued sexual service through temporary access to the victim's intimate parts, and the intent is not merely to "take," but to humiliate and degrade.

S. Brownmiller, *supra* note 72, at 377-78. Recently courts have begun to acknowledge rape as a distinctive crime in terms of its impact on victims, rather than in terms of the danger to the falsely accused:

> [Rape] is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self."

Coker v. Georgia, 433 U.S. 584, 597 (1977) (citation omitted). "Rape constitutes an intrusion upon areas of the victim's life, both physical and psychological, to which our society attaches the deepest sense of privacy." United States *ex rel.* Latimer v. Sielaff, 561 F.2d 691, 694 (7th Cir. 1977). Some commentators view rape primarily as a crime of sex which expresses male power over women and not just as a violent act which occurs in the

Justice Brennan's classification of rape trials involving minor victims under the general rubric of criminal trials frustrates the basic trend in rape law reform. While his categorization may appear consistent with the reform goal of eliminating unequal treatment of rape victims, such an analogy is inapposite. An Aristotelian notion of justice demonstrates the fallacy of any such comparison. According to Aristotle, justice requires not only equal treatment for equals, but also unequal treatment for unequals.[76] The injustice of *Globe* lies in equating minor rape victims with, for example, victims of burglary and car theft.[77]

Globe represents a sharp regression in the attempt to educate the legal system as to the nature and societal context of rape. Rape is a consequence of social conditions, not a natural fact.[78] The physical attack itself expresses dominance over, as well as hostility toward, women.[79] The legal definition of rape reflects the imbalance of power between men and women from which the crime itself derives.[80] Historically, the law has viewed wives and daughters as property subject to male dominion.[81] Legal codification of sexual stereotypes which burden the rape victim and favor the rapist further demonstrate male dominion.[82] Removal of formal burdens through procedural reforms conferred a measure of surface

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context of sex. *See* Largen, *History of Women's Movement in Changing Attitudes, Laws and Treatment Toward Rape Victims*, in Sexual Assault 69 (M. Walker & S. Brodsky ed. 1976); L. Clark and D. Lewis, *supra* note 74, at 24-25.

76. Aristotle, Politics, Book III, Ch. 9, 1280a.

77. The District of Columbia Court of Appeals has noted this concept. "There is a real inequality—notwithstanding the surface uniformity—in according the same disposition to persons different in essential characteristics, as was noted long ago by Aristotle . . . . " Scott v. United States, 419 F.2d 264, 282 n.3 (D.C. Cir. 1969) (Leventhal, J., concurring). "[I]t is as old in philosophy at least as Aristotle, and it is settled in the law as well, that the application of an apparently uniform rule may in reality engender unfair discrimination when like measures are applied to unlike cases." International Union of Elec., Radio and Mach. Workers v. NLRB, 426 F.2d 1243, 1250 (D.C. Cir. 1970).

78. "[Rape] is produced by a certain kind of society and not by an eternal, immutable human nature." L. Clark and D. Lewis, *supra* note 74, at 28.

79. A woman is perceived by the rapist both as hated person and desired property. Hostility *against* her and possession *of* her may be simultaneous motivations, and the hatred for her is expressed in the same act that is the attempt to "take" her against her will. In one violent crime, rape is an act against person and property.

S. Brownmiller, *supra* note 72, at 185 (emphasis in the original).

80. *See* E. Hilberman, The Rape Victim 6-8 (1976); S. Brownmiller, *supra* note 72, at 16-30.

81. "As the first permanent acquisition of man, his first piece of real property, woman was, in fact, the original building block, the cornerstone, of 'the house of the father.' " S. Brownmiller, *supra* note 72, at 17.

82. The legal system has traditionally held a stereotypical view of rape which derived from sources such as the Biblical story of Potiphar's wife and the works of Sigmund Freud. Berger, *supra* note 67, at 25.

equality between the sexes which many hoped would lead to a more fundamental equality.[83] *Globe* rejects this fundamental equality through its elevation of surface equality as the prevailing legal maxim.

Recognition of the need for closure in cases involving minor rape victims could reduce the power disparity between men and women. The legal system justifies closed trials for minor offenders based on the rationale that minors form a class inherently distinct from adults.[84] Yet *Globe* prohibits states from exercising a like solicitude on behalf of minor rape victims,[85] thus prescribing unequal treatment for persons whom the law has declared to be equals. The juvenile justice system underscores this supposed equality by rejecting the criminal label for minor offenders[86] and thus eliminating the basic legal distinction between offenders and victims.

Globe imposes a burden on minor rape victims which the legal system does not impose on minor rapists. This disturbing paradox[87] constitutes an instance of gender inequality which the legal system cannot disguise by distinguishing between minors who rape and minors who are raped. *Globe* secures a status quo in which males receive absolute protection while females receive only a conditional protection.

The issue of closure during the testimony of minor rape victims requires a sensitive appraisal of the nature of rape and the paradigm of male power that rape represents. Section 16A's paternalistic origin[88] highlights the need to assess *Globe* with reference to the power imbalance between the sexes. Originally enacted in 1923, section 16A protects children as property, just as the male definition of rape protects women as property.[89] Although research confirms that the law's initial aim retains

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83. Berger, *supra* note 67, at 11, 100; S. Brownmiller *supra* note 72, at 391; Largen, *supra* note 75, at 72-73.

84. People v. Walton, 70 Cal. App. 2d Supp. 862, 867, 161 P.2d 498, 501 (App. Dep't Super. Ct. 1945).

85. *Globe III*, 102 S.Ct. at 2621.

86. *In re* Alley, 174 Wis. 85, 91-92, 182 N.W. 360, 362 (1921); State v. Heart Ministries, Inc., 227 Kan. 224, 253, 607 P.2d 1102, 1109 (1980).

87. "[The Court's holding in *Globe*] advances a disturbing paradox. Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused." *Globe III*, 102 S.Ct. at 2623 (Burger, C.J., dissenting).

88. [The] legislative history reveals that G.L. c. 278, § 16A, stands at the nexus of two overlapping strands of policy; the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public; and the Legislature joined this solicitude for victims with the broad, *paternal* protection afforded children generally.

Globe I, 379 Mass. at 858, 401 N.E.2d at 368 (emphasis added) (citations omitted).

89. "[I]f woman was man's original corporal property, then children were, and are, a wholly owned subsidiary." S. Brownmiller, *supra* note 72 at 281.

its validity,[90] measures designed to protect minor victims cannot depend on paternalistic, property-oriented concerns for children.[91] *Globe* demonstrates the inadequacies of such measures when balanced against the right of access. Minor rape victims merit special protection not only because of their minority status, but also because they are victims of a crime stemming from gender inequality.[92]

In following his first guiding principle, Justice Brennan considered only the historic practice surrounding general criminal trials. He did not examine the more specific record of trials involving minor sex crime victims. While Justice Brennan's characterization of the particular proceeding as simply a criminal trial is facially correct, case law and statutes support Chief Justice Burger's assertion that historical practice compels the restriction of access to sex crime trials.[93]

The *Globe* majority refused to distinguish minor rape victims from victims of other crime.[94] This stance conflicts with the longstanding practice of treating minor sex crime victims as a singular class.[95] Unlike Chief Justice Burger, Justice Brennan did not consider historical practice dispositive in *Globe*. He did acknowledge, however, that a tradition of

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90. *See infra* notes 103-06 and accompanying text.

91. Reliance on such arguments is no more satisfactory than the conservative stance that assumes rape is simply a law and order matter. *See* Largen, *supra* note 75, at 72.

92. While section 16A appears to represent a convergence of traditional paternalism and feminism, any argument that attempts to combine the two in defense of the statute is untenable. *See* S. Brownmiller, *supra* note 72, at 392-93. Brownmiller describes an analogous situation that exists with regard to the anti-pornography movement. *Id.* Traditionally composed of conservative and religious factions, this movement has only recently acquired a feminist perspective. *Id.*

93. Justice Burger cited statutes from eight jurisdictions which provide for closure in cases involving minor sex crime victims. *Globe III*, 102 S. Ct. at 2624 n.3.

> [T]he courts generally concede that the right to have members of the public present in a case of this character [statutory rape] is subject to some limitations. Hence a trial judge in the exercise of a sound discretion may exclude members of the public as may become necessary to protect a witness from embarrassment by reason of having to testify to delicate or revolting facts, as a child, or where it is demonstrated that the one testifying cannot, without being freed from such embarrassment, testify to facts material to the case.

United States v. Geise, 158 F. Supp. 821, 824 (D. Alaska), *aff'd*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959). "[Closing the courtroom to spectators during the testimony of a rape victim] is a frequent and accepted practice when the lurid details of such a crime must be related by a young lady." Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967).

94. "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." *Globe III*, 102 S.Ct. at 2622 (emphasis in the original).

95. "It is considered that it is a matter of common knowledge that such victims suffer far beyond anything suffered by men or women in connection with other classes of crimes." State v. Evjue, 253 Wis. 146, 149, 33 N.W.2d 305, 309 (1948).

openness conferred special force on a claim of access.[96] This disregard for the established tradition of closure during the testimony of minor rape victims conflicts with Justice Brennan's stated respect for the constitutional significance of historical practice.

In *Globe*, Justice Brennan determined under his second principle that the structural value of open trial supported a right of access.[97] He identified enhancement of the administration of justice and promotion of public respect as benefits accruing to the trial process as the result of accessibility.[98]

Empirical data and policy considerations refute both of the rationales underlying Justice Brennan's opinion in *Globe*. Testimony in open court can unnerve an emotionally stable adult.[99] The trial process is a particularly brutal experience for sex crime victims, regardless of age.[100] Open trial from the victim's perspective constitutes a second rape.[101] The trauma resulting from a sex crime prosecution frequently matches that of the assault itself.[102] Social scientists contend that the legal process trauma[103] accompanying rape trials involving children may actually harm the child-victim more than the original crime.[104]

Legal process trauma stems initially from the child's unpreparedness to face the trial setting. Minor victims lack the emotional stamina to enable them to cope with this frightening aspect of the adult world.[105] The public setting of the trial intensifies their apprehension.[106] The public's

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96. *Richmond Newspapers*, 448 U.S. at 589.

97. *Globe III*, 102 S.Ct. at 2620.

98. *Id.*

99. Hilberman, *supra* note 80, at 53.

100. L. Holmstrom & A. Burgess, The Victims of Rape: Institutional Reactions chs. 6, 7 (1978).

101. J. Bode, Fighting Back ch. 7 (1978); Holmstrom & Burgess, *supra* note 100, at 232, 235-36.

> The victim will be questioned in front of [courtroom spectators]. She will be asked identifying information, such as her name, address, or where she works. She will be asked about intimate aspects of the rape as well as about her personal life. The questioning often concerns minute details of the sexual aspects of the incident. No item is left to the imagination. Everyone in the courtroom is given the chance to participate vicariously in the rape.

Id. at 163.

102. Holmstrom & Burgess, *supra* note 100, at 229.

103. Legal process trauma is the damaging psychological effect of legal proceedings on a child victim. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, in Rape Victimology 284 (L. Schultz ed. 1975).

104. A. Kinsey, Sexual Behavior in the Human Female 121 (1953); Hilberman, *supra* note 80, at 53; V. DeFrancis, Protecting the Child Victim of Sex Crimes Committed by Adults 2 (1969).

105. Hilberman, *supra* note 80, at 53.

106. *Id.*

presence heightens the dread that the child already feels toward this formidable adult proceeding.

Rape is one of the most underreported crimes in the United States.[107] Estimates of the degree of underreporting vary widely.[108] Law enforcement officials ascribe the underreporting of rape primarily to victim reluctance resulting from fear and embarrassment.[109] One study found unwillingness to suffer the trial ordeal a major reason for victim reluctance to press charges.[110] The same study cited concern over the public setting of the trial as a factor contributing significantly to the desire to avoid legal proceedings.[111]

The reported rates of sex crimes against minors also understate the true incidence of offenses.[112] Research reveals that minor victims and their families often fail to prosecute once they have reported the rape.[113] A significant reason for this failure is the parents' desire to protect the child from legal process trauma.[114] The public setting of the trial plays a large part in generating parental concern for the minor's well-being.[115] Consequently, as with adult victims, open trials inhibit the reporting of sex crimes against minors. Such underreporting of crime does not promote the administration of justice.

In addition to its chilling effect on the reporting of sex crimes against children, open trial contributes to distorted and inaccurate testimony. Legal authorities historically have expressed concern over the general testimonial capacity of children at trial.[116] The public's presence in the courtroom further interferes with the child's ability to remember and relate facts.[117] Open trials thereby impede fact-finding accuracy in

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107. "Forcible rape, a violent crime against the person, has been recognized by law enforcement as one of the most under-reported of all [FBI] Index crimes . . . " United States Department of Justice, Federal Bureau of Investigation, Crime in the United States 13-14 (1980), *quoted in* Appellee's brief at 28, Globe Newspaper Co. v. Superior Court, 102 S.Ct. 2613 (1982).

108. Curtis, *Present and Future Measures of Victimization in Forcible Rape*, in Sexual Assault 61, 63-64 (M. Walker & S. Brodsky eds. 1976). *See* Griffin, *Rape: The All-American Crime*, in Rape Victimology 20 (L. Schultz ed. 1975) (the figure of reported rapes must be multipled by a factor of ten); M. Amir, Patterns in Forcible Rape 27-28 (1971) (one in five, or possibly one in twenty rapes may actually be reported).

109. Crime in the United States, *supra* note 107.

110. Holmstrom & Burgess, *supra* note 100, at 58.

111. *Id.* at 58, 227.

112. L. Schultz, *The Child as a Sex Victim: Socio-Legal Perspectives*, in Rape Victimology 257, 258 (L. Schultz ed. 1975).

113. DeFrancis, *supra* note 104, at 187.

114. *Id.*

115. *Id.*

116. *See* 4 W. Blackstone, Commentaries 214 (19th ed. 1853).

117. Libai, *supra* note 103, at 323. *See* Moore v. State, 151 Ga. 648, 659, 108 S.E. 47, 52 (1921).

cases of rape against minor victims and thus adversely affect the administration of justice.

Justice Brennan noted in *Richmond Newspapers* that the judiciary is a coordinate branch of government in the fullest sense.[118] In *Globe*, he found that trial access contributes to the public respect that a democratic institution requires for support.[119] Assuming that legislation expresses the popular will, *Globe* will not promote this requisite public trust in the courts. Legislatures and courts traditionally have demonstrated concern for minor sex crime victims through statutes and court orders restricting trial access.[120] Such official actions reflect the public's empathy toward minor victims. *Globe* will only diminish the public's respect for the legal system.[121]

Public respect for the courts will also decline because of the harsh gender disparity which *Globe* represents. By withdrawing the distinctive label traditionally attached to minor victims by section 16A, *Globe* will discredit the courts in the eyes of the population growing increasingly aware of women's social and legal inequality.

Globe signals a retreat from progress toward a law of rape based on modern reality rather than sexual myths. Justice Brennan's suggestion that the courts resolve individual questions of closure on a case-by-case basis further illustrates this retrenchment.[122] His approach will require a hearing in which any opponents of closure could contest the victim's inability to withstand open trial.[123] By imposing this additional traumatic proceeding, *Globe* shifts the focus of the rape prosecution back to the victim, at least for the initial stages of trial. Such treatment humiliates and stigmatizes the minor victim in a manner consistent with the legal system's traditional distrust of the female accuser.[124]

IV.

The structural justifications cited by Justice Brennan in support of trial access lapse when the trial involves minor sex crime victims. A presumptive right of access to the testimony of minor victims of rape hampers the administration of justice by providing an additional disincentive to report the most underreported crime. Moreover, adherence to the open trial concept in such cases erodes public confidence in

118. *Richmond Newspapers*, 448 U.S. at 595-96.

119. *Globe III*, 102 S. Ct. at 2620.

120. *See supra* note 93.

121. *See* Bode, *supra* note 101, at 171-72 (Bode cites a 1977 Harris poll in which a majority reacts negatively to two judges with harsh, sexist attitudes towards rape victims).

122. *Globe III*, 102 S.Ct. at 2621-22.

123. *Id.* at 2622 n.25.

124. *See supra* note 82.

the legal system.

The initial successes of reform efforts in the law of rape provided hope that the legal system could understand rape and its effect on victims.[125] This change in judicial attitudes signalled to many a heightened sensitivity to the general concerns of women in society. *Globe* casts doubt on whether the interests of minor rape victims and rape victims in general rise to any significant level of deference.

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125. [A]ltering the way the complaining witness is treated at trial will not guarantee that men and women everywhere abandon harsh traditional ideas and double standards of sexual conduct. It will, however, give the Establishment's imprimatur to growing societal respect for women in a setting where deep and primitive emotions have often beclouded rational analysis.

Berger, *supra* note 67, at 100.

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