ARTICLE

Protecting Child Sex-Crime Victims: How Public Opinion and Political Expediency Threaten Civil Liberties

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INTRODUCTION

While members of the journalistic and legal communities have debated for more than two decades whether or not the news media should publish the names of sex-crime victims, the level of discussion has increased in the last decade.[1] *The Des Moines Register's* receipt of

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1. *See generally* Carey Haughwout, *Prohibiting Rape Victim Identification in the Media: Is It Constitutional?*, 23 U. TOL. L. REV. 735 (1992); Sarah Henderson Hutt, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41 DUKE L.J. 368 (1991); Kimberly Wood Bacon, *Florida Sun v. B.J.F.: The Right of Privacy Collides with the First Amendment*, 76 IOWA L. REV. 139 (1990); Deborah W. Denno, *The Privacy Rights of Rape Victims in the Media and the Law*, 61 FORDHAM L. REV. 1113 (1993); Victor Arnell DuBose, *The Florida Star—"Happy 200th" to the First Amendment, But a Setting Sun for Victims' Privacy?*, 10 MISS. C.L. REV. 193 (1990); Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019 (1991); Helen Benedict, *Panel Discussion*, 61 FORDHAM L. REV. 1141 (1993); Michael Gartner, *Panel Discussion*, 61 FORDHAM L. REV. 1133 (1993); James Burges Lake, *Of Crime and Consequence: Should Newspapers Report Rape Complainants' Names?*, 6 J. MASS MEDIA ETHICS 106 (1991); Katha Pollitt, *Media Goes Wilding in Palm Beach*, *in* TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN MASS MEDIA AND SOCIETY 107 (Alison Alexander & Janice Hanson eds., 1995); Bill Seymour, *Reporting Rape: Live TV Coverage Generates A Debate*, *in* POLICE AND THE MEDIA 205 (Patricia A. Kelly ed., 1987); Zena Beth McGlashan, *By reporting the name, aren't we victimizing the rape victim twice?*, ASNE BULL., Apr. 1982, at 20; Deni Elliott, *Reporting Rape Charges: Treating Victims as Victims*, BALTIMORE SUN, Apr. 28, 1991, at D1; Susan Estrich, *Press Should Zip Its Lip In Rape Case—Identifying Victim Serves No Purpose and Discourages Them From Coming Forward*, ST. LOUIS POST-DISPATCH, Apr. 22, 1991, at 3B; Alex S. Jones, *Editors Debate Naming*

a Pulitzer Prize for a series of articles in which a rape victim was named and photographed,[2] as well as public criticism of the *New York Times* for its profile of Patricia Bowman, who accused William Kennedy Smith of rape,[3] have helped propel the issue to the forefront of journalists' discussions about ethics.[4] Both journalists and their critics tend to focus on what journalists *should* do after they acquire victims' names. Some commentators say journalists should publish sex-crime victims' names because doing so promotes truth and helps reduce the stigma of the crime.[5] Others say journalists cannot write about sex-crime victims without tainting them, consequently making future victims reluctant to report the crimes against them.[6]

The matter of what journalists *can* do was largely settled in the 1970s, when the United States Supreme Court held in *Cox Broadcasting Corp. v. Cohn*[7] that the media could not be punished for printing the names of sex-crime victims when reporters obtained those names from public court documents.[8] The *Cohn* Court held that official court records are of public interest and that the public benefits from the reporting of true contents of these records.[9] The press should therefore not be punished for merely republishing information already available in court documents. The Court stated:

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.[10]

Rape Victims, N.Y. TIMES, Apr. 13, 1991, at A6.

2. *See* Jane Schorer, *It Couldn't Happen To Me: One Woman's Story*, DES MOINES REGISTER, Feb. 25 - Mar. 1, 1990, at 1A (series of five articles).

3. Fox Butterfield & Mary B.W. Tabor, *Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance*, N.Y. TIMES, Apr. 17, 1991, at A17.

4. *Naming Names*, NEWSWEEK, Apr. 29, 1991, at 26.

5. *See* Gartner, *supra* note 1, at 1133; Geneva Overholser, *Why Hide Rapes?*, N.Y. TIMES, July 11, 1989, at A19.

6. *See* Benedict, *supra* note 1, at 1145; McGlashan, *supra* note 1, at 20; M.K. Guzda, *A right to privacy?*, EDITOR & PUBLISHER, Mar. 10, 1984, at 7.

7. 420 U.S. 469 (1975).

8. *Id.* at 496-497.

9. *Id.* at 495.

10. *Id.* at 496.

In 1989, the U.S. Supreme Court qualified the *Cohn* decision, holding that absent a "state interest of the highest order," the press could not be punished for publishing sex-crime victims' names (or other truthful information) when that information was legally obtained.[11] The Court did not explain what might constitute a "state interest of the highest order," and thus far, no court has articulated a circumstance which meets that criteria.[12]

However, the courts have not left sex-crime victims completely at the media's mercy. The U.S. Supreme Court has held that "[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts."[13] While the state in most circumstances cannot keep the media from publishing sex-crime victims' names once reporters have obtained them, it may make a reasonable effort to prevent reporters from acquiring those names.[14] Accordingly, nearly two dozen states have attempted to protect sex-crime victims' privacy by enacting legislation that allows public officials to withhold information about the victim from the press and public.[15] These laws vary in scope. Some protect sex-crime victims' identities during all stages of the police investigation and judicial proceedings;[16] but many apply only to certain public documents or

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11. The Florida Star v. B.J.F., 491 U.S. 524, 541 (1989).

12. Some lower courts have decided privacy cases involving the news media's identification of sex-crime victims on constitutional grounds, while others have applied the common law. In nearly all cases, the reasoning of the final appellate decisions followed that outlined by the U.S. Supreme Court in *Cox*. *See* Ayers v. Lee Enters. Inc., 561 P.2d 998, 1003 (Or. 1977); Poteet v. Roswell Daily Record, Inc., 584 P.2d 1310, 1312 (N.M. Ct. App. 1978); Macon Tel. Publ'g Co. v. Tatum, 436 S.E.2d 655, 657 (Ga. 1993); State v. Globe Communications Corp., 648 So. 2d 110, 112-114 (Fla. 1994); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 474-475 (Tex. 1995).

13. *Florida Star*, 491 U.S. at 534.

14. Laws restricting the press's access to sex-crime victims' names must be narrowly tailored and narrowly applied. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-607 (1982) (holding that where the state denies the press access to a criminal trial, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.").

15. ALASKA STAT. § 12.61.140 (Michie 1995); ARIZ. REV. STAT. ANN. § 13-4434 (West 1995); CAL. GOV'T CODE § 54961 (West 1995); FLA. STAT. ANN. § 92.56 (West 1995); IND. CODE ANN. § 35-37-4-12 (Michie 1995); MASS. ANN. LAWS ch. 265, § 24C (Law. Co-op. 1996); MICH. COMP. LAWS § 780.758 (1994); MONT. CODE ANN. § 44-5-311 (1995); NEB. REV. STAT. § 81-1842 (1995); NEV. REV. STAT. ANN. § 200.3772-200.3774 (Michie 1995); OHIO REV. CODE ANN. § 2930.07 (Anderson 1995); TEX. CODE CRIM. P. ANN. art. 57.02 (West 1996); UTAH CODE ANN. § 77-38-6 (1995); VA. CODE ANN. § 19.2-11.2 (Michie 1995); WASH. REV. CODE § 42.17.310 (1995); WYO. STAT. ANN. § 14-3-106 (Michie 1995).

16. FLA. STAT. ANN. § 92.56 (West 1995); MASS. ANN. LAWS ch. 265, § 24C (Law. Co-op. 1996); NEV. REV. STAT. ANN. § 200.3772-200.3774 (Michie 1995); TEX. CODE CRIM. P. ANN. art. 57.02 (West 1996).

only until the victim testifies at trial.[17] In four states, the law only protects *child* sex-crime victims' identities.[18]

This Article looks at the enactment and subsequent nullification of a 1992 Washington law that state legislators intended to protect the privacy of child sex-crime victims.[19] The Article uses this statute to illustrate that through the enactment of such statutes, politicians may sacrifice constitutional rights, such as freedom of the press and access to government proceedings, in order to achieve short-term political gains. Therefore, because it is somewhat less affected by elections and the political process, the judiciary is often the only branch of government responsible for protecting civil liberties. In the case of Washington's law on access to child sex-crime victims' names, politicians sought to curry favor by eliminating public and press access to court proceedings. Washington courts blocked the legislators' efforts, in the process issuing important statements about the value of openness in government.

Part I of this Article provides a history of the controversy in Washington over the *Shelton-Mason County Journal's* publication of child sex-crime victims' names. Part II explains how this controversy led to the passage of a victim identification law that eliminated public and press access to court proceedings and documents in cases involving child sex-crime victims. The passage of this law resulted in a lawsuit by Washington media, who claimed their ability to monitor and report on court proceedings was severely damaged. Part III discusses the media's lawsuit. Part IV explores the Washington Supreme Court's rationale in overturning the victim identification law, reviewing precedents and detailing the court's decision. Finally, Part V of this Article discusses the historical importance of access to government proceedings and documents and explains why the judiciary historically has been more protective of the right to access than the legislature.

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17. ALASKA STAT. § 12.61.140 (Michie 1995); CAL. GOV'T CODE § 54961 (West 1995); IND. CODE ANN. § 35-37-4-12 (Michie 1995); MICH. COMP. LAWS § 780.758 (1994); MONT. CODE ANN. § 44-5-311 (1995); NEB. REV. STAT. § 81-1842 (1995); OHIO REV. CODE ANN. § 2930.07 (Anderson 1995); UTAH CODE ANN. § 77-38-6 (1995); VA. CODE ANN. § 19.2-11.2 (Michie 1995); WASH. REV. CODE § 42.17.310 (1995); WYO. STAT. ANN. § 14-3-106 (Michie 1995).

18. IOWA CODE § 910A.13 (1995); ME. REV. STAT. ANN. tit. 30-A § 288 (West 1995); N.J. REV. STAT. § 2A:82-46 (1994); R.I. GEN. LAWS § 11-37.8.5 (1995). North Dakota protects the identities of child victims of all crimes. N.D. CENT. CODE § 12.1-35-03 (1995).

19. Substitute House Bill 2348, 52nd Leg., Confidentiality of Identity of Child Victims of Sexual Abuse, ch. 188, 1992 Wash. Laws 818 [hereinafter S.H.B. 2348].

I. A BRIEF HISTORY OF THE CONFLICT IN MASON COUNTY

The *Shelton-Mason County Journal* (the *Journal*), located in Washington's rural Olympic Peninsula, has the distinction of being one of the few American newspapers to incite people to such anger that they passed a law against it.[20] The *Journal* has a policy of printing the names and testimony of all victims who testify in felony trials in Mason County Superior Court.[21] That includes the names of rape and child molestation victims.

When publisher Henry Gay bought the *Journal* in 1966, its policy on covering Mason County Superior Court was already established.[22] The newspaper covered all felony trials and reported the names and testimony of all witnesses.[23] Mason County journalists may have followed this procedure since the newspaper's establishment in 1888. In doing research, staff members have come across articles from the nineteenth century in which crime victims, including sex-crime victims, were named.[24]

In the 1960s and 70s, other newspapers that named sex-crime victims stopped doing so, but the *Journal* continued.[25] Henry's son, Charles, who has been the newspaper's editor since 1980, explained, "To change our policy, we feel, would be a dereliction of our journalistic duty, an unfair treatment of defendants and an action that sends exactly the wrong message to victims that you need to be protected, you should be ashamed, the world mustn't know of your tragedy."[26]

For two decades, the *Journal* continued its policy with little trouble. The 9,400-circulation weekly covered a sex-crime trial perhaps once a year or once every eighteen months.[27] A few people

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20. *Id.* This law was aimed at the *Shelton-Mason County Journal*. *See Confidentiality of Identity of Child Victims of Sexual Abuse, 1992: Public hearing on S.H.B. 2348 Before the House Comm. on the Judiciary*, 52nd Leg. (Wash. 1992) [hereinafter *Public Hearing on S.H.B. 2348*].

21. The *Shelton-Mason County Journal*'s actual policy is to publish the names and testimony of all *witnesses* in felony trials in Mason County Superior Court. Victims who testify have the same legal standing as other witnesses and are treated the same as other witnesses. Interview with Charles Gay, Editor of *The Shelton-Mason County Journal*, in Shelton, Wash. (Mar. 22, 1996).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*; *See also* Joel Kaplan, *State lawmakers are trying to seal key information in sex crimes*, ASNE BULL., July/Aug. 1993, at 14; Joseph F. Pisani, *Is it time for us to start naming rape victims?*, ASNE BULL., July/Aug. 1991, at 14-15.

26. Charles Gay, Remarks to the American Civil Liberties Union (May 2, 1992) (transcript available from *The Shelton-Mason County Journal*).

27. *Id.*

would get upset about the use of the victim's name, but the complaints never lasted long.[28] But, Charles said:

> Then came 1985, when there were four sex-offense trials on top of each other. The anger in the community built after each one instead of dissipating. Someone called Channel 4 to ask for a "Town Meeting" on the subject to discredit us, and I agreed to appear. There followed broadcasts on Nightline and another national program as well as stories in the *New York Times* and other newspapers. We published about 40 letters to the editor on the subject that year, about 30 of them opposing the policy of covering trials completely, consistently and fairly.[29]

Coverage of the four trials, which were held from May through July, inflamed the community.[30] About 450 people went to the taping of the Town Meeting television special to protest the *Journal's* policy.[31] In July, people picketed outside the newspaper's office, and later in the year, someone organized a letter-writing campaign, asking about two hundred businesses to pull their advertising from the *Journal*.[32] The following year, eight hundred community members signed a petition asking the *Journal* to change its policy.[33]

People were not just upset about the use of victims' names; they also were outraged by the publication of what some considered obscene material.[34] The *Journal* includes victims' names *and* testimony. Here are two accounts of victims' testimony from articles about the 1985 trials:

> Kelly testified that in the early morning hours of November 21, he had been forced to have oral and anal sex with George, who was his cellmate at the time. He said the incident occurred after lockdown when the two were locked in their cell.[35]

and

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28. *Id.*

29. *Id.*

30. Interview with Charles Gay, *supra* note 21.

31. Carolyn Maddux, *TV crowd rips Journal policy*, SHELTON-MASON COUNTY J., Nov. 14, 1985, at 1.

32. Interview with Charles Gay, *supra* note 21.

33. *Id.*; Barbara A. Serrano, *New Law A Shield or Gag?—Effort to Protect Child Sex-Crime Victims Brings Fear of Censorship*, SEATTLE TIMES, Apr. 3, 1992, at A1.

34. Virginia P. Martig, *Don't name the defiled*, SHELTON-MASON COUNTY J., June 20, 1985, at 4; Stephanie Rice, *Does public have right to names?*, SHELTON-MASON COUNTY J., June 6, 1985, at 5.

35. *Jury convicts inmate of raping his cellmate*, SHELTON-MASON COUNTY J., June 27, 1985, at 2.

> She said he was holding her down on the bed and had her knees pushed up to her shoulders while she was trying to push him away with her hands.
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> She said while they were struggling, he ejaculated all over her and the bedding. She said he said, "Whoops." He then, she said, told her not to tell anyone and got up and left. She said that at one time during the struggle, he had penetrated her with his finger.[36]

Distressed by coverage they perceived as harmful to victims, community members asked the *Journal* to tone down its coverage. In a letter to the editor, one woman wrote:

> The purpose of testimony in court is to determine the guilt or innocence of the accused. The repetition by the media of every lurid detail of that testimony serves no legitimate purpose—it can only satisfy the morbid curiosity of a minority and can incite into action those with unhealthy inclinations.[37]

Another woman wrote:

> When will you stop and how far does the public have to go before you finally stop this scandalous way of running a newspaper? I think you owe us all an explanation of your reasoning for this type of policy, when the other newspapers such as the *Daily Olympian, Tacoma* and *Seattle Times* have no such policy. We are not asking you to change your newspaper, just be more sensitive on these issues and stop printing the names and addresses of these people who have suffered enough.[38]

The Gays, however, stood firm. They would not change the *Journal*'s policy.[39] "It's absolutely a moral issue," Charles said.[40] The Gays made two main arguments to support their position. First, designating a person as a victim and giving them anonymity before a verdict is rendered implies that the person accused is guilty.[41] That is unfair, Charles Gay said, given that our justice system is supposed to presume innocence until a person is found guilty.[42] Second, concealing the names of sex-crime victims implies they have done

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36. *Jury finds man guilty of rape*, SHELTON-MASON COUNTY J., May 16, 1985, at 5.
37. Martig, *supra* note 34, at 4.
38. Rice, *supra* note 34, at 5.
39. Serrano, *supra* note 33, at A1.
40. Interview with Charles Gay, *supra* note 21.
41. *Journal testimony at committee hearing*, SHELTON-MASON COUNTY J., Jan. 23, 1992, at 4.
42. *Id.*; Interview with Charles Gay, *supra* note 21.

something wrong or have something to be ashamed of.[43] In a series of editorials, Henry Gay, who still serves as the paper's publisher, explained the Gays' position:

> From the beginning, a rape case is a trail of male cliches—original sin, jail bait, slice off a cut loaf, asked for it, man trap, damaged goods, poor little thing, pitiful creature and fallen woman. And at the end of the trail is the Big Daddy newspaper editor with his unctuous promise, "Don't worry, little lady. No one will find out from me that you're ruined forever."
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> We don't believe that rape victims are ruined forever. The term, damaged goods, is repugnant to us. We won't accept the description or the cruel premise on which it is founded. And we cannot understand why family and friends of the victim accept this atrocious, damaging indictment which is the good old boys' ultimate power play against women.[44]

Eventually, the furor faded, and business continued as usual at the *Journal.* Only nine people had canceled their subscriptions, and the letter-writing campaign to advertisers generated only one letter from an advertiser who said he would think about withdrawing his business if the *Journal* continued to print rape victims' names.[45] The *Journal* is the only source of local news and advertising for Mason County's 39,000 residents, Charles noted.[46] People may cancel their subscriptions or advertising in anger, but eventually they cool down and come back.[47] "People realize that this is not something that's in the paper every week, and people realize it doesn't happen very often. And they understand we're standing up for principles we believe in."[48]

II. THE PROPOSAL AND PASSAGE OF WASHINGTON'S "RAPE ID" LAW

Mason County residents may have understood the Gays' position, but that understanding did not curb their desire to protect the community's children. Parents of young sexual assault victims tried for years to persuade state legislators from Mason County to do something about the *Journal's* policy, but legislators were reluctant to

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43. *Journal testimony at committee hearing, supra* note 41, at 4.

44. Henry Gay, Editorial, *It's time to right the wrong,* SHELTON-MASON COUNTY J., June 13, 1985, at 4.

45. Interview with Charles Gay, *supra* note 21.

46. *Id.*

47. *Id.*; *See also* Serrano, *supra* note 33, at A1.

48. Interview with Charles Gay, *supra* note 21.

take on the press.[49] The 1990 elections, however, resulted in a significant turnover in the state legislature.[50] Shelton parents found their new state representative, Democrat Tim Sheldon, sympathetic to their plight. "I just think it's wrong to put kids' names in the paper," said Sheldon, who has a young daughter.[51] He knew that people had tried to no avail to persuade the Gays to change their policy.[52] When parents approached him, he said, "I'll just write a bill and see if it works."[53]

It was a good time for Sheldon and his constituents to make a move. Liberal Democrats had dominated the Washington House of Representatives for years.[54] "Throughout the 1980s, the House established a reputation for promoting some of the most progressive social and environmental legislation in the country."[55] But in 1990, voters elected more conservative members of both parties.[56] In 1992, the Democrats faced a difficult election and the impending loss of two party leaders, Governor Booth Gardner and House Speaker Joe King, who were not running for re-election.[57] Attempting to please voters, legislators proposed plenty of "hero bills" that targeted socially unpopular, politically weak groups.[58] Many of these bills, while restricting civil rights, addressed problems, such as drunk driving and gang violence, that touched people's nerves.[59]

"[Legislators] are trying to be responsive to what they perceive as complaints from home," Representative Mike Riley said at the time. "But I think there is the underlying concern that they will be perceived as soft on crime if they try to rely on the Bill of Rights."[60]

Sheldon introduced his bill on January 15, 1992.[61] Its main provisions included the following: (1) Law enforcement agencies cannot release information identifying child victims of sexual assault to

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49. Telephone Interview with Tim Sheldon, State Representative (D-Shelton) (Apr. 10, 1996).

50. Barbara A. Serrano & Jim Simon, *Olympia's Right Turn—Democrats Retreat Before Conservative Agenda*, SEATTLE TIMES, Mar. 15, 1992, at A1.

51. Telephone Interview with Tim Sheldon, *supra* note 49.

52. *Id.*

53. *Id.*

54. Serrano & Simon, *supra* note 50, at A1.

55. *Id.*

56. *Id.*

57. *Id.*

58. Annie Capestany, *Rights Come Under Attack in Olympia as Lawmakers Ponder Volatile Issues*, SEATTLE TIMES, Mar. 11, 1992, at B7.

59. *Id.*

60. *Id.*

61. S.H.B. 2348, ch. 188, 52nd Leg., 1992 Wash. Laws 818.

the press or public without permission of the child or the child's legal guardian. Identifying information includes the child's name, address, photograph, location and, where the child is a relative or stepchild of the alleged perpetrator, identification of the child's relationship to the perpetrator;[62] (2) judges must require observers to keep child victims' identities a secret during sexual assault trials.[63] Reporters who violate judges' orders may be fined up to five hundred dollars;[64] (3) judges must ensure that information identifying child victims of sexual assault is not given to the press or public, and if it is, must prevent the distribution of that information;[65] and (4) portions of court records that identify child victims of sexual assault must be sealed unless the identifying information is deleted.[66]

A. Passage in the House

The Washington House of Representatives considered the bill first and approved it fairly quickly. On January 21, 1992, the House Judiciary Committee held a public hearing on the matter.[67] Representative Sheldon testified on behalf of the bill along with Mason County counselors, law enforcement officials and a parent of a child victim.[68] Their testimony was compelling.

Law enforcement officials said many sex-crime cases in Mason County are dropped or settled because parents do not want their children to testify in court and subsequently be identified in the newspaper.[69] Victims always ask about publicity, Shelton police detective Gary Martzell said. "They're always hoping police or the courts can do something to keep their names out of the paper."[70]

Counselors told the Judiciary Committee that the publicity interferes with victims' treatment and recovery.[71] "Two months ago,

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62. S.H.B. 2348, ch. 188, § 2(8), 52nd Leg., 1992 Wash. Laws 819 (codified at WASH. REV. CODE § 7.69A.020).

63. S.H.B. 2348, ch. 188, § 3(2), 52nd Leg., 1992 Wash. Laws 819 (vetoed by Governor Gardner, Apr. 2, 1992).

64. S.H.B. 2348, ch. 188, § 3(4), 52nd Leg., 1992 Wash. Laws 820.

65. S.H.B. 2348, ch. 188, § 9, 52nd Leg., 1992 Wash. Laws 826 (held unconstitutional in Allied Daily Newspapers v. Eikenberry, 121 Wash. 2d 205, 848 P.2d 1258 (1993)).

66. *Id.*

67. *Public hearing on S.H.B. 2348*, *supra* note 20.

68. *Id.*

69. Sheldon Police Det. Gary Martzell and Victoria Meadows, chief deputy prosecutor for Mason County, testified. *Id.*

70. *Id.*

71. Peggy Zorn, a Shelton family and marriage therapist; Leauri Grindeland, a counselor at Recovery: AID to Victims of Sexual and Domestic Abuse; and Dawn Larson, a representative of the Washington Coalition of Sexual Assault Programs, testified. *Public hearing on S.H.B. 2348*,

a 14-year-old girl came into our agency to talk about being sexually abused and raped," recalled Leauri Grindeland, a counselor at Recovery: AID to Victims of Sexual and Domestic Abuse.

> Her uncle molested her for five years, beginning when she was 4 years old. She told me of three other separate sexual assaults all committed within Mason County. Because she knew that I am required to report child sexual abuse to the proper authorities, she chose to speak to me anonymously. She told me her sole reason for remaining anonymous was because of the Shelton *Journal's* reporting policy.[72]

The father of another sexual assault victim asked to remain anonymous during his testimony because his daughter had not testified in court yet, and he still hoped to protect her from publicity. He stated, "I believe in freedom of the press. And I believe in First Amendment rights, but I don't believe what the forefathers had in mind was publishing the names of children and the testimony so they can and will be chastised by their peers for years to come."[73]

Charles Gay testified against the bill along with Roland Thompson, the lobbyist for Allied Daily Newspapers, an organization representing Washington's daily newspapers, and Jerry Sheehan, the American Civil Liberties Union's Washington state lobbyist.[74] Gay explained his belief that victims have nothing to be ashamed of and that not naming them was unfair to the people on trial. He continued:

> The Sixth Amendment guarantees the accused the right to meet his accuser in public. No law requires the press to practice the same principle, but we think the defendant should have the same right on our news pages, as a matter of fairness, when we cover these open, public trials. Just as we don't let someone attack another in an unsigned letter to the editor, the *Journal* doesn't let anonymous women accuse men of raping them or allow anonymous juveniles to accuse someone of sexually assaulting them.[75]

Thompson and Sheehan told the committee they believed Sheldon's bill was unconstitutional because it involved prior restraint.[76] Prior restraint, which occurs when the government prevents

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supra note 20.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* Gay's remarks were printed in the *Shelton-Mason County Journal* two days later. *Journal testimony at committee hearing*, *supra* note 41, at 4.

76. *Public hearing on S.H.B. 2348*, *supra* note 20.

an individual from publishing, is unconstitutional.[77] The prohibition on prior restraint dictates that the government can punish false, defamatory publications after they occur, but it cannot prevent information from reaching the public to begin with.[78]

Thompson urged legislators not to pass legislation that would affect the entire news industry just to regulate one small newspaper.[79] "What we're standing on here is a matter of principle," Thompson told the committee. "I don't condone what the Shelton *Journal* does. They're the only newspaper in the state that makes that decision. They probably account for less than one-tenth of one percent of circulation in the state of Washington. This problem is peculiar to that town."[80] If Shelton residents object to the *Journal's* policy, they can force the newspaper to change by canceling their subscriptions, Thompson added.[81] Legal solutions are not the answer. "Once you institute prior restraint, it's a very difficult thing to stop."[82]

While Thompson and Sheehan raised pertinent legal issues, their testimony did not engage people's emotions like the testimony of parents and counselors had.[83] The House Judiciary Committee approved the bill on February 4, 1992 with little discussion.[84] A few committee members expressed concern that the bill might be found unconstitutional, but they said they would vote for it anyway.[85] "I don't like to encroach newspapers' rights or crowd First Amendment freedoms," committee member Curtis Ludwig said. "But I think the Shelton publisher leaves me no alternative but to vote for this bill."[86]

Committee members clearly had been offended by copies of *Journal* articles sent to them. Representative James Hargrove commented: "There needs to be some responsibility that goes with those freedoms and perhaps not just in the area of relating victims' names but in some of the other reporting that goes on in graphic detail about these types of crimes that I think encourages others, stimulation of other crimes of that nature."[87]

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77. *See* Near v. Minnesota, 283 U.S. 697, 723 (1931) (holding suspension of future publications as punishment for previous publications constitutes prior restraint).

78. *Id.* at 714.

79. *Public hearing on S.H.B. 2348, supra* note 20.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.*

84. *Public Hearing on S.H.B. 2348, supra* note 20.

85. *Id.*

86. *Id.*

87. *Id.*

The Washington House of Representatives passed the bill unanimously on February 18, 1992.[88] A month later, several members expressed regret for voting for the bill and said they had become caught up in the emotional aspects of the issue.[89] But others stood by their decision.[90]

Representative Michael Heavey expressed the feelings of many representatives when he said: "It comes down to a balancing of 'do I want my daughter to be in the paper?' Freedom of speech and the press are not absolute."[91]

B. Passage in the Senate

Meanwhile, Representative Sheldon was having some difficulty getting the bill through the Senate Law and Justice Committee.[92] The House was controlled by members of Sheldon's party, but Republicans controlled the Senate. Discussing the politics of the issue later, Sheldon pointed out: "Why would [the Republicans] want to let some yo-yo freshman get a high-profile bill passed?"[93]

Others remember the bill's constitutionality being more of an issue than party politics.[94] Several members of the Law and Justice Committee were lawyers, who also had lawyers on their staff.[95] Newspaper and civil rights lobbyists found these legislators more receptive to their arguments than those in the House had been.[96] In the end, however, distaste for the *Journal's* policy outweighed the senators' constitutional concerns.[97]

Senate staff member Susan Carlson, who worked on the bill, said several of the committee members thought the bill might be found unconstitutional, but like their peers in the House, they felt compelled to vote for it because it dealt with child victims.[98] "It would have been hard for them to say, 'Oh, it's unconstitutional so we're not going to do anything about it,'" Carlson recalled.[99] In addition, legislators

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88. 1992 Wash. Laws 827.
89. Capestany, *supra* note 58, at B7.
90. *Id.*
91. *Id.*
92. Telephone Interview with Tim Sheldon, *supra* note 49.
93. *Id.*
94. Telephone Interview with Roland Thompson, lobbyist for Allied Daily Newspapers (Apr. 10, 1996); Telephone Interview with Gary Nelson, former state senator (Apr. 10, 1996).
95. Telephone Interview with Susan Carlson, Senate staff member (Apr. 11, 1996).
96. Telephone Interview with Roland Thompson, *supra* note 94.
97. *Id.*; Telephone Interview with Susan Carlson, *supra* note 95.
98. Telephone Interview with Susan Carlson, *supra* note 95.
99. *Id.*

supported Sheldon's cause. "Generally, down here, when you're talking about victims of crime, the Legislature is fairly sympathetic," Carlson noted.[100]

Several Washington legislators and legislative staff members said the general rule in the state legislature is that if one likes a bill, but has doubts about its constitutionality, the proper thing to do is pass it and let the courts decide.[101]

During the Senate Law and Justice Committee hearing, one senator noted dryly, "This is probably unconstitutional. I do realize that rarely stops us from passing legislation here, but I do think it's at least worth pointing out."[102]

After a brief discussion and a few remarks from Sheldon, the committee passed the bill even though other committee members also said they thought it might be found unconstitutional.[103] In the end, Thompson said, the bill probably "got two minutes of thought."[104] The committee had a large agenda that day because the deadline for bills to be passed out of committee was near, and the senators didn't have time to hash out legal issues.[105] They would leave that to the full Senate or the courts.

On March 5, 1992, the day before the Senate was to vote on the bill, the *Journal* published an account of the trial of a man who was found guilty of child rape.[106] As usual, the paper named the ten-year-old victim and recounted testimony about the incident.[107] The article included this passage: "She said three times while her mother was gone, Chambers came into the bedroom where she was sleeping and had put his penis inside her. She said it happened three different nights. She said there was enough light in the bedroom that she could tell it was him."[108]

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100. *Id.*

101. *Id.*; Telephone Interview with Pat Shelledy, House staff member (Apr. 10, 1996); Telephone Interview with Tim Sheldon, *supra* note 49; Telephone Interview with Gary Nelson, *supra* note 94.

102. *Confidentiality of Identity of Child Victims of Sexual Abuse, 1992: Hearing on S.H.B. 2348 Before the Senate Law and Justice Comm.*, 52nd Leg. (Wash. 1992) [hereinafter *Senate hearing on S.H.B. 2348*].

103. *Id.*

104. Telephone Interview with Roland Thompson, *supra* note 94.

105. *Id.*; Telephone Interview with Susan Carlson, *supra* note 95.

106. *Jury finds Chambers guilty of child rape*, SHELTON-MASON COUNTY J., Mar. 5, 1992, at 12.

107. *Id.*

108. *Id.*

Sheldon bought fifty copies of the paper, highlighted the offensive passages and placed a copy on each senator's desk.[109] If the vote hadn't been assured before, it became so the moment the senators saw the article. Recalling the floor discussion, Thompson said, "They just held up the paper and talked about how awful it was."[110]

Given the senators' distaste for the *Journal's* article, the outcome of their discussion was not surprising. They approved the bill by a vote of forty-three to five.[111] Several senators who were attorneys voted against the bill because they thought it was unconstitutional.[112] Senator Phillip Talmadge, an attorney who would later be elected to the Washington Supreme Court, proposed an amendment on the floor to try to address some of the bill's problems.[113] The amendment would have required prosecutors to make a motion to use a pseudonym or the victim's initials instead of the victim's name.[114] In ruling on the motion, judges would have to weigh the victim's rights against those of the defendant and the public. As written, the bill arguably made the victim's rights supreme and required judges to take action without discussion. To nonlawyers, the amendment probably seemed trivial, but it touched on an issue—mandatory closure—that would later cause the bill to be declared unconstitutional.[115]

The Senate rejected Senator Talmadge's amendment twice.[116] According to Senate staff member Carlson, supporting the amendment would have been politically imprudent.[117] The bill had the backing of victims' rights organizations and children's advocates, who may not have accepted what could be seen as a weaker version.[118] "Some groups come in that people don't like to vote against," Carlson said,

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109. Telephone Interview with Tim Sheldon, *supra* note 49; Serrano, *supra* note 33, at A1.

110. Telephone Interview with Roland Thompson, *supra* note 94.

111. *Final Bill Report, S.H.B. 2348*, 52nd Leg., at 3 (1992).

112. Sean Hanlon, *Senate passes bill to ban use of names*, SHELTON-MASON COUNTY J., Mar. 12, 1992, at 1.

113. Telephone Interview with Susan Carlson, *supra* note 95.

114. A copy of the proposed amendment is not included in the state archives. Details about the amendment and the vote on it were provided by Susan Carlson, who referred to notes in her files. Telephone Interview with Susan Carlson, *supra* note 95; *See also* Hanlon, *supra* note 112, at 1.

115. Mandatory closure occurs when the law requires judges to close the courtroom whenever a particular circumstance, such as the testimony of a child victim, occurs. Laws can be written to require closure or to leave closure to the discretion of the presiding judge. If the rape-victim identification law had been written in a way that left closure to the discretion of judges, it may have withstood constitutional scrutiny. *See* Allied Daily Newspapers v. Eikenberry, 121 Wash. 2d 205, 211-212, 848 P.2d 1258, 1261-1262 (1993).

116. Telephone Interview with Susan Carlson, *supra* note 95.

117. *Id.*

118. *Id.*

explaining that politicians consider it unwise to vote against bills that the public sees as helping children.[119] Voters tend to like programs and laws that help children, who are universally appealing.[120] Particularly in an election year, state legislators want to appear to support the rights of children and families so that they may gain voter approval and be reelected.[121]

On April 2, 1992, Washington Governor Booth Gardner signed the bill into law subject to a partial veto.[122] He vetoed the sections of the bill which prohibited the release of identifying information to anyone other than law enforcement agencies without the victim's permission, required judges to exact promises from trial observers not to disclose child victims' identities, and allowed judges to fine reporters who did publish child victims' names.[123] In his letter to the legislature, Governor Gardner explained that those sections of the bill were likely to be found unconstitutional.[124] The rest of the bill was to become effective on June 11, 1992.[125] It included sections requiring courts and other government agencies to withhold information identifying child sexual assault victims from the public by sealing or redacting documents and closing courtroom testimony.[126]

Several years later, Roland Thompson of Allied Daily Newspapers said efforts to block the bill's passage in the Washington State Legislature were fairly futile.[127] Legislators objected to the *Journal's* policy and, in an election year, it was difficult for them to vote against any bill that might help children.[128] How could they go home and explain to voters that they had voted against children because of a legal technicality?[129] They might as well ask to be voted out of office. "The emotions were such that they didn't really care," Thompson said. "They wanted to send a message, and they didn't care if it was constitutional."[130]

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119. *Id.*

120. *Id.*

121. *Cf.* Capestany, *supra* note 58, at B7 (asking, "who would disagree with a bill to protect young victims of sexual abuse?").

122. Governor Booth Gardner, Veto Message on S.H.B. 2348, 52nd Leg., (Apr. 2, 1992), 1992 Wash. Laws 827.

123. *Id.*

124. *Id.*

125. 1992 Wash. Laws 818.

126. *See* S.H.B. 2348, ch. 188, 52nd Leg., 1992 Wash. Laws 818.

127. Telephone Interview with Roland Thompson, *supra* note 94.

128. *Id.*; Telephone Interview with Susan Carlson, *supra* note 95.

129. *Id.*

130. Telephone Interview with Roland Thompson, *supra* note 94.

III. THE ALLIED DAILY NEWSPAPERS SUIT AND TRIAL COURT INJUNCTIONS

Members of the newspaper industry quickly realized that they could not stop Sheldon's bill in the legislature.[131] They had a better chance of challenging the law in the courts.[132] Thus, even as the bill was working its way through the House and Senate committees, Allied Daily Newspapers began preparing a lawsuit.[133]

On May 27, 1992, Allied Daily Newspapers filed suit in King County Superior Court, asking Judge Norman Quinn for an injunction that would prevent state and county officials from enforcing the new law.[134] The Washington Newspaper Publishers Association, which represents weekly newspapers, and Fisher Broadcasting, joined Allied Daily Newspapers in the suit.[135] Notably, the *Journal* was involved in the suit only to the extent that it is a member of the Washington Newspaper Publishers Association. During the suit, other newspapers tried to distance themselves from the *Journal*.[136] They wanted to make it clear that they were fighting for the First Amendment, not the unpopular weekly.[137] The *Seattle Times* editor Mike Fancher wrote in an editorial in his paper:

> In this case, we must defend one newspaper's right to act irresponsibly in order to preserve the underlying principles of our democracy.
>
> And, there should be no mistake about it—what the Shelton-Mason County Journal does is wrong. It should stop.
>
> If the Journal keeps printing the names of young victims of sexual assault, and chances are it will, the appropriate remedy is for people to stop reading it.

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131. *Id.*

132. *Id.*

133. *Id.* Allied Daily Newspapers' members include all of Washington state's daily newspapers. Its partner in the suit, the Washington Newspaper Publishers Association, includes most of the weekly newspapers in Washington. Thus, the suit included virtually all of the state's more than 100 newspapers in addition to broadcasting outlets owned by Fisher Broadcasting, Inc.

134. Complaint for Declaratory Judgment and Injunctive Relief at 5-6, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, May 27, 1992) [hereinafter *Plaintiffs' Complaint*].

135. *Allied Daily Newspapers*, 121 Wash. 2d at 208, 848 P.2d at 1259.

136. Interview with Charles Gay, *supra* note 21; Telephone Interview with Roland Thompson, *supra* note 94.

137. Interview with Charles Gay, *supra* note 21; *see also Public Hearing on S.H.B. 2348*, *supra* note 20.

> The public should defend the right of a free press to act irresponsibly, but it needn't support an irresponsible newspaper.[138]

A. Main Arguments of the Press and State

Allied Daily Newspapers attacked the new law's constitutionality on several grounds. Their three main arguments were as follows: (1) the law violates the media's and the public's right of access to court proceedings and documents; (2) the law erases the separation of powers in state government by mandating judicial action; and (3) the law abridges freedom of speech.[139]

First, Allied Daily Newspapers argued that the law violates the public's right of access to court proceedings and documents because it requires judges to close court proceedings and seal documents in which the victim's name is used.[140] At a minimum, judges would have to close the court during the victim's testimony.[141] More likely, the entire trial would be closed.[142] In making this argument, the newspapers relied largely on statements made by county prosecutors, particularly those made by Rebecca Roe, a senior deputy prosecutor in King County.[143] After explaining how the law would convolute judicial procedure by requiring portions of trials to be closed and documents sealed, Roe said: "Disclosure of the victim's name to the

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138. Michael R. Fancher, Editorial, *Why We Support Law That Keeps Names Of Victims Public*, SEATTLE TIMES, May 31, 1992, at A2.

139. *Plaintiffs' Complaint*, *supra* note 134 at 4-5; Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Injunction at 4-20, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, May 27, 1992) [hereinafter *Plaintiffs' Memo in Support of Preliminary Injunction*]; Plaintiffs' Reply to State's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 3-9, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, June 8, 1992) [hereinafter *Plaintiffs' Reply to State's Memo in Opposition to Preliminary Injunction*]; Plaintiffs' Response to State's Memorandum in Opposition to Plaintiffs' Complaint for Declaratory Relief and Permanent Injunction at 2-15, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, June 26, 1992) [hereinafter *Plaintiffs' Response to State's Memo in Opposition to Complaint for Declaratory Relief and Permanent Injunction*].

140. *Plaintiffs' Memo in Support of Preliminary Injunction*, *supra* note 139, at 7-9; *see also* Brief of Respondents at 11, Allied Daily Newspapers v. Eikenberry, 121 Wash. 2d 205, 848 P.2d 1258 (1992) (No. 59435-0) [hereinafter *Brief of Respondents*].

141. *Plaintiffs' Reply to State's Memo in Opposition to Preliminary Injunction*, *supra* note 139, at 5.

142. *Id.*

143. *Id.* at 5-6; *see also* Deposition of James C. Townsend at 2, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, June 1, 1992) [hereinafter *Deposition of Townsend*].

judge and jury, and public spectators, cannot be avoided if we are to conduct trials honestly."[144]

In reply, the State, represented by Attorney General Kenneth Eikenberry, argued the law did not require judges to close courtrooms during trials.[145] Judges could order the use of the victim's initials or a pseudonym instead of the victim's name.[146] Alternatively, they could make people attending the trial agree not to disclose the child's name to others.[147] To support its position, the state referred to statements made by Victoria Meadows, Mason County's chief deputy prosecutor. Meadows said it was possible to enforce the new law and still provide adequate public access to court proceedings.[148] She noted that Mason County already used aliases for victims in documents and proceedings leading up to trial and added, "Mason County expects to exclude the press during child victim/witness testimony, but make available tapes of the testimony, at cost, which have been excised, deleting the identifying information."[149]

In addition to arguing that the new law interfered with free access to the courts, Allied Daily Newspapers asserted that the law violated the separation of powers doctrine because the legislature was telling judges how to run court proceedings.[150] The Washington Supreme Court had already established guidelines for closing court hearings or documents.[151] The media organizations contended that in passing

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144. Affidavit of Rebecca J. Roe at 3, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, May 27, 1992) [hereinafter *Affidavit of Rebecca Roe*].

145. State's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 11-13, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, June 4, 1992) [hereinafter *State's Memo in Opposition to Preliminary Injunction*]; *See also* Brief of Appellants at 14-15, Allied Daily Newspapers v. Eikenberry, 121 Wash. 2d 205, 848 P.2d 1258 (1992) (No. 59435-0) [hereinafter *Brief of Appellants*].

146. *State's Memo in Opposition to Preliminary Injunction*, *supra* note 145, at 13; see also *Brief of Appellants*, *supra* note 145, at 15-16.

147. *State's Memo in Opposition to Preliminary Injunction*, *supra* note 145, at 13.

148. Affidavit of Victoria Meadows at 4, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, June 16, 1992) [hereinafter *Affidavit of Meadows*].

149. *Id.*

150. *Plaintiffs' Memo in Support of Preliminary Injunction*, *supra* note 139, at 16; *see also Brief of Respondents*, *supra* note 139, at 16-19.

151. *See* Cohen v. Everett City Council, 85 Wash. 2d 385, 388, 535 P.2d 801, 803 (1975) (recognizing certain exceptional circumstances and conditions which justify some limitations on open judicial proceedings); Federated Publications, Inc. v. Kurtz, 94 Wash. 2d 51, 62-63, 615 P.2d 440, 446 (1980) (holding that pretrial hearings may be closed upon showing of some likelihood of prejudice to defendant's fair trial rights); Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 20, 633 P.2d 74, 77 (1981), *cert. denied*, 456 U.S. 984 (1982) (holding that a court may order closure to protect a defendant's right to a fair trial); Seattle Times Co. v. Ishikawa, 97 Wash. 2d 30, 37-39, 640 P.2d 716, 702-721 (1982) (outlining five factors that courts must consider before restricting access to criminal hearings or records from hearings).

Sheldon's bill, the legislature was directing courts to ignore those guidelines and close any proceedings or seal any documents in which child victims were identified.[152]

In reply to these arguments, the State asserted that the legislature intended the new law to complement, not replace, the court's guidelines.[153] It noted that under normal circumstances, the public's and press's right of access to court proceedings would outweigh the victim's right to privacy.[154] The new law simply assured victims that their right of privacy would be considered by judges in deciding whether or not to close proceedings or seal documents.[155] According to Attorney General Eikenberry, "[The law] neither states that a child victim's right to privacy has priority over the rights of others nor requires the court to protect the child's right to privacy in a constitutionally impermissible manner."[156]

Third, Allied Daily Newspapers asserted that the bill violated the press's and public's right to free speech in that judges could require people to agree not to disseminate victims' names before they were permitted to attend a trial.[157] This constitutes prior restraint as it "forces the public and press to accept a violation of their free speech rights in exchange for exercising their right of access to open justice."[158]

In response, the State argued that the First Amendment does not protect speech involving information that was improperly obtained.[159] Because judges could order attorneys and witnesses to not reveal a victim's name,[160] any violation of this order would result in the victim's name being improperly released.[161] Judges could then order

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152. *Plaintiffs' Memo in Support of Preliminary Injunction*, *supra* note 139, at 16-18; *Plaintiffs' Reply to State's Memo in Opposition to Preliminary Injunction*, *supra* note 139, at 3.

153. *Brief of Appellants*, *supra* note 145, at 11-12, 19-24; *see also State's Memo in Opposition to Preliminary Injunction*, *supra* note 145, at 18; State's Memorandum in Opposition to Plaintiffs' Complaint for Declaratory Relief and Permanent Injunction at 6-9, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County) [hereinafter *State's Memo in Opposition to Plaintiffs' Complaint*].

154. *See Brief of Appellants*, *supra* note 145, at 18-19, 36.

155. *Id.* at 11.

156. *Id.* at 14.

157. *See Plaintiffs' Memo in Support of Preliminary Injunction*, *supra* note 139, at 15-16; *Plaintiffs' Reply to State's Memo in Opposition to Preliminary Injunction*, *supra* note 139, at 7; *see also Brief of Respondents*, *supra* note 140, at 37-38.

158. *Brief of Respondents*, *supra* note 140, at 40.

159. *Brief of Appellants*, *supra* note 145, at 29; *see also State's Memo in Opposition to Preliminary Injunction*, *supra* note 145, at 16-17.

160. *Brief of Appellants*, *supra* note 145, at 27-29.

161. *Id.*

reporters not to print the improperly released information.[162] Also, the State argued, there is no First Amendment issue when people give up their right to free speech voluntarily in order to attend a trial that would otherwise be closed.[163] Accordingly, asking people to choose between agreeing to a gag order or being excluded from a trial did not constitute a form of coercion.[164]

B. Disposition in King County

On June 9, 1992, two days before the new law was to go into effect, King County Superior Court Judge Norman Quinn issued a preliminary injunction forbidding both the State Attorney General and the King County Prosecutor from enforcing the section related to court proceedings and documents.[165] Judge Quinn said the section was unconstitutional because it required judges to close court proceedings and "amount[ed] to the Legislature telling courts what they may admit as evidence."[166]

In his decision, Judge Quinn also made the King County Prosecutor a plaintiff in the suit instead of a defendant.[167] Deputy prosecutor Virginia Kirk, who represented the prosecutor's office in the initial hearing, had surprised State attorneys by siding with Allied Daily Newspapers and saying the new law would interfere with prosecutors' ability to conduct trials.[168]

While attorneys for Allied Daily Newspapers were preparing to argue for a permanent injunction and State attorneys were responding to Judge Quinn's order, other Washington judges, who were not bound by Judge Quinn's decision, heard motions involving the new victim identification law.[169] On June 16, 1992, a Yakima County Superior

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162. *Brief of Appellants*, *supra* note 145, at 26-28.

163. *See id.* at 27-28.

164. *See id.*

165. Order Granting Preliminary Injunction at 4, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, June 10, 1992) [hereinafter *Order Granting Preliminary Injunction*].

166. George Tibbits, *Judge Bars Law on Release of Juvenile Sex Crime Names*, OREGONIAN, June 11, 1992, at D15. *See generally Order Granting Preliminary Injunction*, *supra* note 165, at 2-3.

167. *Order Granting Preliminary Injunction*, *supra* note 165, at 5.

168. Sean Hanlon, *Judge Stops Enactment of Law Against Using Names*, SHELTON-MASON COUNTY J., June 11, 1992, at 1-2; *see also* Defendant Norm Maleng's Memorandum in Response to Plaintiffs' Motion for Preliminary Injunction at 6, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, June 4, 1992) [hereinafter *Maleng's Memo in Response to Preliminary Injunction*].

169. Because superior courts' jurisdiction is limited, Quinn's decision only affected government agencies in King County.

Court judge followed Judge Quinn's ruling and refused to close a child molestation trial.[170]

The same day, Mason County Superior Court Judge James Sawyer used the new law to close the testimony of an eleven-year-old sex-crime victim, instructing attorneys to use an alias for her in other portions of the trial, and to seal any records that would reveal her testimony.[171] David Utevsky, an attorney representing the American Civil Liberties Union in the case, protested the ruling on behalf of the *Journal*, but both the defense attorney and the county prosecutor agreed to the closure.[172] Shortly after Judge Sawyer made his decision, the defendant pled guilty to a lesser charge.[173]

In a declaration later made to the King County court, Utevsky described the Mason County judge's reasons for closing the trial:

> Judge Sawyer emphasized that both the prosecution and the defense had endorsed the proposed procedure to implement [the new law]. The defendant had waived his right to an open trial, so his rights were not at issue. Judge Sawyer also concluded that [the law] could be enforced without violating the public right of access under the state and federal Constitutions, so long as the court did not restrict public access to a degree which was not necessary to protect the alleged victim's right of privacy.[174]

On June 29, 1992, Judge Quinn permanently enjoined enforcement of the new law.[175] The injunction, however, applied only to Section 9 of the law, which referred to court proceedings and court documents.[176] Judge Quinn concluded that by requiring judges to close traditionally open proceedings and records, Section 9 violated the Washington State Constitution.[177] Sections of the law that did not specifically refer to traditionally open judicial proceedings and court documents were acceptable, Judge Quinn concluded, because they

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170. Peter Lewis, *Confusion Over New Shield Law—Shelton Judge to Enforce Challenged Rule*, SEATTLE TIMES, June 17, 1992, at B1.

171. *Id.*; Al Ford, *Case Was Almost First One Tried Under No-Names Law*, SHELTON-MASON COUNTY J., June 18, 1992, at 1.

172. *Id.*; *see also* Declaration of David Utevsky at 2, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, June 26, 1992) [hereinafter *Declaration of Utevsky*]; Declaration of Gary P. Burleson at 3, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, July 30, 1992) [hereinafter *Declaration of Burleson*].

173. Ford, *supra* note 171.

174. *Declaration of Utevsky*, *supra* note 172, at 3-4.

175. Declaratory Judgment and Order Granting Permanent Injunction, Allied Daily Newspapers v. Eikenberry at 3-5 (No. 92-2-12149-2) (Superior Court for King County, June 29, 1992) [hereinafter *Declaratory Judgment and Order Granting Permanent Injunction*].

176. *Id.* at 3.

177. *Id.* at 2-3.

didn't *require* closure, although they allowed judges to close proceedings and documents as they saw fit.[178] The distinction Judge Quinn made between the sections eventually would allow the state to keep part of the law on the books and apply it to such things as police records and juvenile court proceedings.[179]

Immediately after Judge Quinn issued the permanent injunction, Assistant Attorney General Lee Ann Miller told reporters she would appeal directly to the state supreme court.[180]

IV. THE WASHINGTON SUPREME COURT NULLIFIES THE "RAPE ID" LAW

The State appealed Judge Quinn's decision directly to the Washington Supreme Court. In *Allied Daily Newspapers v. Eikenberry*,[181] the court declared Section 9 of the 1992 law unconstitutional. In doing so, the court relied on five prior decisions. One was a United States Supreme Court case, which had dealt with a similar law ten years earlier.[182] The other four were Washington State Supreme Court cases.[183] The court used these cases to conclude that court proceedings and documents could be closed only in exceptional circumstances and that the closure had to be limited.[184] If possible, the court should only close *part* of the hearing or trial instead of the entire proceeding.[185] Sealed documents should be opened as soon as possible; they could not be sealed indefinitely.[186] A brief review the five decisions relied on by the Washington Supreme Court is outlined below.

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178. *Id.* at 3.

179. *See* WASH. REV. CODE § 7.69A (1994).

180. Richard Seven, *Child-Victim Shield Law Struck Down*, SEATTLE TIMES, June 29, 1992, at C4; Associated Press, *Judge Makes Permanent His Ban of New State Law*, OREGONIAN, June 30, 1992, at D10. *See also* Notice of Appeal to the Supreme Court at 1, Allied Daily Newspapers v. Eikenberry (No. 92-2-12149-2) (Superior Court for King County, July 28, 1992).

181. 121 Wash. 2d 205, 848 P.2d 1258 (1993).

182. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 610-611 (1982).

183. Cohen v. Everett City Council, 85 Wash. 2d 385, 535 P.2d 801 (1975); Federated Publications, Inc. v. Kurtz, 94 Wash. 2d 51, 615 P.2d 440 (1980); Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 633 P.2d 74 (1981); Seattle Times Co. v. Ishikawa, 97 Wash. 2d 30, 640 P.2d 716 (1982).

184. *See Ishikawa*, 97 Wash. 2d at 37-39, 640 P.2d at 720-721.

185. *See Kurtz*, 94 Wash. 2d at 64-65, 615 P.2d at 447.

186. *See Ishikawa*, 97 Wash. 2d at 39, 640 P.2d at 721.

A. *Precedents for Allied Daily Newspaper v. Eikenberry*

1. *Globe Newspaper Co. v. Superior Court*

In *Globe Newspaper Co. v. Superior Court*,[187] the United States Supreme Court held that judges could not be required by statute to close criminal proceedings because public access to government proceedings is necessary in order for people to exercise their First Amendment rights.[188]

Globe began in 1979 when a Massachusetts Superior Court judge closed several pretrial hearings and the entire trial of a man charged with raping three teenage girls.[189] The judge justified his actions by referring to a Massachusetts law that required judges to bar the press and members of the public from courtrooms during the testimony of sexual assault victims who are under the age of eighteen.[190] The *Boston Globe*, which was covering the trial, sought injunctive relief.[191] A justice of the Massachusetts Supreme Court conducted an initial hearing and denied the *Globe's* request.[192] While the *Boston Globe* was waiting for the Massachusetts Supreme Court to hear its appeal, the rape trial ended.[193] The man was acquitted.[194]

On appeal, the Massachusetts Supreme Court held that the trial judge had wrongly interpreted the Massachusetts law to require closure of the entire trial if it involved juvenile sexual assault victims.[195] Instead, the Massachusetts Supreme Court held that the law only *required* the judge to close the court during the testimony of minor victims.[196] Judges could close additional parts of trials if they saw fit, but that remained within the judge's discretion.[197] The law was meant to encourage child sexual assault victims to press charges and to protect them from embarrassment once they did.[198] The *Boston Globe* appealed to the United States Supreme Court, which vacated the

187. 457 U.S. 596 (1982).
188. *See id.* at 604-605.
189. *Id.* at 598.
190. *Id.* at 599 (citing MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981)).
191. *Globe Newspaper*, 457 U.S. at 599.
192. *Id.* at 599-600.
193. *Id.* at 600.
194. *Id.*
195. *See* Globe Newspaper Co. v. Superior Court, 401 N.E.2d 360, 370 (Mass. 1980), *vacated*, 449 U.S. 894.
196. *Id.*
197. *Id.* at 372.
198. *Id.* at 369.

decision of the Massachusetts Supreme Court and remanded the case.[199] On remand from the United States Supreme Court, the Massachusetts Supreme Court stated that the mandatory closure rule was constitutional in that it furthered a substantial state interest that justified restricting the press's and public's access to the courtroom.[200]

The *Boston Globe* appealed the Massachusetts decision to the United States Supreme Court.[201] In a six-three vote, the Court overturned the state court's decision.[202] The Court's opinion, written by Justice Brennan, made it clear that court proceedings could be closed only in exceptional circumstances.[203] The Court acknowledged that access to courts is not guaranteed by the First Amendment, but that 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."[204] The First Amendment was intended to foster discussion of government affairs among citizens.[205] Without information about government proceedings, citizens have nothing to discuss.[206]

In regard to criminal trials in particular, citizens have a right of access because trials historically have been open and because access helps citizens monitor the operations of the judicial system and government as a whole.[207] Justice Brennan stated:

> Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. In sum, the

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199. Globe Newspaper v. Superior Court, 449 U.S. 894 (1980). The remand was to allow the Massachusetts Supreme Court to consider the case in light of the U.S. Supreme Court's decision in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). *Id.*

200. Globe Newspaper Co. v. Superior Court, 423 N.E.2d 773, 781 (1981), *rev'd*, 457 U.S. 596 (1982).

201. *Globe Newspaper*, 457 U.S. at 602.

202. *Id.* at 610-611.

203. *Id.* at 606.

204. *Id.* at 604.

205. *See id.* at 604-606.

206. *See Globe Newspaper*, 457 U.S. at 604-605.

207. *See id.* at 605-606.

> institutional value of the open criminal trial is recognized in both logic and experience.[208]

The right of access is not absolute, but can be restricted only in exceptional circumstances.[209] The Court did not find that the circumstances of the rape trial justified mandatory restriction of access in this case.[210] The Massachusetts Supreme Court had given two reasons to justify the law. First, closing courts during child sexual assault victims' testimony spares them the embarrassment and trauma of recounting the assault in front of others.[211] Second, because it spares these victims embarrassment, the law encourages them to press charges and testify.[212] The first reason is compelling, Justice Brennan said, but "it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of the victim."[213] Further, as to the Massachusetts Supreme Court's second justification, the United States Supreme Court found that there was no evidence to support the claim that closing victims' testimony would encourage them to report crimes.[214] Justice Brennan noted:

> Although [the statute] bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus [the statute] cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity.[215]

If victims' willingness to testify depends on the state keeping that testimony secret, the Massachusetts law was inadequate.[216] Finally, the Court said, even if the law furthered the state's interest in encouraging victims to testify, it did so in a way that undermined the

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208. *Id.* at 606 (footnotes omitted).

209. *Id.* at 606-607. The Court held that the right of access may only be denied where it is necessitated "by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 607.

210. *See id.* at 607-608.

211. Globe Newspaper Co. v. Superior Court, 423 N.E.2d at 779.

212. *Id.*

213. *Globe Newspaper*, 457 U.S. at 608.

214. *Id.* at 609.

215. *Id.* at 610.

216. *Id.*

principle of open government.[217] If child sex-crime victims were allowed to testify in secret, other victims may ask to do so.[218] For example, adult sex-crime victims probably suffer embarrassment and trauma like child victims.[219] If the state could close child victims' testimony, it also could close adult victims' testimony.[220]

While the Court clearly said laws requiring judges to close portions of court proceedings are unconstitutional, Chief Justice Burger wrote a dissenting opinion that could have given supporters of the Washington law hope.[221] Justice Burger stated that the proper inquiry was whether the proceeding historically had been open and whether there was a substantial state interest that justified closing the court.[222] Justice Burger concluded that the majority had "ignored the weight of historical practice."[223]

While criminal trials historically have been open, trials involving minors often have been closed.[224] Justice Burger noted that our society historically has protected minors *charged* with crime by prohibiting the release of juvenile offenders' names, barring the press and the public from juvenile court proceedings, and sealing juvenile court records.[225] While minors charged with crime have been afforded protection, the majority opinion eliminated such protection for child *victims*:[226]

> Yet today the Court holds unconstitutional a state statute designed to protect not the *accused*, but the minor *victims* of sex crimes. In doing so, it 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.[227]

Supporters of the Washington bill used Justice Burger's argument several times in testifying before the Washington legislature.[228]

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217. *See id.*
218. *See Globe Newspaper*, 457 U.S. at 610.
219. *See id.*
220. *See id.*
221. *Id.* at 616 (Burger, J., dissenting).
222. *Globe Newspaper*, 457 U.S. at 613-614 (Burger, J., dissenting).
223. *Id.* at 614.
224. *See id.*
225. *Id.* at 612.
226. *Globe Newspaper*, 457 U.S. at 612 (Burger, J., dissenting).
227. *Id.* at 612.
228. *Public hearing on S.H.B. 2348, supra* note 20.

However, Justice Burger's analysis of the intent of the Massachusetts statute distinguishes it from the intent of the Washington statute and supports the notion that the Washington statute was unconstitutional.[229] Justice Burger said the majority misunderstood the intent of the Massachusetts law.[230] The state did not want to deny reporters information about victims' testimony.[231] This information would be available in transcripts.[232] Rather, Justice Burger said, the State wanted to spare children the trauma and embarrassment of having to testify in front of a large group of people.[233] Massachusetts, according to Justice Burger, was not trying to keep information secret for an indefinite period of time.[234] In contrast, Washington legislators wanted to keep victims' names secret permanently.[235]

In addition to the *Globe* case, in reaching its decision in *Allied Daily Newspaper*, the Washington Supreme Court considered a series of its own decisions involving access to judicial proceedings.[236] These cases are explained briefly below.

2. *Cohen v. Everett City Council*

In its first case dealing with media access to the judicial system, the Washington Supreme Court in *Cohen v. Everett City Council*,[237] held that all members of the public, including reporters, have a right to view documents entered as court evidence.[238] This right exists even if the documents could be sealed under other circumstances.[239]

In the early 1970s, the Everett City Council revoked the city license of a sauna parlor owner during a closed meeting.[240] The sauna parlor owner appealed the city's decision to the Snohomish County Superior Court. In making his appeal, the sauna parlor owner got an order sealing the transcript of the city council meeting so that

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229. *See Globe Newspaper*, 457 U.S. at 615-616 (Burger, J., dissenting).
230. *See id.*
231. *Id.*
232. *Id.* at 616.
233. *Globe Newspaper*, 457 U.S. at 615 (Burger, J., dissenting).
234. *See id.* at 615-616.
235. *See* S.H.B. 2348; *Public hearing on S.H.B. 2348*, *supra* note 20; *Senate Hearing on S.H.B. 2348*, *supra* note 102.
236. *Allied Daily Newspapers*, 121 Wash. 2d at 205, 848 P.2d at 1258; *See also Cohen*, 85 Wash. 2d at 385, 535 P.2d at 801; *Kurtz*, 94 Wash. 2d at 51, 615 P.2d at 440; *Swedberg*, 96 Wash. 2d at 13, 633 P.2d at 74; *Ishikawa*, 97 Wash. 2d at 30, 640 P.2d at 716.
237. 85 Wash. 2d 385, 535 P.2d 801 (1975).
238. *See id.* at 390, 535 P.2d at 804.
239. *See id.* at 389, 535 P.2d at 803-804.
240. *Id.* at 386, 535 P.2d at 802.

only the judge could see the file.[241] During the city council's closed meeting on the license, the sauna parlor owner had made some allegations against another person, and the judge did not want those accusations known.[242]

The Everett Herald, a local newspaper, asked the judge to unseal the record.[243] The judge refused "pending a hearing on the merits of the action."[244] After reviewing the meeting record, the judge affirmed the council's decision to revoke the sauna parlor owner's license and ordered the record sealed.[245] Again, the *Everett Herald* filed a motion asking the judge to unseal the record, and again the judge refused.[246] The paper then appealed directly to the Washington Supreme Court.[247]

Writing for the court in *Cohen*, Justice Brachtenbach opined that the Washington State Constitution requires civil suits to be heard in open court unless there is a statutory exception or a compelling reason for closing the court.[248] The council claimed that in this case there was a statutory exception since records of executive sessions, or legitimately closed meetings, are not public records under state law.[249] The Washington Supreme Court said that was true "[b]ut the minutes lost their confidential nature when they became the basis for judicial review on the merits. What is statutorily secret in one context is not necessarily so when it moves into the judicial arena."[250] When the records became the basis for a lawsuit, they became the equivalent of court testimony.[251]

Further, Justice Brachtenbach said, there was no reason for the records to be closed.[252] Concern about revealing the sauna parlor owner's remarks was not a compelling state interest.[253] The court therefore ordered the records opened.[254]

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241. *Cohen*, 85 Wash. 2d at 386, 535 P.2d at 802.
242. *Id.* at 388, 535 P.2d at 803.
243. *Id.*
244. *Id.* at 387, 535 P.2d at 802.
245. *Cohen*, 85 Wash. 2d at 387, 535 P.2d at 802.
246. *Id.*
247. *Id.* at 387, 535 P.2d at 802.
248. *Id.* at 387-388, 535 P.2d at 803.
249. *Id.* at 389, 535 P.2d at 804.
250. *Cohen*, 85 Wash. 2d at 389, 535 P.2d at 804.
251. *Id.*
252. *See id.* at 388-389, 535 P.2d at 803.
253. *See id.*
254. *Cohen*, 85 Wash. 2d at 390, 535 P.2d at 804.

3. *Federated Publications v. Kurtz*

In *Federated Publications v. Kurtz*,[255] which stemmed from a heavily publicized murder trial, the Washington Supreme Court dealt with media access to court proceedings and documents.[256] The court held that judges could close *pretrial* hearings to protect defendants from prejudicial publicity as long as the judges followed the five guidelines enumerated by the court.[257]

In November 1978, Elliott Tharp was charged with the murder of William Ray Bond, a Port of Bellingham terminal manager.[258] The *Bellingham Herald*, located in Whatcom County, covered the case,[259] as did several local television and radio stations. Between April 1978 and March 1979, the *Bellingham Herald* published sixteen stories about the murder and the upcoming trial.[260] As a result, Whatcom County Superior Court Judge Jack Kurtz granted the prosecutor a change of venue, moving the trial to neighboring Skagit County.[261] The change of venue was not adequate. Since about 1,000 of Skagit County's 63,000 residents read the *Bellingham Herald* regularly, the jury pool could still be contaminated by people who learned of the murder from the newspaper.[262]

The trial began on April 2, 1979, in Skagit County.[263] In March, Judge Kurtz held a suppression hearing in Whatcom County to discuss whether the prosecutor could use the defendant's prior criminal record and incriminating statements as evidence in the trial.[264] Duirng the suppression hearing, the prosecutor and defense attorney moved the court to close the rest of the hearing and seal the records. The motion was granted.[265]

After the trial began, the newspaper sued the judge, asking the Washington Supreme Court to open the suppression hearing files and

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255. 94 Wash. 2d 51, 615 P.2d 440 (1980).
256. *See id.* at 52-53, 615 P.2d at 441.
257. *See id.* at 62-65, 615 P.2d at 446-47.
258. *Id.* at 52, 615 P.2d at 441.
259. *See, e.g.*, Becky Fox, *Jo Tharp charged in Bond's murder*, BELLINGHAM HERALD, Nov. 1, 1978, at A1; Becky Fox, *Jury finds Tharp guilty in Bond death*, BELLINGHAM HERALD, Apr. 12, 1979, at A1.
260. *Kurtz*, 94 Wash. 2d at 52, 615 P.2d at 441.
261. *Id.* at 53, 615 P.2d at 441.
262. *See id.*
263. *Id.*
264. *Kurtz*, 94 Wash. 2d at 53, 615 P.2d at 441.
265. *Id.*

to prevent Judge Kurtz from closing future proceedings.[266] A few days later, Judge Kurtz opened the suppression hearing files without prompting from the higher court.[267] However, the supreme court agreed to hear the case because the issue could come up again, and the court wanted to give lower court judges guidelines to follow in similar situations.[268] Fifteen months after Judge Kurtz opened the hearing files, the Washington Supreme Court issued an opinion supporting Kurtz's initial decision to close the hearing and seal the files.[269]

In a similar case the year before, *Gannett Company v. De Pasquale*,[270] the U.S. Supreme Court had held that the public has a right of access to suppression hearings, but that right is outweighed by a defendant's right to a fair trial.[271] In deciding *Kurtz*, the Washington Supreme Court referred to *Gannett* and held that because the case before it was so factually similar to *Gannett*, "we are compelled to conclude that respondent's closure order and order temporarily sealing the file did not violate the United States Constitution."[272]

However, the court continued, it would rather decide the case based on Washington law than federal law because the Washington State Constitution has a clause that specifically addresses the issue while the United States Constitution does not.[273] In *Gannett*, the Supreme Court had not been able to agree on the source of the right of access to judicial proceedings.[274] Four justices found the right in the Sixth Amendment.[275] Four did not.[276] One found the right in the First Amendment.[277]

In the Washington State Constitution, three clauses address the issue.[278] Article 1, section 5, which deals with the right to publish

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266. *Id.* at 53-54, 615 P.2d at 441-442.

267. *See id.* at 54, 615 P.2d at 442.

268. *Kurtz*, 94 Wash. 2d at 54, 615 P.2d at 442.

269. *Id.* at 56, 615 P.2d at 443.

270. 443 U.S. 368 (1979).

271. *Gannett*, 443 U.S. at 393-394.

272. *Kurtz*, 94 Wash. 2d at 56, 615 P.2d at 443.

273. *Id.* at 56, 58-59, 615 P.2d at 443-445.

274. *Gannett*, 443 U.S. at 379-380.

275. Justice Blackmun articulated a Sixth Amendment right of access in his dissenting opinion, which Justices Brennan, White and Marshall signed. *Gannett*, 443 U.S. at 433, 446 (Blackmun, J., dissenting).

276. The majority opinion, written by Justice Stewart, with whom Justices Burger, Powell, Rehnquist and Stevens voted, denied a Sixth Amendment right of access. *Id.* at 379-380.

277. In his concurring opinion, Justice Powell identified a First Amendment right of access to the suppression hearing. *Id.* at 397.

278. *See* WASH. CONST. art. 1, § 5 (freedom of speech), § 10 (administration of justice), § 22 (rights of the accused).

on all subjects, is similar to the First Amendment.[279] Article I, section 22, which deals with the right to public trials, mirrors the Sixth Amendment.[280] Article I, section 10 has no match in the federal constitution.[281] It reads, "Justice in all cases shall be administered openly, and without unnecessary delay."[282] On that clause the Washington Supreme Court based its decision in *Kurtz*.[283]

The *Kurtz* court held that the Washington State Constitution clearly establishes the public's right of access to judicial proceedings, but that right is not absolute.[284] In some cases, judges must close their courts in order to protect a criminal defendant's right to a fair trial.[285] The court must determine "whether the present circumstances were exceptional enough to justify closure."[286] To answer that question, "the court needs workable standards that allow it to strike a balance between the public's right of access and the accused's rights to a fair trial including an impartial jury."[287] To help judges strike that balance, the court outlined the following test in determining whether closure was justified: (1) the accused must show that an open trial or hearing will likely jeopardize his or her ability to get a fair trial;[288] (2) anyone present when the closure motion is made must be allowed to object;[289] (3) the objector must demonstrate that there are alternatives to closing the proceeding that will protect the accused's rights;[290] (4) the court must weigh the competing interests of the accused and the public;[291] and (5) the closure order cannot be any broader than needed to serve its purpose.[292] In other words, if the

279. The clause reads, "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." WASH. CONST. art. 1, § 5.

280. Washington's provision reads: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases. . . ." WASH. CONST. art. 1, § 22.

281. WASH. CONST. art. 1, § 10.

282. *Id.*

283. *Kurtz*, 94 Wash. 2d at 59-60, 615 P.2d at 445.

284. *Kurtz*, 94 Wash. 2d at 60, 615 P.2d at 445.

285. *Id.*

286. *Id.*

287. *Id.* at 61, 615 P.2d at 445.

288. *Kurtz*, 94 Wash. 2d at 62, 615 P.2d at 446.

289. *Id.*

290. *Id.* at 63, 615 P.2d at 446.

291. *Id.* at 64, 615 P.2d at 447.

292. *Kurtz*, 94 Wash. 2d at 64, 615 P.2d at 447.

judge can protect the accused's rights by closing part of a hearing or trial instead of all of it, he should close only part.[293] If records from the hearing are sealed, they should be opened as soon as possible.[294]

The supreme court held that Judge Kurtz had met these criteria because he had closed only a portion of the suppression hearing, opened records from the hearing soon after the jury was chosen, and had reason to believe no alternative measures would protect the defendant's right to a fair trial.[295] In deciding Judge Kurtz had no alternatives to closing the hearing, the court noted that the judge had twice asked the *Bellingham Herald* not to publish information from ballistic reports, and the newspaper published the information anyway, violating the Washington Bench-Bar-Press Guidelines.[296] Although the *Bellingham Herald's* reporter promised to follow the Bench-Bar-Press Guidelines, the newspaper's previous actions gave Judge Kurtz no reason to believe it would not publish incriminating evidence from the suppression hearing.[297]

4. *Federated Publications v. Swedberg*

A year after the Washington Supreme Court issued its opinion in *Kurtz*, it heard *Federated Publications v. Swedberg*,[298] in which the *Bellingham Herald* sued a superior court judge for restricting access to a suppression hearing.[299] In *Swedberg*, the court held that because judges can ban the public and media from court proceedings, they can also institute other, less restrictive measures to control media coverage of such proceedings.[300]

The *Swedberg* case arose from a criminal trial involving Veronica Compton, the girlfriend of "Hillside Strangler" Kenneth Bianchi. Bianchi was convicted of killing two women in Bellingham and five in Los Angeles.[301] While he was in jail awaiting trial, Compton

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293. *See id.*

294. *See id.*

295. *Id.* at 62-65, 615 P.2d at 446-447.

296. *Kurtz*, 94 Wash. 2d at 63, 615 P.2d at 447. *Bench-Bar-Press Principles and Guidelines* are developed by reporters, lawyers, and judges and outline how all parties shall behave during trials. Adherence to the guidelines is voluntary. The purpose is to curtail prejudicial pretrial publicity. *See generally* THE BENCH-BAR-PRESS COMMITTEE OF WASHINGTON, BENCH-BAR-PRESS PRINCIPLES AND GUIDELINES (1974) [hereinafter BENCH-BAR-PRESS GUIDELINES].

297. *Id.*

298. 96 Wash. 2d 13, 633 P.2d 74 (1981).

299. *Id.* at 15, 633 P.3d at 75.

300. *See id.* at 22-23, 633 P.2d at 78.

301. *'Copycat Strangler' One of Two Escapees*, SEATTLE TIMES, July 27, 1988, at D1.

attempted to kill a Bellingham cocktail waitress to divert suspicion from Bianchi.[302]

Before Compton's trial, a suppression hearing was held in Whatcom County Superior Court.[303] Compton's attorney asked the judge to close the court because media coverage of the hearing might prejudice jurors.[304] Judge Byron Swedberg considered closing the hearing but decided to keep it open if reporters covering the hearing would sign an agreement to abide by Washington's Bench-Bar-Press Guidelines.[305] Reporters from the *Bellingham Herald* and a few other news organizations refused to sign the agreement and were asked to leave the courtroom.[306] The *Bellingham Herald* then sued Judge Swedberg, alleging that requiring reporters to sign an agreement on how they will cover a hearing before they attend that hearing constitutes prior restraint.[307]

The Washington Supreme Court disagreed.[308] The court said Judge Swedberg followed the guidelines outlined in *Kurtz* and determined that closing the suppression hearing would be the only way to prevent prejudicial publicity without infringing on Compton's rights.[309] A continuance or change of venue might have alleviated the dangers of pretrial publicity, but those options required Compton to give up her right to a speedy trial and right to be tried in the county where the offense was committed.[310] Then the court said if Judge Swedberg could justifiably close the hearing, he could take other, less drastic action.[311] Justice Rosellini wrote:

> Ordinarily, members of the media who have declared their adherence to the guidelines do exercise restraint in such reporting, but it had been the experience of the trial judge here that mere oral commitment had not sufficed to produce that restraint. He recognized that by admitting members of the press to such a sensitive proceeding, even upon their written agreement to be guided by these standards, he was placing the defendant's interests in some jeopardy. Yet he was willing to try this method of securing compliance, as an experiment, to see if it would be effective in

302. *Id.*
303. *Swedberg*, 96 Wash. 2d at 15, 633 P.2d at 74.
304. *Id.* at 14-15, 633 P.2d at 74-75.
305. *Id. See* BENCH-BAR-PRESS GUIDELINES, *supra* note 296.
306. *Swedberg*, 96 Wash. 2d at 15, 633 P.2d at 75.
307. *See id.* at 15-16, 633 P.2d at 75.
308. *Id.* at 22-23, 633 P.2d at 78.
309. *See id.* at 16-21, 633 P.2d at 75-78.
310. *See id.* at 17, 633 P.2d at 75-76.
311. *Swedberg*, 96 Wash. 2d at 22, 633 P.2d at 78.

> protecting the defendant while at the same time allowing the public, including the media, to attend the hearing. As we view this measure, it was a good faith attempt to accommodate the interests of both defendant and press which, hopefully, would prove both practical and effective as an alternative to closure.[312]

Justice Rosellini also said the court did not consider requiring the media to sign an agreement to abide by the Bench-Bar-Press Guidelines a prior restraint because the guidelines "are, by definition, not a set of rules but rather principles which guide the courts, lawyers and court personnel, as well as the media . . . ."[313] Most of the guidelines are general suggestions and don't address the specific content of stories, although a few suggest not publishing items such as opinions about defendants' guilt or innocence, defendants' confessions and results of polygraph and ballistic tests.[314]

Justice Dolliver wrote a vehement dissent on this point, saying conditioning admission to the hearing on a promise to obey the guidelines was a prior restraint, and Judge Swedberg had not met the burden of proof needed to exercise prior restraint.[315] While the Compton case would certainly receive a great deal of publicity, Dolliver wrote, the judge had no reason to believe it would be sensational, prejudicial or in violation of the Bench-Bar-Press Guidelines given the coverage up to that point.[316] He implied that the judge should have looked at media coverage of that particular case and not at media coverage of trials generally.[317]

5. *Seattle Times Co. v. Ishikawa*

A year after the Washington Supreme Court decided *Swedberg*, it heard *Seattle Times Co. v. Ishikawa*,[318] its first case involving a closure order that was not entirely based on a threat to the defendant's right to a fair trial.[319] The court held that judges could close judicial proceedings for reasons other than to protect defendants from prejudicial publicity, but they must demonstrate a greater need for closure in those cases than in cases where a defendant's Sixth Amend-

312. *Id.* at 21, 633 P.2d at 78.
313. *Id.* at 20-21, 633 P.2d at 77.
314. *See* BENCH-BAR-PRESS GUIDELINES, *supra* note 296 at 7, 10.
315. *Swedberg*, 96 Wash. 2d at 27-28, 633 P.2d at 81-82 (Dolliver, J., dissenting).
316. *Id.* at 27, 633 P.2d at 82.
317. *See id.*
318. 97 Wash. 2d 30, 640 P.2d 716 (1982).
319. *Id.* at 36-37, 640 P.2d at 720.

ment right to a fair trial is threatened.[320] The state supreme court modified the criteria for closure it established in the first *Bellingham Herald* case, creating the test that would be used in *Allied Daily Newspapers*.[321]

The *Ishikawa* case arose from a 1981 murder trial that was not particularly celebrated.[322] Just before the trial, the defendant's lawyer made a motion to dismiss the case.[323] He also asked the judge to close the courtroom while the motion was being heard.[324] After discussing the issue with the defense attorney and prosecutor in his chambers, King County Superior Court Judge Richard Ishikawa agreed to close the court while the lawyers argued the motion to dismiss.[325] In announcing his decision, Judge Ishikawa did not explain why he agreed to close the hearing.[326] He did allow the press to object and to present alternatives to closure, but it was difficult for the media to do so when they didn't know why the court was being closed.[327]

The judge heard arguments for the motion to dismiss, denied the motion and sealed the hearing record.[328] The trial was held, and the defendant was convicted of murder.[329] After the trial, the *Seattle Times* and *Seattle Post-Intelligencer* again asked the judge to unseal records from the pretrial hearing.[330] The judge refused, and the newspapers appealed directly to the Washington Supreme Court.[331]

Because Judge Ishikawa had not explained his reasons for closing the pretrial hearing and sealing the records, the supreme court ordered him to explain his reasons before it heard oral arguments.[332] Judge Ishikawa said he closed the hearing and sealed the documents to protect the defendant's right to a fair trial, avoid interference with a continuing investigation of the murder, and protect witnesses' safety.[333]

In its decision, the supreme court said it would expand the *Kurtz* test because Judge Ishikawa had not closed the hearing simply to

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320. *See id.*
321. *See id.*
322. *See Ishikawa*, 97 Wash. 2d at 32-33, 640 P.2d at 717-718.
323. *Id.* at 32, 640 P.2d at 717.
324. *Id.*
325. *Id.* at 33, 640 P.2d at 718.
326. *Ishikawa*, 97 Wash. 2d at 33, 640 P.2d at 718.
327. *See id.*
328. *Id.*
329. *Id.*
330. *Ishikawa*, 97 Wash. 2d at 33, 640 P.2d at 718.
331. *Id.* at 34, 640 P.2d at 718.
332. *Id.* at 39-40, 640 P.2d at 721-722.
333. *Id.* at 40, 640 P.2d at 721.

protect the defendant's fair-trial rights and the court believed "that closure to protect the defendant's right to a fair trial should be treated somewhat differently from closure based entirely on the protection of other interests . . . ."[334] The court then outlined the following test to determine if closure was justified: First, the proponent of closure must make some showing of need. Defendants need only show a "likelihood of jeopardy" to their Sixth Amendment rights. Other people have a higher burden of proof. They must show a "serious and imminent threat to some other important interest."[335] Second, anyone present when the motion to close the court or seal documents is made must be allowed to object, *and* the person arguing for closure must give specific reasons for wanting closure so other people "have sufficient information to be able to appreciate the damages which would result from free access to the proceeding and/or records. This knowledge would enable the potential objector to better evaluate whether or not to object and on what grounds to base its opposition."[336] Third, all parties must analyze whether the proposal for closure is the least restrictive means available for protecting the threatened interests.[337] Fourth, judges must weigh the competing interests of the defendant and public and explain their findings and conclusions.[338] Finally, the closure order must be as limited as possible. If it involves sealed documents, it must expire at a specific time unless the person asking for closure comes back to court at that time and gives a reason why the order should be extended.[339]

The court, in an opinion written by Justice Brachtenbach, then argued that Judge Ishikawa had not met these guidelines.[340] Ishikawa did not tell the newspapers why the hearing and documents were going to be sealed, which deprived them of a reasonable opportunity to suggest alternatives to closure.[341] Further, Ishikawa did not explain his consideration of the defendant's and public's competing interests.[342] He did not explain why other alternatives were not adequate, and he gave no reason to believe that closing the entire hearing and sealing the records indefinitely was the least restrictive

334. *Ishikawa*, 97 Wash. 2d at 37, 640 P.2d at 719.
335. *Ishikawa*, 97 Wash. 2d at 37, 640 P.2d at 720.
336. *Id.* at 38, 640 P.2d at 720.
337. *Id.*
338. *Id.*
339. *Ishikawa*, 97 Wash. 2d at 39, 640 P.2d at 721.
340. *See id.* at 39-45, 640 P.2d at 721-724.
341. *Id.* at 41, 640 P.2d at 722.
342. *Id.* at 45, 640 P.2d at 724.

means of achieving his goals.[343] The supreme court sent the case back to Judge Ishikawa, ordering him to follow the new guidelines in reconsidering the newspapers' motion to open the records.[344]

Globe, Cohen, Kurtz, Swedberg, and *Ishikawa* suggested that Washington's victim identification law was unconstitutional.[345] *Globe* held that laws requiring judges to close court proceedings were unacceptable and that such proceedings could be closed only in exceptional cases.[346] The Washington decisions also emphasized the importance of conducting judicial proceedings in public.[347] *Cohen* established a public right to view documents submitted as evidence.[348] *Kurtz, Swedberg* and *Ishikawa* emphasized the need for caution in closing court proceedings.[349] These three cases stressed the importance of carefully considering arguments in favor of open hearings before mandating closure. In *Allied Daily Newspapers,* the State tried to argue that the rape-victim identification law allowed judges to consider arguments for keeping court proceedings open, but Allied's lawyers, several district attorneys and at least two superior court judges believed that the law was written in a way that mandated closure and thus brought the law into conflict with established precedent.[350]

Further, a study of state legislative history supports the assertion that the legislators meant to require public officials to keep child victims' names from the public.[351] Therefore, while the specific wording of the statute may not have conflicted with the standards in *Globe, Cohen, Kurtz, Swedberg,* and *Ishikawa,* the legislators' intent was to mandate closure. At the very least, the intent of the law violated the Washington Supreme Court's established guidelines and was unconstitutional.

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343. *Ishikawa,* 97 Wash. 2d at 45, 640 P.2d at 724.

344. *Id.* at 45-46, 640 P.2d at 724.

345. *See Globe Newspaper,* 457 U.S. at 596; *Cohen,* 85 Wash. 2d at 385, 535 P.2d at 801; *Kurtz,* 94 Wash. 2d at 51, 615 P.2d at 440; *Swedberg,* 96 Wash. 2d at 13, 633 P.2d at 74; *Ishikawa,* 97 Wash. 2d at 30, 640 P.2d at 716.

346. *See Globe Newspaper,* 457 U.S. at 606-607.

347. *Cohen,* 85 Wash. 2d at 387-388, 535 P.2d at 803; *Kurtz,* 94 Wash. 2d at 59-60, 615 P.2d at 445; *Swedberg,* 96 Wash. 2d at 20, 633 P.2d at 77; *Ishikawa,* 97 Wash. 2d at 36, 640 P.2d at 719.

348. *See Cohen,* 85 Wash. 2d. at 389-390, 535 P.2d at 803-804.

349. *See Kurtz,* 94 Wash. 2d at 60, 615 P.2d at 445; *Swedberg,* 96 Wash. 2d at 20, 633 P.2d at 77; *Ishikawa,* 97 Wash. 2d at 37, 640 P.2d at 720.

350. *See Allied Daily Newspapers,* 121 Wash. 2d at 211-214, 848 P.2d at 1261-1262.

351. *See Public Hearing on S.H.B. 2348, supra* note 20; *Senate Hearing on S.H.B. 2348, supra* note 102.

B. *Oral Arguments for Allied Daily Newspapers v. Eikenberry*

During oral arguments for *Allied Daily Newspapers v. Eikenberry*,[352] the court focused on the practical effects of the victim identification law instead of the legal precedents. Decisions in earlier cases indicated how the court might rule in *Allied Daily Newspapers* and the justices' questions during oral argument clearly demonstrated their position in the matter.[353] The court allowed Stephen Hassett, an assistant attorney general representing the State, some opening remarks about the legislature's intent and the harms the law was supposed to abate. The court then launched into questions highlighting the weakest points in the State's argument.[354] In contrast, it presented Cameron DeVore, the attorney representing Allied Daily Newspapers, and Virginia Kirk, who represented the King County Prosecutor, with questions that allowed them to elaborate and strengthen their arguments.[355]

All parties made essentially the same arguments as they had in the trial court hearings.[356] Hassett emphasized the need to protect children and encourage reporting of sex crimes.[357] DeVore claimed that by requiring judges to close court proceedings the law violated the state constitution's clauses pertaining to open justice, freedom of speech, right to due process and separation of powers.[358] Kirk said the law required prosecutors to ask for closed court proceedings and interfered with their ability to successfully prosecute cases.[359]

Hassett explained the legislature's desire to pass a law that would protect children from harm and encourage them to report sex crimes.[360] As he began to discuss the chilling effect that publicizing victims' names might have on families' willingness to report sex

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352. 121 Wash. 2d 205, 848 P.2d 1258 (1993).

353. There is no transcript of the oral arguments. Copies of the hearing tapes can be obtained from the Washington Supreme Court's administrator for a nominal fee or can be heard free of charge at the administrator's office. Tape of Oral Arguments in Allied Daily Newspapers v. Eikenberry (No. 59435-0), held by the Washington Supreme Court, Olympia, WA [hereinafter *Tape of Oral Arguments*].

354. *Id.*

355. *Id.*

356. *Id.*; *See also Brief of Appellants*, *supra* note 145; Brief of Respondent (Maleng), Allied Daily Newspapers v. Eikenberry, 121 Wash. 2d 205, 848 P.2d 1258 (1992) (No. 59435-0) [hereinafter *Brief of Maleng*]; *Brief of Respondents*, *supra* note 140.

357. *Tape of Oral Arguments*, *supra* note 353.

358. *Id.*

359. *Id.*

360. *Id.*

crimes, a justice interrupted him to ask if the statute was aimed at one newspaper.[361]

Hassett replied that although only one newspaper currently named child victims of sex crimes, the legislature intended the statute to apply to all news organizations.[362] "The legislature, seeing actual harm taking place to those children, was compelled to act, correctly so, and simply cannot rely on the good graces of other media outlets in this state to continue the policies they've had in the past," Hassett said. "These policies can change. There may be pressures if one newspaper does it, another may feel compelled to do this."[363]

Another justice immediately asked him what evidence the state had of harm to children.[364] Hassett referred to the hearing testimony of parents, counselors, and the Mason County deputy prosecutor, whereupon the justice asked if there was any medical testimony.[365] Hassett replied that the counselors' testimony could be considered medical testimony since it showed psychological harm.[366] Some help was provided by a justice who stepped in and noted an anecdote from one of the depositions that told of a child victim being taunted on the playground by children who said that if she had had sex with one person, she could have sex with them.[367]

The court would come back to the issue of harm later, but at that point it moved on and asked if the new law required judges to close court proceedings.[368] This was the main point made by Allied Daily Newspapers, who used the *Globe* decision to point out that mandatory closure was not constitutional.[369] Hassett's answer indicates he was aware of the state's vulnerability on this issue:

> Probably the key words in the statute and in this controversy are the words that 'the court shall ensure that the information identifying the child victim is not disclosed to the press or the public.' If we take the position of the media respondents that those words mandate closure, then we would have to concede they have a point. The

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361. Unfortunately, there is no way to tell from the tapes which justice asked a particular question. It is possible to tell which lawyer is speaking because they introduce themselves at the beginning of their statements. *Tape of Oral Arguments*, *supra* note 353.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Tape of Oral Arguments*, *supra* note 353.

366. *Id.*

367. *Id.*

368. *Id.*

369. *See Brief of Respondents*, *supra* note 140, at 21-23; *See also Globe Newspaper*, 457 U.S. at 610-611 (1982).

> state does not concede that point. We feel that the court can ensure that the identifying information is not disclosed without closing the case every time.[370]

Attorneys and judges could use the victim's first name, initials or a pseudonym, Hassett said.[371] He noted prosecutors from two counties had said that substituting initials or fake names would confuse children and make it difficult to prosecute cases, but these prosecutors didn't have to deal with news organizations that publish child victims' names.[372] These alternatives to closing the court might not be feasible in cases involving young children, but they could be used with teenage victims, Hassett said.[373]

One justice questioned Hassett's interpretation of the law and referred to the prosecutors' affidavits. "They're both prosecutors," the justice said. "They've been before this court. They're knowledgeable about this specific area. They're saying under their view the law requires mandatory closure in every instance. How do you refute that?"[374]

Again, Hassett said these prosecutors had no incentive to creatively apply the statute since they didn't have to deal with a newspaper like the *Journal*.[375] It was obvious, however, he was having difficulty on this point, and DeVore and Kirk latched on to that weakness in their arguments.[376] "What has happened here is that the legislature has impermissibly put its thumb on the scales of justice and has decided how matters that have been left to the careful balancing and wise discretion of the trial courts are going to come out in these circumstances," DeVore said.[377]

The new law could have been written in an acceptable way, DeVore continued, but "the legislature just didn't do it right."[378] DeVore asserted that if the law had stated the child victim's privacy was an important issue that should be considered with other rights, it probably would have been acceptable. However, the law uses the word "shall" in saying courts shall prevent victims' names from becoming

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370. *Tape of Oral Arguments*, *supra* note 353.
371. *Id.*; *See also Brief of Appellants*, *supra* note 145, at 15-16.
372. *Tape of Oral Arguments*, *supra* note 353.
373. *Id.*
374. *Id.*
375. *Tape of Oral Arguments*, *supra* note 353.
376. *See id.*
377. *Id.*
378. *Id.*

known, and that forecloses any kind of balancing of interests, DeVore said.[379]

Kirk, speaking on behalf of the King County prosecutor, supported DeVore's statements.[380] She noted that while prosecutors differed on how much of a trial would have to be closed, they agreed that some of each trial involving a child sex-crime victim would be held in secret.[381] She referred to the affidavit of Mason County's deputy prosecutor, who supported the law. "Even where this practice has been going on for some time in Mason County, the prosecutor there who handles these cases still believes that there's no other way to comply with this law, other than closure and excluding the media at least during the time when the child is testifying," Kirk said.[382] Kirk and DeVore also claimed that if child sex-crime victims were given special consideration under the law, other victims would ask for similar protection of their privacy.[383] "I think that would only add another layer of difficulty and problems to our effective prosecution of criminal cases," Kirk said.[384]

When a justice asked Hassett if the law would be stretched to apply to other victims, Hassett said he could not give a conclusive answer.[385] The law specifically addressed child sex-crime victims, but a clever attorney probably could find a way to make it apply to other victims, he said.[386]

During the oral arguments, it was evident that the court's main concern was that the law required judges to close court proceedings in violation of the open justice provision of the state constitution and the *Ishikawa* guidelines. DeVore and Kirk fed this concern by saying that not only did the law require closure but that judges and district attorneys already had interpreted and applied the law as a mandatory closure rule. Hassett simply could not provide assurance that the law would be applied in a way consistent with the *Ishikawa* guidelines. Nor could he provide documented evidence of harm to the children named in news stories. Anecdotal evidence apparently was not enough to persuade the court that the state interest in protecting the children's

379. *Tape of Oral Arguments*, *supra* note 353.
380. *See id.*
381. *Id.*
382. *Id.*
383. *Tape of Oral Arguments*, *supra* note 353.
384. *Id.*
385. *Id.*
386. *Id.*

privacy should outweigh the interest in maintaining open judicial proceedings.

The key moment in the oral arguments came when a justice interrupted Hassett's explanation of why the law was needed when the *Ishikawa* test provided a mechanism for judges to close court proceedings.[387] "I think the practical reality is that there's nobody at the time of the trial or in the pretrial proceeding who's necessarily going to raise the issue on behalf of the child," Hassett said, explaining that prosecutors fear asking for a closed hearing because it provides grounds for an appeal, and defense attorneys won't raise the issue because they want the victim to be uncomfortable.[388]

At that point, a justice interjected: "Counselor, before you move on too far, could you comment on what you want us to do with Article 1, section 10, of our state constitution that says, quote, justice in all cases shall be administered openly, close quote. What do we do with that?"[389]

C. *The Washington Supreme Court's Decision*

On April 1, 1993, the day before the one-year anniversary of the bill's enactment, the Washington Supreme Court declared Section 9 of the victim identification law unconstitutional.[390] The opinion, written by Justice Guy, side-stepped the issues of freedom of speech, right to due process and separation of powers.[391] It did not discuss the First or Fourteenth amendments to the U.S. Constitution.[392] The court focused instead on the fact that the state constitution explicitly guaranteed the open administration of justice. The court felt that the victim identification law could interfere with that.[393] Justice Guy wrote:

> We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being

387. *See id.*
388. *Id.*
389. *Id.*
390. *Allied Daily Newspapers*, 121 Wash. 2d at 207, 848 P.2d at 1259.
391. *See id.* at 209, 848 P.2d at 1260.
392. *See id.*
393. *See id.* at 211, 848 P.2d at 1261.

> the ultimate protector of liberty, property, and constitutional integrity.[394]

The right of access is not absolute, the court continued, so courts must apply the *Ishikawa* test when there is a question about whether to close proceedings or documents.[395] Applying the first part of the test, protecting child victims from further harm is a compelling state interest and "on an individualized basis may be sufficient to warrant court closure."[396] However, the court adopted Allied Daily Newspapers' and county prosecutors' interpretation of the law.[397] The problem, the court said, was that the victim identification law *required* judges to close court proceedings whenever a child victim's identity might be revealed, thus preventing judges from considering individual cases on their merits.[398] Indeed, whether the victim needed anonymity was irrelevant according to the law.[399] Justice Guy noted, "In this way, a trial court might be forced to close its doors and to seal records when the child's psychological maturity, the nature of the crime, and the child's and the relatives' wishes regarding closure all warrant keeping the trial open."[400]

Further, the court said, the law restricts people's ability to object to court closure and to offer alternatives.[401] It requires judges to protect victims' privacy regardless of the other interests that the objectors or the judges themselves might suggest. The law makes it nearly impossible to narrowly tailor closure orders since it places no time limit on the sealing of court documents.[402] The law does not allow trial courts to comply with the *Ishikawa* guidelines in any way, the court concluded.[403]

Allied Daily Newspapers and State attorneys had limited most of their arguments over the law to Section 9. Section 9 referred to closing court proceedings and documents that had traditionally been open and was the section that King County Superior Court Judge Norman Quinn had found unconstitutional.[404] However, Allied Daily Newspapers' attorneys had also argued that other sections of the law might

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394. *Allied Daily Newspapers*, 121 Wash. 2d at 211, 848 P.2d at 1261.
395. *Id.*
396. *Id.*
397. *See id.*
398. *Allied Daily Newspapers*, 121 Wash. 2d at 211, 848 P.2d at 1261.
399. *See id.*
400. *Id.* at 212, 848 P.2d at 1262.
401. *Id.*
402. *See Allied Daily Newspapers*, 121 Wash. 2d at 212, 848 P.2d at 1262.
403. *Id.*
404. *See id.* at 213-214, 848 P.2d at 1262.

be unconstitutional.[405] The Washington Supreme Court chose not to make a decision on those sections of the law because the trial court had found them constitutional and the attorneys for Allied Daily Newspapers did not appeal that ruling.[406] Thus, Sheldon's law would still apply to government documents and proceedings that were not considered "traditionally open," such as police and juvenile court records.[407]

The Washington Supreme Court's verdict was a foregone conclusion according to several of the people associated with the case.[408] DeVore, who had worked on the *Kurtz* and *Ishikawa* cases, said the media organizations could not have lost.[409] Even if the Washington State Constitution had not explicitly called for open court proceedings, the U.S. Supreme Court's decision in *Globe* would have required the state court to declare the law void according to the federal constitution or face having the U.S. Supreme Court reverse its decision.[410] "We had two strings in our bow," DeVore said.[411]

V. CONCLUSION

The saga of Tim Sheldon's victim identification law shows why the law cannot be taken for granted as a protector of individuals' civil liberties. The law should represent interests or rights which Americans collectively have agreed are important. Yet statutory law is created by politicians who may be willing to sacrifice the enduring values embodied in a constitution's civil liberties clauses for short-term political gains. Since statutes must apply to all citizens equally, legislative action often does not leave room for the careful balancing of interests that is needed in dealing with social problems such as the dispute over public identification of sex-crime victims.

Americans have agreed that the ability to monitor and criticize government is important.[412] Having had experience with the British system, which allowed punishment for criticism of government and,

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405. *Id.*

406. *Allied Daily Newspapers*, 121 Wash. 2d at 214, 848 P.2d at 1262.

407. *See id.*; *See also* S.H.B. 2348, ch. 188, § 7 (codified at WASH. REV. CODE § 13.50.050(25)), § 8 (codified at WASH. REV. CODE § 10.97.130), 52nd Leg., 1992 Wash. Laws 822-826.

408. Telephone Interview with Roland Thompson, *supra* note 94; Telephone Interview with Cameron DeVore, attorney for Allied Daily Newspapers (Apr. 23, 1996).

409. Telephone Interview with Cameron DeVore, *supra* note 408.

410. *Id.*

411. *Id.*

412. *See* ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 16-17 (Atheneum 1969) (1941).

during some periods, secret trials, the authors of the federal Constitution and Bill of Rights feared the United States' government could become equally oppressive.[413] The American system gave citizens the power to vote government officials out of office if they failed to represent the people. However, in order to vote wisely, citizens needed information about government action and public issues. By guaranteeing freedom of speech and press, the authors of the Bill of Rights hoped to enable Americans to become informed about government affairs, discuss them openly and reach a consensus about how public issues should be handled.[414] In 1787, Thomas Jefferson wrote to a friend:

> The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.[415]

Early Americans were interested in fostering openness in the judicial system. Many were familiar with the Star Chamber, a British court that held secret, political trials during the reigns of the Tudors and early Stuarts.[416] During the colonial period, the courts were no less abusive than other parts of the government, and in some ways, may have been more so.[417] Legal scholar William Nelson explains, "Because there was no modern bureaucracy, the judiciary and the officials responsible to it (e.g., sheriffs) were the primary link between a colony's central government and its outlying localities. The judiciary alone could coerce individuals by punishing crimes and imposing money judgments."[418]

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413. *Id.* at 21, 29.

414. *See generally* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON: EARLY AMERICAN LIBERTARIAN THEORIES (Leonard W. Levy ed., 1966).

415. Letter from Thomas Jefferson to Edward Carrington *in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON: EARLY AMERICAN LIBERTARIAN THEORIES 333 (Leonard W. Levy ed., 1966).

416. *See* Letter from the New York Gazette *in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON: EARLY AMERICAN LIBERTARIAN THEORIES 108 (Leonard W. Levy ed., 1966). *See generally* CORA L. SCOFIELD, A STUDY OF THE COURT OF STAR CHAMBER (1900); FREDRICK S. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL (1965).

417. *See* William E. Nelson, The Jury and Consensus Government in Mid-Eighteenth-Century America, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 333 (Eugene W. Hickok, Jr. ed., 1991).

418. *Id.*

The Sixth Amendment guarantee of a public trial and, according to some scholars, the First Amendment guarantee of a free press were intended to prevent miscarriages of justice, such as those that occurred in British courts.[419] Many states through their constitutions and statutes, have also established their own guarantees of freedom of the press, open trials and access to government information. As discussed previously, the authors of Washington's constitution were quite deliberate and diligent in guaranteeing open justice in this state.[420]

The constitutional guarantees of access to state judicial proceedings and documents cannot be taken for granted. As one can see in the actions of Washington's legislators in passing the child-victim identification bill, lawmakers may see more political opportunity to be gained from limiting citizens' civil rights than protecting them. Majority opinion fuels American government. Public officials are aware that they must at some point be re-elected or re-appointed. Therefore, lawmakers may find it in their interest to pass laws that in effect punish unpopular minorities in order to win the approval of the majority. The public disapproval of the *Shelton-Mason County Journal's* practices in naming child sex-crime victims made it an attractive target for legislators seeking to win public support in an election year. Legislators could effectively cut off the *Journal's*, and other media's, access to information about child victims and win public approval for protecting children while remaining free from repercussions about the law's restrictiveness, as most ordinary voters have little reason to attend or look up records of court proceedings.

It is tempting to believe that the *Shelton-Mason County Journal* brought such a government assault on itself by exposing child victims to public scrutiny and possible harassment. In other instances in which Washington media and law enforcement officials have clashed over media coverage of judicial proceedings, the Washington Bench-Bar-Press Association's mediation committee, called the "fire brigade," has been able to engender compromises between judges who fear publicity will interfere with their ability to conduct a trial, and journalists who fear losing their access to court proceedings.[421] In 1990, for instance, the brigade moderated a disagreement between the judge handling the Westley Dodd murder trial and a newspaper that

419. *See Gannett*, 443 U.S. at 422.

420. *See Kurtz*, 94 Wash. 2d at 59-60, 615 P.2d at 445.

421. Telephone Interview with Justice Alexander, Washington Supreme Court Justice (Apr. 15, 1996).

published some of Dodd's writings.[422] In Mason County, mediation was never attempted. Washington Supreme Court Justice Gerry Alexander, a former Mason County Superior Court judge and chairman of the fire brigade during the early 1990s, said to the best of his knowledge mediation was never considered by court officers in Mason County, probably because it only works when the parties are willing to compromise.[423] The Gays gave no indication of a willingness to compromise, Alexander said.[424]

Yet the plaintiffs in most of the cases that have given teeth to the First Amendment have been more unpopular and disagreeable than the Gays.[425] They have included Ku Klux Klan members, religious dissidents and newspapermen so vitriolic they offended nearly every segment of their community.[426] Because the courts are more insulated from public opinion than the legislature, they are more able to address issues of civil liberties according to agreed-upon principles as opposed to current sentiment. Legal scholar Henry Abraham has said the courts are the last protectors of American civil liberties, and in the latter part of this century, the courts have protected unpopular citizens from sometimes-popular government restrictions upon them.[427] In Washington, this was certainly the case as the courts protected the press's and public's access to court proceedings even in the face of popular opposition.

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422. While he was in jail awaiting trial, Dodd, who eventually plead guilty to murdering three young boys and was executed, wrote a booklet that supposedly told children how to avoid sexual predators. He then gave the booklet to a newspaper in Vancouver, Washington, to publish. The judge handling Dodd's trial feared the publication would prejudice potential jurors and called the Washington Bench-Bar-Press Association. After much discussion, the newspaper published the booklet. While the judge and the prosecutor did not agree with the decision, they respected it, and the newspaper was able to retain access to future court proceedings. Rob Phillips, *A Child Murderer Grants an Exclusive*, QUILL, Sept. 1990, at 19-22.

423. Telephone Interview with Gerry Alexander, *supra* note 421.

424. *Id.*

425. *See generally* CHAFEE, *supra* note 412.

426. *See generally* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding an Ohio statute prohibiting advocacy of the use of force violated the First Amendment and could not be used to convict the leader of a Ku Klux Klan group for holding a rally); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943) (holding a West Virginia statute compelling students to salute the flag violated the First Amendment and could not be used to expel Jehovah's witnesses from school); Near v. Minnesota, 283 U.S. 697, 723 (1931) (holding unconstitutional a Minnesota statute enjoining the publication of a "malicious, scandalous and defamatory" newspaper).

427. HENRY J. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 53 (5th ed. 1980).

Still, the courts do not veer far from public opinion.[428] Without enforcement power of its own, the judiciary must rely on the executive branch and the power of public opinion to execute its rulings. Therefore, proponents of freedom of the press and open access to government-held information should not stand too comfortably in the shadow of the courts' protection. Instead, advocates of open government and freedom of the press should help educate the public on the enduring need for openness in government and unhindered publication, even when such openness and freedom results in offensive material. For if the public does not demand access to government-held information and the freedom to exchange that information, legislators surely will be tempted to cut off public access to sensitive information when such restrictions seem politically expedient.

428. *Id.* at 202-203.