NEW YORK LAW SCHOOL

NYLS Law Review

Volume 32 | Issue 1 Article 6

January 1987

Protecting the Rape Victim Through Mandatory Closure Statutes: Is it Constitutional?

PROTECTING THE RAPE VICTIM THROUGH MANDATORY CLOSURE STATUTES: IS IT CONSTITUTIONAL?

I. INTRODUCTION

Rape is a devastating experience. It can permanently scar a victim, both physically and psychologically.[1] The effects of rape are long-term and often traumatic.[2] A rape trial can cause further severe psychological harm to the rape victim.[3] She[4] is often exposed to hostile question-

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1. *See* DePaul, *The Rape Trauma Syndrome: New Weapon for Prosecutors,* Nat'l L.J., Oct. 28, 1985, at 20, col. 1. Recently, prosecutors around the country have begun to use expert testimony on the psychological effects of rape in order to prove that a forcible assault took place. *Id.* According to psychiatrists and researchers, a rape victim will show signs of "rape trauma syndrome," a disorder that manifests itself after a particularly traumatic experience. *Id.* Prosecutors who try to use the testimony assert that for a long period of time after the rape, a victim experiences a definable set of as many as 50 separate psychiatric symptoms. These symptoms include the inability to sleep, nightmares of the incident, sexual dysfunction, eating disorders, and general nervousness. *Id. See generally* S. BROWNMILLER, AGAINST OUR WILL 361-74 (1975). Although a woman may survive the physical trauma of rape, she may be emotionally devastated. She may have difficulty sleeping, being alone, or entering into intimate relationships. *Id.*

2. *See* S. BROWNMILLER, *supra* note 1, at 361-74. One rape victim described her experience in the following way:

> I don't think I slept for a week. I lay on a cot in my sister's apartment with my clothes on. I thought of committing suicide. I had to quit my job—first of all I was a nervous wreck but also I was afraid he had spotted my going to and from work. I tried to stay still and make time move forward. I felt the course of my life had changed and nothing would ever be the same again.

Id. at 362-63.

3. T. MCCAHILL, L. MEYER & A. FISCHMAN, THE AFTERMATH OF RAPE (1979) [hereinafter T. MCCAHILL] (based on a survey of 1,401 women of all ages who reported a rape or sexual assault to authorities in Philadelphia between February 1, 1973 and June 30, 1974).

In one incident, a woman was raped by three men in her Philadelphia apartment for nearly two hours. *Id.* at 213. The victim was "devastated" after the experience. *Id.* She was so traumatized that she and her boyfriend were forced to move from their apartment immediately so as not to be reminded of the crime. *Id.*

Some time later, the police arrested the three rapists. *Id.* The trials were delayed over the next three years, during which time the victim gave testimony at no less than six different hearings. *Id.* Two of the rapists were convicted and imprisoned. *Id.*

Two years after the crime, the couple moved to California. *Id.* at 214. After they moved, however, they were subpoenaed again to testify in the third rapist's trial. *Id.* The couple flew back to Philadelphia to give testimony, but the case resulted in a mistrial. *Id.* Several months later, the couple received another subpoena. *Id.*

When the victim received this final subpoena in the mail, she became "hysterical" and, according to the detective assigned to the case, "had to be placed under the emergency care of a psychiatrist." *Id.* This example, although extreme, is by no means singular. *Id.*

ing by defense lawyers, causing her to experience humiliation and feelings of guilt.[5] To make matters worse, the victim must often testify about the details of a rape incident in front of a crowd of spectators.[6]

Some courts and legislatures have tried to reduce victims' psychological trauma by excluding the press and the public during the testimony of a rape victim.[7] The United States Supreme Court has held, however, that a state cannot enact a statute that mandates closure of a criminal trial during the testimony of a minor who is the alleged victim of a sexual assault.[8] Consequently, the victim's needs are given less priority than the rights of the defendant and the public to an open trial.

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4. Many statutes expressly state that rape can only be committed by a male. *See, e.g.*, N.Y. PENAL LAW §§ 130.25-.35 (McKinney 1985); MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962).

5. *See, e.g.*, Hibey, *The Trial of a Rape Case*, in RAPE VICTIMOLOGY 164 (1975). The following example is given of a rape victim's cross-examination by defense counsel:

> Q. Isn't it a fact that at the point when your girdle came off, you *assisted* in the taking of that girdle off?
> A. *Assisted?* I wouldn't use the word *assisted.*
> Q. Did you participate in taking that girdle off?
> A. No. I might have had my hands down there, yes, but I didn't participate.
> Q. Did you in any way pull that girdle down?
> A. No, I wouldn't say that sir. . . .
> Q. Isn't it a fact that you helped those men take that girdle off your body?
> A. That's not true.
> Q. Isn't it a fact, further, that you did not resist their taking off those underpants from your body?
> A. That's not true. That's not true.
> Q. Is it not a fact that on the occasion of the third intercourse, you said to the man "come on, come on?" . . .
> A. . . . If I used the words "come on," it meant please leave me alone, come on, don't do this to me . . . But I didn't say "come on" in the sense the other way.

Id. at 180-81 n.48 (emphasis in original).

6. T. MCCAHILL, *supra* note 3, at 212. The parents of a sixteen-year-old rape victim were angered when they discovered that their daughter would be giving testimony to a court filled with old men and junior high school students. *Id.* They asked, "Who are all these people and why are they in here listening to this?" *Id.* Another victim said, "I didn't want to have to speak of this experience in front of all those people." *Id.*

7. *See* Note, *Protecting Child Rape Victims From the Public and Press After Globe Newspaper and Cox Broadcasting*, 51 GEO. WASH. L. REV. 269, 273 (1983) (citing as examples Harris v. Stephens, 361 F.2d 888, 891 (8th Cir. 1966), *cert. denied*, 386 U.S. 964 (1967); Geise v. United States, 262 F.2d 151, 156-57 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); Hogan v. State, 191 Ark. 437, 438, 86 S.W.2d 931, 931-33 (1935)).

8. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 610-11 (1982). There are limited instances where a state may bar courtroom access to the press and public, namely if there is a compelling government interest and the closure is narrowly tailored to serve the compelling interest. This, however, is quite different from a statute that requires mandatory closure in all cases involving sexual crimes. *Id.* at 606-08. For a discussion of *Globe*, see *infra* notes 105-49 and accompanying text.

This Note considers the conflicting interests involved when the press and public are excluded from the courtroom during the testimony of a rape victim. Part II examines the legal system's impact on the rape victim. Part III explores the strong historical reasons for constitutionally mandating a public trial in criminal cases. Part IV analyzes the United States Supreme Court's interpretation of the constitutionality of a mandatory closure statute. Part V concludes that the severe trauma suffered by victims of rape warrants protecting them with statutes that mandate closure for portions of the trial.

II. THE RAPE VICTIM AND THE LEGAL SYSTEM

Rape statistics present a frightening picture. According to Federal Bureau of Investigation statistics, in 1984, 84,233 rapes were reported in the United States, up 6.7 percent from the 78,819 rapes reported the previous year.[9] Counselors at rape crisis centers, the Federal Bureau of Investigation, and the United States Department of Justice assert that the actual number of rapes is significantly higher because often the crime is not reported.[10]

Many explanations are offered for why rape so often goes unreported. Some victims fear the assailant will retaliate against them if they report the crime.[11] Other victims believe that society will label them as "damaged goods."[12] Additionally, the rape victim may be discouraged from reporting the crime because of her belief that the criminal justice system is hostile to the rape complainant.[13] Indeed, this hostility often begins with the skepticism of the law enforcement official to whom the crime is reported.[14] When the victim relates the crime, the

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9. Sherman, *A New Recognition of the Realities of 'Date Rape,'* N.Y. Times, Oct. 23, 1985, at C14, col. 1 (citing Federal Bureau of Investigation statistics).

10. *See* Prince, *The Trials of a Rape Victim,* N.Y. Daily News, Apr. 4, 1985, at 41, col. 1. According to a study by the United States Department of Justice, "nearly half the rapes committed from 1973 to 1982 went unreported." *Id.* In addition, "40% of the estimated 479,000 women raped did not report the crime, and 49% of the 1.03 million attempted rapes during the same period also went unreported." *Id.*

11. *Id.* at col. 2. The assailant often threatens to return and kill the victim should she report the rape to the police. *Id.*

12. Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 COLUM. L. REV. 1, 23 (1977). A rape victim often loses status in society. Some people view victims of crimes as "losers," and rape victims are often characterized as "ravaged" or "despoiled." *Id.*

13. *Id.*

14. T. MCCAHILL, *supra* note 3, at 103. "The rape victim who reports the incident to the police is often not prepared for what follows . . . . [F]or many rape victims, attempts at retribution are brought to a sudden and permanent halt at the police station." *Id.*

The skepticism that women face when they report a rape is shown by this excerpt from a California police manual: "Forcible rape is one of the most falsely reported crimes

police official must decide whether the account "meets a reasonable standard of credibility, and, if so, whether the event constitutes a crime."[15] If the official believes the victim's account of the crime, he will label the case as "founded." If the official decides a crime did not occur, the complaint will be deemed "unfounded," and the police official will recommend against charging.[16] When a rape victim finds her complaint unfounded, she is put in the confusing position of having come to the police for help, "only to have the door slammed firmly in her face."[17] The criteria used by the police to determine the validity of a victim's story are open to question.[18] The police have been accused, for example, of marking cases as unfounded because they believed the victim "asked for it," or because the victim was simply a member of a group of people the police dislike.[19] The groups most frequently discriminated against include the poor, minority females, prostitutes, and drug and alcohol abusers.[20] Additionally, the police often label cases as unfounded if they are thought to be "poor risk court cases."[21]

Even if the victim's case is deemed founded by the police, she then must face significant obstacles in the courtroom. At trial, the defense will attempt to discredit the testimony of the complaining witness by suggesting that she consented to the incident.[22] Especially in cases where the victim bears no physical scars, the defense will suggest that the woman did not really resist and was not actually raped.[23] "Many

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. . . . The majority of 'second day reported' rapes are not legitimate." S. BROWNMILLER, *supra* note 1, at 364 (quoting G. PAYTON, PATROL PROCEDURE 312 (1967)).

15. T. MCCAHILL, *supra* note 3, at 103.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 105.

20. *Id.*

21. *Id.*

22. *Id.* at 215-16. The consent defense tactic may be especially injurious to the young rape victim. In one case, a young girl was raped by several boys in an elevator. *Id.* at 216. At trial, the defense attacked her credibility and past sexual behavior, alleging that she was promiscuous and that she had consented to having intercourse with the group of boys. As the trial went on, the girl became more and more confused. By the end of the trial, she seemed to have lost her self-esteem and confidence. *Id.*

23. Berger, *supra* note 12, at 23.

> The police, like the courts, like society as a whole, "have fashioned a stereotype, which contains the attributes assumed to be a part of the true victim's character. Like negligence's reasonable man, the true victim of rape exercises due care and caution for her own safety. She possesses a reputation for chastity in her community. Additionally, she copes well with aggression, usually meeting force with force. Should she fail to overpower her aggressor and rape occurs, she will make an immediate complaint in a hysterical state."

Id. at 23-24 (quoting Comment, *Rape in Illinois: A Denial of Equal Protection*, 8 J. MARSHALL J. PRAC. & PROC. 457, 469 (1975)).

women emerge from the experience of testifying with their feelings of strength and self-reliance all but erased, an unfortunate result of the trial."[24] Generally, in cases where consent is an issue, the focus is on the victim's motives and behavior.[25] "She is made to feel that *she* is on trial."[26]

Furthermore, although most states have enacted "rape shield laws," which restrict the defense from introducing evidence about the victim's past sexual history,[27] stereotypes about women's behavior still influence juries, judges, and law enforcement officials.[28] Recent research on juries indicates that when consent is an issue in a rape case, jurors are inclined to accept the defendant's claim that "she wanted it," especially when the victim is "young, single and sexually active."[29] These stereotypes create an atmosphere that is particularly dangerous and threatening for rape victims.

In addition to the myths about rape victims themselves, society has fashioned a view of the prototypical rapist and rape encounter. Many people believe that rape occurs only in specific situations: in a dark alley between two strangers, for example.[30] Consequently, victims are even less likely to press charges in cases of "date rape," types of assaults in which women are forced to have sexual intercourse against their will with a friend or an acquaintance.[31] In these circumstances,

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24. T. McCAHILL, *supra* note 3, at 215.

25. *Id.* at 216.

26. *Id.* (emphasis added).

27. *See, e.g.*, ALA. CODE § 12-21-203(b), (c) (1986) (past sexual behavior of complainant not admissible unless such behavior involves the accused); FLA. STAT. ANN. § 794.022(2) (West 1976 & Supp. 1987) (prior sexual activity of victim with person other than offender not admissible, unless court finds a pattern of behavior relevant to consent, or that such evidence may prove source of semen, pregnancy, injury, or disease unrelated to defendant); GA. CODE ANN. § 24-2-3(a),(b) (Harrison 1985) (evidence of victim's past sexual behavior is inadmissible in rape prosecution except if with accused or if inference of reasonable belief that there was consent); *see also* FED. R. EVID. 412 (limiting use of reputation or opinion evidence of victim's past sexual behavior).

28. Berger, *supra* note 12, at 23-24.

> The myths supporting the notion that women are likely to make false accusations of rape, that rape is a charge easily made but difficult to defend against, that women say no but mean yes, and so forth, seem to be tacitly acknowledged in the standards of proof required by fact finders.

T. McCAHILL, *supra* note 3, at 231.

29. DePaul, *supra* note 1, at 20, col. 1. According to Brooklyn District Attorney Elizabeth Holtzman, jurors "hold rape victims to a higher standard than other victims." *Id.*

30. Berger, *supra* note 12, at 24.

31. Sherman, *supra* note 9, at C14, col. 1. Several recent studies indicate that the stereotype of the rapist as wearing "stocking masks and jumping out at women from dark alleys" is wrong. *Id.* at C1, col. 5. A three-year survey of 6,500 students, sponsored by Ms. Magazine and conducted by a psychologist, shows that "of the first 1,000 respondents, one out of eight women said she had been raped." *Id.* Of the women who were raped, 47% said the assailants were first or casual dates or acquaintances. *Id.*

the victim and the assailant may share the same friends or, in fact, be friends. Date-rape victims often fear that if they report the crime, they will not be believed by their family and friends, thus alienating the people most important to them.[32]

Finally, and for purposes of this Note most important, many victims are greatly distressed by the discovery that they must testify about the specifics of the rape at trial.[33] "The verdict is often less distressing to the victim than her experiences during the actual proceeding of the trial."[34] Indeed, as compared to victims who have not testified, victims who have testified are plagued with more nightmares and have more difficulties adjusting to everyday life.[35] By testifying, victims must relive the rape incident again at trial. "Fears and emotional turmoil that may have subsided earlier are once again aroused," and the process of the trial "may increase the victim's feelings of guilt and may lead her to question her own motivation."[36]

The existence of many observers in the courtroom compounds the rape victim's problems at trial. In courtrooms where sex offense trials are being prosecuted, often all of the seats reserved for the public are occupied.[37] The observers include "retired men, the unemployed, schoolchildren, and policemen in training."[38] Many attend rape trials "just to get out of the house" or "because it's great entertainment."[39] These spectators can make the rape victim's testimony especially difficult. The presence of the news media imposes additional hardships on the rape victim. "Few would relish recounting intimate sexual events in the knowledge that not ten yards away a newspaperman or television reporter was scribbling down every last detail."[40]

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32. *Id.* at C14, col. 1. The circumstances surrounding a "date rape" are not as clearly defined as when the assailant is a stranger. *Id.* According to the director of community education at the D.C. Rape Crisis Center in Washington, 60% of the 500 rape victims who were treated at the center in 1984 knew their attackers. *Id.* Thus, the issue becomes whether the woman has consented. There usually are no bruises and the victim has not been beaten. "It is basically his word against hers." *Id.*

33. T. MCCAHILL, *supra* note 3, at 211.

34. *Id.* "[T]he trial itself, regardless of the outcome, contributes to the negative adjustment of the victim." *Id.* at 223.

35. *Id.*

36. *Id.* at 225.

37. *Id.* at 211.

38. *Id.*

39. *Id.* One young male observer, interviewed during a rape trial recess, stated that he had been laid off from his job and that sitting around the house all day with his wife and kids had made him nervous. After hearing about rape trials from a neighbor on his block, he started attending such trials, and has been going ever since, finding them to be great entertainment. *Id.*

40. Berger, *supra* note 12, at 92. The media treatment of the victim is occasionally as devastating as the treatment by the assailant. For example, a 16-year-old who was raped in Shelton, Washington, a city of 7,500 people, stated that she had been victimized three

The extremely difficult plight of the rape victim and the recognition of her needs have received wide public attention.[41] Rape has received a great deal of media coverage since the early 1970s, when the women's movement first targeted rape as a "core issue."[42] Counseling services have been formed to handle rape victims,[43] some police departments have changed procedures in rape investigations,[44] and legislatures have enacted statutes affording rape victims greater protection.[45]

Despite perceivable progress in the treatment of rape victims by the law enforcement and judicial systems, rape victims must still undergo the emotional trauma of testifying in open court. Although many states have enacted statutes that empower the judge to close portions of a rape trial in certain circumstances,[46] this option is left solely to the

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times—by the rapist, by testifying at trial, and in a newspaper article that recounted the details of the crime. Turner, *Newspaper's Coverage of Sex-Crime Trials Splits a Town in Washington*, N.Y. Times, Dec. 5, 1985, at A18, col. 1. The newspaper's publisher believed that it was professionally improper to cover rape trials differently than other trials. *Id.* Another rape victim in Shelton complained that she was humiliated by the report of the details of her rape. *Id.* " 'My 8-year-old daughter had to hear at school from other kids that her mother had been raped,' she said." *Id.*

41. Berger, *supra* note 12, at 3.

> To put the matter in perspective, however, it should be noted that this is not the only time in our nation's history when rape—at least, specific kinds or examples of it—has taken hold of and even obsessed broad segments of the popular mind. Most notably, interracial rape, an institutional reality in the Old South where white men freely took female slaves for their sexual use, assumed the aspect of regional myth and monomania when the question turned to black assault on white women.

Id. (footnotes omitted).

42. T. McCAHILL, *supra* note 3, at 233.

43. *See* ST. VINCENT'S HOSPITAL AND MEDICAL CENTER OF NEW YORK, RAPE CRISIS PROGRAM, FIRST PROGRAM REPORT 1976-1982 (1983) [hereinafter FIRST PROGRAM REPORT]. This rape crisis program "was called upon to provide public education, training for health care workers, and technical assistance to other agencies while victims from throughout the greater metropolitan area came . . . for counseling for themselves and their loved ones." *Id.*

44. T. McCAHILL, *supra* note 3, at 233. In many cities, the procedure for handling rape complaints has changed. *Id.* For example, in Multnomah County, Oregon, standardized procedures for interviewing both the victim and the suspect are followed in all rape investigations. *Id.*

45. For a discussion of rape shield statutes, see *supra* note 27 and accompanying text.

46. *See, e.g.*, ALA. CODE § 12-21-202 (1986) (in prosecutions for rape, the court may, in its discretion, exclude from courtroom all persons not necessary); KAN. STAT. ANN. § 38-822 (1981) ("The district court may exclude from any hearing pursuant to juvenile code all persons except counsel for interested parties, officers of the court and the witness testifying."); LA. REV. STAT. ANN. § 15:469.1 (West 1981) (in cases of rape, where victim is 15 years or younger, the court may upon its own motion or that of defendant or state, order testimony of victim to be heard in closed courtroom); N.C. GEN. STAT. § 15-166 (1983) (in trial for rape or sex offense, or attempt to rape or commit sex offense, the

discretion of the trial judge. Consequently, these statutes offer little comfort to the rape victim who needs assurance that she will be protected by a closed courtroom.[47] Without this protection, she may very well decide not to report the crime.[48] While a mandatory closure statute would afford the rape victim more protection, it may infringe upon the constitutional rights of the defendant and the public to an open trial.

III. The Right to a Public Trial

To determine whether a statute which mandates closure of portions of a rape trial is constitutionally permissible, it is necessary to examine two areas of constitutional law: the accused's sixth amendment right to an open trial,[49] and the development of a first amendment right to attend criminal proceedings.[50]

a. The Sixth Amendment Right of the Accused

The sixth amendment guarantees the accused the right to a public trial. Openness has long been recognized as a necessary characteristic of Anglo-American trials.[51] The significance of the public trial has been attributed to a number of factors. It has been recognized as a way to

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trial judge may, during taking of testimony, exclude from the courtroom all persons except officer of the court and defendant and those engaged in trial of case); N.D. Cent. Code § 27-01-02 (1974) (judge may exclude all persons not necessary as parties or witnesses from trial of cases "of a scandalous or obscene nature").

47. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 618 (1982) (Burger, C.J., dissenting). Chief Justice Burger felt it best that judges not have to make individual determinations on whether or not to invoke closure. *Id.* ("[t]he legislature did not act irrationally in deciding not to leave the closure determination to the idiosyncracies of the individual judges").

48. *Id.* at 619.

49. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial. . . . " U.S. Const. amend. VI (emphasis added). *See generally* Note, *The Right to Attend Criminal Hearings*, 78 Colum. L. Rev. 1308 (1978) (fifth and sixth amendments taken together support the public's right to attend criminal hearings); Note, *The Right to a Public Trial in Criminal Cases*, 41 N.Y.U. L. Rev. 1138 (1966) (discussing the sources and extent of the right to a public trial) [hereinafter Note, *The Right to a Public Trial*].

50. The first amendment provides: "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. amend. I.

51. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980). Before the Norman Conquest, freemen in England attended cases brought before "moots," the local or county courts, where the freemen would render judgments. Attendance at these early meetings was mandatory. *Id.* at 565. For a discussion of *Richmond Newspapers*, see *infra* notes 78-104 and accompanying text.

prevent the abuse of the judicial system.[52] "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[53] A public trial also reduces the possibility of perjury, as the presence of the public may deter false testimony.[54] Further, open proceedings potentially enhance the performance of witnesses, to the extent that someone attending the trial may be able to shed light on or furnish important evidence.[55]

Additionally, courts have found that open trials have significant therapeutic value for the community. The Supreme Court has recognized that "the open processes of justice serve an important prophylactic purpose, proving an outlet for community concern, hostility, and emotion."[56] For people in a society to accept an institution, it is necessary that they to be able to observe its workings.[57]

The United States Supreme Court discussed the public trial provision of the sixth amendment at length in *Gannett Co. v. DePasquale.*[58] In *Gannett,* the petitioners sought to prohibit enforcement of two orders excluding the public and the press from a pretrial hearing in a criminal prosecution involving two defendants charged with murder.[59] The defendants believed that "the unabated buildup of adverse publicity had jeopardized" their ability to receive a fair trial.[60] Neither the

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52. 448 U.S. at 569. The openness of English trials was seen as assuring the basic fairness of the proceedings; it discouraged perjury, misconduct, and bias. *Id. Cf. In re* Oliver, 333 U.S. 257, 268-70 (1948) (Anglo-American distrust of secret trials traceable to abuses of secrecy by the Spanish Inquisition and the English Court of Star Chamber).

53. *Oliver,* 333 U.S. at 270. As stated by Jeremy Bentham over 120 years ago:

> [S]uppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably effective check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account . . . .

Id. at 271 (quoting 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

54. *Richmond Newspapers,* 448 U.S. at 570 n.8 (citing 6 J. WIGMORE, EVIDENCE § 1834, at 436 (J. Chadbourn rev. ed. 1976)).

55. *Id.*

56. *Id.* at 571.

57. Public attendance at a trial also serves an educational purpose. "It is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." State v. Schmit, 273 Minn. 78, 87-88, 139 N.W.2d 800, 807 (1966).

58. 443 U.S. 368 (1979). For a further discussion of *Gannett,* see George, *United States Supreme Court 1978-1979 Term: Criminal Law Decisions,* 25 N.Y.L. SCH. L. REV. 217, 273-74 (1979).

59. Gannett Co. v. DePasquale, 55 A.D.2d 107, 109, 389 N.Y.S.2d 719, 720 (App. Div. 1976), *modified,* 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977), *aff'd,* 443 U.S. 368 (1979).

60. 443 U.S. at 375.

district attorney nor a reporter employed by the petitioner objected to the closure motion.[61] Finding that an open suppression hearing would pose a "reasonable probability of prejudice to the defendants," the judge granted the defendants' motion.[62] A local newspaper appealed the closure order, claiming that the court's action violated first amendment guarantees and the sixth amendment right to a public trial.[63] The New York Court of Appeals upheld the exclusion of the press and the public.[64] The United States Supreme Court affirmed, noting that the public trial provision of the sixth amendment exists solely for the benefit of the criminal defendant.[65] The Court held that the sixth amendment does not accord the media or the general public any constitutional right of access to such pretrial hearings.[66]

Justice Stewart, writing for the majority, stated that although there is a public interest in the enforcement of sixth amendment guarantees, that interest does not rise to the level of a constitutional right.[67] Rejecting the petitioner's reliance on the history of the public-trial guarantee, Justice Stewart remarked that the history of open civil and criminal proceedings reflected common law rules that had never been incorporated into the Constitution.[68] He found nothing in the structure, text, or history of the sixth amendment to support a right of members of the public to insist upon an open trial.[69] Furthermore, to

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61. *Id.*

62. 55 A.D.2d at 109, 389 N.Y.S.2d at 721.

63. Gannett Co. v. DePasquale, 43 N.Y.2d 370, 374, 372 N.E.2d 544, 546, 401 N.Y.S.2d 756, 758 (1977), *aff'd*, 443 U.S. 368 (1979).

64. *Id.* at 381, 372 N.E.2d at 551, 401 N.Y.S.2d at 763. While the court of appeals noted that criminal trials are presumptively open to the public, the public trial concept has never been viewed as a "rigid, inflexible straitjacket 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." *Id.* at 377, 372 N.E.2d at 548, 401 N.Y.S.2d at 760 (quoting People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954)).

65. Gannett Co. v. DePasquale, 443 U.S. 368, 381 (1979). The Court stated that since adverse publicity can jeopardize the ability of a defendant to receive a fair trial, the trial judge may take "measures even when they are not strictly and inescapably necessary." *Id.* at 378. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) (holding that massive publicity prevented defendant from receiving a fair trial); Estes v. Texas, 381 U.S. 532 (1965) (holding that defendant was unfairly prejudiced by extensive pretrial media coverage).

66. 443 U.S. at 381 & n.9. "There is not the slightest suggestion . . . that there is any correlative right in members of the public to insist upon a public trial." *Id.* at 381.

67. *Id.* at 383. "In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation." *Id.*

68. *Id.* at 384-87. Justice Stewart noted that even if the sixth and fourteenth amendments were viewed as incorporating the common law right of the public to attend criminal trials, "there [still] exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings . . . ." *Id.* at 387.

69. *Id.* at 384-87.

the extent that the sixth amendment requires open trials, it does not require that a pretrial proceeding be opened to the public.[70]

Seven members of the *Gannett* Court failed to address the question whether a first amendment right exists to attend criminal trials.[71] Only Justice Powell's concurrence expressly recognized such a first amendment right.[72] In his view, for the public to have "accurate information concerning the operation of its criminal justice system," the first amendment must protect the press interest in being present at pretrial hearings.[73] Justice Powell cautioned that although the press is constitutionally protected, the right of access to a courtroom proceeding is not absolute.[74] Considerations that must be weighed against the first amendment right include the defendant's constitutional right to a fair trial, the necessity to preserve the identity of informants, and the need of the government to preserve the confidentiality of sensitive information.[75] Justice Powell concluded that the trial court, in considering a closure motion at a pretrial suppression hearing, must consider "whether a fair trial for the defendant is likely to be jeopardized by publicity."[76]

While the *Gannett* Court confirmed that the public may not invoke the sixth amendment to gain access to criminal pretrial proceedings, it did not decide whether the first amendment affords the public such a right.[77]

b. The First Amendment Right of Access to Trials

One year later, in *Richmond Newspapers, Inc. v. Virginia*,[78] the Supreme Court addressed that issue. The plurality opinion[79] held that

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70. *Id.* at 385. The Court explicitly recognized a distinction between trials and pretrial proceedings. *Id.*

71. *Id.* at 392. Justices Blackmun, White, Brennan, and Marshall dissented, but did not reach the first amendment issue raised by the petitioner, that access to pretrial proceedings is protected under the first amendment. Justice Blackmun stated that "[t]o the extent the Constitution protects a right of public access to the proceeding, the standards enunciated under the Sixth Amendment suffice to protect that right." *Id.* at 447 (Blackmun, J., concurring in part, dissenting in part).

72. *Id.* at 397 (Powell, J., concurring).

73. *Id.*

74. *Id.* at 397-98.

75. *Id.* at 398.

76. *Id.* at 400. Justice Powell suggested that careful application of these considerations would accommodate both the sixth amendment rights of defendants and the first amendment rights of members of the press. *Id.*

77. *Id.* at 391-92.

78. 448 U.S. 555 (1980). For a further discussion of *Richmond Newspapers*, see George, *United States Supreme Court 1979-1980 Term: Criminal Law Decisions*, 26 N.Y.L. SCH. L. REV. 99, 167-68 (1981).

79. 448 U.S. at 555. A separate statement was submitted by each of the seven mem-

the right of the public to attend criminal trials is implicit in the first amendment.[80]

In *Richmond Newspapers,* the Circuit Court of Hanover County convicted the defendant of murder.[81] The Virginia Supreme Court reversed the conviction, because evidence allegedly belonging to the defendant had been admitted improperly.[82] After two subsequent retrials ended in mistrials,[83] the trial judge, prior to the beginning of the fourth trial, granted the defense counsel's motion for a closed trial.[84] Counsel for Richmond Newspapers and two reporters moved that the closure order be vacated, but the judge denied their motion.[85] Agreeing with the defense counsel, the judge noted that there was a possibility that information about the trial would be published in the media and seen by the jurors.[86] The appellants petitioned the Virginia Supreme Court, but were denied their petition for appeal.[87]

The newspaper and its two reporters appealed to the United States Supreme Court.[88] Reversing the closure order, seven Justices recognized that members of the public have a first amendment right of access to criminal trials.[89] In reaching its decision, the plurality observed that when the Constitution was adopted, "criminal trials both here and in England had long been presumptively open."[90] Chief Jus-

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bers of the majority. Justice Rehnquist was the only dissenter. Justice Powell did not participate in the case.

80. *Id.* at 580. The plurality noted that "without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.' " *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

81. *Id.* at 559.

82. *Id.* (citing Stevenson v. Commonwealth, 218 Va. 462, 237 S.E.2d 779 (1977)).

83. *Id.* at 559. The second trial ended in a mistrial, because a juror requested to be excused after the trial had begun and no alternate was available. The third mistrial apparently was caused by a prospective juror who related information about the defendant's previous trials to other prospective jurors. The defendant Stevenson was retried both times in the Circuit Court of Hanover County.

84. *Id.* at 559-60. In requesting that the trial be closed to the public, the defense counsel stated: "I don't want any information being shuffled back and forth when we have a recess as to what—who testified to what." *Id.* (quoting Tr. of Sept. 11, 1978 Hearing on Defendant's Motion to Close Trial to the Public 2-3).

85. *Id.* at 560. Appellants argued that the court failed to show that the closure order was necessary, and that the court did not consider any less restrictive measures in attempting to ensure a fair trial for the defendant. *Id.* (quoting Tr. of Sept. 11, 1978 Hearing on Motion to Vacate at 11-12).

86. *Id.* at 561. Additionally, the judge noted that "having people in the Courtroom is distracting to the jury." *Id.*

87. *Id.* at 562.

88. *Id.*

89. *Id.* at 580. The Court held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Id.* at 581.

90. *Id.* at 569.

tice Burger, writing for the plurality, stated that society's criminal process must "satisfy the appearance of justice," and allowing people to observe trials is a way to provide such an appearance.[91] Furthermore, the Chief Justice noted that although attendance at trials was once a common pastime,[92] today the public learns about trial activities through the press, not through firsthand observation.[93] Consequently, the media claim that they function as "surrogates for the public" is validated.[94]

In discussing the public's constitutional right of access to criminal trials, Chief Justice Burger concluded that this right "is implicit in the guarantees of the First Amendment."[95] His conclusion was based on the belief that first amendment guarantees of speech and press would be meaningless if the public and the press were prohibited from attending criminal trials.[96] Additionally, the Chief Justice implied that the first amendment right of assembly would be violated should places traditionally open to the public, such as trial courtrooms, be impermissibly restricted.[97]

Although the plurality recognized the strong presumption in favor of open criminal trials, it noted that this right is not absolute, stating:

> [O]ur holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, . . . so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.[98]

The Chief Justice did not enumerate standards for evaluating the reasonableness of closure orders under the first amendment, but he did discuss the judge's errors respecting the fourth trial.[99] First, the judge failed to make findings to support his order to close the trial to the public;[100] and second, failed to inquire into the alternatives to closure

91. *Id.* at 571-72 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).
92. *Id.* at 572.
93. *Id.*
94. *Id.* at 573.
95. *Id.* at 580.
96. *Id.* at 576-77.
97. *Id.* at 577-78 ("[A] trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.").
98. *Id.* at 581 n.18 (citation omitted).
99. *Id.* at 580-81.
100. *Id.* at 580.

that might have been sufficient to ensure the defendant a fair trial.[101] Chief Justice Burger suggested that the trial judge should have considered sequestration of the jurors as an alternative to closure.[102]

In a separate concurrence, Justice Stewart agreed with the Chief Justice that a trial, by its very nature, must be open to the public and the press.[103] However, Justice Stewart reiterated that this right is not absolute and that a trial judge may impose limitations upon the presence of members of the press and public at a trial. Specifically, Justice Stewart remarked that "the sensibilities of a youthful prosecution witness, for example, might justify similar exclusion in a criminal trial for rape, so long as the defendant's Sixth Amendment right to a public trial were not impaired."[104]

The Supreme Court explored the implications of *Richmond Newspapers* in *Globe Newspaper Co. v. Superior Court,*[105] which involved the trial of a defendant accused of raping three teenagers.[106] During hearings on several preliminary motions, the presiding judge applied a Massachusetts statute which mandated closure in trials for specified sexual offenses.[107] Before the trial began, Globe moved for revocation of the closure order and permission "to intervene 'for the limited purpose of asserting its rights to access to the trial and hearings on related

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101. *Id.* at 580-81.

102. *Id.* at 581.

103. *Id.* at 599 (Stewart, J., concurring). According to Justice Stewart, a courtroom is not only a place where the press may go, but a place "where their presence serves to assure the integrity of what goes on." *Id.* at 600. Justice Stewart distinguished a courtroom from a jail, a military base, or a prison, where access by the public and press is curtailed. *Id.* at 599.

104. *Id.* at 600 n.5 (citation omitted). Justice Rehnquist, the sole dissenter, stated simply that he did not believe any provision of the Constitution authorized the Supreme Court to review a state's reasons for denying public access to a trial, particularly if both the prosecution and the defense agreed to closure. *Id.* at 605-06 (Rehnquist, J., dissenting). Furthermore, in Justice Rehnquist's opinion, no provisions of the Constitution prohibit a state from doing what the trial judge in Virginia did in this case. *Id.* at 606.

105. 457 U.S. 596 (1982). For a further discussion of *Globe*, see George, *United States Supreme Court 1981-1982 Term: Criminal Law Decisions*, 29 N.Y.L. SCH. L. REV. 551, 601-07 (1984-1985).

106. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 849, 401 N.E.2d 360, 363, *vacated*, 449 U.S. 894 (1980), *on remand*, 383 Mass. 838, 423 N.E.2d 773 (1981), *rev'd*, 457 U.S. 596 (1982).

107. *Id.* at 847, 401 N.E.2d at 362. Chapter 278, section 16A of the Massachusetts General Laws 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.

MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

preliminary motions.' "[108] The trial court, however, denied Globe's motions on the basis of the Massachusetts statute.[109] Globe then sought injunctive relief from a justice of the Massachusetts Supreme Judicial Court.[110] After a hearing, the justice denied Globe's request for relief.[111]

Prior to Globe's appeal to the full court, the defendant was acquitted. Nine months later, the supreme judicial court dismissed Globe's appeal,[112] stating that, although section 16A of the Massachusetts statute did not require the exclusion of the press from the entire criminal trial, it did require the closure of trials during the testimony of minor victims.[113] The court explained that the statute's purposes were "to encourage young victims of sexual offenses to come forward," and to protect them from psychological harm at trial.[114] The court further stated that closure during other portions of such trials was "a matter within the judge's sound discretion."[115] Choosing to await the Supreme Court's decision in *Richmond Newspapers,* the court reserved judgment on whether Globe had a right to attend the entire trial under the first and sixth amendments.[116]

Appellants then appealed to the United States Supreme Court, which vacated the supreme judicial court's judgment and remanded the case for further consideration in light of *Richmond Newspapers.*[117]

On remand, the supreme judicial court dismissed Globe's ap-

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108. 457 U.S. at 599. Defendant also objected to the exclusion order. The prosecution stated that the order was issued on the court's "own motion and not at the request of the Commonwealth." *Id.*

109. *Id.*

110. 379 Mass. at 847, 401 N.E.2d at 362.

111. *Id.* At the hearing, the Commonwealth expressed the view that it would waive "whatever rights it may have to exclude the press." 457 U.S. at 599 n.5. The prosecutor had indicated that she had spoken with the victims and, although they expressed some "privacy concerns," they would not object to the press being present during the trial. However, they did object to the press publishing their names, photographs, or other personal information. The victims probably did not realize that their names were already part of the public record. *Id.*

112. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 866, 401 N.E.2d 360, 372, *vacated,* 449 U.S. 894 (1980), *on remand,* 383 Mass. 838, 423 N.E.2d 773 (1981), *rev'd,* 457 U.S. 596 (1982). The court held that the issue was moot because the criminal trial had since ended in acquittal. It proceeded to the merits of the case, however, since the issues raised by Globe were "significant and troublesome, and 'capable of repetition yet evading review.' " *Id.* at 848, 401 N.E.2d at 362 (quoting South Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

113. *Id.* at 864, 401 N.E.2d at 371.

114. *Id.* at 860, 401 N.E.2d at 369.

115. *Id.* at 864, 401 N.E.2d at 371.

116. *Id.* at 854, 401 N.E.2d at 366.

117. Globe Newspaper Co. v. Superior Court, 449 U.S. 894 (1980), *on remand,* 383 Mass. 838, 423 N.E.2d 773 (1981), *rev'd,* 457 U.S. 596 (1982).

peal.[118] Although the court recognized the "unbroken tradition of openness"[119] in trials, it stated that there is at least one important exception to this tradition: "In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult."[120] According to the court, the use of a case-by-case method would defeat the state's purposes, because the trauma of a preliminary hearing, which would have to be held to determine the susceptibility of the victim, would probably deter some victims from testifying.[121] Finally, the court held that *Richmond Newspapers* did not require the invalidation of the mandatory closure requirement, "given the statute's narrow scope in an area of traditional sensitivity to the needs of victims."[122]

Globe again appealed to the United States Supreme Court. The Court reversed the Supreme Judicial Court of Massachusetts, holding that the mandatory closure rule in section 16A violated the first amendment.[123] Having invalidated the statute on first amendment grounds, the Court noted that it need not consider Globe's additional claim of a sixth amendment violation.[124]

Writing for the majority, Justice Brennan found the law invalid under the principles of *Richmond Newspapers.*[125] In his view, *Rich-*

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118. Globe Newspaper Co. v. Superior Court, 383 Mass. 838, 852, 423 N.E.2d 773, 781 (1981), *rev'd*, 457 U.S. 596 (1982). The plaintiff argued that its own rights had been violated under the first amendment, as applied to the states by the fourteenth amendment. *Id.* at 841, 423 N.E.2d at 775. Additionally, Globe implied that it could assert the sixth amendment rights of the defendant. *Id.* The court disagreed, stating that the accused's failure to pursue the claim after acquittal prevented Globe from asserting the defendant's rights. *Id.* at 841-42, 423 N.E.2d at 776. According to the court, sixth amendment rights are personal rights which can be asserted only by the original criminal defendant. *Id.* at 842, 423 N.E.2d at 776.

119. *Id.* at 845, 423 N.E.2d at 778.

120. *Id.* at 846, 423 N.E.2d at 778. "Historically there has been a recognition that significant interests are at stake in a trial involving a sexual assault, interests that may outweigh the public's right to unfettered access to the trial." *Id.* at 847, 423 N.E.2d at 778-79.

121. *Id.* at 848, 423 N.E.2d at 779-80.

122. *Id.* at 851, 423 N.E.2d at 781. In a concurring opinion, Justice Wilkins distinguished *Globe* from *Richmond Newspapers,* pointing out that the latter decision did not involve a trial of a minor victim of a sex crime. He noted that various Justices in *Richmond Newspapers* recognized that countervailing interests might overcome the general tradition of openness. Justice Wilkins questioned whether mandatory closing of a trial is constitutional absent specific findings by the judge that closing the trial is justified. *Id.* at 852-53, 423 N.E.2d at 781-82 (Wilkins, J., concurring). Justice Wilkins never addressed the majority's argument that mandatory closure is necessary to encourage minor victims to step forward and report crimes.

123. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602 (1982).

124. *Id.* at n.10.

125. *Id.* at 603. In *Richmond Newspapers,* seven Justices had recognized an implied first amendment right of access to criminal trials, also applicable to the states through

mond Newspapers "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials."[126] He stated that although the right of access to criminal trials is not explicit in the first amendment, the first amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[127]

The Court reiterated that the right of access to criminal trials is not absolute. However, the public and the press may only be excluded from a trial in limited situations.[128] According to Justice Brennan, "[w]here, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[129]

In its analysis, the Court considered two interests advanced by the state in support of the statute: the avoidance of further harm to the victim while testifying, and the encouragement of minor victims to provide testimony.[130] In examining the first interest, the Court agreed that protecting both the physical and psychological welfare of a minor is important,[131] but held that a *mandatory* closure rule is not justified.[132]

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the fourteenth amendment. *Id.* For a detailed discussion of the Court's constitutional analysis in *Richmond Newspapers*, see *supra* notes 78-104 and accompanying text.

126. 457 U.S. at 603.

127. *Id.* at 604 (citing *Richmond Newspapers*, 448 U.S. 555, 579-80 & n.16 (plurality opinion), 587-88 & n.4 (Brennan, J., concurring) (1980)). The *Globe* majority explained that, by offering constitutional protection to the right of access to criminal trials, the first amendment collaterally ensured a free and informed "discussion of governmental affairs." *Id.* at 604-05. Furthermore, the Court noted that through its collective reasoning in *Richmond Newspapers*, it had articulated the constitutional predicates for so guaranteeing access to criminal trials, namely the weight of history and sound tradition underlying the presumption of openness accorded such trials; and the preservation of integrity and fairness necessary to the judicial process and the governmental system in general. *Id.* at 605-06.

128. *Id.* at 606.

129. *Id.* at 606-07. The Court noted that such a strict scrutiny analysis would not apply to situations where the denial of access resembled "time, place, and manner" restrictions on free speech. *Id.* at 607 n.17.

130. *Id.* at 607. The Supreme Judicial Court of Massachusetts had described the state interests in greater detail as designed:

> (a) to encourage minor victims to come forward to institute complaints and give testimony . . . ; (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage . . . ; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote the sound and orderly administration of justice . . . ; (e) to preserve evidence and obtain just convictions.

Id. at n.18 (citation omitted).

131. *Id.* at 607. The Court marked the importance of measuring the state's interest in terms of the relative degree of injury suffered by minor victims of sex crimes when testi-

Instead, the Court believed that a case-by-case determination could be made by the trial court to decide whether closure is necessary to protect a minor victim.[133] The factors to be considered by the trial judge include "the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives."[134]

Next, the Court rejected the state's claim that the statute encouraged minor victims of sex crimes to report the offense.[135] According to the Court, "[t]he Commonwealth [had] offered no empirical support for the claim that the rule of automatic closure contained in Section 16A [would] lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities."[136] The Court further refuted the state's claim by noting that, although section 16A closed the courtroom during the testimony of minor sex victims, the statute did not protect the victim from public scrutiny since the press had access to the transcript, court personnel, and other sources capable of providing an account of the minor victim's testimony.[137]

Chief Justice Burger, joined by Justice Rehnquist, dissented,[138] disagreeing with the "Court's expansive interpretation"[139] of the *Richmond Newspapers* decision. According to the Chief Justice, it was in-

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fying *"in the presence of the press and the general public."* *Id.* at n.19 (emphasis in original).

132. *Id.* at 608. The Court said that Massachusetts stood alone in having a mandatory statute that excluded the press and general public during the testimony of a minor victim in a criminal sex offense trial. Other states, however, have statutory or constitutional provisions that allow a trial judge to close such a proceeding. *Id.* at n.22.

133. *Id.* at 608.

134. *Id.* (footnote omitted). Justice Brennan noted that section 16A would require closure "even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence." *Id.; see also* Note, *supra* note 7, at 275 ("The objective factors enumerated by the Court, such as age, must be considered, but they cannot be determinative. Victims' needs are entirely subjective . . . . ").

135. 457 U.S. at 609.

136. *Id.*

137. *Id.* at 610. The Court viewed as speculative the state's claim that closure would improve the quality and credibility of minor victims' testimony. Instead, the Court believed that openness in court proceedings would improve the quality of testimony. *Id.* at 609 n.26.

138. *Id.* at 612 (Burger, C.J., dissenting). In a separate dissent, Justice Stevens did not reach the merits of the case, believing instead that the matter should have been dismissed for mootness. *Id.* at 623 (Stevens, J., dissenting).

The majority addressed the issue of mootness, but concluded that the controversy fell under the exception of " 'capable of repetition, yet evading review.' " *Id.* at 603 (quoting Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). *But see id.* at 623 n.3 (Stevens, J., dissenting) (questioning the applicability of the mootness exception).

139. *Id.* at 613 (Burger, C.J., dissenting). The Chief Justice painted "a disturbing paradox" where states are allowed to close proceedings for minors accused of sex crimes but not permitted to close proceedings relating to the victims of sex crimes. *Id.* at 612.

correct to read *Richmond Newspapers* "as spelling out a First Amendment right of access to all aspects of all criminal trials under all circumstances."[140] Indeed, the Chief Justice noted that "[t]here is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors."[141]

The Chief Justice asserted that the Massachusetts statute was neither intended to, nor did it in fact, deny the press or the public access to information.[142] The statute was enacted to "give assurance to parents and minors that they would have this moderate and limited protection from the trauma" of testifying in open court.[143] The question, therefore, was whether the statute's restrictions were reasonable and whether the state's interest in protecting minor sex-offense victims from the trauma of public testimony outweighed the "interests of the media for instant access."[144] With the "minimal impact of the law on First Amendment rights" clearly outweighed by the state's interest in protecting child rape victims, Chief Justice Burger believed that section 16A was unquestionably constitutional.[145] Furthermore, Chief Justice Burger concluded that the Massachusetts law was a reasonable re-

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140. *Id.* at 613.

141. *Id.* at 614. The Chief Justice listed just a few of the cases that have excluded the public from trials involving sexual assaults. *Id.* (citing Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966) (courtroom closed to spectators during testimony of prosecuting witness in interracial rape trial), *cert. denied*, 386 U.S. 964 (1967); Reagan v. United States, 202 F. 488 (9th Cir. 1913) (exclusion of spectators during testimony of 16-year-old rape victim nonreversible error under the circumstances); United States v. Geise, 158 F. Supp. 821 (D. Alaska) (exclusion of spectators in a prosecution for statutory rape properly within the discretion of the trial court), *aff'd*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959); Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) (spectators excluded during examination of ten-year-old prosecuting witness); State v. Purvis, 157 Conn. 198, 251 A.2d 178 (1968) (clearing the courtroom during testimony of prosecuting witness not error); Moore v. State, 151 Ga. 648, 108 S.E. 47 (1921) (clearing the courtroom during testimony of prosecuting witness not error), *appeal dismissed*, 260 U.S. 702 (1922)).

142. 457 U.S. at 615 (Burger, C.J., dissenting). Chief Justice Burger delineated the public's and the media's right of access to information and the protection accorded the minor victim. *Id.* The same reasons advanced by the majority to defeat the state's justification for § 16A, i.e., that the public and media had access to the trial transcript, were asserted by the Chief Justice as acknowledgements that the public and media suffered no ill effects from a closure order. *Id.* For a discussion of the majority's criticisms of the justifications for § 16A, see *supra* notes 135-37 and accompanying text.

143. 457 U.S. at 615 (Burger, C.J., dissenting).

144. *Id.* at 616. As the Chief Justice noted, public testimony includes television coverage in more than half of the states. *Id.*

145. *Id.* The Chief Justice stated that the Massachusetts statute, in excluding "the press and public only during the actual testimony of the child victim of a sex crime, rationally serves the Commonwealth's overriding interest in protecting the child from severe—possibly permanent—psychological damage. It is not disputed that such injury is a reality." *Id.* at 616-17.

sponse to the problem of the underreporting of sexual offenses.[146]

Additionally, the Chief Justice contended that the Court misunderstood the state's reasons for enacting the mandatory closure law.[147] According to the majority, the minor victim's trauma is not lessened by closure, insofar as the press can still discover the identity of the victim and the substance of the testimony. However, the dissent pointed out that the purpose of section 16A was not to preserve confidentiality, but to prevent the psychological harm caused by relating details of the crime in front of strangers.[148] The dissenters further argued that a statute which left the closure determination to the discretion of individual judges might not help encourage the reporting of the crimes, for "[t]he mere *possibility* of public testimony might cause parents and children to decide not to report these heinous crimes."[149]

In *Press-Enterprise Co. v. Superior Court*,[150] the United States Supreme Court reaffirmed its decision in *Richmond Newspapers*. The controversy in *Press-Enterprise* arose when the trial judge denied Press-Enterprise Co. access to both the proceedings and the complete transcript of the voir dire examination of prospective jurors at a trial involving the rape and murder of a teenage girl.[151] Petitioner argued that the "public had an absolute right to attend the trial" which included the voir dire proceedings.[152] The state opposed the petitioner's motion and contended that if the press remained during the voir dire proceedings, "juror responses would lack the candor necessary to assure a fair trial."[153] Agreeing with the state, the judge ruled that the

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146. *Id.* at 617. In so doing, the Chief Justice criticized the Court's "cavalier disregard of the reality of human experience" in this area. *Id.*

147. *Id.*

148. *Id.* at 618.

149. *Id.* at 619 (emphasis added). The Chief Justice explained that since victims and their parents may not be aware of the "nuances of state law," a person who reads a newspaper report of a "minor victim's testimony may very well be deterred from reporting a crime on the belief that public testimony will be required." *Id.*

150. 464 U.S. 501 (1984). For a further discussion of *Press-Enterprise*, see George, *United States Supreme Court 1983-1984 Term: Highlights of Criminal Procedure*, 31 N.Y.L. SCH. L. REV. 61, 127-29 (1986). Chief Justice Burger delivered the opinion of the Court in which Justices Brennan, White, Blackmun, Powell, Rehnquist, Stevens, and O'Connor joined. Justices Blackmun and Stevens filed concurring opinions. *Id.* at 513 (Blackmun, J., concurring); *id.* at 516 (Stevens, J., concurring). Justice Marshall filed an opinion concurring in the judgment. *Id.* at 520 (Marshall, J., concurring in judgment).

151. 464 U.S. at 503. Unlike *Globe*, the issue in *Press-Enterprise* concerned the right of privacy of prospective jurors.

152. *Id.*

153. *Id.* Counsel for the defendant argued that the jurors' right of privacy would be violated by releasing the transcript of the voir dire proceedings. *Id.* at 504. The prosecutor concurred and added that the questioning of the prospective jurors had been undertaken with an " 'implied promise of confidentiality.' " *Id.* (quoting App. at 111).

right of privacy should prevail during the voir dire proceedings.[154] Petitioner was denied a writ of mandate by the California Court of Appeal[155] and a hearing by the California Supreme Court.[156]

The United States Supreme Court reversed and remanded to the state court,[157] holding that the guarantees of open public proceedings in criminal trials cover proceedings for the voir dire examination of potential jurors.[158] Chief Justice Burger, writing for the majority, relied on historical evidence to show that jury selection has long been a public process "with exceptions only for good cause shown."[159] Reiterating the same themes that had been expressed in both *Richmond Newspapers* and *Globe*, Chief Justice Burger stated that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[160] Applying this test to the facts in *Press-Enterprise*, the Chief Justice held that the trial court had unconstitutionally closed the voir dire.[161] First, the closure order was unsupported by findings that an open proceeding threatened any state interests.[162] Also, the trial court had not considered whether alternatives to closure were available to protect the interests of the prospective jurors.[163]

The Chief Justice noted that, in some circumstances, "when inter-

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154. *Id.* (quoting App. at 121). After the defendant was convicted and sentenced to death, the petitioner applied again for the release of the transcript. *Id.* The California Superior Court denied the application, stating that while most of the jurors' statements are only dull and boring, "some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." *Id.* (quoting App. at 39).

155. *Id.* at 504-05.

156. *Id.* at 505.

157. *Id.* at 513.

158. *Id.* at 508-10. "For present purposes, how we allocate the 'right' to openness as between the accused and the public, or whether we view it as a component inherent in the system benefitting both, is not crucial." *Id.* at 508.

159. *Id.* at 505. The majority believed that juror selection is presumptively a public and open process. *Id.*

160. *Id.* at 510.

161. *Id.* at 511-13.

162. *Id.* at 510-11. The Court noted that "the California Court's conclusion that Sixth Amendment and privacy interests were sufficient to warrant prolonged closure was unsupported by findings showing that an open proceeding in fact threatened those interests." *Id.*

163. *Id.* at 511.

> Even with findings adequate to support closure, the trial court's orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard. Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*.

Id.

rogation touches on deeply personal matters," the privacy interests of a prospective juror may outweigh the need for openness of the process.[164] Chief Justice Burger explained that in a rape trial, "a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode."[165]

Thus, the Court in *Richmond Newspapers*,[166] *Globe*,[167] and *Press-Enterprise*[168] recognized a first amendment right of the press and the public to attend criminal proceedings traditionally open to the public. However, the Court pointed out in dicta that this right is not absolute. If the state has an overriding interest in closing the trial, and if the closure is narrowly tailored to serve that interest, closure is permissible.[169]

IV. ANALYSIS

A closure order in a criminal trial may be upheld if it is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[170] A statute mandating closure for portions of a rape trial during the victim's testimony would meet both prongs of this test.

The fact that courts have traditionally excluded the public from trials involving sexual assaults is evidence that partial closure of a rape trial may serve a compelling governmental interest.[171] It is generally accepted that courts may exclude the general public during the testimony of certain witnesses. Exclusion has been applied when the presence of spectators would cause undue embarrassment and thereby prevent effective testimony.[172] The tradition of closure shows widespread recognition that legitimate and significant interests exist in closing at

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164. *Id.* The Court noted further that it would require "a compelling interest" to justify a prospective juror's reasons for keeping his or her experiences out of the public domain. *Id.*

165. *Id.* at 512.

166. 448 U.S. 555 (1980).

167. 457 U.S. 596 (1982).

168. 464 U.S. 501 (1984).

169. For a discussion of *Richmond Newspapers*, see *supra* notes 78-104 and accompanying text. For a discussion of *Globe*, see *supra* notes 105-49 and accompanying text. For a discussion of *Press-Enterprise*, see *supra* notes 150-65 and accompanying text.

170. *Globe*, 457 U.S. at 607.

171. *See supra* text accompanying note 141.

172. *See* Note, *The Right to a Public Trial*, *supra* note 49, at 1145. The courts may also order exclusion when, for example, children are forced to testify to revolting facts, when a large audience might prevent effective testimony by an adult witness, or when spectators might endanger the safety of a witness. *Id.*

least portions of trials for sexual assaults.

Additionally, the Supreme Court has consistently emphasized that open proceedings are not an absolute requirement.[173] It would be a misrepresentation to state that there has been a history of open proceedings in cases involving sexual assault, especially in the case of minors.[174] Indeed, in *Richmond Newspapers,* Justice Stewart expressly acknowledged that closure might be justified in a criminal trial for rape, provided the defendant's right to a fair public trial is not violated.[175]

The courts have long recognized that rape and sexual assault victims need additional protection during the trial proceedings.[176] This protection is necessary to alleviate the traumatic effects of the trial on the rape victim.[177] As discussed earlier, a rape victim will often decide not to report the crime to avoid testifying "before a crowd of the idly curious."[178] The state, therefore, has a compelling interest to enact laws that would alleviate the rape victim's difficulties during the trial proceedings. A statute mandating closure at rape trials during the victim's testimony would not only protect the rape victim from the potentially humiliating effects of testifying in public, but would also encourage the reporting of the crime.

In addition to being necessitated by a compelling governmental interest, a closure order must be narrowly tailored to serve the state's interest.[179] A mandatory closure statute, such as the one at issue in *Globe,* would meet this prong of the test. Indeed, if, as suggested by Chief Justice Burger, the Supreme Court in *Globe* had more fully understood Massachusetts' reasons for enacting section 16A, the Court would have upheld the statute.[180] Although the Supreme Court prop-

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173. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980) (plurality opinion). The plurality noted that

> [j]ust as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic . . . , so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

Id. (citation omitted).

174. *See Globe,* 457 U.S. at 614 (Burger, C.J., dissenting); *supra* note 141 and accompanying text.

175. 448 U.S. at 600 n.5 (Stewart, J., concurring).

176. *See* Globe Newspaper Co. v. Superior Court, 383 Mass. 838, 845-47, 423 N.E.2d 773, 778-79 (1981), *rev'd,* 457 U.S. 596 (1982).

177. *See Globe,* 457 U.S. at 615 (Burger, C.J., dissenting). Chief Justice Burger further noted that closure would encourage reporting of such crimes by victims otherwise intimidated by the publicity surrounding such a trial. *Id.* For a discussion of the traumatic effects of a rape trial upon the victim, see *supra* notes 22-29 and accompanying text.

178. Berger, *supra* note 12, at 88; *see supra* notes 33-40 and accompanying text.

179. *See supra* text accompanying notes 166-69.

180. 457 U.S. at 616-18 (Burger, C.J., dissenting); *see supra* text accompanying notes

erly identified the interest asserted by the Commonwealth, it failed to see how that interest was furthered by a mandatory closure rule.[181] As the dissent in *Globe* correctly pointed out, the majority failed to understand that the state was not trying to protect the victim's identity, which was a matter of public record, but was trying to limit the number of people in the courtroom in order to mitigate the trauma of testifying.[182]

The *Globe* Court held that the Massachusetts statute was invalid because it was a mandatory closure rule; the Court believed closure would be permissible only on a case-by-case basis.[183] As previously discussed, the purpose of the statute was to encourage parents of minor rape victims and rape victims themselves to come forward and testify. If the closure determination is made on a case-by-case basis and is wholly within the discretion of a trial judge, the victims may actually feel more apprehensive and less protected,[184] as the uncertainty about whether the courtroom will be closed to the press and public will tend to increase the trauma and anguish.[185] Furthermore, any victim who reads or hears through a press report about the testimony of another victim may be deterred from reporting a crime, mistakenly believing that public testimony is mandatory.[186] Few citizens can be expected to understand the "nuances of state law."[187]

The *Globe* Court criticized the second state interest, encouraging the reporting of the crime, and found the claim "speculative in empirical terms [and] open to serious question as a matter of logic and common sense."[188] However, as Chief Justice Burger explained in the dissent, such empirical evidence can only be collected and produced if states are permitted to experiment.[189] The Chief Justice stated: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[190]

Finally, the Supreme Court should allow the rape victim at least

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147-49.

181. *See supra* text accompanying notes 147-49.

182. 457 U.S. at 618 (Burger, C.J., dissenting).

183. *Id.* at 608 (majority opinion).

184. *Id.* at 619 (Burger, C.J., dissenting).

185. *Id.* "The victim might very well experience considerable distress prior to the court appearance, wondering, in the absence of such statutory protection, whether public testimony will be required." *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 609-10 (majority opinion).

189. *Id.* at 617 (Burger, C.J., dissenting).

190. *Id.* (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

some of the same protection that is afforded a juvenile defendant in a criminal trial.[191] In juvenile proceedings, the name of the accused is not released, the press is barred, and the records are sealed.[192] As Chief Justice Burger observed in his dissent in *Globe*, it is a "disturbing paradox" that the Supreme Court does not grant minor victims of sex crimes this same protection.[193]

Thus, the Supreme Court's decision to invalidate a statute which mandated closure for portions of a rape trial was based on a "cavalier rejection"[194] of a state's interests. The Supreme Court overruled a legislative manifestation of society's desire to protect rape victims and encourage the reporting of such a heinous crime.

V. CONCLUSION

For hundreds of years, rape has been recognized as different from other crimes.[195] Not only has society recognized this fact by granting victims some additional protection,[196] but legislatures[197] and courts[198] have reflected this attitude by allowing the exclusion of the public from trials involving sexual assaults. Indeed, the Supreme Court has characterized rape as being, short of homicide, the "ultimate violation of self."[199]

Given the unique traumatic impact of the trial on the rape victim and the seriousness of the crime, trial procedures should better protect the victim from further emotional damage and encourage the reporting of such crimes. A mandatory closure statute would meet these ends by allowing the victim—whether a minor or an adult—to avoid the humiliation and degradation of testifying in front of the public and the press. Further, such a statute would not compromise the constitutional guarantees contained in the sixth and first amendments, which protect the rights of the defendant and the public. The public and the press could be present during all of the trial proceedings, except the testimony of the rape victim. This testimony would not be withheld from public scrutiny, as the public and the press would have full access to

191. *Id.* at 612.
192. *Id.*
193. *Id.*
194. *Id.* at 613.
195. "The offence [sic] is peculiar." Camp v. State, 3 Ga. 417, 420 (1847). Because the crime is almost always committed in secret, trial procedures must necessarily be different. *Id.* at 420-21.
196. *See, e.g.*, FIRST PROGRAM REPORT, *supra* note 43, (example of counseling service for rape victims); T. MCCAHILL, *supra* note 3, at 233 (examples of police departments that have now adopted specialized procedures for interviewing rape victims).
197. *See supra* note 46 and accompanying text.
198. *See supra* note 141 and accompanying text.
199. Coker v. Georgia, 433 U.S. 584, 597 (1977) (footnote omitted).

the complete transcript of the trial, including the testimony of the rape victim. In this way, the rights of all parties would be constitutionally protected.

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