Journal of Civil Rights and Economic Development

Volume 8
Issue 1 *Volume 8, Fall 1992, Issue 1*

Article 11

September 1992

The Victim's Right to Privacy: Imperfect Protection from the Criminal Justice System

Marijo A. Ford

Paul A. Nembach

NOTES

THE VICTIM'S RIGHT TO PRIVACY: IMPERFECT PROTECTION FROM THE CRIMINAL JUSTICE SYSTEM

Due to the increased victims' rights movement[1] and heightened

[1] *See, e.g., Hearing on HR 14666 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976) Rep. Elizabeth Holtzman testified that legislation is needed that recognizes the problem of victims being treated as if rape was their fault, which discourages reporting of such crimes. *Id.* at 2. Holtzman contended that the legislation "would rectify the problem in Federal courts." *Id.*; *see also id.* at 3. Roger A. Pauley, a spokesman for the Department of Justice echoed the sponsor's intentions: "We want to see an end to hostile, callous and degrading "processing" of victims of sex crimes. There is no question that victims of sex crimes, predominantly women, fail to report large numbers of these crimes because they believe the ensuing legal proceedings will subject them to an ordeal more onerous than the sexual assault itself." *Id.*; PRESIDENT'S TASK FORCE ON VICTIMS' RIGHTS: FOUR YEARS LATER 13 (1986) [hereinafter TASK FORCE] (recommending action at the state and federal levels to protect crime victims); VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS (Arthur J. Lurigio et al. eds., 1990) (same); New York Legislative Assembly Task Force on Crime Victims, *Victim-Witness Assistance Programs: Help for the Forgotten Victim in the Criminal Justice System* (1982) (recommending suggestions at state level) (recommending suggestions at state level).

The intense treatment of the subject is also evidenced by the numerous articles written on victims' rights. *See, e.g.*, J.R. Acker, *Social Sciences and the Criminal Law: Victims of Crime* -- Plight v. Right, 28 CRIM. L. BULL. 64 (1992); Catherine Bender, *Defendant's Wrongs and Victim's Rights:* Payne v. Tennessee, 27 HARV. C.R.-C.L. L. REV. 219 (1992); John W. Cannon,*The Resurrection of Victim Impact Evidence in Capital Sentencing:* Payne v. Tennessee, 27 TULSA L.J. 453 (1992); J.J. Curran, Jr., *Victims Struggle for their Rights*, 24 MD. B.J. 22 (1991); Thomas B. Dixon, *Arizona Criminal Procedure after the Victims' Bill of Rights Amendments: Implications of a Victim's Absolute Right to Refuse a Defendant's Discovery Request*, 23

media focus,[2] the role of the crime victim in the criminal justice system has recently received considerable attention. Despite this new awareness, one disturbing aspect of the victim's role continues to exist—the potential for loss of privacy.[3] Specifically, victims of crime are exposed to privacy invasions through a criminal defendant's exercise of his constitutional rights,[4] as well as from the

ARIZ. ST. L.J. 831 (1991); Edward C. Gilmore, Note, *Rejection of Precedent, Recognition of Victim Impact Worth*, 41 CATH. U.L. REV. 469 (1992); J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233 (1991); George Nicholson, *Victims' Rights Symposium*, 23 PAC. L.J. 815 (1992); Brent L. Smith, *Trends in the Victims' Rights Movement and Implications for Future Research*, 10 VICTIMOLOGY 34 (1985); Curtis J. Stiomer, *Judges Assemble from Across United States to Discuss the Rights of Crime Victims*, CHRISTIAN SCI. MONITOR, Nov. 28, 1983; ABA Criminal Justice Section, Victims Committee, *ABA Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System* (1983).

[2] *See* Jill Abramson, *Firm Supports Victims' Role in Death Cases*, WALL ST. J., Dec. 12, 1988, at 5 (advocating participation of victim in criminal justice system); Cynthia Crossen, *Crime Victims are Winning Share of Fines, Role in Judicial Process*, PHILA. INQUIRER, Nov. 10, 1991, at A1 (delineating victims' expanded role in criminal justice system); Linda Greenhouse, *Supreme Court Roundup: Law that Created Crime Victims' Fund is Upheld*, N.Y. TIMES, May 22, 1990, at A24 (explaining Supreme Court's approval of crime victim fund); Dylan James, *Protecting a Victim's Privacy*, USA TODAY, Dec. 5, 1989, at 3D (enumerating various members of media who knew identity of "Central Park jogger" but refrained from publishing in name of privacy); Marvin Lipton, *Can We Protect Rights in Sex Assault Trials?*, TORONTO STAR, Dec. 16, 1991, at B8 (discussing rights of victims in sex assault cases); Anne McGraw, *Legislator to Offer Measure Protecting Sex-Assault Victims*, PHILA. INQUIRER, Apr. 26, 1991, at B2 (discussing proposal to protect sexual assault victims); Richard E. Vatz & Lee S. Weinberg, *The Smith Case: An End to Rape Shield Laws?*, WASH. POST, Sept. 3, 1991, at A19 (discussing viability of rape shield laws); *Nightline: N.Y. Times, NBC Names Palm Beach Rape Victim* (ABC television broadcast, Apr. 17, 1991) (discourse on propriety of NBC releasing "Palm Beach" rape victim's name); *Justices Ponder Use of Victim Impact Evidence at Capital Sentencing Hearings*, U.S.L.W., May 14, 1991, at 1176 (discussing admissibility of victim impact statements at capital sentencing hearings); *Respect Rape Victims' Privacy*, WALL ST. J., Apr. 24, 1991, at A14 (advocating privacy for rape victims); *Justices Ponder Conflict Between Rape Victims' Privacy and Free Press*, U.S.L.W., Apr. 4, 1989, at 1151 (explaining conflict between privacy of victim and First Amendment); *Victims' Rights Guide is Drawn by Legal Group*, WALL ST. J., Aug. 7, 1992, at B1 (discussing formalization of victims' rights).

[3] *See* Thomas C. Galligan, *Raped Once, But Violated Twice: Constitutional Protections of a Rape Victim's Privacy*, 66 ST. JOHN'S L. REV. 151,153 (1992) (rape victims "suffer insensitivity and mistreatment from the police, medical professionals, and the public."); Sarah A. Hutt, Note, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41 DUKE L.J. 368, 370 (1991) (advocating constitutional right of public to know names of crime victims).

[4] U.S. CONST. amend. V. The Fifth Amendment reads, in part, "no person shall be compelled in a criminal action to be a witness against himself, nor be deprived of life, liberty or property without due process of law." *Id.*; Washington v. Texas, 388 U.S. 14, 19 (1967) (Fifth Amendment Due Process Clause applicable to states through Fourteenth Amendment); Romley v. Superior Ct., 836 P.2d 445, 452 (Ariz. Ct. App. 1992) (defendant may have constitutional right to examine victim's medical records to determine victim's possible psychological state at time crime committed, despite state protection of such discovery requests).

Defendants are also protected under the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI; Waller v. Georgia, 467 U.S. 39, 39 (1984) (closure of

media's First Amendment right of access to criminal proceedings.[5] Decisions whether to permit an invasion of privacy can only be made after weighing the defendants' and the victims' rights.[6] These two countervailing forces inevitably lead to a conflict of interest.[7]

Part One of this Note surveys the sources of a victim's right to privacy. Part Two of this Note analyzes the rules of discovery, evidence and courtroom closure that impact on a victim's privacy interest. Finally, this Note examines how the federal and state courts have balanced victim's rights against the constitutional rights of defendants, and concludes that despite pivotal attempts at preserving the privacy of crime victims, complete protection is unattainable.

I. SOURCES OF A VICTIM'S RIGHT TO PRIVACY

A. *Common Law*

Today, every person has a right to privacy based in the common law.[8] This right has been recognized as protected by the United

suppression hearing over defendant's objections was unjustified and violated Sixth Amendment); Press Enterprise Co., 464 U.S. 501, 501 (1984) (guarantee of open public proceedings in criminal trials covers proceedings for *voir dire* examination of potential jurors).

[5] *See* U.S. CONST. amend I. "Congress shall make no law . . . abridging the freedom . . . of the press." *Id.*; *see also* Richmond Newspapers v. Virginia, 448 U.S. 555, 557 (1980) (holding First Amendment encompasses media's right to access criminal trials). Although the media's right of access can infringe upon victims' privacy rights, this Note focuses primarily on how a defendant's constitutional rights can affect the privacy rights of victims. The media angle is covered where appropriate.

[6] *See, e.g.*, United States v. Galloway, 963 F.2d 1388, 1390 (10th Cir. 1990). In *Galloway*, the defendant sought to introduce into evidence the victim's birth control pills. *Id.* After considering the victim's privacy right, the court found that the probative value of birth control pills did not outweigh the need to protect victim from an unwanted privacy invasion. *Id.* Courts may also consider the prejudicial effect evidence will have on jurors. *See generally* SUE BESSMER, THE LAWS OF RAPE 150-60 (1984) (noting prejudicial effect on judge and jury of evidence of rape victim's past sexual history); EDWARD J. IMMWINKELREID, EXCULPATORY EVIDENCE 207 (1990) (fear that jurors become preoccupied with credibility of witness rather than alleged crime, and issues of fact).

[7] *See, e.g.*, People v. Grosunor, 108 Misc. 2d 932, 937, 439 N.Y.S.2d 243, 248-49 (N.Y.C. Crim. Ct. Bronx County 1981) (recognizing tension between "the rights of an accused to confront and cross-examine adverse witnesses, and the interests of every witness to be free from having his private life made an open book."); IMMWINKELREID, *supra* note 6, at 222 nn.105 & 106 (discussing law review articles which recognize collision of interest between accused and defendant).

[8] *See, e.g.*, Pavesich v. New England Life Ins. Co., 50 S.E. 68, 68 (Ga. 1905) (right to privacy derived from natural law); RESTATEMENT (SECOND) TORTS § 652A(2) (1977) (codifying common law tort remedy against one who invades the right of privacy of another); RESTATEMENT (SECOND) TORTS § 652D cmt. (b) (1977).

States Constitution,[9] and is codified by state law.[10] Over one hundred years ago Samuel D. Warren and Louis D. Brandeis au-

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends . . . . When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Id.

[9] *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965), which first formulated a privacy right protected by the Constitution. The *Griswold* guarantee of privacy was limited to protection from governmental intrusion into procreational activities. *Id.* at 485. *Griswold* held that Connecticut, as a state, could not infringe on those rights. *Id.* Individuals, therefore, were still subject to privacy invasions by private sources. *Id.*

The *Griswold* Court found "zones of privacy." *Id.* at 484. Justice Douglas found that the right to privacy could be found in the "penumbra" of rights expressly granted by the Constitution. *Id.* at 483. From the express rights granted by the First, Third, Ninth and Fourteenth Amendments, the right to privacy naturally "emanates." *Id.* at 484. "Specific guarantees in the Bill of Rights," Douglas wrote, "have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.*; see *also* Roe v. Wade, 410 U.S. 113, 154 (1973) (abortion decision protected by qualified constitutional right to privacy); G. Sidney Buchanan, *The Right to Privacy: Past, Present and Future*, 16 OHIO N.U. L. REV. 403, 425 (1989) (broad construction of Bill of Rights found contraceptive use protected privacy right). *But see* Whalen v. Roe, 429 U.S. 589, 597 (1977) (state legislation which affected individual not unconstitutional simply because court found it unnecessary).

[10] *See* ALASKA CONST. art. 1, § 22 (explicit constitutional guarantee of privacy); ARIZ. CONST. art. 2, § 8 (same); CAL. CONST. art 1, § 1 (inalienable rights include the right to pursue and obtain privacy); FLA. CONST. art 1, § 23 (every natural person has the right to be let alone and free from government intrusion into his private life); HAW. CONST. art 1, § 6 (recognizes right of privacy and directs state legislature to "take affirmative steps to implement [the] right."); LA. CONST. art 1, § 5 (general protection against invasion of privacy); *see also* CAL. CIVIL CODE § 43 (West 1993) (general personal rights includes protection from injury to personal relations); CONN. GEN. STAT. ANN. § 17a-238 (West 1992) (gives mentally ill persons the right to be treated "with full respect for . . . personal dignity and privacy."); D.C. CODE ANN. § 1-1524 (exempts from Freedom of Information Act things "of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy."); GA. CODE ANN. § 16-11-61 (criminalizes acts of "peeping toms" that enter premises of another for the purpose of invading their privacy); IND. CODE ANN. § 35-46-15.1 (Burns 1992) (invasion of privacy a misdemeanor); ME. REV. STAT. ANN. tit. 17-A, § 511 (West 1992) (protects against government invasions of privacy); ME. REV. STAT. ANN. tit. 17-A, § 511 cmt. (West 1992) (statute "designed to prevent seeing or hearing of things that are justifiably expected to be kept private."); MASS. GEN. LAWS ANN. ch. 214, § 1-B (West 1992) (expands right against unreasonable search and seizure to include protection against "serious interference with privacy); MINN. STAT. ANN. § 609.76 (West 1992) (prohibits entering person's property to gaze, stare, follow, or pursue another with the intent of harassing them); NEB. REV. STAT. §§ 20-201 to 20-211 (general privacy protections against exploitation, trespass, intrusion, libel and slander); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992) (misdemeanor to use living person's name, portrait, or picture for advertising purposes without that person's consent); OKLA. STAT. ANN. tit. 21, § 839.1 (West 1993) (misdemeanor to use person's name, picture, or portrait without prior consent); R.I. GEN. LAWS § 9-1-28.1 (1992) (privacy protection includes "right to be secure from unreasonable intrusion upon one's physical solitude or seclusion."); S.D. CODIFIED LAWS ANN. § 22-21-3 (prohibition on "peeping toms"); TENN. CODE ANN. § 47-25-1106 to 47-25-1102 (1992) (protects unauthorized use of name, photograph, or likeness); UTAH CODE ANN. (1992) §§ 45-3-1 to 45-3-6 (same).

thored one of the most famous law review articles in United States history which "gave birth" to the field of privacy law, based on the "right to be let alone."[11] The protection is a general right to prevent the disclosure of personal information,[12] and provides a tort remedy.[13] The right to privacy has since been recognized by the United States Supreme Court as constitutionally protected in *Griswold v. Connecticut*[14] and *Roe v. Wade*.[15] However, the scope of the privacy protection is restricted to certain fundamental rights such as marriage, abortion, procreation, and child rearing.[16] Courts have been adverse to extend constitutional protection beyond this rather narrow list.[17] In the context of a "victim," how-

[11] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-96 (1890) (discussing general right to privacy in English common law); *see* ALAN F. WESTIN, PRIVACY & FREEDOM 7 (1967) (defining right to privacy as "claim of individuals, groups or institutions to determine for themselves, when, how and to what extent information about them is communicated to others"); Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren & Brandeis*, 39 CATH. U. L. REV. 703, 703-04 (1990). Kramer describes the tremendous impact which the Warren & Brandeis law review article had on the American system of jurisprudence. *Id.* Kramer acknowledges the article was criticized, but notes that it suggested a right that "may forever remain one of society's most valued individual protections." *Id.* at 705; Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 647-48 (1991) (noting remarkable influence of Warren & Brandeis article). *See generally* THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888) (coining phrase "right to be let alone"); DAVID A. ELDER, THE LAW OF PRIVACY 1 (1991) (defining Warren & Brandeis article as "a classic in legal literature"); JULIE C. INNESS, PRIVACY, INTIMACY AND ISOLATION 116 (1992) (Warren & Brandeis "established the foundation of tort privacy law"); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960) (describing Warren & Brandeis article as "outstanding example of influence of legal periodicals upon American law").

[12] *See* NAACP v. Alabama, 357 U.S. 449, 462 (1958) (recognizing disclosure of association affiliation and personal information as protected privacy interests); Nicholson v. McClatchy Newspapers, 223 Cal. Rptr. 58, 64 (1986); ELDER, *supra* note 11, at 149-257 (listing elements of public disclosure of private facts); *see also* WILLIAM L. PROSSER & PAGE KEETON, THE LAW OF TORTS 392 (5th ed. 1984) (right of privacy encompasses protection against disclosure of personal information); Buchanan, *supra* note 9, at 469-72 (right to nondisclosure of private information). *But see* Daury v. Smith, 842 F.2d 9, 13 (1st Cir. 1988) (privacy right must give way to consideration of public interest). *See generally* Greenberg, *infra* note 40, at 1236 (disclosure of personal information constitutionally protected and recognized privacy right).

[13] *See* PROSSER & KEETON, *supra* note 12, at 849 (tort remedy for invasion of privacy).

[14] 381 U.S. 479 (1965); *see* Lackland H. Bloom, Jr., *The Legacy of* Griswold, 16 OHIO N.U. L. REV. 511, 512 (1989) (Griswold gave "birth to concept of an independent constitutional right of privacy"); *see also supra* note 9 (discussing *Griswold* decision and its protection of privacy rights).

[15] 410 U.S. 113 (1973).

[16] *See id.* at 153 (decision to abort fetus protected privacy right); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (decision to use contraceptives protected privacy right).

[17] *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (no protected right to engage in homosexual sodomy); Kelley v. Johnson, 425 U.S. 238, 244 (1976) (refusing to extend privacy protection to police officer who wished to wear his hair in violation of department's dress code).

ever, neither the historical common law, nor the Supreme Court decisions provide any guidelines as to what the "right to privacy" may mean.[18]

B. *Statutory Law*

On the federal level, crime victims receive no substantive statutory protection of their privacy rights.[19] The Victim's Rights and Restitution Act of 1990[20] ostensibly provides that crime victims "be treated with fairness and with respect for [their] dignity and privacy."[21] Although the Act does support a policy in favor of dignified treatment, it specifically states that no cause of action or defense arises as a result of a failure to adhere to the statute.[22] Thus, this purported federal protection lacks the teeth necessary to ensure any real privacy protection for the victim.

States have also enacted laws to protect a victim's right to privacy.[23] Varied in scope, these laws range from comprehensive victims' bills of rights,[24] to protections of specific pieces of personal information such as communications with counselors and physicians,[25] release of medical records,[26] or release of a victim's name,

[18] *See* Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.—C.L. L. REV. 233, 235 (1977) (suggesting that lack of uniform definition of privacy right prevents any meaningful extension of that right); *see* Ronald J. Krotoszynski, Jr., *Autonomy, Community and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398 (1991) (Supreme Court has "failed to provide a clear and reliable standard for identifying protected privacy rights").

[19] *See infra* notes 20-22. Although the history of federal assistance programs for crime victims dates back several years, it was not until 1990 that federal law actually codified the victim's privacy right. *See also* Victim & Witness Protection Act of 1982, 18 U.S.C. § 1501 (1992); Victims of Crime Assistance Act of 1984, 42 U.S.C. § 10601 (1992).

[20] 42 U.S.C. § 10606 (1992).

[21] *Id.* ¶(b)(1).

[22] *Id.* ¶(c). "This section does not create a cause of action or defense in favor of any person arising out of the failure to accord a victim the rights enumerated in subsection (b) of this section." *Id.* However, the statute does require federal officers to "use their best efforts to see that victims of crime are accorded the rights." *Id.* ¶(a).

[23] *See infra* notes 24-27 (discussing state protections for victims).

[24] ARIZ. CONST. art. II, § 2.1 (victims' bill of rights); MICH. CONST. art. I, § 24 (crime victims' bill of rights approved as ballot initiative in 1988); N.M. CONST. art II, § 24 (victims' bill of rights *proposed* as a ballot initiative in 1992); TEX. CONST. art I, § 30 (victims' bill of rights); 1992 Ill. Legis. Serv. 95 (West) (court can order whatever is necessary to protect privacy; no information can be released that would be unwarranted invasion of privacy); KAN. STAT. ANN. § 74-7333 (1991) (victims' bill of rights guarantees crime victims be treated with respect for their dignity and privacy); NEB. REV. STAT. § 20-201 (1991) (legislative intent to provide a privacy right under state's civil rights law). *But see, e.g.*, IDAHO CODE § 66-1310 (1992) (civil rights of residents specifically limit privacy rights where they conflict with prison or mental hospital security).

[25] *See, e.g.*, IND. CODE ANN. § 35-37-6-9 (Burns 1992) (communications between counselor

address, and phone number.[27]

Although the common law, the federal Act, and the state laws are all potential sources of the victim's privacy right, each has its limits in granting the victim substantive protection.[28] First, the common law tort remedy, instead of providing an affirmative protection against an invasion of privacy, compensates the victim only *after* it has been shown that the intrusion was "highly offensive and objectionable to a reasonable person of ordinary sensibilities."[29] Second, although the constitutionally recognized right to privacy is intended as affirmative protection, it extends only to a narrow list of fundamental rights which does not specifically protect victims.[30] While attempts have been made to provide statutory protection, the extent of such protection is limited by the

and victim-patient protected); N.H. REV. STAT. ANN. § 173-C:5 (1991) (right to refuse disclosure of confidential information between victim and social counselor or psychiatrist; use of probative value test when defendant requests such information); OR. REV. STAT. §40.262 (1992) (same); TENN. CODE. ANN. § 24-1-207 (1992) (protects victim's communications with psychiatrist except in interest of justice or where mental condition of patient is at issue); WASH. REV. CODE ANN. § 70.125.065 (West 1992) (same).

[26] *See, e.g.*, GA. CODE ANN. § 24-9-40 (1992) (protects release of medical information by physician, hospital or health care facility); IND. CODE ANN. § 34-1-14-5 (Burns 1992) (protects patient's health records); MASS. GEN. LAWS ANN. ch. 223, § 20B (West 1992) (patient can refuse to disclose any communication including conversations, correspondence or actions).

[27] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4434 (victim's right to refuse to testify regarding name, address, and place of employment); MINN. STAT. ANN. § 611 A.035 (1991) (confidentiality of victim's address); N.Y. CIV. RIGHTS LAW § 50 (McKinney 1992) (protecting victim's right to keep identity confidential); OR. REV. STAT. §1-47.115 (1992) (protects confidentiality of victim's application to victim compensation board); TEX. CRIM. PROC. CODE ANN. § 56.09 (West 1992) (right of crime victim to keep address and phone number out of court records); *see also* TASK FORCE, *supra* note 1, at 13 (victims, fearful of retaliation by accused, hesitate to report crime because names, addresses or phone number may be revealed). In 1982, the Task Force did not list any states with a privacy protection, but by 1985 there were five states. *Id.* The only recommendation made concerning the victim's privacy was to prohibit the release of the victim's name, address and phone number. *Id.*

Some statutes may extend protection only to certain privacy interests. *See* 18 U.S.C. § 3509 (1992) (affording child victims and witnesses special protections under federal statute including manner in which testimony may be made); ARK. CODE ANN. § 12-12-515 (Michie 1992) (protecting child and elder abuse victims only); 1992 Cal. Adv. Legis. Serv. 3 (Deering) (no unwarranted invasions of privacy in release of court records); IOWA CODE § 235 A.12 (1992) (privacy rights of child abuse victims).

[28] *See infra* notes 29-31.

[29] *See* PROSSER & KEETON, *supra* note 11, at 857. According to Prosser, before determining whether such disclosure met the highly offensive and objectionable test, it must be shown that, first, the "disclosure of the private facts must be a public disclosure, and not a private one, [and second,] the facts disclosed to the public must be private facts, not public ones." *Id.*

[30] *See supra* note 16.

courts' deference to defendants' constitutional rights.[31]

II. DISCOVERY, EVIDENCE, AND COURTROOM CLOSURE

A. *Discovery and Evidence*

Pursuant to the Fifth Amendment's Due Process Clause, every defendant has the right to present exculpatory evidence.[32] In the course of discovery, the defendant may seek access to a number of the victim's personal papers including diaries,[33] medical histories,[34] educational records,[35] social work reports and communications with doctors or counsellors,[36] results of physical[37] or psycho-

[31] *See, e.g.*, U.S. CONST. amend V. (right to due process, which includes the right to present relevant and exculpatory evidence); U.S. CONST. amend VI (right to a speedy and public trial).

[32] U.S. CONST. amend. V; Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (exclusion of critical evidence violated defendant's "right to present witnesses in his own defense"); Lindsey v. Normet, 405 U.S. 56 *passim* (1972) (right to discover evidence); Washington v. Texas, 388 U.S. 14, 19 (1967) (Fifth Amendment Due Process Clause applicable to states through Fourteenth Amendment); Romley v. Superior Ct., 836 P.2d 445, 452 (Ariz. Ct. App. 1992) (defendant may have constitutional right to examine victim's medical records to determine victim's possible psychological state at time crime committed, despite state protection of such discovery requests); Tom Stacy, *The Search for Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1371 (1991) (right to discover and present evidence considered necessary in search for truth); *see also* IMMWINKELREID, *supra* note 6, at 17 (right "distinguishes tyrannies from democracies"). Immwinkelried also discusses whether the Fifth Amendment is the proper source of the defendant's right to present exculpatory evidence is discussed *Id.*

However, any evidence presented must be relevant. *See* FED. R. EVID. 401. Rule 401 reads: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*; JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 10 (3d ed. 1940) ("all facts having a rational probative value are admissible, unless some specific rule forbids" admission).

[33] *See, e.g.*, People v. Chambers, 134 Misc. 2d 688, 689, 512 N.Y.S.2d 631, 632 (N.Y.C. Crim. Ct. N.Y. County 1987) (defendant sought victim's diary to prove victim's aggressive nature to support a self-defense claim).

[34] *See, e.g.*, Baltimore v. Stein, 612 A.2d 880, 882 (Md. 1992) (defendant sought medical records to determine cause of alleged child victim's injury as necessary to defense); People v. Lowe, 96 Misc. 2d 33, 37, 408 N.Y.S.2d 873, 876 (N.Y.C. Crim. Ct. Bronx County 1978) (court ordered disclosure of medical records regarding brain injury where complainant voluntarily testified).

[35] *See, e.g.*, Klein School Dist. v. Mattox, 830 F.2d 576, 580 (5th Cir. 1987) (applying balancing test to determine admissibility of school records); Zaal v. Maryland, 602 A.2d 1247, 1261-62 (Md. 1992) (use of alleged victim's school records to discover extent of possible mental disability).

[36] *See* United States v. Begay, 937 F.2d 515, 521 (10th Cir. 1991) (permitting testimony of doctor who examined victim as critical to defendant's case); United States v. Shaw, 824 F.2d 601, 605 (8th Cir. 1987) (permitting doctor testimony to determine if victim suffered injury as required by statute).

logical exams,[38] as well as access to polygraph results.[39] Recognizing that these demands invade a victim's right to privacy,[40] some statutes have allowed victims to limit discovery requests.[41]

[37] *See, e.g.*, People v. Nelson, 151 Misc. 2d 951, 952, 574 N.Y.S.2d 144, 145 (1991). In *Nelson*, the court denied defendant's request for blood and saliva of rape victim. *Id.* Many defendants have tried to prove mistaken identity by mandating a physical examination of the victim. *Id.* The defendant often hopes that an examination of the victim's blood type will prove the defendant's innocence by revealing that a third person must have been at the scene of the crime. *Id.* In addition, physical exams are almost always ordered in order to corroborate the victim's accusations in sexual offense cases. United States v. Wiley, 492 F.2d 547, 551 (1973) (reversing conviction due to insufficient corroboration of alleged rape victim's testimony); N.Y. PENAL LAW § 130.16 (McKinney 1992) (requiring corroborating evidence to convict defendant of any sexual offense in which intent is an element).

[38] *See* Ballard v. Superior Court, 410 P.2d 838, 849 (Cal. 1966) (defendant who asserted that crime never took place may request psychological exam to determine victim's propensity to falsely accuse or fantasize); WIGMORE, *supra* note 32, § 924(a) (suggesting that all rape complainants undergo mandatory psychological examinations); *see also* Leigh B. Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. L. REV. 235, 263-64 (1983) (defendant may demand psychological examination and, due to limited statutory protections for victims, grant of such exams is in court's discretion); James Quinn, *Charges Against 2 Gang Members Dropped by D.A.*, L.A. TIMES, Mar. 21, 1992, at B3 (alleged rape victim admitted fabricating story to avoid punishment by parent for missing school); Vatz & Weinberg, *supra* note 2, at A19 (editorial regarding rape defendant's request for psychological examination of complainant).

[39] *See* United States v. Bartlett, 794 F.2d 1285, 1292 (8th Cir. 1986) (even if polygraph not ordered, testimony of victim's prior false accusations admissible); State v. Dedman, 640 P.2d 1266, 1270 (Kan. 1982) (refusing defendant's request to require rape victim to submit to polygraph examination); *see also* Commonwealth v. Joyce, 415 N.E.2d 181, 184 (Mass. 1981) (right to inquiry of victim's tendency to lie could be defendant's "last refuge"); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts*, 70 MINN. L. REV. 763, 768 (1986) (recognizing false accusation proof as defendant's last hope).

[40] *See, e.g.*, Virgin Islands v. Scuito, 623 F.2d 869, 875 (3rd Cir. 1980) (psychiatric examination may seriously violate witness's right to privacy); Baker v. State, 526 So. 2d 202, 204 (Fla. Dist. Ct. App. 1988) (denying psychological test for victim on privacy grounds); People v. Gissendanner, 48 N.Y.2d 543, 548; 399 N.E.2d 924, 928, 423 N.Y.S.2d 893, 897 (1979) (recognizing that disclosure of personnel data could violate public confidence); People v. Manzanillo, 145 Misc. 2d 511, 511, 549 N.Y.S.2d 343, 344 (N.Y.C. Crim. Ct. 1989) (privileged medical records could not be turned over to defendant absent showing of necessity for due process); *see also* Judith Greenberg, Note, *Compulsory Psychological Examination in Sexual Offense Cases: Invasion of Privacy or Defendant's Right?*, 58 FORDHAM L. REV. 1257, 1263-68 (1990) (discussing psychological examination as violation of rape victim's constitutional right).

[41] *See, e.g.* ARIZ. CONST. art I, § 2.1 (victim can refuse defendant's request for interview); N.Y. CRIM. PROC. LAW § 240.50 (McKinney 1992) (giving court power to limit discovery); TEX. CRIM. PROC. CODE ANN. § 56.05 (West 1992) (enumerating rights of crime victim with respect to discovery); *see also* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (criminal defendant has no constitutionally protected right to discovery). *But see* Giglio v. United States, 405 U.S. 150, 154 (1972) (if guilt or innocence of defendant could be determined by reliability of witness, prosecution must disclose evidence of such reliability); Brady v. Maryland, 373 U.S. 83, 87 (1963) (prosecutor has duty to disclose to defendant any exculpatory evidence). *See generally* Dixon, *supra* note 1, at 800-43 (discussing victim's right to refuse discovery and prosecution's duty to disclose).

In considering whether to grant a defendant's discovery request for potentially sensitive information, a court will seek to determine if there is any other corroborating evidence available.[42] For instance, on the issue of competency, a court has discretion to deny a defendant's request for a psychiatric examination of the victim if there is independent evidence that would extrinsically establish the reliability of the victim's testimony.[43] Conversely, where the evidence sought to be discovered is essential to the defendant, courts will be more apt to permit discovery of personal information, as this evidence may be the only source of the truth.[44] For instance, in *United States v. Begay*,[45] the Eighth Circuit ruled that an examining doctor's testimony was admissible as critical to the defendant's case.[46] In doing so, the court noted that the doctor's testimony was the only evidence that could counter the prosecution's claims.[47]

Even where discovery is allowed, a victim's right to privacy can be protected by a court-ordered *in camera* review of potential evidence to prevent unnecessary public disclosure of private information contained therein.[48] In *People v. Chambers*,[49] one of the most

[42] *See* United States v. Butler, 481 F.2d 531 (D.C. Cir. 1973). The *Butler* court found that the defendant had not overcome, by the showing of need, the presumption against ordering a psychiatric exam. *Id.* at 534. The "narrative evidence was supported by overwhelming extrinsic corroboration, giving substantial independent assurance of its reliability." *Id.* at 535.

[43] United States v. Benn, 476 F.2d 1127, 1131 (D.C. Cir. 1972) (refusal to order psychiatric examination within the discretion of the trial judge where corroborating evidence present).

[44] *See* United States v. Begay, 937 F.2d 515, 523 (10th Cir. 1991) (evidence critical to defendant's case could not be excluded).

[45] 937 F.2d 515 (10th Cir. 1991).

[46] Id. at 521. State courts are also giving this deference to a defendant's need to discover information. In Zaal v. Maryland, 602 A.2d 1247 (Md. 1992), the Maryland Court of Appeals recently allowed a defendant to infringe on an alleged rape victim's privacy by letting the defendant examine the victim's school records. *Id.* at 1255. The defendant maintained that he needed the records in order to determine the victim's "motivation, bias and veracity."*Id.* The court found that since the defendant demonstrated a sufficient relationship "between the charges, the information sought, and the likelihood that relevant information [would] be obtained," it permitted the review of the victim's records. *Id.* The Court remanded the case for consideration of whether the review of the records should take place *in camera* with counsel present, or should be reviewed by counsel followed by a hearing on the admissibility. *Id.* at 1281.

[47] 937 F.2d at 521.

[48] *See* People v. Chambers, 134 Misc. 2d 688, 690-91, 512 N.Y.S.2d 631, 633-34 (Sup. Ct. N.Y. County 1987) (court conducted *in camera* investigation of victim's diary prior to allowing defendant examine); *see also* People v. Manzanillo, 145 Misc. 2d 511, 512, 549 N.Y.S.2d 343, 345 (N.Y.C. Crim. Ct. 1989) (court ordered *in camera* examination of psychological and social assessment records of complainant).

publicized homicide cases in the history of the City of New York,[50] the court utilized *in camera* review before denying the defendant's request to discover the victim's personal diary.[51] In *Chambers*, the defendant wanted to prove the victim's aggressive sexual tendencies through the contents of her diary.[52] The defendant was charged with murder but claimed self-defense, contending that the victim was the initial aggressor the night of the homicide.[53] The defendant sought the diary to support his claim that the victim had a habit of engaging in "aggressive sexual activity."[54]

Recognizing the need to provide some privacy protection, the court ordered the diary be examined *in camera*.[55] This examination found that the diary was not discoverable since the defendant did not show that "it [was] reasonably likely that the diary contain[ed] evidence or potential evidence."[56] As the *Chambers* case demonstrates, an effective privacy protection can be afforded to the victim by using *in camera* review to determine the admissibility of sensitive evidence, resulting in better protection for victims.

When serving as a witness, introduction of character evidence potentially intrudes on the victim's privacy.[57] Although such evi-

[49] 134 Misc. 2d 688, 512 N.Y.S.2d 631 (Sup. Ct. N.Y. County 1987).

[50] *See* Samuel G. Freedman, *Darkness Beneath the Glitter: Life of Suspect in Park Slaying*, N.Y. TIMES, Aug. 28, 1986, at A1 (front page interviews and analyses with social acquaintances of victim); Crystal Nix, *Slain Woman Found in Park; Suspect Seized*, N.Y. TIMES, Aug. 27, 1986, at B1 (initial report of murder and brief reaction of victim's family); Mary Reinholz, *Five Years Later*, NEWSDAY, Aug. 26, 1991, at 46 (interview with victim's mother).

[51] 134 Misc. 2d at 690, 512 N.Y.S.2d at 634.

[52] *Id.* at 689, 512 N.Y.S.2d at 632.

[53] *Id.* at 689, 512 N.Y.S. 2d at 632.

[54] *Id.* The self-defense claim was the crux of Chambers's defense. *Id.* The Levin family claimed that the diary was not discoverable on the grounds that it was a private, sacred, and sensitive document. *Id.* at 632, 134 Misc. 2d at 689. The defendant countered by contending that "no right of privacy exist[ed] after Ms. Levin's death." *Id.*

Although the court never reached the privacy question, since the diary was deemed nonprobative, there is considerable authority that the privacy interest ends at one's death. *See* Kiraly v. FBI, 728 F.2d 273, 279 (6th Cir. 1984) (suggesting that right to privacy expires on death); Cordell v. Detective Publications, 419 F.2d 989, 990 (6th Cir. 1969) (right of privacy ends with death of person who enjoyed such right). *But see* Shapiro v. Smith, 652 F. Supp. 218, 218 (S.D. Ohio 1986) (deceased victim's privacy right upheld in civil case).

[55] 134 Misc. 2d at 690, 512 N.Y.S.2d at 634.

[56] *Id.* The defendant could not inspect the diary merely to "explore and investigate possible leads," and the court's *in camera* examination of the diary "found no admissible evidence." *Id.* at 633, 134 Misc. 2d at 689. "[N]othing was relevant and material to defendant's case." *Id.* at 634, 134 Misc. 2d at 690.

[57] *See* BESSMER, *supra* note 6, at 150-60 (explaining prejudicial effect of evidence of victim's past sexual history).

dence is generally inadmissible,[58] certain historical exceptions permit the defendant to prove character traits.[59] For instance, a defendant charged with assault, battery, or murder may have a right to prove the victim's aggressiveness in order to show that his own actions were in self-defense.[60] Frequently, a defendant charged with rape will seek to prove the victim's consent, a complete defense to the charge of rape, by evidence of the complainant's tendency to engage in consensual sexual intercourse.[61] The common law rule provided for liberal introduction of character evidence,[62]

[58] *See* FED. R. EVID. 404. Rule 404 reads: "evidence of a person's character or trait . . . is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." *Id.* The advisory committee's note to Rule 404 states that character evidence is generally circumstantial due to its suggestive nature of "an inference that the person acted on the occasion in question consistently with his character." *Id.*; CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 342 (John W. Strong et al eds., 4th ed. 1992) (character evidence inadmissible because slight probative value); *see also* BESSMER, *supra* note 6; Abraham P. Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 CORNELL L. REV. 90, 96 (1977) (discussing inadmissibility of character evidence). *But see* People v. Culhane, 45 N.Y. 2d 757, 759, 380 N.E.2d 315, 317 408 N.Y.S.2d 489, 492, *cert. denied*, 439 U.S. 1047 (1978) (character evidence of witness who was neither victim nor accused was admissible).

The Federal Rules of Evidence permit character evidence as follows:

> [E]vidence of a pertinent trait of character of the victim of the crime, offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

FED. R. EVID. 404; Ordover, *supra*, at 91 (accused rapist may introduce reputation evidence of complainant).

[59] *See* Smith v. United States, 161 U.S. 85, 88 (1896) The *Smith* Court stressed the right of the defendant to introduce evidence of a victim's character in a homicide case to prove the victim's aggressive tendencies. *Id.* at 86. Smith claimed self-defense, and the evidence to support that claim could not be excluded or tainted in the jury instructions or the defendant would have been entitled to a new trial. *Id.* at 91. Justice Gray found that testimony that tends to prove the victim was "larger and more powerful" that the defendant, and had a "general reputation for being a quarrelsome and dangerous person" was both "competent and material." *Id.* Commentators have all agreed that evidence of a victim's character is admissible in homicide cases. *See, e.g.*, MCCORMICK, *supra* note 56, at 820 (evidence of victim's character for violence is permitted in homicide and assault cases); WIGMORE, *supra* note 32, § 63 (same).

[60] *See supra* note 57 (evidence of victim's aggressive nature admissible regarding claim of self-defense).

[61] *See, e.g.*, United States v. Saunders, 943 F.2d 388, 390 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1199 (1992) (rejecting defendant's attempt to introduce evidence of past sexual conduct with defendant and defendant's friend); Jeffries v. Nix, 912 F.2d 982, 984 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1327 (1991) (denying defendant's attempt to prove victim's consent through victim's past experience of selling sex for drugs). Proof of the character for chastity of a sexual assault victim has been accepted by the courts and commentators since the beginning of American law. *See* H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 857-59 (1982) (discussing propriety of admitting character evidence of victim).

[62] At common law, the character of a rape victim was admissible to prove the victim's consent. *See* WIGMORE, *supra* note 32, § 62 (non-consent of complainant is material element

which had the effect of putting the victim on trial.

In order to protect the victim in sexual assault cases, rape shield statutes were enacted in virtually every jurisdiction in the United States.[63] Yet, these rape shield statutes still allow evidence of a

in rape case and character of woman's chastity is of considerable probative value in judging likelihood of consent); Ordover, *supra* note 56, at 95 (lack of consent necessary element to rape charge). In 1895, a California court claimed that character evidence was admissible to show the "nonprobability of resistance upon the part of the prosecutrix." People v. Johnson, 39 Pac. 622, 623 (Cal. 1895). The court went on to explain that "it is certainly more probable that a woman who has done these things voluntarily in the past would be more likely to consent than one whose reputation was without blemish." *Id.*; *see also* State v. Bird, 302 So. 2d 589, 592 (La. 1974) (defining chastity as the abstention from premarital or extramarital sex); People v. Abbott, 19 Wend. 192, 195 (N.Y. 1838) (charge to jury implied that women promiscuously dressed more likely to consent to intercourse); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 15-22 (1986) (summarizing Dean Wigmore's acceptance of sexual history evidence in rape cases and reasons for traditional laws); Galvin, *supra* note 39, at 176 (proof of past sexual conduct allowed at common law to show action in conformity with character); Ordover, *supra* note 56, at 97 (traditionalist view that evidence of unchastity always relevant to issues of consent); Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 546 (1980) (combination of false charges by vindictive women, presumptions of unchaste women's character, and belief that premarital sex was immoral, led to general rule of admissibility of victim's sexual history).

This common law doctrine exposed victims of sexual crimes to a "second victimization" in the courtroom through the defense attorney's allegations of unchaste behavior and a survey of the victim's past sexual relations with the defendant or other parties. *See generally* LYNDA LYLLE HOLMSTROM & ANN WOLBERT BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS 221-36 (1978) (describing adverse effects of courtroom experience on victims); A. Thomas Morris, Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L. J. 154 (1988) (discussing physical and mental ordeal which rape victim must endure in court).

Arguably, the most invasive of all discovery methods is this relentless scrutiny into the victim's past so frequently attempted in cases of sexual assault and rape. *See* BESSMER, *supra* note 6, at 141-60; NANCY GAGER & CATHLEEN SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA 129-35, 151-57 (1976).

In addition, studies have shown that the introduction of sexual behavior has prejudiced judges and juries alike in their presidings and deliberations over sexual assault cases. *See generally* BESSMER, *supra* note 6, at 150-60.

[63] *See* Ala. Code § 12-21-203 (Supp. 1992); Alaska Stat § 12.45.045 (Supp. 1992); Ark. Stat. Ann. § 16-42-101 (Supp. 1992); Cal. Evid. Code §§ 782, 1103 (Bancroft & Whitney Supp. 1992); Colo. Rev. Stat. § 18-3-407 (1992); Conn. Gen. Stat. Ann. § 54-86f (West 1992); Del. Code Ann. tit. 11, §§ 3508-09 (1992); Fla. Stat. Ann. § 794.022 (West Supp. 1991); Ga. Code Ann. § 38-202.1 (Supp. 1992); Ill. Rev. Stat.c ch. 38, para. 115-7 (Smith Hurd 1992); Ind. Code § 35-37-4-4 (1992); Kan. Stat. Ann § 21-3525 (Supp. 1992); Ky. Rev. Stat. Ann. § 510.145 (Michie/Bobbs-Merill 1992); La. Rev. Stat. Ann. § 15:498 (West Supp. 1991); Me. Rev. Stat. Ann. tit. 17-A, § 252 (Supp. 19912; Md. Code Ann. art. 27, § 461A (Supp. 1992); Mass Ann. Laws ch. 233, § 21B (Law Co-op, 1992): Mich. Comp. Laws Ann. § 750.520j (West Supp. 1992); Minn. Stat. Ann. § 609.347 (West 1992); Mo. Rev. Stat § 491.015 (1992); Mont. Code Ann. § 45-5-511(4) (1991); Neb. Rev. Stat. § 28-321 (1990); Nev. Rev. Stat. Ann. §§ 48.069, 50.090 (Michie (1991); N.H. Rev. Stat. § 632-A:6 (1992); N.J. Stat. Ann. § 2A:84A-32.1 (West Supp. 1992); N.Y. Crim. Proc. Law § 60.42 (Consol. 1992); N.D. Cent. Code § 12.1-20-14 (1991); Ohio Rev. Code Ann. § 2907.2 (Baldwin Supp. 1992); Okla Stat. Ann. tit. 22 § 750 (West Supp. 1992); 18 Pa. Cons. Stat. Ann § 3104 (Purdon 1992); R.I. Gen. Laws § 11-37-13 (1992); S.C. Code

victim's character, chastity, and reputation in certain circumstances. The Federal Rules of Evidence, and most state rape shield statutes permit evidence of 1) past sexual behavior with persons other than the accused to show that the defendant was not the "source of semen or injury," and 2) past consensual sexual behavior with the accused to show the victim's consent.[64] In *United States v. Begay*,[65] the Tenth Circuit Court used this language in the federal rape shield law to permit evidence and cross-examination of the victim's past sexual activity with a third person to determine if the "victim's memory was clear and accurate" as to the incident in question, and to determine if the victim's injuries were indeed caused by a third person rather than the defendant.[66] So, despite the enactment of these statutes, many sexual assault victims are

Ann. § 16-3-659.1 (Law. Co-op 1992); S.D. Codified Laws Ann § 23A-22-15 (Supp. 1992); Tenn. Code Ann. § 40-17-119 (1992); Vt. Stat. Ann. tit. 13, § 3255 Va. Code Ann. § 18-2-67.7 (Supp. 1992); Wash. Rev. Code Ann. § 9A.44.020 (1992); W. Va. Code § 18-2-67.7 (Supp. 1992) Wis. Stat. §§ 904.04, 972.11 (1991); Wyo. Stat. § 6-2-312 (1991);

For an application of the rape shield laws, see Jeffries v. Nix, 912 F.2d 982, 986 (8th Cir. 1990) (purpose of rape shield statute is to protect victim's privacy and encourage reporting of sexual assault (citing State v. Ogilive, 310 N.W.2d 192, 195 (Iowa 1981))); Doe v. United States, 666 F.2d 43, 49 (4th Cir. 1981) (federal rape shield statute enacted to protect privacy interests of victim); State v. Johnson, 692 P.2d 35, 37 (N.M. Ct. App. 1984) (purpose of rape shield statute is to encourage reporting of crime by making trial less traumatic); *see also* United States v. Galloway, 963 F.2d 1388, 1390 (10th Cir.), *cert. denied*, 113 S. Ct. 418 (1992) (excluding evidence of birth control pills found in rape victim's purse as unwarranted invasion of victim's private life pursuant to rape shield statute); Wood v. Alaska, 957 F.2d 1544, 1550 (9th Cir. 1992) (evidence that victim had appeared in pornographic movies irrelevant).

For a discussion of the origins of the rape shield laws, see David Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WISC. L. REV. 1219, 1220 at nn.2 & 3 (tracing adoption of rape shield statutes in United States); Pamela J. Fisher, Comment, State v. Alvey: *Iowa's Rape Shield Law*, 76 IOWA L. REV. 835, 837-42 (1991) (summary of historical development of state rape shield laws); Lara E. Simmons, Michigan v. Lucas: *Failing to Define the State Interest in Rape Shield Legislation*, 70 N.C. L. REV. 1592, 1596 n.4 (1992).

[64] *See, e.g.*, FED. R. EVID. 412. Rule 412 permits evidence of "past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury" and evidence of "past sexual behavior with the accused . . . offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such [sexual] offense is alleged."

[65] 937 F.2d 515 (10th Cir. 1991).

[66] *Id.* at 521; *see also* United States v. Bartlett, 794 F.2d 1285, 1292 (8th Cir.), *cert. denied*, 479 U.S. 934 (1986) (evidence needed to determine if injury caused by defendant); *Doe*, 666 F.2d at 48 (victim's telephone conversations with defendant and defendant's knowledge of victim's past sexual history relevant and admissible); State v. LeClair, 730 P.2d 609, 613 (Or. App. 1986) (evidence of prior false accusation would be admissible under Oregon rape shield law). *But see* United States v. Shaw, 824 F. 2d 601, 602 (8th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988) (evidence inadmissible because it fell short of "demonstrat[ing] infliction of an injury.").

still subject to privacy invasions during the course of a trial.[67]

B. *Closure of Courtroom*

After it is determined that evidence is admissible, the victim may have one last privacy protection to invoke — the request for courtroom closure.[68] Such requests are more likely to be honored in cases of rape where the courts are apt to consider the psychological damage that can result from public scrutiny.[69] A victim can request a closure or partial closure of the courtroom if he is likely to suffer injury from public disclosure of certain items.[70] Conversely, a defendant will insist, and has the right to, a fair and public trial.[71] Moreover, the media may invoke its First Amendment right of access to the trial.[72]

The decision of whether or not to allow closure of the courtroom rests within the discretion of the trial judge.[73] Before clo-

[67] *See Jeffries*, 912 F.2d at 986 (evidence of victim's sexual delusions could have been admitted despite rape shield law); Wallace Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 601 n.292 (1980) (no increase in convictions as result of Washington's reforms); see also Nancy C. Cody, Comment, *Federal Rule of Evidence 412: Was the Change an Improvement?*, 49 U. CIN. L. REV. 244, 254-55 (1980). The author points to some pre-rape shield statute cases which precluded prejudicial evidence. *Id.* at 254-55; United States v. One Feather, 702 F.2d 736, 737 (8th Cir. 1983) (evidence of rape victim's illegitimate son was inadmissible as unduly prejudicial); United States v. Kasto, 584 F.2d 268, 271-72 (8th Cir. 1978) (prior to rape shield statute evidence of rape victim's birth control device and general reputation for unchastity was inadmissible), *cert. denied*, 440 U.S. 930 (1979) ; United States v. McFadyen-Snider, 552 F.2d 1178, 1182 (6th Cir. 1977) (evidence of victim's prostitution was inadmissible).

[68] *See* Deborah Pines, *Courtroom Closure Allowed for Substantial Reason*, N.Y.L.J., Oct. 15, 1992, at 1 (discussing Second Circuit's test for closure procedure).

[69] *See* United States v. Sherlock, 865 F.2d 1069, 1077 (9th Cir. 1989) ("The protection of young victims of sexual crimes from the trauma and embarrassment of public scrutiny justifies closing parts of a criminal proceeding."); Latimore v. Sielaff, 561 F.2d 691, 695 (7th Cir. 1977) (stating that closure of trial to spectators during testimony of alleged rape victim was justified since it protected personal dignity of victim); Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 487 (1986). Ms. Gardner stated: "The psychological effects on witnesses of courtroom distractions have been considered a serious enough threat to excluding spectators from the courtroom during the testimony of particular witnesses. Courts have excluded the public in order to prevent public embarrassment and emotional disturbance to the witness." *Id.* (footnotes omitted); *cf.* Nieto v. Sullivan, 879 F.2d 743, 749-50 (10th Cir.) (closure prompted by concern for victim's safety, not protection from embarrassment), *cert. denied*, 493 U.S. 957 (1989). *See generally* S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 198-200 (1979) (explaining emotional effects of court appearances on rape victims).

[70] *See supra* note 67 (courts can close portions of trial to protect crime victims).

[71] *See supra* note 4 (noting Sixth Amendment's guarantees).

[72] *See also supra* note 5 (media has First Amendment right of access to trial).

[73] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (trial judge can

sure can be effectuated, the trial judge must consider all possible alternatives, such as a gag order or a change of venue.[74] If no alternative is deemed sufficient, the trial judge can allow closure if he is satisfied that, first, failure to do so will result in unnecessary harm to the victim, and second, the closure will not contravene either the defendant's or the media's constitutional rights.[75]

Although much of the analysis in the leading closure cases focuses on the tension between the defendant's right to a fair trial and the media's right of access to the trial, similar principles are applied in considering a victim's right to privacy and the defendant's constitutional rights.[76] When the courts do speak of a victim's privacy rights, it is usually couched in terms of the *government's* interest in protecting victims.[77]

1. Balancing

In cases of courtroom closure, courts must balance the right of the defendant to a fair and public trial, the victim's right to privacy, and possibly the media's right access to the trial.[78] A review of recent decisions demonstrates the inconsistent and sometimes fleeting treatment that victims receive in this balancing process. In *Davis v. Reynolds*[79] and *United States v. Galloway*,[80] the Tenth Cir-

rule on case-by-case basis whether closure is necessary); *Sherlock*, 865 F.2d at 1077 (right to public trial is subject to trial judge's discretion).

[74] *See* Press-Enterprise v. Superior Court, 464 U.S. 501, 510 (1984) (trial court must consider reasonable alternatives before closing court).

[75] *See* United States v. Galloway, 963 F.2d 1388, 1390 (10th Cir.) (partial closure of courtroom during complaining witness's testimony not violative of Sixth Amendment), *cert. denied*, 113 S.Ct. 418 (1992); Nieto v. Sullivan, 879 F.2d at 743, 743 (10th Cir.) (closure of trial to inmate's relatives during testimony of complaining witness was not violative of Sixth Amendment), *cert. denied*, 493 U.S. 957 (1989); *Sherlock*, 865 F.2d at 743 (narrowly tailored partial closure not violative of Sixth Amendment); Latimore v. Sielaff, 561 F.2d 691, 691 (7th Cir. 1977) (exclusion of spectators during testimony of complaining witness justified and proper).

[76] *See infra* note 88 and accompanying text.

[77] *See* Davis v. Reynolds, 890 F.2d 1105, 1110 (10th Cir. 1989) (stating that "government clearly has a compelling interest in protecting youthful witnesses who are called upon to testify in cases involving sensitive and painful issues.").

[78] *See, e.g.*, *Galloway*, 963 F.2d at 1389 (balancing right of victim to closure against defendant's constitutional rights); *Davis*, 890 F.2d at 1107 (balancing whether closure unconstitutionally violated defendant's rights); *see also* Waller v. Georgia, 467 U.S. 39, 39 (1984) (closure of suppression hearing over defendant's objections was unjustified and violated Sixth Amendment); Richmond Newspapers v. Virginia, 448 U.S. 555, 555 (1980) (right of public and press to attend criminal trials is guaranteed under First and Fourteenth Amendments).

[79] 890 F.2d 1105 (10th Cir. 1989). In *Davis*, the defendant was charged with three counts of rape. *Id.* at 1108. Before the jury was impaneled or any testimony had been

cuit faced the closure issue by directly considering the victim's rights.[81] Although the two decisions had different results, they both reflect the subordinate treatment victims receive when their rights are balanced against the defendant's Sixth and the media's First Amendment rights.[82]

The *Davis* court reversed a closure order as violative of the defendant's Sixth Amendment right to a public trial.[83] The victim's

taken, the prosecutor requested that the public be excluded during the complaining witness's testimony. *Id.* The prosecutor noted that the judge at the preliminary hearing had cleared the courtroom during the witness's testimony, and that she had experienced " 'some emotional and psychological trauma associated with this incident.' " *Id.* Without taking any evidence concerning the witness's condition, and without interviewing the witness, the trial court granted the motion to exclude the public during the complaining witness's testimony. *Id.* The defendant was eventually convicted on three counts of first degree rape. *Id.* at 1110. After the district court dismissed the defendant's habeas corpus petition, the Court of Appeals for the Tenth Circuit reversed, holding that the trial court's allowance of closure violated the defendant's Sixth Amendment right to a public trial. *Id.* at 1111.

[80] 963 F.2d 1388 (10th Cir.), *cert. denied*, 113 S. Ct. 418 (1992). In *Galloway*, the defendant was being tried for kidnapping for the purposes of sexual abuse. *Id.* at 1388. The trial court allowed a partial closure of the courtroom essentially because the victim was a minor and the alleged crimes involved the sexual abuse and rape of a young victim. *Id.* at 1390. Additionally, the lower court ruled that birth control pills of the victim were inadmissible as evidence. *Id.* The Tenth Circuit upheld the closure, emphasizing that the trial court narrowly tailored the closure by excluding only the "curious" from hearing the complaining witness's testimony. *Id.* It also affirmed the district court's decision by deeming the birth control pills inadmissible. *Id.* at 1390. However, a forceful dissent argued that the trial court failed to articulate specific enough findings in order to justify closure. *Id.* at 1392 (Seymour, J., dissenting).

[81] *See Galloway*, 963 F.2d at 1390 (balancing victim's privacy against right of press and defendant to public trial); *Davis*, 890 F.2d at 1108 (discussing trial judge's clearing of courtroom during victim's testimony); *cf.* Woods v. Kuhlmann, 977 F.2d 74 (2d Cir. 1992) where the court considered the issue of closure in the context of a robbery victim. *Id.* At issue was whether the trial court's partial closure was violative of the defendant's Sixth Amendment right to a public trial. *Id.* In *Woods*, the prosecutor sought to partially close the courtroom in asking the judge to have the defendant's relatives vacate when the victim was to testify. *Id.* The victim was apparently afraid of retribution by the relatives. *Id.* at 3. The trial court subsequently ordered defendant's relatives to leave during the victim's testimony. *Id.* After the Appellate Division, Second Department, affirmed the defendant's conviction of first degree robbery, the defendant sought a writ of habeas corpus in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 2254. *Id.* The District Court affirmed, and defendant appealed to the Second Circuit. *Id.* The Second Circuit affirmed, holding that the partial closure was not violative of the defendant's Sixth Amendment right to a public trial. *Id.* According to the Second Circuit, as long as there is a "substantial reason" for the partial closure, it was proper procedure as long as the other prongs of the *Waller* test were met. *Id.* at 10.

[82] *See Davis*, 890 F.2d at 1109 (recognizing that protection of victims can be substantial governmental interest but not necessarily justification for infringing on Sixth Amendment by closing courtroom); *see also Galloway*, 963 F.2d at 1390 (noting substantial interest in protecting complaining witness requires narrowly tailored closure order so as not to infringe on defendant's Sixth Amendment right).

[83] *Davis*, 890 F.2d at 1112 (improper violation found in courts "failing to articulate specific, reviewable findings adequate to support the general closure of the courtroom . . .").

right to be shielded from embarrassment and harm was not an "overriding" interest that could infringe upon the defendant.[84] Absent from the opinion was any mention of the *personal* privacy rights of the victim, i.e., it was the government who had the interest in protecting the victim.[85]

The *Galloway* court upheld a partial closure order as not violative of the defendant's Sixth Amendment right to a public trial.[86] In support of this holding, the court emphasized the "exceedingly narrow scope" of the closure order.[87] In fact, the press was not even asked to leave.[88] Although the victim's privacy right was ultimately honored in this case, the fact that such a narrow closure implicated the defendant's rights underscores the tenuous and inferior status of the victim's privacy rights.[89]

Although both *Davis* and *Galloway* were decided solely on Sixth Amendment grounds, the courts relied on precedent which considered the closure issue when it was the *press* who, citing the First Amendment, sought access to the proceedings.[90] Whether it is the defendant invoking the Sixth Amendment, or the media invoking the First Amendment, the "public" nature of the criminal trial is equally protected.[91] These two constitutional barriers will give way to a victim's privacy interest *only* if the victim can advance an "overriding interest that is likely to be prejudiced."[92] To date, no court has found such an overriding interest to justify total closure; however, many courts have found a substantial interest that justified a partial closure, such as the exclusion of spectators or family

[84] *Id.* at 1110. The court applied the "overriding interest" standard developed in *Waller* to complete the closure order. *Id.* The Court explained that "to justify an order completely excluding the public from portions of a criminal proceeding, the party [requesting closure] must advance an overriding interest that is likely to be prejudiced . . . ." *Id.*

[85] *Id.* (recognizing government's interest in protecting victims). *But see* Hutt, *supra* note 3, at 412-14 (noting that victims have ill-defined privacy interests in protecting their identity).

[86] *Galloway*, 963 F.2d at 1390.

[87] *Id.*

[88] *Id.*

[89] *See generally* Hutt, *supra* note 3, at 370 (protecting victim's privacy jeopardizes integrity of criminal justice system).

[90] *Galloway*, 963 F.2d at 1390 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)); *See Davis*, 890 F.2d at 1110 (citing *Globe*).

[91] *Davis*, 890 F.2d at 1110-11 ("[t]he explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." (citing Waller v. Georgia, 467 U.S. 39, 46 (1984)).

[92] *Id.* at 1110.

members.[93]

CONCLUSION

Although on the surface it may appear that there are effective shields to safeguard a victim's right to privacy, these protections must always be measured against the defendant's Fifth Amendment right to due process, and his Sixth Amendment right to a public trial. It appears that any newly enacted legislation will suffer from the same infirmity of currently existing legislation—inherent inferiority to a constitutional mandate. With that in mind, it seems logical that the only true way to protect a victim's privacy is to constitutionalize the right in the form of an amendment. However, the constitution's broad guarantee of a fair and public trial is grounded in historical notions of fairness that this country has relied on for over two centuries. Thus, while a constitutional amendment could ostensibly level the playing field, it would likely tread too heavily upon the defendant's long-honored rights. Further, it is improbable that the common law right to privacy will be extended to protect victims of crime. Therefore, it seems that only careful consideration by our judges on a case-by-case basis can be of practical assistance in formulating further protections.

Marijo A. Ford & Paul A. Nembach

[93] Nieto v. Sullivan 879 F.2d 743 (10th Cir.) (exclusion of defendant's relatives not violative of Sixth Amendment), *cert. denied*, 493 U.S. 957 (1989); United States v. Sherlock 865 F.2d 1079, 1080 (9th Cir. 1989) (exclusion of defendant's family members in light of "substantial" interest in protecting victim not violative of Sixth Amendment); Latimore v. Sieloff, 561 F.2d 691, 692 (7th Cir. 1977) (exclusion of spectators during complaining witness's testimony justified and proper).