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Limiting Disclosure of Rape Victims' Identities

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PAUL MARCUS
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LIMITING DISCLOSURE OF RAPE VICTIMS' IDENTITIES*

PAUL MARCUS**
AND
TARA L. McMATHON***

I. INTRODUCTION

When a woman is raped1 she experiences severe physical and emotional traumas from both the assault and the events that follow. The attack itself is a brutal and terrifying personal violation that can have a long term if not permanent impact on the victim's life.2 The victim also suffers the extremely difficult ordeal of disclosing the nature and specifics of the crime to law enforcement officers. If the assailant is caught, the victim will likely be asked to testify in a public trial about the crime committed against her, again subjecting her to emotional pain. Throughout this period the woman is trying to regain a sense of control and autonomy in her daily living situation. Compounding these and other difficulties, some women are being further victimized by having their identities widely disseminated by newspapers and television stations.

1. While certainly men are also the victims of sexual assaults, criminal justice statistics indicate that women are the overwhelming majority of victims of such crimes, with reported cases having 10-15 times more women as victims than men. See U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 164 (1986).

While fortunately the phenomenon is not prevalent, if disclosure occurs prior to trial it can be one of the more cruel aspects of this traumatic experience.\(^3\)

In two important cases the Supreme Court attempted to balance the important privacy concerns of the sexual assault victim against the legitimate interests of the news media in reporting newsworthy events. In *Cox Broadcasting Corp. v. Cohn*\(^4\) the Court overwhelmingly supported the views of the media over those seeking penalties for the disclosure of the victims’ identities. Recently, however, in *Florida Star v. B.J.F.*\(^5\) a majority of the Court retreated from its earlier strong language and left open the distinct possibility of valid state sanctions against those who disclose the names of sexual assault victims prior to trial.

In this article we will analyze the Court’s opinions in *Cox Broadcasting Corp. v. Cohn* and *Florida Star v. B.J.F.* and the related first amendment and privacy issues. In addition, we will review the state interests involved in limiting disclosure of the victim’s identity. It is our view that the disclosure of rape victims’ identities should be limited and states should adopt narrowly and carefully written statutes designed to promote the interests of both the media and the victims of these crimes. We believe such statutes would survive constitutional scrutiny and would not unduly interfere with the legitimate concerns of the media in reporting newsworthy events. Moreover, they could provide true protection to the victims of brutal sexual offenses. We conclude the article with a proposed comprehensive statute.

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3. Trial disclosure is fairly common because the trials are open to the public at large. The discussion here is limited to pretrial matters principally because of our particular concern with disclosure just after the commission of the crime when the victim may be most emotionally vulnerable and when the assailant may still be at large. Moreover, at trial the judge may be able to take special precautions to limit the impact on the victim. See infra note 152 and accompanying text. Most media organizations prohibit disclosure prior to trial of the names of victims of crime. That clearly was the rule in *Florida Star v. B.J.F.* See infra text accompanying note 22. But see infra note 128 (discussing the problems that arise in the detailed reporting of the crime with only the victim’s name being withheld). Moreover, some continue to argue that records of rapes must be kept open and that the public should be advised of all important facts, including the identity of the victim, even prior to trial. See Worthington, *Identifying Rape Victims Sparks Row*, Chi. Tribune, July 29, 1990, § 1, at 15, zone C. (Geneva Overholser, editor of the Des Moines Register, for example, has repeatedly argued that rape victims names should be published.).


II. COX BROADCASTING CORP. v. COHN

The plaintiff was the father of a young woman who had been raped and murdered by six criminal defendants. Both the incident and the court proceedings were widely reported, though the identity of the daughter was not disclosed prior to trial. At the time of the hearing on the motion to accept guilty pleas, a television station identified the victim in a news report discussing the court proceedings. The identification violated a state criminal statute which prohibited the identification of a rape victim. The victim's family sued the station under a common law theory of public disclosure of private facts. The Georgia courts allowed a substantial judgment to be entered against the media defendant.

In both state and federal courts the media defendant essentially raised two defenses. The first was that the defendant learned the name of the victim from a review of the indictments available for public inspection in a courtroom. The second was that the public's right to know of newsworthy events under the first amendment absolutely protected the disclosure of the name of the victim of the crime. Responding to both arguments, the Georgia Supreme Court found for the plaintiff. The court's opinion conceded a strong public interest in the reporting of criminal proceedings; however, it concluded that there could be "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection."8

In a strongly worded opinion by Justice White, the United States Supreme Court resolved the matter wholly in favor of the media defendant. For the Court the question was "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."9 A few factors were essential to the Court's analysis. The opinion emphasized the important role of the media in reporting criminal trial proceedings:

7. The trial court had found that the criminal statute impliedly created a civil remedy for the plaintiff. The Georgia Supreme Court held instead that the plaintiff's action was based on the state common law tort of public disclosure of private facts. Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 61-62, 200 S.E.2d 127, 129-30 (1973), rev'd, 420 U.S. 469 (1975).
8. Id. at 68, 200 S.E.2d at 134.
LIMITING DISCLOSURE

With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials . . . .

. . . . The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government. 10

Moreover, in this case Georgia allowed members of the media to receive information regarding the identity of victims of sexual assaults by making such information readily available to reporters. This fact became determinative. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." 11

Several related cases came to the Supreme Court soon after its decision in Cox Broadcasting. 12 Of paramount importance was the decision in Smith v. Daily Mail Publishing Co. 13 concerning a West Virginia criminal statute that prohibited the publication of the name of any child prosecuted in a juvenile criminal action. The media defendant learned of a serious shooting incident, obtained the name of the juvenile assailant by speaking to witnesses, and published a story in the newspaper about the shooting, revealing the juvenile’s name and picture. Though a strong argument was made for the need to protect confidentiality in the juvenile process, 14 the Court refused to recognize "the power of a state to punish the truthful publication of an alleged juvenile delinquent’s name lawfully obtained by a newspaper." 15 The state was unable to demonstrate that its action was necessary to further the important governmental interest

10. Id. at 492.
11. Id. at 496.
12. See, e.g., Landmark Communications v. Virginia, 435 U.S. 829 (1978) (reversing the conviction of a newspaper that accurately reported pending judicial review of commission proceedings); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (striking down a state judge’s pre-trial order prohibiting the media from publishing the name of an 11-year-old boy in connection with a juvenile proceeding where reporters had been present).
14. Justice Rehnquist, in concurrence, emphasized that "publicity may have a harmful impact on the rehabilitation of a juvenile offender." Id. at 108 n.1 (Rehnquist, J., concurring). He believed that limitation of disclosure was appropriate and necessary: "[A] State's interest in preserving the anonymity of its juvenile offenders—an interest that I consider to be, in the words of the Court, of the 'highest order'—far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' names entails." Id. at 107.
15. Daily Mail, 443 U.S. at 105-06.
involved, particularly when forty-five other states had confidentiality requirements in connection with juvenile proceedings, yet did not have criminal sanctions. 16

The Daily Mail holding became less important than the test it established to resolve conflicting interests in the disclosure of individuals' names, whether juvenile offenders as in Daily Mail or rape victims as in Florida Star. The test was simply stated by Chief Justice Burger: "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 17

In any analysis involving appropriate state responses to the disclosure of crime victims' names, the Daily Mail formulation requires the answers to two questions: Is the state's interest of the highest order, and is the action necessary to further that state interest?

III. FLORIDA STAR v. B.J.F.

Fourteen years after its decision in Cox Broadcasting, the Supreme Court's opinion in Florida Star v. B.J.F. undoubtedly came as a surprise to many. The surprise was not in the ultimate disposition of the case, a finding for the media defendant, but rather was in the narrow holding of the Court and the rather cautious language found throughout the majority opinion of Justice Marshall. 18 Indeed, early in the opinion the Court stated that even though all earlier opinions had upheld the press's right to publish, "we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context." 19

The state of Florida, seemingly heeding the language in Cox Broadcasting, 20 passed a law making it illegal to "print, publish, or broadcast

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16. Id. at 105.
17. Id. at 103.
18. The Court noted the very different approach followed in the defamation area: "The somewhat uncharted state of the law in this area thus contrasts markedly with the well-mapped area of defamatory falsehoods, where a long line of decisions has produced relatively detailed legal standards governing the multifarious situations in which individuals aggrieved by the dissemination of damaging untruths seek redress." Florida Star v. B.J.F., 491 U.S. 524, 530 n.5 (1989).
19. Id. at 530.
20. Justice White, the author of the Cox Broadcasting opinion, was especially concerned with the Court's rejection of the Florida statute. "Florida has done precisely what we suggested, in Cox Broadcasting, that States wishing to protect the privacy rights of rape victims might do: 'respond [to the challenge] by means which avoid public documentation or other exposure of private information.'" Id. at 547 (White, J., dissenting) (quoting Cox Broadcasting, 420 U.S. at 496) (emphasis added by Justice White in his Florida Star dissent).
LIMITING DISCLOSURE

... in any instrument of mass communication" the name of the victim of a sexual assault.\textsuperscript{21} Pursuant to this statute, the victim of a sexual assault brought an action against a weekly newspaper that had published a description of the assault committed against her and also specifically identified her. The reporter for the newspaper received this information from an investigative report in the sheriff's department press room. The printing of the victim's name also violated the newspaper's own internal policy of not publishing the names of victims of sexual offenses.\textsuperscript{22}

At trial the plaintiff testified that she suffered greatly from the publication of her identity. She was questioned by her co-workers, received harassing phone calls, required mental health counseling, was forced to move from her home and seek police protection, and was even threatened with being raped again. The trial judge found that the newspaper's actions constituted negligence per se, so that ultimately the only issue left for the jury was determination of damages. The plaintiff received $75,000 in compensatory damages and $25,000 in punitive damages.\textsuperscript{23}

In response to the newspaper's broad arguments that these court actions violated the first amendment, the Florida court looked to the suffering endured by the rape victim and concluded that her name was "of a private nature and not to be published as a matter of law."\textsuperscript{24}

Justice Marshall began his opinion by remarking that the central issue involved in \textit{Florida Star} had recurred over the past two decades and had never been fully resolved by the Court:

The tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other, is a subject we have addressed several times in recent years.\textsuperscript{25}

\textsuperscript{21} \textit{FLA. STAT.} § 794.03 (1987).
\textsuperscript{22} \textit{Florida Star}, 491 U.S. at 528.
\textsuperscript{23} The punitive damages award in this case appeared to be of special concern to all of the Justices, though it was not substantively analyzed because of the holding of the Court. Justice Marshall's stated: "Having concluded that imposing liability on appellant pursuant to § 794.03 violates the First Amendment, we have no occasion to address appellant's subsidiary arguments that the imposition of punitive damages for publication independently violated the First Amendment . . . ." \textit{Id.} at 540 n.9.

Justice White also made reference to this point: "The Court does not address the distinct constitutional questions raised by the award of punitive damages in this case . . . . Consequently, I do not do so either. That award is more troublesome than the compensatory award discussed above." \textit{Id.} at 553 n.5 (White, J., dissenting).
\textsuperscript{25} \textit{Florida Star}, 109 S. Ct. at 530.
The Court resisted the parties' call for a broad rule. The publisher claimed the first amendment mandated "that the press may never be punished, civilly or criminally, for publishing the truth." The plaintiff, on the other hand, espoused the "categorical rule that publication of the name of a rape victim never enjoys constitutional protection." In support of these propositions each of the parties strongly emphasized Cox Broadcasting. Justice Marshall, however, quickly distinguished Cox Broadcasting and refused to rely heavily on its holding. He noted that while there was some resemblance to Cox Broadcasting, that case involved a very different principle because the name of the rape victim had been obtained from courthouse records open to public inspection, a fact that the Court in Cox Broadcasting repeatedly noted. In the instant case, however, the press's role in subjecting trials to public scrutiny, emphasized in Cox Broadcasting, "is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified."

The majority chose to take a narrow view, stating, "We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." The controlling case for the majority was not Cox Broadcasting, but Smith v. Daily Mail Publishing Co. The Court concluded that the correct rule, formulated in Daily Mail, is that "[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." Justice Marshall's opinion gave several reasons for relying on this rule. Preliminarily, the Court wrote that under the rule the states retain

26. Id. at 531.
27. Id at 531-32.
28. Id. Justice White in his dissent strongly disagreed with the parties as to the impact of the Cox Broadcasting case. He repeatedly emphasized that disclosure in Cox Broadcasting came about in connection with fully open judicial proceedings and that the holding in the case simply was "that the State cannot make the press its first line of defense in withholding private information from the public—it cannot ask the press to secrete private facts that the State makes no effort to safeguard in the first place." Id. at 544 (White, J., dissenting).
29. Florida Star, 491 U.S. at 532.
30. Id.
31. Id. at 533.
substantial means for safeguarding their interests because the rule deals only with situations in which the media defendant has lawfully obtained the information.34 Also, if the government had chosen to make the information publicly available, a prohibition of media coverage would be "relatively unlikely to advance the interests in the service of which the State seeks to act."35 Finally, the Court believed that the Daily Mail test struck a proper balance because anything less protective of the first amendment interest would result in "timidity and self-censorship"36 on the part of reporters and publishers. This would be particularly troublesome, wrote Justice Marshall, because news articles such as the one in Florida Star concerned matters of "public significance" as they described for the public the commission and investigation of violent crimes.37

Conceding that the state's interest in this case was of the highest order,38 the Court nevertheless struck down the Florida action. Justice Marshall gave three reasons for finding the Florida action inappropriate under the first amendment. The first focused on the manner in which the newspaper had obtained the information. Because the government had given the information freely to the press in a situation that was open to the public, the state's policy against disclosure of rape victims' identities had been "undercut." "Where, as here, the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity."39

The second reason was based on the Court's difficulties with Florida's particular civil cause of action. There was no apparent requirement that the jury find "that the disclosure of a fact about a person's private

34. Id. at 534. The Court made clear that none of these cases resolved the issue of government sanctions when truthful information was published by a newspaper that had acquired that information unlawfully. Id. at 535 n.8.
35. Id. at 535.
36. Id. (quoting Cox Broadcasting, 420 U.S. at 496).
37. Id. at 536-37. The dissenters rejected the heavy reliance on Daily Mail, a case involving information disclosed as to an offender rather than a victim. They argued that the rule in Daily Mail "should not be so uncritically accepted as constitutional dogma." Id. at 545 (White, J., dissenting).
38. Florida Star, 491 U.S. at 544; see infra text accompanying notes 45-47.
39. Florida Star, 491 U.S. at 538. Justice Marshall went on to remark that deference at that point should be given to the publishers:
Once the government has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy, and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence. Id. at 538-39 (quoting Cox Broadcasting, 420 U.S. at 496).
life was one that a reasonable person would find highly offensive. Instead, because the trial judge adopted a per se theory of negligence, a defendant would be found liable even where the victim's identity had already been known, or where the victim had voluntarily called public attention to the crime.

The third reason offered was the Court's concern with the "facial underinclusiveness" of the statute because it only prohibited publication of the victim's identity in instruments of mass communication. Because the statute did not deal with other situations that might have been at least as significant, the majority could not find that the statute was necessary to accomplish the stated purpose of the Florida legislature.

Ultimately, therefore, the Court's holding became simply another in the line of cases beginning with Cox Broadcasting that upheld the publisher's right to disclose truthful information even in situations which are very difficult for the victims of crime. The difference here—and it is a significant difference—is that the Court for the first time appeared to recognize an important state interest in protecting the victims of sexual offenses against the disclosure of their names to the public. Justice Marshall's opinion articulated several purposes proffered by the state of Florida for adopting its rule against publication. This list included protecting the privacy of sexual offense victims, protecting the physical safety of such individuals, and encouraging future victims of crime to report offenses without fear of exposure. Justice Marshall recognized the importance of these interests. "At a time in which we are daily

40. Id. at 539.
41. Id. Justice White strongly disputed this conclusion by the Court, emphasizing that the jury here had specifically found that the publisher had acted with "reckless indifference towards the rights of others." Id. at 548 (White, J., dissenting).
42. Justice Scalia, concurring, would have decided the case relying exclusively on the unwillingness of the state to prohibit publication except by the media. He found that the state action here left "appreciable damage to that supposedly vital interest unprohibited." Florida Star, 491 U.S. at 542 (Scalia, J., concurring).
43. The statute obviously did not cover any "individual who maliciously spreads word of the identity of a rape victim." Florida Star, 491 U.S. at 540.
44. Id. at 540-41. The dissenters again challenged this view, writing that the civil action here was not actually for a violation of the statute but was for the negligent publication of the victim's name and thus should be viewed as part of the "whole of Florida privacy tort law." They argued that because Florida recognized a tort of publication of private facts, individual defendants might well be covered by the tort law, even if not by the statute. Id. at 549-50 (White, J., dissenting).
46. Florida Star, 491 U.S. at 537.
reminded of the tragic reality of rape, it is undeniable that these are highly significant interests, a fact underscored by the Florida Legislature's explicit attempt to protect these interests by enacting a criminal statute prohibiting much dissemination of victim identities.47

The dissenting opinion of Justice White48 stated the rationale even more poignantly:

"Short of homicide, [rape] is the 'ultimate violation of self.' " For B.J.F., however, the violation she suffered at a rapist's knifepoint marked only the beginning of her ordeal. A week later, while her assailant was still at large, an account of this assault—identifying by name B.J.F. as the victim—was published by The Florida Star. As a result, B.J.F. received harassing phone calls, required mental health counseling, was forced to move from her home, and was even threatened with being raped again.49

Justice Marshall wrote that state activity in this area—presumably based upon properly and narrowly drafted statutes—might well survive constitutional scrutiny in order to protect these important interests:

We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the Daily Mail standard.50

Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order 51

47. Id.
50. Florida Star, 491 U.S. at 537.
51. Id. at 541. Some have argued that there can be little doubt that the opinion in the Florida Star case will strongly encourage state legislatures to move in this area and to draft statutes along the lines suggested by the majority opinion. See, e.g., Sanford & Noble, For the Press, Privacy Ruling Not Good News, Nat'l J., Aug. 21, 1989, at 7-8, col. 3:
The Florida Star decision illustrates the Court's ongoing struggle to strike an appropriate balance between the media's freedom of the press and the rape victim's right of privacy. In our view, a legal and policy analysis establishes that the identity of a rape victim does fall within a zone of personal privacy that the state may and should protect from intrusion by the press. We further believe that a statute can be drafted that will provide such protection and will withstand constitutional scrutiny.

IV. LIMITING DISCLOSURE OF RAPE VICTIMS' NAMES AS A MATTER OF PUBLIC POLICY

No crime is more horribly invasive or more brutally intimate than rape. Justice White described the crime as the "ultimate violation of self," short of homicide. Yet the effects of rape do not end with the crime itself. At the same time a victim is suffering from the severe emotional and physical traumas brought on by the rape, she is also being scrutinized and judged by her community. There is no other crime in which the victim risks being blamed and in so insidious a way—she asked for it, she wanted it.

This is the stigma society has placed on the rape victim and sadly it continues to be prevalent today. Robert M. Morgenthau, District Attorney for the County of New York, writes:

While our society has made progress in sympathizing with rape victims, it remains commonplace for the community to look with suspicion and blame upon the rape victim, wondering why she didn’t offer more resistance or why she was at a particular location at a particular time—as if she were somehow responsible for her own assault.

signal that the court has neither the intention nor the desire to "nationalize" privacy law, i.e. preempt state laws with the complex protections it has provided in defamation law. The decision is likely to usher in a new decade of invasion-of-privacy legislation and litigation at the state level.

53. Overholser, American Shame: The Stigma of Rape, Des Moines Reg., July 11, 1989, at 6A. See sources cited supra note 2; see also Macara & Shephard, Sex Differences in the Perception of Rape Victims, 4 J. INTERPERSONAL VIOLENCE 278 (1989) (describing how men's and women's perceptions of rape victims differ and are altered by variations in the characteristics of the victim); Study Finds People Believe Rape Victims Contribute to Assault Despite Assailant's Guilt, HIGHER EDUC. & NAT'L AFF., July 4, 1988, at 5 [hereinafter Victims Contribute] (presenting the results of a study that show that victims of rape are perceived as blameworthy); Biele, Don't Pressure Victims In Disclosing Names, USA Today, Apr. 4, 1990, at 8A, col. 5 ("Victims are still blamed for where they were, how they were dressed, who they were with, how they live.").
Nancy F. Biele, executive director of the Sexual Violence Center, supports Mr. Morgenthau's opinion, writing, "Studies show that the characteristics of the victim (not the offender) influence how the public reacts to a sexual-assault story." Depending on the victim's attributes—whom she was with, how she was dressed, how she lives—the victim may be seen as more responsible for her actions than the rapist is for his actions.

Despite society's proclivity to judge victims of rape, some people argue that victims' names should be routinely disclosed and that such disclosures would remove the stigma attached to rape. They assert that to remain silent only perpetuates the falsehood that a rape victim is an outcast and incapable of future normal relations. For a rape victim to keep quiet implies agreement with the notion that a woman's body belongs to one man and that she is "damaged goods" if another man touches her. To treat victims of rape differently from victims of burglary or other crimes where the victim's name is routinely reported, they argue, insinuates that being raped is such a disgrace for a woman that her name must be concealed. Karen DeCrow, former president of the National Organization for Women, emphasizes these points by proclaiming, "Now is the time for us to understand that keeping the hunted under wraps merely establishes her as an outcast and implies that her chances for normal social relations are doomed forevermore. Pull off the veil of shame. Print the name." We strongly disagree with the view that keeping rape victims' identities private contributes to the stigma of rape. We also believe that those who seek routine disclosure of victims' names are not adequately considering the harm such an action would bring to the victim. For example, in the same column where DeCrow demands that the media "stop treating victims as pariahs" and print their names, she also says, “While [the

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D1, col. 1, which discusses the community's reaction to the alleged rape of a 17 year-old girl by four Washington Capitals hockey players. Kornheiser wrote:

The men and women I've talked to . . . are appalled by the general description of what took place, but many are also skeptical of the girl's motives. 'What was she doing there to begin with?' is the comment I most frequently hear. Even in this age of enlightenment they seem more receptive to the notion of condemning a 'bad girl' than a 'bad boy.'

Id. at D-8, col. 6 (emphasis added).

55. Biele, supra note 53.

56. See, e.g., Kaplan & Leonard, Should We Reveal Her Name?, Newsweek, Apr. 2, 1990, at 48 ("The paradox . . . is that 'by not printing her name, you're just perpetuating the myth that rape is the worst possible thing that can happen to a woman.'" quoted author Susan Brownmiller); DeCrow, Stop Treating Victims as Pariahs: Print Names, USA Today, Apr. 4, 1990, at 8A, col. 5; Overholser, supra note 53.

57. DeCrow, supra note 56.
woman who was raped while jogging in Central Park in 1989] was hospi­
talized, and in recovery, it seemed insensitive and inappropriate to com­
ment. But, . . . [now that she] has returned to her job . . . [i]t is fitting to 
ask why she was never identified." 58 To us, it is more fitting to ask why 
DeCrow, society, or the media should determine for the victim when 
publicizing her name will no longer be insensitive, will no longer cause 
her emotional harm, or will no longer create further physical danger. 
Every individual's recovery process is unique. Research shows that for 
most victims the trauma caused by rape lasts a minimum of three years 
and, depending on the circumstances, can be permanent. 59 For a third 
party arbitrarily to pick a point in time—such as when the victim is 
released from the hospital, when she returns to her job, when she 
resumes social activities, or when her assailant is in jail—as the appropri­
ate end to a healing period is to sacrifice unilaterally the victim's well­
being for no tangible benefit. Furthermore, asserting that a victim is 
helping to perpetuate the stigma of rape by keeping her identity private 
while she is going through this healing process is a calloused response to 
the problem.

Geneva Overholser, the editor of the Des Moines Register, suggests 
that by not printing the victim's name the media is subscribing to the 
idea that rape is not a crime of brutal violence, and she believes that this 
"sour blight of prejudice is best subjected to strong sunlight." 60 But we 
must ask ourselves, who and what would be exposed under this strong 
sunlight? Revealing the identity of the victim against her wishes focuses 
the attention on the victim, not on those who foster prejudicial views. 
The goal sought by those who advocate routine disclosure of rape vic­
tims' names—erasing the stigma inflicted on victims of rape—would not 
be realized by publicizing their names. 61 In fact, such an action would 
likely strengthen the stigma and have other damaging repercussions as 
well. According to the Sexual Violence Center in Minneapolis, most

58. Id.
59. National Center for the Prevention & Control of Rape, The Sexual Assault Research Pro­
ject: Assessing the Aftermath of Rape, RESPONSE, Fall 1985, at 20-24 [hereinafter Sexual Assault 
Research Project]; See sources cited supra note 2.
60. Overholser, supra note 53.
61. Nancy Ziegenmeyer, a rape victim who voluntarily went public with her identity and the 
details of her rape in response to the Des Moines Register editorial, agrees with our view, stating, 
"We're not going to lessen the stigma by just publishing victims' names. We need to educate society 
to what rape is." Feedback: Other Views on the Crime of Rape, USA Today, July 20, 1990, at 13A, 
col. 1. Indeed, she recently noted that if she had known at the time of the crime that her identity 
would be disclosed, "I would not have reported the crime." Worthington, supra note 3.
public disclosures tend to reinforce rather than dispel sexual assault stereotypes.62 One explanation for this result is that sixty to eighty percent of rapes are committed by an acquaintance, a date, or a husband,63 and frequently the community does not react with support in those situations.64 Family and friends may reject the victim, employers may question her veracity, and others may attempt to distance themselves from the crime and its victim. For these reasons, most women who do go public with their stories are white, middle class women in stable relationships who are raped by strangers.65 Revealing a victim's name without her permission would not change this pattern as the proponents claim.

In addition, why must the victim, who has already suffered from the ordeal of rape, be forced to bear the responsibility of educating society and changing its prejudicial view toward rape and its victims? These negative views have been developed and reinforced by many segments of our society—parents, teachers, newspaper and television reporters, filmmakers, politicians, sports heroes, and other role models.66 The seeds of

62. Biele, supra note 53; telephone interview with Nancy Pride Biele, executive director of the Sexual Violence Center in Minneapolis (July 12, 1990).
63. Women Facing Increased Violence, USA Today, July 18, 1990, at 2A, col. 2 (citing the U.S. DEPARTMENT OF JUSTICE, 1988 FBI UNIFORM CRIME REPORT, NATIONAL CRIME SURVEY); see also Women and Violence: Hearing on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary, Part 2, 101st Cong., 2d Sess. (1990) [hereinafter Hearings on Women and Violence]. More than half college rape victims are attacked by dates. More than four out of five victims know their attackers. Id. at 77. A woman has a one in six chance of being raped by an acquaintance in her lifetime Id. at 74. A national study of rape victims found only 11% of the rapes and attempted rapes were perpetrated by strangers, whereas 62% were perpetrated by male relatives, current or former husbands, boyfriends, and lovers. The remainder were perpetrated by acquaintances with whom the respondent was not romantically involved. Id. at 36.
64. "We are finding that any degree of prior acquaintance, no matter how superficial, dramatically affects the way that the victim is viewed," says Eugenia Gerdes, associate professor of psychology, who conducted a Bucknell University study on the subject. Victims Contribute, supra note 53.
65. Telephone interview with Nancy Pride Biele, supra note 62.
66. See, e.g., Overheard, NEWSWEEK, July 16, 1990, at 15 (quoting Bill Carpenter, mayor of Independence, Missouri: "I say this a lot, and I probably shouldn't: the difference between rape and seduction is salesmanship."); Saholz, Clift, Springen & Johnson, Women Under Assault, NEWSWEEK, July 16, 1990, at 24, ("Sexual assaults are a staple of TV and movies; according to the National Coalition on Television Violence in Champaign, Ill., one out of eight Hollywood films depicts rape."); Callahan, Sex, Lies and Sporting Heroes, Wash. Post, May 27, 1990, at C3, col. 2 ("[O]n national television, Indiana [University] basketball coach Bobby Knight reconfirms the general atmosphere and attitude with his cheerful advice to Connie Chung: 'If rape is inevitable, relax and enjoy it.'"); Kornheiser, supra note 54, at D8, col. 6 ("The Washington Capitals report not a single ticket cancellation in protest, not a single angry letter demanding that these players be punished, or traded, or asking who is responsible for bringing them to this team."); Mann, Running for Governor with '60s Attitudes, Wash. Post, Apr. 25, 1990, at D3, col. 5 (Mann wrote that Clayton Wheat Williams Jr., Republican candidate for governor in Texas, compared the drizzle that was dampening his plans for a cattle roundup to a rape, stating: "If it's inevitable, just relax and enjoy..."
change must come from these same individuals if society is to make any meaningful progress in changing its attitude about rape victims.\(^{67}\)

The media is tremendously influential in our society in forming public opinion on many issues. Consequently, it plays an important part in the process of educating citizens about rape. Routinely publicizing victims' names would not be a responsible step toward furthering this effort,\(^{68}\) and the arguments put forth to support a policy of publicizing victims' names are unconvincing. For example, the media has argued that the victim's name is necessary to add credibility to a story. NBC News president Michael Gartner states, "As wounding as revealing her name may be, it's news. Details add credibility to the story."\(^{69}\) This claim lacks merit. The media has access to police reports, court files, and judicial proceedings, which provide specific details of an alleged rape. The press also may be able to obtain many personal facts about the victim through interviews and other investigative measures that can add credibility to a story.\(^{70}\) With this comprehensive information available,
LIMITING DISCLOSURE

whether the victim was named Jane Doe or Sue Smith is not a necessary element to make a story believable.

Overholser, in contrast takes a different approach in her argument by attempting to analogize the desired results of publicizing a rape victim's name with the apparent actual results of newspaper coverage of gay issues. She writes, "Take homosexuality: Until recently very few gay men or lesbians sought public identification. Now many identify themselves assertively and proudly. Newspaper treatment of gay issues has evolved apace. And society's understanding of homosexuality has grown and matured."71 This argument is weak for at least two reasons. First, the editor refers to newspaper treatment of gay "issues." Without a doubt we believe the "issues" of rape—the frequency of its occurrence, its long term impact on the victim, and the brutal violence associated with it—need better coverage by the media if society's understanding of the crime is to grow and mature. It does not follow, however, that effective coverage of rape issues must include the victim's name. Second, the editor states that many homosexuals now "identify themselves" assertively and proudly. In other words, they go public voluntarily. The rape victim should at minimum be given this same prerogative.

In response to the Des Moines Register's plea for rape victims to speak out, one victim, Nancy Ziegenmeyer, did come forward to publicly reveal her identity and the terrifying, explicit details of her rape.72 She has been called courageous for her action and indeed she is courageous. Yet, the decision to go public was Ziegenmeyer's, not the media's. And despite the accolades she has received, she remains firm in her belief that a rape victim's name should not be made public by the press without the victim's permission. She states, "That is a decision that should be made by the victim when they're healed enough. Speaking out publicly is not for all victims."73 Rape is a unique crime in our society because of the stigma attached to it and the extreme psychological and physical harm


71. Overholser, supra note 53.


73. Scherer, Rape Story: A Flood of Positive Reaction, Des Moines Reg., Mar. 3, 1990, at 2A. Nancy Ziegenmeyer further stated: "I would encourage any rape victim to come forward who has gone through enough counseling and has a support system and she thinks it is right for her. No one should dictate to rape victims that they should speak out. It must be their choice." Feedback: Other Views on the Crime of Rape, supra note 61.
caused by it. Good public policy recognizes this and gives the victim, not
the media, the choice of revealing her identity. To establish such a public
policy and ensure that it will withstand a constitutional challenge, one
must also review the legal issues involved and determine the proper bal­
ance a policy must maintain to protect the victim's right of privacy with­
out unduly interfering with the media's first amendment rights.

V. PRIVACY AND THE FIRST AMENDMENT

The creation of a right to privacy began in 1890 when Samuel D.
Warren and Louis D. Brandeis wrote what has been referred to as the
"most influential law review article of all."74 The now famous and often
cited article grew out of Warren and Brandeis's belief that individuals
needed to be protected from the increasing excesses of the press. They
wrote:

Recent inventions and business methods call attention to the next step
which must be taken for the protection of the person, and for securing
to the individual what Judge Cooley calls the right 'to be let alone.'
Instantaneous photographs and newspaper enterprise have invaded the
sacred precincts of private and domestic life; and numerous mecha­
nical devices threaten to make good the prediction that 'what is whis­
pered in the closet shall be proclaimed from the house-tops.' ... The
press is overstepping in every direction the obvious bounds of propriety
and of decency. ... [M]odern enterprise and invention have, through
invasions upon [an individual's] privacy, subjected him to mental pain
and distress, far greater than could be inflicted by mere bodily injury.75

The propositions put forth by Warren and Brandeis generated extensive
legal debate over whether existing law afforded the principle that each
person had a cognizable legal interest in private life, both physical and
emotional.76 Although the appellate court in the first state to confront
the issue did not accept the Warren and Brandeis principle,77 a subse­
quent state court did recognize the existence of a distinct right to privacy
in Pasvesich v. New England Life Insurance Co.,78 which became the

74. Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890). The article is so
described in Kalven, Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 LAW & CON­
TEMP. PROBS. 326, 327 (1966).
75. Warren & Brandeis, supra note 74, at 195-96 (citing T. Cooley, COOLEY ON TORTS 29 (2d
ed. 1888)).
76. W. PROSSER & W. KEeton, PROSSER & KEeton ON TORTS 850 (W. Keeton 5th ed.
1984); Kalven, supra note 74, at 326.
77. Kalven, supra note 74, at 327 (citing Roberson v. Rochester Folding Box Co., 171 N.Y.
538, 64 N.E. 442 (1902)).
78. 122 Ga. 190, 50 S.E. 68 (1905). See W. PROSSER & W. KEeton, supra note 76, at 851
(citing Pasvesich, 122 Ga. 190, 50 S.E. 68); see also Cox Broadcasting Corp. v. Coln, 420 U.S. 469,
leading case in this area. Several years after the \textit{Pasvesich} decision, an action for privacy was included in the Restatement of Torts\textsuperscript{79} and today virtually all jurisdictions accept the right of privacy in one form or another.\textsuperscript{80}

The product of this evolution is a body of privacy law which, as defined by Prosser, comprises the invasion of four different interests of the plaintiff.\textsuperscript{81} Disclosure of a sexual assault victim's identity falls under the category called "public disclosure of private facts." Scholars have not unanimously determined all the private facts about an individual that are protected under this category, but they have agreed that the law is intended to reflect the need of individuals to keep some core of their personality to themselves, outside the notice of society.\textsuperscript{82} The ultimate value at stake has been described as human dignity, individuality, and autonomy, but the primary point is that control of personal information about oneself is the essence of privacy.\textsuperscript{83} The interest a wholly private individual has in keeping her name out of the public limelight while she recovers from the personal tragedy of rape lies at the heart of this right.

The constitutional right competing with the interests of the rape victim who seeks to keep her identity private is the first amendment freedom of the press to report on matters of legitimate public concern. Both the freedom of the press and the right of privacy protect interests which the

\textsuperscript{489} (1975) (noting that the Georgia Supreme Court first recognized the right to privacy in \textit{Pasevich};) \textit{Kalven, supra} note 74, at 327 (noting that \textit{Pasevich} was the first case in the country to recognize explicitly the right of privacy).

\textsuperscript{79} \textit{W. PROSSER \\& W. KEETON, supra note 76, at 851 (citing \textit{RESTATEMENT (FIRST) OF TORTS} \S 867 (1934-39)) (approving a cause of action for "unreasonable and serious" interference with privacy).}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} The four categories are as follows: 1) unreasonable intrusion upon the seclusion of another; 2) appropriation of another's name or likeness; 3) public disclosure of private facts about another; and 4) publicity which unreasonably places another in a false light before the public. Prosser was of the opinion that to find liability in a suit based on public disclosure of private facts, the plaintiff must show that the disclosure of the private facts is a public disclosure and is not privileged, that the facts disclosed to the public are private, and that the disclosure is highly offensive and would be objectionable to a reasonable person of ordinary sensibilities. The Restatement of Torts adds that the public must not have a legitimate interest in having the information readily available. \textit{W. PROSSER \\& W. KEETON, supra note 76, at 851-63.}


\textsuperscript{83} \textit{Note, supra note 82, at 1474.}
Supreme Court views as "plainly rooted in the traditions and significant concerns of our society." The Court notes that "[t]he tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other," is an issue courts have frequently addressed. The mechanism the Court has developed for resolving these competing interests is a balancing test. Rather than apply a strict rule, the Court attempts to determine which party's interest is more compelling or what weights to give the competing values. The Supreme Court's use of a balancing test to resolve conflicting press and privacy interests was restated by Justice Rehnquist in the Daily Mail case:

Historically, we have viewed freedom of speech and of the press as indispensable to a free society and its government. But recognition of this proposition has not meant that the public interest in free speech and press always has prevailed over competing interests of the public. ... [T]he press is not free to publish with impunity everything and anything it desires to publish. ... We have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented.

As a result of this balancing process by the courts, for most of the twentieth century our courts experienced a strong tide running in favor of the individual's right of privacy over the press's reporting interest. One of the most famous cases is Melvin v. Reid, where the plaintiff was a former prostitute who was tried for murder and acquitted, then later married and became "entirely rehabilitated." She sued the defendant for making a movie seven years after the trial which depicted her former life and used her actual name. The court held that absent the use of the plaintiff's name, the movie would have been protected because the public had a right to know the details of the plaintiff’s trial that were part of a public record. However, the public's interest did not include the need

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89. *Id.* at 286, 297 P. at 91.
90. *Id.* at 290-91, 297 P. at 93.
to know the plaintiff's name because it was not newsworthy and therefore the use of the plaintiff's name "was not justified."91

In State v. Evjue,92 where the defendant published a rape victim's name in violation of a state criminal statute,93 the court held that the statute did not violate the constitutional freedom of the press. The court reasoned:

[The statute] was no doubt intended to save from embarrassment and offensive publicity women who have been the subject of the kind of assault delineated in the statute, and to aid law enforcement officers to more readily obtain evidence for the prosecution of such criminal offenses. It is considered that it is a matter of common knowledge that such victims suffer far beyond anything suffered by men or women in connection with other classes of crimes. It was to prevent this and aid prosecuting officers that the legislature of this and 19 other states have enacted laws of this general character.94

The court found that the publication of the identity of the female ministered to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim. Demonstrating its balancing approach, the court wrote:

When the situation of the victim of the assault and the handicap prosecuting officers labor under in such cases is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime, there can be no doubt that the slight restriction of the freedom of the press prescribed by [the statute] is fully justified.95

Although the court in Sidis v. F-R Publishing Corp.96 did not rule in favor of the plaintiff because it determined the plaintiff was already a public figure, language from that case has been relied upon in subsequent cases upholding the plaintiff's right to privacy over the freedom of the press: "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of

91. Id. at 292, 297 P. at 93.
92. 253 Wis. 146, 33 N.W.2d 305 (1948).
93. The statute in question, Sec. 348.412, Stats. 1945, provided as follows:
Any person who shall publish or cause to be published in any newspaper, magazine, periodical or circular, except as the same may be necessary in the institution or prosecution of any civil or criminal court proceeding, or in the compilation of the records pertaining thereto, the identity of a female who may have been raped or subjected to any similar criminal assault, shall be punished by imprisonment in the county jail for not more than one year or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.
Id. at 153, 33 N.W.2d at 308.
94. Id. at 155, 33 N.W.2d at 309.
95. Id. at 161-62, 33 N.W.2d at 312.
96. 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 711 (1940).
decency." For example, in Garner v. Triangle Publications Inc. the media defendant published magazine articles containing photographs and stories portraying the plaintiff as a principal participant in the murder of the plaintiff's husband. Quoting from Sidis, the court held that the defendant went beyond the limits of decency. It reasoned that if individuals "go beyond the bounds of propriety and decency, they should not be cloaked with and shielded by the public interest in dissemination of 'information'." Similarly, in Nappier v. Jefferson Standard Life Insurance Co. the court ruled against the media defendant when the defendant violated a state statute making it a misdemeanor to publish a rape victim's name. The defendant's television broadcast identified two rape victims through photos of their vehicle, which prominently displayed the name of their puppet show, "Little Jack." In holding for the plaintiff, the court reasoned:

Aside from the personal protection of the woman involved, the object of the law, concededly is to encourage a free report of the crime by the victim. Fear of publicity might deter her from notifying police. Thus the public interest is advanced by the statute: the crime is investigated promptly and the injured person is shielded.

The above cases illustrate the significance the courts place on both the individual's interest in maintaining as private certain truthful information and the state's interests in enforcing the statutes protecting such privacy. In recent years, however, the courts have shifted away from this value assessment and their decisions have without exception sided with the press's right to publish. As Justice White notes in Florida Star, "[T]he trend in 'modern' jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish." With its decision in Cox Broadcasting, the Supreme Court appears to have charted a course which it continues to follow. For example, two years after Cox Broadcasting, the Court in Oklahoma Publishing Co. v. District Court extended first amendment protection to publication of a juvenile's name obtained during what by statute should have been a closed juvenile proceeding. The Court reasoned that even though the juvenile court judge violated the statute by

97. Id. at 809.
99. Id. at 550.
100. 322 F.2d 502 (4th Cir. 1963).
101. Id. at 504.
103. Id. at 553 (White, J., dissenting).
permitting reporters to attend the hearing, once the truthful information was "publicly revealed" or "in the public domain," the Court could not constitutionally restrain its subsequent dissemination. In *Landmark Communications v. Virginia*, the Court held that under the first amendment, Virginia could not criminally punish a newspaper for divulging the confidential identity of a state judge whose conduct was being investigated. The Court felt that the state's interest in maintaining the confidentiality of the judicial review commission proceedings was insufficient to justify encroachments on the freedom of the press. Similarly, in the important case of *Smith v. Daily Mail Publishing Co.* the Court found that the state's interest in protecting the anonymity of a juvenile offender was not significant enough to warrant criminal punishment for the disclosure of such information. There, the press was given constitutional protection when it identified the juvenile after learning his name by monitoring routine police radio frequencies and by interviewing witnesses at the scene of a crime.

State and lower federal courts have followed the Supreme Court's current lead and consistently upheld the press's right to publish over an individual's right to privacy. In *Ayers v. Lee Enterprises* the court, citing *Cox Broadcasting*, ruled in favor of a newspaper which published a rape victim's name and address obtained from a police report. The court reached this result despite the fact that when the victim reported the crime to the police she specifically requested that her privacy be preserved and her name and address not be made public. Although the Court stated "they were understanding of [the] problems and of the reasons why the victim of a rape who reports that crime to the police with the request that her name not be made public would feel justifiably aggrieved at the release and publication of her name and address," the Court went on to hold for the newspaper because it reasoned that any information obtained from a police report is a matter of public record and thus no liability could lie for its publication.

The court in *Poteet v. Rosewell Daily Record, Inc.* dismissed an invasion of privacy claim for the truthful publication of a fourteen-year-old rape victim's name learned from a criminal complaint and published after a preliminary hearing. Again citing *Cox Broadcasting*, the court

108. *Id.* at 535, 561 P.2d at 1002-03.
said the incident was a matter of public record and therefore newsworthy. The court dismissed the argument that the reporter had promised the district attorney the child's name would not be published and that the newspaper had a policy of not using minors' names in reports of sexual assault incidents. Another key example of the current trend is *Howard v. Des Moines Register*, where the court ruled that the press did not invade an institutionalized eighteen-year-old girl's privacy when it published the contents of her medical records indicating she had been sterilized. Even though her records were confidential pursuant to state statute, the court stated that the records lost their confidentiality when they were forwarded from the custodian to the governor's office and made part of a nonconfidential file of complaints against the agency authorizing the sterilization.

These cases, along with the most recent *Florida Star* decision, represent the radical movement of the courts toward ruling in favor of the media over individuals seeking to keep very personal aspects of their lives out of society's view. While the Supreme Court stated in *Florida Star* that it has not exhaustively considered the first amendment and privacy conflicts in cases involving government attempts to sanction the dissemination of truthful information, we believe the Court's efforts to strike an appropriate balance between the rape victim's right to privacy and the public's right to know have accorded far too little weight to the victim's side of the equation. This imbalance is giving the press the freedom to delve into matters that society has always considered to constitute an impenetrable sphere of privacy. If one combines this expanded freedom with today's advanced technology and methods for obtaining and communicating information, the potential results are astounding.

In the late 1800's Warren and Brandeis feared the impact of inventions such as instantaneous photographs and newspapers on an individual's private life. They were concerned about private information being proclaimed from house-tops and the impact of the rise of "yellow" journalism. Could they have even imagined the media would be capable of broadcasting a victim's name on radio waves coast-to-coast or around the world in a matter of minutes; or that the private details of a person's life could be discussed at the family breakfast table while they were being portrayed on a morning television show; or that a telephone could be...
"tapped" and the contents of a private conversation published? The media's ability to penetrate and expose our private daily lives has far surpassed that which Warren and Brandeis sought to protect against. We believe the states must take action to curb effectively this invasion of individual privacy. We are optimistic that the final outcome of the present trend of the courts is yet to be determined. Even though the Court in *Florida Star* ruled in favor of the media, it provided a window of opportunity for correcting this current imbalance when it declined to establish a broad rule constitutionally protecting any truthful information the media wished to publish, and at the same time specifically acknowledged the possible need for sanctions for publishing a rape victim's name. We believe such sanctions are necessary and that they would not prohibit the media from sufficiently fulfilling its role of reporting to the public matters of legitimate public concern. Moreover, as we explore that issue more fully, it becomes apparent that the Court and the media have demonstrated their belief in that premise as well.

The Supreme Court has traditionally stressed the integral role of free speech in a democratic political system. "The Court's theory rests on the premise that free speech provides citizens with that 'access to social, political, esthetic, moral and other ideas and experiences' which citizens require in order to perform 'self-governance'."

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112. Justice White's dissent in *Florida Star* discusses his concern that under the Court's ruling, there will be no private facts that a person can be assured will not be published in newspapers or broadcast on television. *Id. at 2618 n.4* (White, J., dissenting). He illustrates his point using *Boettger v. Loverro*, 521 Pa. 366, 555 A.2d 1234 (1989). In *Boettger*, police officers had lawfully "tapped" the telephone of a man suspected of bookmaking. In a preliminary court hearing, a prosecutor inadvertently attached a transcript of the phone conversation to a document filed with the court. A reporter obtained a copy of the transcript due to this error, and his newspaper published a version of the remarks disclosed by the telephone tap. The trial court ruled that a newspaper could not be punished by civil damages for disclosures resulting from the negligence of custodians of confidential records. The Superior Court reversed. Although the Supreme Court of Pennsylvania upheld the civil liability award against the newspaper, concluding that individuals' rights to privacy outweighed the interest in public disclosure of such private telephone communications, Justice White writes that the *Florida Star* decision suggests that the Pennsylvania Court's ruling was erroneous.

113. *Florida Star*, 491 U.S. at 541.


115. Note, supra note 82 at 1463 (quoting Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971)).
In other words, "the First Amendment does not protect a freedom to speak. It protects the freedom of those activities of thought and communication by which we govern." The Court reaffirmed this self-governance rationale in *Cox Broadcasting* when it stated that the freedom of the press to publish information obtained from public judicial records is of "critical importance to [a democratic] government in which the citizenry is the final judge of the proper conduct of public business."

In *Cox Broadcasting* a television reporter covering a murder and rape trial broadcasted information he obtained from official court records which were maintained in connection with the public prosecution and which were open to public inspection. Included in the court records and the reporter's news broadcast was the victim's name, the disclosure of which was the issue in this lawsuit. In ruling for the television station, the Court explained that the judicial records from which the victim's name was obtained were an example of the very type of documents which contain basic data of government operations that the public must have access to in order to evaluate the effectiveness of the institutions which govern them. The Court added that because most individual citizens in our society have limited time and resources of their own to observe the operations of their governmental institutions firsthand, the press provides that function for them. In this respect, the press serves as a necessary link in the flow of vital information about government proceedings to the electorate, dispensing the information in a timely and convenient format. Although the Court avoided identifying other types of official records which contain information that should be made available to the press for publication, it did decide that the media should be able to publish information released to the public in official court records. The Court stated, "Without [such] information . . ., most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." The key element, then, in both the *Cox Broadcasting* decision and the Court's traditional reasoning


We, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness. Now it is these activities, in all their diversity, whose freedom fills up "the scope of the First Amendment." These are the activities to whose freedom it gives its unqualified protection. And it must be recognized that the literal text of the Amendment falls far short of expressing the intent and the scope of that protection.


118. Id. at 492.
in this area is the relation of the published information to the public's self-governing process. This element is the critical factor in determining whether information is a legitimate matter of public concern.

Acknowledging this axiom, the appellant in *Florida Star* argued that when the newspaper ran a story about the rape, it had printed a legitimate matter of public concern. The appellant asserted that the matter involved the actions of government, was of concern to a self-governing people, and was within the responsibility of the press to report.\(^{119}\) It quoted from *Cox Broadcasting*: "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operation of government."\(^{120}\) In actuality, however, when the newspaper included the rape victim's name in its story about the rape, it went beyond reporting information concerning the commission of a crime to reporting an intimate detail. The Court explicitly recognized this fact, as well as the unimportance of the victim's name to the public, when it stated, "[T]he article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities."\(^{121}\) A rape victim's name is clearly not a piece of information relevant to the public's self-governing choices, which the Supreme Court has identified as the major underlying rationale for freedom of speech.\(^{122}\) With a rape, the value of the news item is the rape's occurrence, the location of the crime, the assailant's identifying characteristics, and the status of the assailant's apprehension. This is the type of information the public needs in order to evaluate the services provided by government, such as whether the community has appropriate safety measures in the crime area, whether the police force is performing its job effectively, or whether existing emergency procedures are adequate. Reporting the victim's name does nothing more than feed the public's curiosity.

The media in *Florida Star* also argued that prohibiting disclosure of a rape victim's name would disable the press from providing the public

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120. *Id.* (quoting *Cox Broadcasting*, 420 U.S. at 492).
121. *Florida Star*, 491 U.S. at 536-37 (emphasis added).
122. The Georgia State court made this point in its *Cox Broadcasting* opinion: "There is simply no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection." *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 68, 200 S.E.2d 127, 134 (1973), rev'd, 420 U.S. 469 (1975).
with the broader, truly important information society needs to govern itself. And, in both Cox Broadcasting and Florida Star, the Court noted concern about whether a rule restricting the publication of certain truthful information would make it difficult for the media to inform citizens about the public business and yet stay within the law. In Cox Broadcasting Justice White wrote, "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." Justice Marshall in Florida Star stated, "[Such a rule] would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication."

These pronouncements must be given great weight, but let us not lose sight of the issue before us. We are not suggesting that a nebulous concept be enacted into law that would require the media continually to analyze information to determine whether or not it was publishable. We are merely proposing a limitation on the disclosure of a rape victim's identity—an easily distinguishable piece of information. In addition, before it is determined that such a law would unreasonably restrain the media or that the media is incapable of restricting disclosure of a victim's name without harmful results, a review of current media practices is in order.

The journalists' code of ethics and the policies of most members of the media currently prohibit publication of a rape victim's name. No more than five to ten percent of newspapers routinely use rape victim's names. In fact, the New York Times calls the policy "one of modern journalism's few conspiracies of silence." And even though a few members of the media, such as NBC News president Michael Gartner,

123. Appellant's Brief at 17, Florida Star v. B.J.F., 491 U.S. 524 (1989) (No. 87-329) ("The chilling effect on a free press and consequent constriction of the free flow of vital information about the government to its electorate are self-evident.").
124. Cox Broadcasting, 420 U.S. at 496.
127. Id.
128. Id. Still, a prohibition on publishing the name of the victim will not necessarily protect her identity. See for instance the angry letter to one Arizona newspaper concerning the paper's reporting of a recent sexual assault:
disagree with the policy because, as Gartner says, "it's not the job of the media to keep secrets," the majority supports exercising such restraint. Furthermore, it is doubtful many would argue that as a result of working within this established policy of not disclosing rape victims' names, members of the media have become more timid in their endeavor to investigate and report the news. From our vantage point, news reporters appear no less aggressive in pursuing their stories. Codifying in a rule of law what is already the prevailing practice would not have a chilling effect on the media.

Interestingly, in the time span between Cox Broadcasting and Florida Star, one member of the Supreme Court changed his views regarding the concerns of rape victims versus the burden such a disclosure rule would impose on the media. Justice White's majority opinion for the Court in Cox Broadcasting upheld the right of the media to publicize a rape victim's name without even a discussion of the harm to the victim. However, Justice White dissents in Florida Star stating,

[I]t is not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victim's name, address, and/or phone number. The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society.

... There is no public interest in publishing the names of persons who are the victims of crime . . . .

Perhaps we should take heed from the Justice who started the Court down the path of curtailing rape victims' privacy rights with the Cox Broadcasting decision and now believes "we have hit the bottom of the slippery slope." Justice White maintains, and we agree, that a line can and should be drawn "higher on the hillside"—high enough to protect

Shame, shame, shame on The Arizona Daily Star, re: the report of a sexual assault, in the Metro Section of the June 1 edition. The article that I am referring to contained a description of the area where the victim was found, the block in which she lives and a detailed description of her vehicle. The only information the article did not contain was the victim's name and license plate number on her car. Anyone who lives in her area will know who this woman is now—thanks to your paper's "responsibility to report news."

Surely an individual's right to privacy and confidentiality outweighs the Star's freedom of speech.


129. Kaplan & Leonard, supra note 56.
130. Id.
132. Id. at 553.
133. Id.
the rape victim’s privacy rights but at the same time not to interfere with the reporting of matters of legitimate public concern. The remaining factor to weigh in this analysis is one strongly emphasized by the Court in both Daily Mail and Florida Star—the states' interests in limiting disclosure of rape victims’ identities.

VI. STATE INTERESTS

In Florida Star, the Supreme Court conceded the “highly significant interests” of the state in limiting disclosure of a rape victim’s name: “the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure.”

We now examine those interests to consider how important they really are. We have already discussed a number of privacy issues relating to victims of sexual offenses and the unique stigma attached to rape. Clinical research shows that high levels of fear and anxiety dominate the victim’s psychological state and behavior immediately after the rape. During this period, each victim is forced to make many personal choices about how to contend with the effects of the assault as they impact both her and those around her in home, work, and social environments. Exacerbating this situation is the question of pregnancy or AIDS resulting from the rape. A victim’s apprehension about such possible consequences can add even more trauma to that which she has already sustained. As stated by Carolyn Holmes, a psychologist at the University of Texas Medical School, “AIDS has made rape an even more frightening and traumatic experience. . . . There has always been a concern about venereal disease, but now [the victim’s] life is involved.”

134. Florida Star, 491 U.S. at 537 (citing Brief for Appellee at 29-30).
obviously be devastating and life threatening.\textsuperscript{137} To expose a person’s identity without her consent strips these private and personal decisions away from her and places them in the hands of a remote stranger. Such an action can only slow the victim’s healing process, a process the state has a significant interest in protecting.

The state’s interest in the physical safety of rape victims is also of the highest order. The facts in \textit{Florida Star} provide a vivid example of the dangerous consequences that disclosing a victim’s name may possibly have, particularly when the assailant is still at large. Here the victim’s name was published within days of her assault. While she was still hospitalized, her mother received several telephone calls from a man who stated that he would rape the victim again. The plaintiff was forced to change her telephone number, seek police protection, and eventually change her residence. Publication of the rape victim’s name subjected her to harassment and threats by the rapist or others. It is not inconceivable that such a publication could also enable the assailant to locate and further harm the victim, knowing she is capable of identifying him and assisting in his apprehension. Even in cases where the assailant has been apprehended and retaliation is not a threat, publicizing the victim’s name just after the crime can plant an idea in a potential criminal’s mind that the victim is a vulnerable target. In fact, it is unknown whether the man who made the threatening phone calls in \textit{Florida Star} was the actual rapist or another person. Thus, the possibility that publicizing a victim’s name can create another crime is a very real one.

Finally, the state’s interest in assisting rape victims and encouraging them to report their rapes is paramount if the state is to compile more accurate statistics on the severity and frequency of the crime, and if it is to more readily obtain evidence for prosecuting rapists. Frightening statistics already show that during the past ten years rape rates have risen nearly four times as fast as the total crime rate, that every hour sixteen American women confront rapists, and that every six minutes a woman is raped.\textsuperscript{138} Astounding as these figures are, rape remains the most

\textsuperscript{137} In addition to the life-threatening impact of AIDS, a victim can be subjected to a stressful situation if she decides to raise the AIDS issue at trial. “If a woman claims she got AIDS from [the rapist], it will open the door to examining her entire sexual history. . . . The defense would attempt to prove she could have gotten it from somebody else.” \textit{Id.} (quoting sociologist Pauline Bart, co-author of \textit{Stopping Rape: Successful Survival Strategies}). “AIDS is so insidious. . . . It serves as a good metaphor for the sexual trauma of rape.” \textit{Id.} (quoting Eugene Porter, an Oklahoma psychologist).

\textsuperscript{138} \textit{Hearings on Women and Violence, supra} note 63, Part 1 at 12 (data compiled by the majority staff of the Senate Judiciary Committee).
underreported crime within the criminal justice system. In 1988, 92,486 rapes were reported to the authorities, yet the FBI estimates actual rapes could total over 900,000 a year. One reason frequently mentioned by victims who do not report their rapes to the police is their uncertainty about whether they will be able to maintain their privacy if they do report the rape. They want control over when and to whom they will reveal the details of their tragedy. Knowing of the severity of the situation, the state has a substantial and tangible interest in guaranteeing a victim's anonymity in order to encourage reporting of rapes. If victims knew anonymity would be guaranteed when they reported a rape and knew that a civil cause of action would be available for violations of that guarantee, the number of victims who would come forward would likely increase. Conversely, if states do not take such protective measures and victims know their names could be made public, the result would likely be a decrease in the already low reporting rate.

In *Florida Star* the Supreme Court specifically noted the possible necessity of imposing civil sanctions for the publication of a rape victim's name in order to advance these significant state interests, but only when sanctions are in the confines of a narrowly tailored statute. Several important drafting issues must be confronted before such a comprehensive statute can be successfully enacted.

VII. A COMPREHENSIVE STATUTE

A. Drafting Issues

Repeatedly, the Supreme Court has made clear that a state may regulate media reporting only if it shows that the interests promoted are truly of the highest order. As indicated above, Justice Marshall in *Florida Star* recognized that such a showing can be made as to the limitation of the disclosure of rape victims. However, it is not enough that the state's interest be of a high order. This is but the first requirement; the

139. *Id.* at 51 (statement of Linda Fairstein, Assistant District Attorney, New York County).
140. U.S. DEPARTMENT OF JUSTICE, 1988 FBI UNIFORM CRIME REPORT, NATIONAL CRIME SURVEY. The April 17, 1991 *USA Today* poll found that 46% of women said if raped, they would be less likely to report it if they knew their names would become public. Sanchez, *supra* note 68.
143. *Id.* at 536-37; see *supra* note 134 and accompanying text.
state must also show that in order to promote these interests, it has taken steps to ensure that it intends to keep the matter private. Hence, broad-based disclosure by government officials will undoubtedly refute the state's assertion that these interests are among the state's highest priorities. 144

At least six Justices of the Supreme Court were troubled by the underinclusive nature of the prohibition in Florida Star. As Justice Scalia put it, "[A] law cannot be regarded as protecting an interest 'of the highest order' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." 145 For Justice Scalia and the majority Justices, this appreciable damage was caused by communication of the rape victim's identity by those other than the media. Therefore, before a prohibitive statute in this area will be approved the law must presumably extend to all those who disseminate the information. 146 A valid statute must explicitly recognize potential liability for those outside of the communications industry.

The majority of the Florida Star Court was also greatly concerned with the Florida court's willingness to allow a judgment on a judicial finding of "negligence per se." Justice Marshall commented that there was no requirement of a specific determination as to the defendant's culpable state of mind. Such a failure, he wrote, would allow recovery even when essentially no damage was done, such as when "the identity of the victim is already known throughout the community; [when] the victim has voluntarily called public attention to the offense; or [when] the identity of the victim has otherwise become a reasonable subject of public concern." 147 It is vital, then, for a statute to include a stringent state of mind requirement with respect to both the publication of the information and the likely impact of such publication.

144. See, for example, the relatively easy conclusions reached by the Court in cases such as Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977), where the judge allowed reporters into the courtroom to hear the information but then attempted to prohibit them from reporting on the proceedings which they had observed. Indeed, in both Cox Broadcasting and in Florida Star the information was made readily available to reporters with limited investigation on their part.
146. It is not entirely clear why the concern as to underinclusiveness was so great in the majority and concurring opinions. That is, why could not the legislature determine that mass media communication is a much greater problem or that dealing with that particular problem was a necessary first step in combating a statewide issue? In addition, as Justice White stated, the state may already have felt it covered private dissemination in the tort action for public disclosure of private facts. Id. at 549-50 (White, J., dissenting).
147. Florida Star, 491 U.S. at 539.
Finally, an unstated but clearly present concern of the Justices related to the implied right of action in both *Florida Star* and *Cox Broadcasting*. That is, in both cases a criminal statute was at issue and the trial courts attempted to determine whether the state tort law allowed for recovery in this area or whether such an action could be implied from the criminal violation. To set out clearly the appropriate balance of privacy and first amendment interests, a specific cause of action should be created by the legislature.

**B. THE STATUTE**

**LIMITING DISCLOSURE OF RAPE VICTIMS' IDENTITIES**

*Preamble:* It shall be the policy of this state to make every effort to limit the disclosure of the names or other identifying information concerning victims of sexual assaults. This policy is adopted in order to protect the privacy and the safety of victims of sexual assaults and to encourage victims of such crimes to report these offenses without fear of exposure. To promote this policy the state creates the following civil right of action.

Any entity or individual who communicates to others, prior to open judicial proceedings, the name, address, phone number, or other specific identifying information concerning the victim of a sexual assault shall be liable to that victim for all damages reasonably necessary to compensate the victim for any injuries suffered as a result of such communication. The victim shall not be able to maintain a right of action unless she is able to show, by clear and convincing evidence, that such communication was intentional and was done with reckless disregard for the highly offensive nature of the publication. Punitive damages shall not be awarded in an action brought pursuant to this section.

**C. COMMENTARY**

The preamble to the statute makes clear that the purposes behind the statute are of the highest order. That these purposes are genuinely of the highest order was expressly recognized by the Court in *Florida Star*. Disappointingly, however, the opinion by the Florida state court made no reference either to these interests or to the limited intrusion on first amendment values which would result if restrictions on the disclosure of sexual assault victims' identities were pursued.148 The preamble also

148. There is absolutely no analysis of either the first amendment interest or of the privacy interest. Instead, the court simply concludes that a rape victim's name is "of a private nature and
states the need to limit disclosure of victims' identities, a policy which the state of Florida had thought it was pursuing in *Florida Star*. The Florida Attorney General had opined that "the name or other identifying information concerning victims of sexual assaults is not part of an open public record and may not be publicly disclosed in any manner by the custodian of such records." 149

The statute expressly creates a civil right of action while making no reference to criminal proceedings. The initiation of criminal proceedings in this area creates severe difficulties. 150 The Supreme Court itself, in referring to the kind of law which might survive constitutional scrutiny, specified "civil sanctions." 151 The statute imposes liability for any individual or entity publishing the information; of course, this is an attempt to avoid the "underinclusive" arguments put forth by both the majority and concurring opinions in *Florida Star*. This statute also is limited to disclosures that occur prior to open judicial proceedings. Normally some sort of protective order can occur at the trial to limit disclosure. 152 Furthermore, in most cases the troubling disclosure occurs prior to open judicial proceedings. 153 Moreover, limiting the statute's application to disclosure prior to open judicial proceedings lessens the first amendment impact here, an impact of great significance in *Cox Broadcasting*. If reporters are writing of open judicial proceedings involving major state crimes, it is highly doubtful that disclosure could routinely be limited and ultimately punished. 154

The cause of action created under this statute is limited to the victim whose identity is disclosed. A case such as *Cox Broadcasting*—where the plaintiff was a member of the victim's family—could not be brought under this law. We believe this is an appropriate limitation because


150. See Marcus, *supra* note 45, at 271-73.
151. *Florida Star*, 491 U.S. at 537.
152. The Florida court in *Sarasota-Bradenton* made specific reference to the state's ability to seek a protective order to ensure that the victim's name and photograph not be published. 436 So. 2d at 331.
153. But see *Sarasota-Bradenton*, 436 So.2d at 329-30, where the television station ran a video-tape of the rape trial and the victim's name and picture were broadcast to the viewing audience. This occurred even though law enforcement authorities had assured the victim that such disclosure would not take place.
154. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975). The opinion in *Cox Broadcasting* reflected the special protection given to reports of judicial proceedings.
undoubtedly it is the victim who suffers the most from disclosure. Moreover, it is difficult to know where to draw the line if persons other than the victim can bring an action. Spouses, live-in companions, children, parents, and close friends could all have legitimate claims.

No effort is made to define the compensatory damages that would be present in this statute. We assume that the common law principles found throughout the United States can deal with the question in much the same way it has been dealt with in both privacy and defamation actions for the last twenty-five years. The grave difficulties that would be created by punitive damages155 are eliminated here because punitive damages are explicitly unavailable.

The burden of proof and the requisite states of mind create perhaps the most significant problems in this area. We have adopted the “clear and convincing” evidence standard from the Supreme Court's line of defamation cases.156 Such a standard effectively balances first amendment concerns against the interests of individuals. Unless the individual can maintain such a high degree of proof, it is not clear that she ought to be able to prevail in connection with the disclosure of truthful information. As to the states of mind required here, it is a two-pronged procedure. First, the cause of action rests upon a showing of intentional publication. A mere misstatement or a negligent disclosure would be insufficient to subject a publisher to liability. Second, the reckless disregard standard, borrowed from New York Times v. Sullivan, is applied to the degree of offensiveness present in the case. This is a direct link to Justice Marshall's own concern over a lack of scienter in Florida Star157 and may be traced to a line of state cases attempting to balance truthful disclosure with privacy interests.158

155. See supra note 23.
158. See, e.g., Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), where Readers Digest published an article specifically mentioning the name of an individual who had been convicted of a crime many years before and had thereafter become rehabilitated. In attempting to balance both the privacy and first amendment concerns the California Supreme Court remanded the case to the trial court to decide the following:

1) Whether plaintiff had become a rehabilitated member of society, 2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, 3) whether defendant published this information with a reckless disregard for its offensiveness, and 4) whether any independent justification for printing plaintiff's identity existed.

Id. at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876.
VIII. CONCLUSION

The disclosure of the identity of a rape victim prior to trial is an outrageous and shocking penalty imposed on a woman already brutalized by a violent and terrorizing crime. As the supervisor of a family violence center recently noted, "[Disclosure] would be the worst thing in the world you could do to a victim. It is the most crucial time in that person's life." Conversely, the impact that disclosure limitations will have on freedom of the press have been widely overstated. Imposing narrowly drawn restrictions will not severely inhibit the media or unduly limit the public's right to know. What such restrictions will do, however, is provide significant protection to victims of a horrible crime and encourage these victims and witnesses to come forth and become involved in the prosecution of these crimes. The statute we propose here carefully balances the interests that the Supreme Court has confronted for over two decades. We believe states should enact it into law.

159. Worthington, supra note 3 (quoting Dee Ann Wolfe, supervisor of the Family Violence Center in Des Moines).