Raped Once, But Violated Twice: Constitutional Protection of a Rape Victim's Privacy

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NOTES

RAPED ONCE, BUT VIOLATED TWICE:
CONSTITUTIONAL PROTECTION OF A
RAPE VICTIM'S PRIVACY

INTRODUCTION

During the early morning hours of March 30, 1991, a twenty-nine-year-old woman was allegedly raped by William Kennedy Smith, the thirty-year-old nephew of Massachusetts Senator Edward Kennedy. On April 7, 1991, her identity was disclosed in The Sunday Mirror, a British tabloid. On April 15, 1991, her identity was further publicized in the Globe, a supermarket tabloid based in Boca Raton, Florida. On April 16, 1991, NBC's "Nightly News" became the largest mainstream news organization to identify the alleged rape victim. Finally, on April 17, 1991, one of the nation's most circumspect newspapers, The New York Times, published a

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2 Shaun Nix, Debate Over Naming Rape Victims, S.F. CHRON., Apr. 18, 1991, at A1; see also On Names in Rape Cases, N.Y. TIMES, Apr. 17, 1991, at A17 (London tabloid published victim's name and photograph along with lurid account of alleged incident).


4 Warren, supra note 3, at C5. The NBC newscast has an estimated average audience of 8 million homes. Id. The other major networks, ABC, CBS, and CNN, did not identify the alleged victim. Id.
story describing her in great detail. Amidst the resulting public outrage, David Bludworth, the Palm Beach County prosecutor, filed misdemeanor charges against Globe Communications, the publishers of the Globe, for printing the name and photograph of the alleged victim in violation of a Florida statute.

Next to homicide, rape is the “ultimate violation of self”; rape
is also the most rapidly increasing and most misunderstood violent crime in the United States. Respecting the privacy of sexual assault victims, many of the nation’s newspapers have voluntarily refrained from publishing the names of alleged rape victims. Although, according to some recent polls, the public agrees with this policy of self-restraint, the media still often display insensitivity in reporting the nature and circumstances of a sexual assault. At times, “the media continue to glorify and romanticize violent sexual behavior.” The rape victim may also suffer insensitivity and mistreatment from the police, medical professionals, and the public. As a consequence, rape victims often decline to seek justice against the perpetrator of the crime. Thus, although the changes

10 See Alex Jones, Naming Rape Victim Is Still a Murky Issue for the Press, N.Y. TIMES, June 25, 1989, at A18. Feminists’ contention that victims were being “raped twice,” once by their assailants and again by newspaper coverage that exposed them to public scrutiny, persuaded most editors and publishers to refrain from identifying victims. See id.; see also Glaberson, supra note 6, at A14 (virtually all major news organizations protect alleged rape victims unless victims choose to come forward); SEATTLE TIMES, Apr. 17, 1991, at A6 (except in cases where victim consented to identification).
11 See Marjie Lundstrom, Poll: Don’t Name Rape Victims Decision Shouldn’t Be Left to Media, USA TODAY, Apr. 9, 1990, at 3A. An April 4, 1990 poll taken by Gannett News Service/USA Today revealed that an overwhelming majority of the public believes that “[t]he names of rape victims should be kept out of news stories unless the victim agrees,” 84% of those persons polled said that “rape victims should decide whether their names become public,” whereas a mere 5% “think the media should decide whether to print or broadcast names.” Id.; see also Sandra Sanchez, Rape Poll: No Names, Say 91%, USA Today, April 18, 1991, at 1A (in poll conducted by USA Today on April 17, 1991, percentage of those persons polled who said that rape victims should decide for themselves whether their names become public rose to 91%).
12 See JOHN M. MACDONALD, RAPE: OFFENDERS AND THEIR VICTIMS 27 (1971). For example, one well-publicized account of a sexual assault included reference to the discovery of rocks in the vagina of a comatose victim. Id.
13 KEMMER, supra note 9, at xii.
14 Id. at xi. A rape victim’s report to police is often met with “incredulous remarks and unsympathetic attitudes.” Id. During trial, responsibility for the crime is often attributed to the rape victim. Id. Furthermore, a victim’s physical, emotional, and psychological needs are often inadequately served because of shortages in specialized personnel. Id. See generally GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989) (examination of “legal processing” of rape cases); WILLIAM B. SANDERS, RAPE AND WOMAN’S IDENTITY 81-124 (1980) (discussing police investigations of rape and construction of truth and lies in such investigations). For information regarding medical treatment of rape victims, see generally AMERICAN HEALTH RESEARCH INST., RAPE-VICTIMS, OFFENDERS & TREATMENT WITH MEDICAL SUBJECT ANALYSIS & RESEARCH GUIDE (1984).
15 See MacDonald, supra note 12, at 27. Because the arrest of the rapist does not preclude further risk of attack, many victims are frightened into remaining silent. Id. Fear
in public attitudes towards rape, the effects of the women's liberation movement, and the increased sensitivity of the criminal justice system have resulted in an increase in reported rapes,\textsuperscript{16} rape is still one of the most underreported crimes.\textsuperscript{17} Unfortunately, the aftermath of the Palm Beach incident may perpetuate such inaction by victims.\textsuperscript{18}

Dissatisfied with the lack of protection for rape victims, many states have initiated legislative reforms ranging from a redefinition of the crime of rape to the enactment of laws designed to protect a victim's right of privacy.\textsuperscript{19} Several states, including Florida, now statutorily prohibit the disclosure of a rape victim's identity.\textsuperscript{20}

of newspaper publicity and of embarrassment in the courtroom are other factors that may discourage victims from reporting rapes. \textit{Id.} A wife's fear of rejection by her husband may induce silence. \textit{Id.} Finally, many victims do not report sexual assaults by family members or close friends. \textit{Id. at 27; see also Doe v. Sarasota-Bradenton Florida Television Co., 438 So. 2d 328, 329 (Fla. Dist. Ct. App. 1983) (rape victim agreed to testify based on assurances by state that her name and photograph would not be published).}


\textsuperscript{17} See M. KOSS & M. HARVEY, THE RAPE VICTIM: CLINICAL AND COMMUNITY APPROACHES TO TREATMENT I (1987) (citing LAW ENFORCEMENT ASSISTANCE ADMIN., CRIMINAL VICTIMIZATION SURVEYS, in 13 AMERICAN CITIES (1975)). Law enforcement officials estimate that "for every rape reported, three to ten rapes are committed but not reported." \textit{Id.; see also Hubert S. Feild & Leigh B. Birnen, Jurors and Rape 75 (1980) (although estimates vary, most authorities agree that between 10% and 30% of rapes are reported to police) (citations omitted); S E D E L L E K A T Z & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 185-86 (1979) (citing studies from 1950s and 1970s on women's reluctance to report rapes).}

\textsuperscript{18} See Sanchez, supra note 11, at 1A. According to an April 17, 1991 USA Today poll, 46% of the women polled said that if they were raped, they would be less likely to report the crime if they knew that their names would become public. \textit{Id.} As a consequence of the publicity received by the rape case in Palm Beach, "victims already are calling the crisis center, confused about whether they should report rapes." Judy Keen & Carolyn Pesce, Misadventure in Paradise—Kennedy Name Keeps Case in Headlines—Clout, Cash Complicate Investigation, USA Today, Apr. 18, 1991, at 1A.

\textsuperscript{19} See NATIONAL INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES, AND CRIMINAL JUSTICE AGENCIES 271 (1975). A number of states have adopted major revisions of the definition of rape that categorize the crime into varying degrees of offenses. \textit{Id.} Another primary concern of reformists is to eliminate the requirement of evidence corroborating the victim's testimony. \textit{Id.} A second major evidentiary reform concerns restricting admissibility of evidence of the victim's prior sexual conduct. \textit{Id.} at 271-73.

This Note will focus on the constitutionality of such laws and other measures that protect the privacy rights of rape victims. Part One will review the respective foundations of privacy rights and First Amendment rights, which are often in conflict in cases involving the publication of rape victims' identities. Part Two will consider the constitutionality of state statutes proscribing the reporting of truthful information such as the identity of a rape victim. Part Three will address collateral means of protecting the privacy of rape victims, including courtroom closures and "gag orders." Finally, this Note will conclude that the Florida statute under which Globe Communications is being prosecuted is unconstitutional, and that the case will fail to answer the question of how the state may protect the privacy of rape victims.

I. THE RIGHTS IN CONFLICT

A. Background—The Right of Privacy

In comparison to more established legal doctrines, the right of privacy is a recent development. It was spurred by the publication in 1890 of what became the seminal article in the area, in which Samuel Warren and Louis Brandeis advocated the recognition of an independent right of privacy. In particular, the improprieties of the press with respect to private matters convinced these commentators to advocate a change in the existing law. In legislatures and the United States Congress have introduced similar legislation protecting the privacy of sexual assault victims. Id.

See THOMAS M. COOLEY, TORTS 29 (2d ed. 1888). In his popular treatise on tort law, Judge Cooley coined the phrase, "the right . . . to be let alone." Id. Ironically, although his terminology has become synonymous with a right to privacy, Judge Cooley used this term to encompass the individual's right to be free from physical intrusions. Id. at 24, 29 (discussing "the right to immunity from attacks and injuries").

See WILLIAM L. PROSSER ET AL., TORTS 951 (8th ed. 1988). Prior to 1890, no English or American court had expressly granted relief based on the right to privacy. Id.


See id. at 196. The article stated the following: The press is overstepping in every direction the obvious bounds of propriety and of decency . . . . To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers . . . . Solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Id.
1903, New York became the first state to accept the right of privacy,25 which gained momentum in the decades to follow.26 The Supreme Court has since that time recognized a constitutional right of privacy.27 Almost a century since its inception, the right is "firmly ingrained in the common law of most states and occupies a prominent place in American society and jurisprudence."28

The common law right of privacy has given rise to four torts for four distinct interferences with an individual's privacy.29 The

25 See Ch. 132, §§ 1-2, [1903] N.Y. LAWS 308, as amended, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1991). In 1902, however, the New York Court of Appeals had rejected the existence of a right to privacy. See Roberson v. Rochester Folding-Box Co., 64 N.E. 442, 443 (N.Y. 1902) (expressing fear that adoption of Warren and Brandeis's proposals would result in absurd and illogical litigation). In response to this decision, the following year the New York legislature enacted a statute that prohibited the use of the name, portrait, or picture of any person for "advertising purposes or for the purposes of trade" without his written consent. See Ch. 132, §§ 1-2, as amended, N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1991). The first major court to adopt Warren and Brandeis's views was the Supreme Court of Georgia. See Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

26 See generally Basil W. Kacedan, The Right of Privacy, 12 B.U. L. Rev. 353, 353-55 (1932) (arguing that every person has absolute right to demand freedom from public scrutiny of private affairs); Wilfred Feinberg, Recent Developments in the Law of Privacy, 48 COLUM. L. REV. 713, 731 (1948) (because of circumspect application of doctrine, right of privacy will not lose its vigor in immediate future); Wilbur Larremore, The Law of Privacy, 12 COLUM. L. REV. 693, 707-08 (1912) (prognosis for establishment and development of right of privacy is favorable).

27 See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (recognizing a "zone of privacy created by several fundamental constitutional guarantees"); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (right of privacy is no less important than any other right reserved to the people) (citation omitted); see also Erwin N. Griswold, The Right To Be Let Alone, 55 N.W. U. L. Rev. 216, 216-17 (1960) (as an underlying theme of Bill of Rights, right to be let alone is implicit in Constitution).


29 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 851 (5th ed. 1984) [hereinafter PROSSER & KEETON]. First, the tort of appropriation prohibits the unauthorized annexation of one's name or likeness for another's benefit. Id. Second, the tort of unreasonable intrusion prohibits highly offensive intrusion upon the seclusion of another. Id. § 117, at 854. The third type of interference concerns publicity that places one in a false light in the public eye. Id. § 117, at 863. Fourth, the tort of public disclosure of private facts penalizes the publication of "highly objectionable . . . private information about the plaintiff, even though it is true and no action would lie for defamation." Id. § 117, at 866.
tort most analogous to statutes proscribing the publication of truthful information, such as a rape victim's identity, is the tort of public disclosure of private facts,\textsuperscript{30} which creates liability for the public disclosure of private facts that would be highly offensive to a reasonable person of ordinary sensibilities.\textsuperscript{31} Public disclosures with respect to public figures and matters of public interest, however, were privileged under the common law.\textsuperscript{32}

The public figure privilege is premised on the fact that certain persons, by their accomplishments, fame, or profession, give the public a legitimate interest in their affairs.\textsuperscript{33} The privilege afforded matters of public interest similarly arises out of the public's right to such information and the freedom of the press to report it.\textsuperscript{34} Among other matters, this privilege has been extended to criminal activity,\textsuperscript{35} suicide,\textsuperscript{36} and marriage.\textsuperscript{37} Therefore, in proscribing the reporting of a rape victim's identity, the court should consider whether the victim is a public figure or whether the circumstances of the attack are a matter of public concern.\textsuperscript{38}

B. Background—The First Amendment

The First Amendment's guarantee of freedom of speech, which was incorporated to the states via the Due Process Clause of the

\textsuperscript{31} PROSSER & KEETON, supra note 29, § 117, at 856. The Second Restatement of Torts requires in addition that the public not have a legitimate interest in the information. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).
\textsuperscript{32} Id. § 117, at 859.
\textsuperscript{33} PROSSER & KEETON, supra note 29, § 117, at 859.
\textsuperscript{34} Id. § 117, at 859-60.
\textsuperscript{35} PROSSER & KEETON, supra note 29, § 117, at 860.
\textsuperscript{36} See Elmhurst v. Pearson, 153 F.2d 467, 468 (D.C. Cir. 1946) (sedition).
\textsuperscript{38} See Aquino v. Bulletin Co., 154 A.2d 422, 430 (Pa. Super. Ct. 1959). The court stated that "[t]he publication of a newsworthy event should always be privileged, unless its presentation is such that the intrusion upon the lives of the parties named in it clearly goes beyond the limits of decency." Id.

\textsuperscript{38} Cf. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986). The analysis of laws restricting the disclosure of truthful information under the right of privacy is similar to the constitutional analysis under the law of defamation. See id. But cf. PROSSER & KEETON, supra note 29, § 117, at 882 (distinguishing public figure concept developed under right of privacy from public figure concept developed under defamation law). When the speech involves a matter of public concern and the plaintiff is a public figure, constitutional protection is afforded the media defendant. Id. When the speech involves a matter of public concern but the plaintiff is a private figure, the constitutional protections are diminished. Id. When the speech is a matter of private concern, and the plaintiff is a private figure, there may not be any constitutional protection. Id.
Fourteenth Amendment,\textsuperscript{39} has become "one of the preeminent rights of Western democratic theory."\textsuperscript{40} From Justice Holmes's "marketplace-of-ideas" theory of free speech,\textsuperscript{41} to Justice Brandeis's "safety-valve" approach,\textsuperscript{42} the value of free debate on public issues is well established.\textsuperscript{43}

In contrast to protections for life, liberty, and property provided under the Fifth and Fourteenth Amendments, the free-speech language of the First Amendment is absolute.\textsuperscript{44} Nevertheless, laws forbidding speech are commonplace.\textsuperscript{45} Moreover, freedom of speech does not include the right to speak on any subject at any time,\textsuperscript{46} nor is the press free to publish with impunity under all

\textsuperscript{39} See Dennis v. United States, 341 U.S. 494, 558 (1951) (Due Process Clause of Fourteenth Amendment makes First Amendment principles applicable to states); Jones v. City of Opelika, 316 U.S. 584, 600 (1942) (same); Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that Fourteenth Amendment's Due Process Clause protected freedom of speech).

\textsuperscript{40} John E. Nowak & Ronald D. Rotunda, Constitutional Law 934 (4th ed. 1991) (footnote omitted). The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

\textsuperscript{41} See Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting) ("Only the emergency that makes it immediately dangerous ... warrants making any exception to the sweeping command, 'Congress shall make no law ... abridging the freedom of speech.'").

\textsuperscript{42} See Whitney v. California, 274 U.S. 357, 375-76 (1927). In his concurrence, Justice Brandeis stated the following:

Those who won our independence believed ... that public discussion is a political duty; and that this should be a fundamental principle of the American government. ... [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; ... that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies .... Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

\textit{Id.} at 375-76 (Brandeis, J., concurring) (footnote omitted).

\textsuperscript{43} See Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). "The vitality of our civil and political institutions depends on free discussion." \textit{Id.} The right to speak freely is a trademark of our democratic society. \textit{Id.}


\textsuperscript{46} See American Communications Ass'n v. Douds, 339 U.S. 382, 394 (1950) (although
circumstances.\textsuperscript{47} Historically, a restriction that enjoins publication before the fact has been regarded with more disfavor than a restriction that imposes sanctions for publication after the fact.\textsuperscript{48} In a case firmly embedding this “prior restraint” doctrine into modern jurisprudence,\textsuperscript{49} the Supreme Court noted that although protection from prior restraints is not unlimited, “the limitation has been recognized only in exceptional cases.”\textsuperscript{50} Thus, a prior restraint comes before the Court “bearing a heavy presumption against its constitutional validity.”\textsuperscript{51} The punishment of speech subsequent to pub-
lication, however, exacts less judicial scrutiny.52

Thus, while the Court has indicated the First Amendment’s preferred position,53 it has often employed a balancing test that carefully weighs conflicting interests.54 In a series of recent cases, the Supreme Court has attempted to balance the important state interests in maintaining the privacy of sexual assault victims against the legitimate interests of the news media in reporting newsworthy events.55 According to at least one court, such privacy

publishing the contents of a classified historical study on Vietnam policy. Id. In a fragmented decision containing six separate opinions, the Court held that the government had not satisfied its burden. Id. Justice Black wrote that “[b]oth the history and the language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.” Id. at 717 (Black, J., concurring). Although Justice Brennan recognized some extreme situations in which the First Amendment’s ban on prior restraints may be overridden, the case exemplifies the heavy presumption of unconstitutionality against prior restraints. Id. at 725-26 (Brennan, J., concurring).

52 See New York Times, 403 U.S. at 733. Justice White explained that the failure to effect a prior restraint does not preclude post-publication punishment:

Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

Id. (White, J., concurring).


Justice White, in commenting on such balancing, argued the following:

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. An absolutist view of the former leads to insensitivity as to the latter.

. . . While I would not want to live in a society where freedom of the press was unduly limited, I also find regrettable an interpretation of the First Amendment that fosters such a degree of irresponsibility on the part of the news media.


55 See, e.g., Florida Star, 491 U.S. at 530 (noting the tension between the right of free press and the right “to personal privacy against the publication of truthful information”); Oklahoma Publishing Co. v. District Court, 430 U.S. 308, 311-12 (1977) (under First and Fourteenth Amendments, press may not be prevented from publishing public information
rights and First Amendment freedoms can coexist.56

II. PROSCRIBING DISSEMINATION OF TRUTHFUL INFORMATION: THE SUPREME COURT’S VIEWPOINT

A. Cox Broadcasting

In 1975, the Supreme Court, in Cox Broadcasting Corp. v. Cohn,57 ruled that a state may not allow damages for an invasion of privacy caused by the publication of a rape victim’s identity when the victim’s identity is a matter of public record.58 The action was brought against a television station by the father of a murdered rape victim whose identity had been publicized in violation of a Georgia statute.59 The television station owners who had broadcast the victim’s name contended that the statute violated the First and Fourteenth Amendments.60

The Court in Cox Broadcasting noted that, in cases involving the dissemination of truthful information, “claims of privacy most directly confront the constitutional freedoms of speech and press.”61 Although truth constituted a defense to a defamation action,62 the Court had never ruled on its applicability in nondefamation actions.63 The Cox Broadcasting Court, however, asserted that

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56 See Briscoe v. Reader’s Digest Ass’n, 483 P.2d 34, 42 (Cal. 1971) (contending that First Amendment freedoms do not require total abrogation of right to privacy and that goals of each may be achieved with minimum intrusion upon the other).
57 420 U.S. 469 (1975).
58 Id. at 494-95. The victim was named at the trial, which the reporter attended, and in the indictments, which were matters of public record. Id. at 473 n.3.
59 Id. at 471-72. The Georgia statute made it a misdemeanor to publish or broadcast the name or identity of a rape victim. Id.; see also Ga. Code Ann. § 26-9901 (Harrison 1988).
60 Cox Broadcasting, 420 U.S. at 473-74.
61 Id. at 489.
62 See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 770 (1986) (under common law of defamation, truth is absolute defense); Gertz v. Robert Welch, Inc., 418 U.S. 323, 375 (1974) (same). Although the defense of truth was a controversial topic before and at the time of ratification of the First Amendment, there is no evidence that the Amendment was intended to protect all truthful statements from criminal sanctions. Id. at 1200-01. In an early case recognizing the defense of truth, a New York court explained that “this doctrine will not go to tolerate libels upon private character, or the circulation of charges for seditious and wicked ends, or to justify exposing to the public eye one’s personal defects or misfortunes.” People v. Croswell, 3 Johns. Cas. 337, 338 (N.Y. Sup. Ct. 1804).
63 See Cox Broadcasting, 420 U.S. at 490-91 (“[C]ourt has . . . carefully left this ques-
the commission of a crime and the corresponding judicial proceedings were matters of public concern and fell within the press's responsibility to report the operations of government. The Court noted that a contrary ruling would "invite timidity and self-censorship" within the press and that "the interests in privacy fade when the information involved already appears on the public record." Read narrowly, Cox Broadcasting thus holds that the press cannot be sanctioned for publishing truthful information on the public record.

B. Oklahoma Publishing

In 1977, the Supreme Court decided another case involving the publication of truthful information, this time with respect to a hostage situation open.

Cox Broadcasting, 420 U.S. at 492. The Court explained that in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broadcasting, 420 U.S. at 496.

See id. at 497. The Court expressly reserved the issue of whether states may constitutionally prevent access by the public and press to official records. Id. at 496 n.26. The Court also refused to extend its holding to encompass information derived from other sources. Id. at 497 n.27.
juvenile criminal defendant. *Oklahoma Publishing Co. v. District Court* involved an 11-year-old boy on trial for fatally shooting a railroad switchman. While attending a detention hearing, reporters, including one from the *Oklahoma Publishing Company's newspapers, learned the juvenile's identity*. Although several published stories had already disclosed the child's identity, the trial judge entered a pretrial order enjoining the media from further "publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child."

The Supreme Court cited *Cox Broadcasting* as authority for the proposition that a state may not constitutionally prohibit publication of truthful information revealed in a judicial proceeding. Noting the state's implicit approval of the press's presence at the detention hearing, the Court ruled that the boy's identity had been "publicly revealed."

Like *Cox Broadcasting*, *Oklahoma Publishing* should be given a narrow construction. At the very least, it appears that information may be "publicly revealed" and become a part of the "public record" through the state's failure to take affirmative action to shield the information from public scrutiny.

C. Daily Mail

In 1979, the Supreme Court decided another case in which the state prosecuted a newspaper for publishing a juvenile offender's

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69 Id. at 309.
70 Id.
71 Id. A number of newspapers, including those of the *Oklahoma Publishing Company*, had published stories using the boy's name and photograph. Id. Several television stations broadcast film footage of him, and radio stations identified him by name. Id.
72 Id. at 308. Unlike the previous detention hearing, a closed hearing was the focus of the pretrial order. Id. at 309-10. The trial judge based the pretrial order on two state statutes. Id.; see also Okla. Stat. Ann., tit. 10, §§ 1111, 1125 (West Supp. 1976) (children's hearings shall be private unless specifically ordered by judge, and case records shall be open to public inspection only by court order). Although the Supreme Court never addressed the issue of whether the pretrial order constituted a prior restraint on speech, *Oklahoma Publishing* has become known as a case involving "a classic prior restraint." See Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (discussed infra notes 76-86).
73 *Oklahoma Publishing*, 430 U.S. at 310-11.
74 Id. at 311.
75 See id. at 311-12. The Court held that "[u]nder these circumstances," the pretrial order violated the First and Fourteenth Amendments. Id. The Court did not hold, however, that such pretrial orders would be unconstitutional under all circumstances. See id.
identity. In Smith v. Daily Mail Publishing Co., a fourteen-year-old boy, identified by seven different eyewitnesses, was arrested for the murder of a classmate. While visiting the murder scene, reporters obtained the youth's identity by questioning various witnesses, the police, and an assistant prosecuting attorney. Although another newspaper and at least three radio stations had previously broadcast the youth's name, the Daily Mail was indicted for violating a West Virginia Statute prohibiting such disclosures without prior court permission.

Although the West Virginia Supreme Court issued a writ of prohibition on the ground that the statute operated as a prior restraint on speech, the United States Supreme Court determined that resolution of the case did not turn on the prior restraint issue. Emphasizing the need for a state interest of "the highest form," the Court noted that statutes penalizing "the publication of truthful information seldom can satisfy constitutional standards." In holding that the state's interest in protecting the anonymity of the juvenile offender failed to satisfy constitutional requirements, the Court identified several of the West Virginia

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77 Id. at 99. The respondents, the Charleston Daily Mail and the Charleston Gazette, learned of the shooting by monitoring the police band frequency on the radio. Id. They immediately dispatched reporters and photographers to the scene of the crime. Id.
78 Id.
79 Id. at 99-100. The West Virginia statute provided in part, the following: "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court." W. Va. Code § 49-7-3 (1976). Because of the statutory prohibition, the Daily Mail initially omitted the youth's name from its story. Daily Mail, 443 U.S. at 99. Believing that the information had become public knowledge, it subsequently decided to identify the youth. Id. at 99-100.
80 Daily Mail, 443 U.S. at 100.
81 Id. at 101.
82 Id. at 102; see also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 829 (1978). Landmark Communications involved a Virginia statute that criminalized the disclosure of information regarding judicial review proceedings that the State Constitution and statutes declared confidential. Id. at 830. At the outset, the Court dismissed the prior restraint issue and asserted that the state's interest must be sufficient to justify the statute's encroachment on First Amendment guarantees. Id. at 838-41. Although legitimate state interests were presented, the Court concluded that these interests failed to justify the encroachments on speech that "lies near the core of the First Amendment." Id. at 838. The Court added, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." Id. (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)). The Court narrowed its holding, however, by refusing to adopt a categorical approach by which all truthful reporting about public officials would be protected by the First Amendment. Id.
statute's shortcomings. First, the statute did not apply to all forms of publication equally. Second, the statute did not achieve its stated purpose because the juvenile's identity had already been publicized prior to the Daily Mail's disclosure. Third, the statute was not necessary to protect the confidentiality of juvenile proceedings.

D. Florida Star

Fourteen years after its decision in Cox Broadcasting, the Court, in Florida Star v. B.J.F., decided a case with facts similar to those surrounding Florida's recent prosecution of Globe Communications. In Florida Star, the Duval County Sheriff's Department prepared a report that identified the victim of a sexual assault by her full name. A Florida Star reporter copied the police report verbatim in an unrestricted press room. The newspaper subsequently violated its own internal policy by publishing the identity of the victim in the "police reports" section of the newspaper. The victim sued the Florida Star for negligently violating section 794.03 of the Florida Statutes, the same statute that was involved in the Globe Communications prosecution. The newspaper contended that imposing civil liability on it for disclosing the

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83 Daily Mail, 443 U.S. at 104. The Court acknowledged that the prohibition was designed to facilitate the rehabilitation of juvenile offenders. Id. at 107 (Rehnquist, J., concurring); see also EDWARD ELDEFONSO, LAW ENFORCEMENT AND THE YOUTHFUL OFFENDER 166 (3d ed. 1978) (publication of juvenile offenders' names impedes social adjustment and impairs rehabilitative goals of juvenile justice system).
84 Daily Mail, 443 U.S. at 104-05. Aside from newspapers, the statute did not restrict publication via electronic media or any other form of publication. Id. at 105. The newspaper had further contended that the statute violated the Equal Protection Clause because it did not apply to all forms of media equally. Id. at 106 n.4.
85 Id. at 105.
86 Id.
88 Id. at 527. The Florida District Court of Appeal referred to the appellee by her initials "in order to preserve [her] privacy interests." Id. at 527 n.2. Respecting those same interests, the United States Supreme Court also referred to her as "B.J.F." Id.
89 Id.
90 Id. at 527-28. The article provided, in part, that the victim was "enroute to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck . . . . The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch and gold necklace." Id. at 527.
91 Id. at 528. As noted previously, the Florida statute proscribes the publication of a rape victim's identity through any instrument of mass communication. FLA. STAT. ANN. § 794.03 (West 1976).
rape victim's identity violated the First Amendment.\(^2\)

Although the Florida Star Court distinguished the case from Cox Broadcasting, it nevertheless held that imposing damages on the Florida Star violated the First Amendment.\(^3\) First, because the Florida Star obtained the identifying information from the government, imposing liability on the newspaper would result in self-censorship within the press.\(^4\) Thus, the statute was not narrowly tailored because more limited means were available to protect the victim short of punishing the reporting of truthful information.\(^5\) Second, civil actions under section 794.03 impermissibly failed to require a case-by-case evaluation of liability.\(^6\) Regardless of whether a reasonable person would have found the disclosure highly offensive or whether the victim was already widely known, liability followed automatically from publication.\(^7\) Third, section 794.03 was underinclusive because it prohibited publication only by an “instrument of mass communication.”\(^8\) The Court asserted that the state must demonstrate its interest by applying the prohibition equally to all disseminators.\(^9\) In a strong dissent, three justices objected to each of the majority's three “independent reasons.”\(^10\)

Although Florida Star was decided in favor of the media, the Court specifically left open the possibility of sanctions for publishing a rape victim's name.\(^11\) Thus, it is submitted that that decision

\(^2\) Florida Star, 491 U.S. at 528.
\(^3\) Id. at 532.
\(^4\) Id. at 538-39.
\(^5\) Id.
\(^6\) Id. at 539.
\(^7\) Id. at 539-40. The Court noted that under the statute, and unlike the common law tort of public disclosure of private facts, liability followed regardless of whether the victim's identity is already known throughout the community, whether the victim has voluntarily called attention to the offense, or whether the matter is a reasonable subject of public interest. Id. Since the statute did not require scienter, it afforded truthful publications less First Amendment protection than even the least-protected defamatory falsehoods. Id.
\(^8\) Id. at 540.
\(^9\) Id. at 540-41. The Court concluded that because of the statute's underinclusiveness, the statute did not achieve its stated purpose. Id. For instance, the statute did not apply to “backyard gossip,” even though such communications could be equally devastating to a victim. Id. at 540.
\(^10\) Id. at 542 (White, J., dissenting). In a dissent jointed by Chief Justice Rehnquist and Justice O'Connor, Justice White rejected the first reason and argued that rape victims' names can be discovered even when the state takes precautions. Id. at 547. He found the majority's second reason inapposite under the circumstances and did not agree with the court's rationale behind the third reason. Id. at 548-50.
\(^11\) Id. at 541. "We do not hold that truthful publication is automatically constitution-
established a window of opportunity for the protection of rape victims.

E. Proscribing Dissemination of Truthful Information: The Cases Synthesized

A statutory prohibition on disclosure, like section 794.03 of the Florida Statutes, serves to protect a rape victim's privacy and to encourage reporting of the crime. However, in light of the recent Supreme Court cases, substantial constitutional barriers to such a prohibition on truthful speech exist. First, legislation may not constitute a prior restraint on speech except in exceptional circumstances. Second, the statute must apply indiscriminately to all forms of publication, including the individual disseminator, in order to achieve its stated purpose. An underinclusive statute may also violate the Equal Protection Clause. Third, the statute

\[\text{ally protected, \ldots or even that a State may never punish publication of the name of a victim of a sexual offense.}^\text{102}\text{ See supra notes 48-52 and accompanying text. But cf. Snepp v. United States, 444 U.S. 507, 512-13 (1980) (per curiam) (upholding CIA agent’s agreement to submit any proposed publication for prior review; failure to do so impaired CIA’s ability to perform statutory duties). For further discussion of contractual agreements between journalists and sources, see Levi, Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations, 43 Rutgers L. Rev. 609 passim (1991); Michael Dicke, Note, Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement, 73 Minn. L. Rev. 1553, 1568-74 (1989).}\]

\[\text{103 See Florida Star, 491 U.S. at 537 (state urged that punishing publication of rape victims’ identity served three related interests: protecting victims’ privacy, protecting victims’ safety, and encouraging victims to report crime without fear of exposure).}\]

\[\text{104 See Florida Star, 491 U.S. at 540. In commenting upon the underinclusiveness of section 794.03, the Florida Star Court asserted that “[w]hen a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant.” Id. The Court also noted that}\]

\[\text{[a]n individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers.}\]

\[\text{Id.}\]

\[\text{105 See Daily Mail, 443 U.S. at 105. In Daily Mail, the Court concluded that the statute did not achieve its purpose because it did not apply to electronic media. See id.}\]

\[\text{106 See id. In Daily Mail, however, the Court did not decide whether the statute in fact}\]
must provide for a case-by-case determination of guilt, thus not penalizing those defendants who publish when the victim’s identity is already widely publicized, or when the victim has voluntarily called attention to the offense, or when the victim’s identity is a reasonable subject of public concern.\textsuperscript{107} Imposing strict liability in these instances will not further the statute’s purpose.\textsuperscript{108} A brief examination of the Globe Communications prosecution will illustrate these principles.

\textbf{F. The Globe Prosecution: Unconstitutional Protection}

As previously noted, the Palm Beach County prosecutor filed misdemeanor charges against Globe Communications, \textit{State v. Globe Communications Corp.},\textsuperscript{109} for publishing two articles identifying the woman allegedly raped by William Kennedy Smith.\textsuperscript{110} After synthesizing the relevant Supreme Court cases,\textsuperscript{111} Judge Robert V. Parker concluded that Florida Statute 794.03 was unconstitutional both on its face and as applied.\textsuperscript{112} Noting the statute’s failure to provide a mechanism for case-by-case determination, Judge Parker held that the statute “is unconstitutionally overbroad and that no valid state purpose is served by imposing criminal liability on [the] defendant, The Globe Communications Corp.”\textsuperscript{113} He also held that the statute was underinclusive because “the selective ban on mass media disclosures cannot be regarded as protecting a state interest of the highest order.”\textsuperscript{114} Finally, Judge Parker held that the statute was unconstitutional as applied be-

\begin{footnotesize}
\textsuperscript{107} See \textit{Florida Star}, 491 U.S. at 535, 539.
\textsuperscript{108} See \textit{id.} at 540. Under a strict liability standard, publications of truthful information would receive less constitutional protection than defamatory falsehoods. \textit{Id}. The Court noted the impermissibility of categorical prohibitions upon media access when First Amendment interests are implicated. \textit{Id.}; accord \textit{Globe Newspapers Co. v. Superior Court}, 457 U.S. 596, 608 (1982) (invalidating state statute providing for categorical exclusion of public from trials for sexual offenses involving juvenile victims).
\textsuperscript{109} No. 91-11008MM A02 (Palm Beach County Ct. Oct. 24, 1991).
\textsuperscript{110} \textit{Id}. at 1.
\textsuperscript{111} \textit{Id.} at 8-12, 14-15.
\textsuperscript{112} \textit{Id.} at 13-15.
\textsuperscript{113} \textit{Id.} at 13. Individualized adjudication would have revealed that “the victim’s identity was a matter of public record” because “[a]n information accusing Smith of sexual battery and simple battery of the victim, and naming her, was filed with the Clerk of the Circuit Court of Palm Beach County, Florida, on May 9, 1991.” \textit{Id}. at 4.
\textsuperscript{114} \textit{Id}. at 15.
\end{footnotesize}
cause the alleged rape victim’s identity “was widely known to nu-
merous members of the public and the media and her identity had
been published by several British tabloid-type newspapers before
the Globe published her name.”

In light of the principal cases discussed above, the trial court’s
decision in Globe Communications to declare Florida’s statute un-
constitutional was inevitable. The same statute was found underin-
clusive by the Supreme Court in Florida Star, and yet the Florida
Legislature failed to correct the statute’s constitutional infirmi-
ties. Although, under proper circumstances, the Supreme Court
may be willing to uphold a statute that punishes the disclosure of a
rape victim’s identity, Globe Communications does not present
such a statute.

III. COLLATERAL MEANS OF PROTECTING PRIVACY:
GAG ORDERS AND COURTROOM CLOSURES

A. Introduction

Because constitutional protection has been afforded only to
the publication of lawfully obtained information, “the government
retains ample means of safeguarding significant interests upon
which publication may impinge, including protecting a rape vic-
tim’s anonymity.” In Florida Star, the Supreme Court suggested
that if the information resided in private possession, the govern-
ment could proscribe its nonconsensual acquisition; if the informa-
tion were in government custody, it could be classified, and govern-
ment officials could be punished for disseminating it. In each of

116 Id. at 13. In discussing the issue of whether the Florida statute operated as a prior
restraint, Judge Parker suggested that although “[i]t no longer makes any difference
whether the restriction comes in the form of an injunction or in the form of a penal ‘subse-
quent punishment’ under federal or state decisional law,” id. at 17, “[t]he statute in ques-
tion is probably not a ‘prior restraint’ as that term has been traditionally used,” id. at 15.
He also held that the statute violated Florida’s state constitution. Id. at 18.

117 Id. at 15. Judge Parker noted that “[b]ecause the statute has not been amended
following the decision in The Florida Star case, I must follow the U.S. Supreme Court’s
decision in that case as binding on this Court.” Id.

118 Florida Star, 491 U.S. at 534.

119 See id. In Florida Star, the Court suggested the following:
To the extent sensitive information rests in private hands, the government may
under some circumstances forbid its nonconsensual acquisition . . . . To the extent
sensitive information is in the government’s custody, it has even greater power to
forestellar mitigate the injury caused by its release. The government may classify
certain information, establish and enforce procedures ensuring its redacted re-
the principal cases discussed, the Court indicated that prior to punishing truthful publications, the government must, if practicable, implement other means of realizing the particular interest. Therefore, the constitutionality of collateral means of protecting a rape victim’s privacy, in particular, “gag orders” and courtroom closures, will be considered.

B. Gag Orders

To protect a rape victim’s privacy, a court may order the participants in the proceeding not to discuss the case with the media, or the media not to report certain aspects of the court’s proceedings. Such judicial orders, which resemble prior restraints, are referred to as “gag orders.”

In a case involving a judicial order directed towards the press, *Nebraska Press Ass’n v. Stuart*, a state district judge, fearing...
the prejudicial effect news would have on impaneling an impartial jury.\textsuperscript{125} enjoined the media from publishing or broadcasting accounts of any confessions or admissions made by the defendant in a widely reported murder case.\textsuperscript{126} Although the Supreme Court found that the state judge, by restraining the media, had acted responsibly in protecting the defendant’s Sixth Amendment right to an impartial jury,\textsuperscript{127} the Court held that these restrictions were “foreclosed” by another Constitutional provision, the First Amendment.\textsuperscript{128} The Court asserted that “prior restraints on speech and publication are the most serious and the least tolerable infringement [sic] on First Amendment rights.”\textsuperscript{129} Accordingly, although the constitutional framers did not assign priorities between the First and Sixth Amendments, the “barriers to prior restraint remain high.”\textsuperscript{130} Concluding that less restrictive measures were available,\textsuperscript{131} the Court held that “[t]o the extent that [the order] prohibited publication based on information gained from other sources, . . . the heavy burden imposed as a condition to securing a prior restraint was not met.”\textsuperscript{132}

\textit{KPNX Broadcasting Co. v. Arizona Superior Court}\textsuperscript{133} involved two judicial orders: (1) that court personnel, counsel, wit-

\textsuperscript{125} Id. at 541-43. “The crime [had] immediately attracted widespread news coverage, by local, regional and national newspapers, radio and television stations.” Id. at 542. Both the county attorney and the defense attorney requested the restrictive order because of the possibility of prejudicial publicity. Id.

\textsuperscript{126} Id. The initial order of the county court precluded dissemination of testimony or evidence adduced at trial; additionally, the media were required to observe the voluntary standards outlined in the Nebraska Bar-Press Guidelines. Id. A subsequent order of the state district court applied until the jury was impaneled, and prohibited the petitioners from reporting: (1) the existence or contents of a confession made by the defendant; (2) other statements made by the defendant; (3) the contents of a note written by the defendant on the night of the crime; (4) aspects of medical testimony; and (5) the identities of the sexual assault victims and the nature of the assaults. Id. at 543-44.

\textsuperscript{127} Id. at 555; see also U.S. Const. amend. VI (conferring right to trial by jury).

\textsuperscript{128} Nebraska Press, 427 U.S. at 555-56.

\textsuperscript{129} Id. at 559. Unlike subsequent punishment of speech, “[a] prior restraint . . . has an immediate and irreversible sanction.” Id. If the threat of civil or criminal sanctions after publication “chills” speech, a prior restraint “freezes” it, at least temporarily. Id. (citing Alexander M. Bickel, The Morality of Consent 61 (1975)).

\textsuperscript{130} Id. at 561. In refusing to subordinate Sixth Amendment rights to First Amendment rights, the Court declined to recognize the media’s right to publish in all circumstances. Id.

\textsuperscript{131} Id. at 563-70. The alternative measures included, among others, the following: (1) a change of venue to an area less exposed to publicity; (2) a postponement of trial until public attention subsided; and (3) a sequestration of jurors. Id. at 563-64 (citing Sheppard v. Maxwell, 384 U.S. 333, 357-62 (1966)).

\textsuperscript{132} Id. at 570.

\textsuperscript{133} 459 U.S. 1302 (1982).
nesses, and jurors not speak directly with the press, and that the sole source of information regarding the proceedings be a court-appointed intermediary; and (2) that all sketches of jurors be cleared by the court prior to broadcast.\textsuperscript{134} Regarding the first order, the Supreme Court held that “[t]he mere potential for confusion if unregulated communication between trial participants and the press were permitted is enough to warrant” the judge’s order during actual sessions, and that protecting the judicial process from “prejudicial outside interferences” is sufficient to warrant the order when the court is not in session.\textsuperscript{135} Although the Court found the second order “more troubling,” it nevertheless believed that the order constituted a viable alternative to the “prototypical” prior restraint.\textsuperscript{136}

Because the media were free to report on the proceedings in the open courtroom, however, the significance of \textit{KPNX Broadcasting} in protecting a rape victim’s privacy is limited.\textsuperscript{137} It is submitted that, in the absence of a closed courtroom, a partial “gag order” does not adequately protect rape victims’ privacy.

C. Courtroom Closure

Another method utilized by some states to protect rape victims from undesirable exposure is courtroom closure.\textsuperscript{138} In considering the constitutionality of measures that deny the media and public access to the courtroom, it is necessary to review a few relevant Supreme Court cases.

In \textit{Gannett Co. v. DePasquale},\textsuperscript{139} the Court considered the issue of whether members of the public have an independent constitutional right of access to pretrial judicial proceedings.\textsuperscript{140} In requesting that the public and the press be excluded from the courtroom, the defense attorneys alleged that adverse publicity would jeopardize the defendants’ opportunity to receive a fair trial following their indictment for murder. This request was granted by

\textsuperscript{134} \textit{Id.} at 1302-03.  
\textsuperscript{135} \textit{Id.} at 1306-08.  
\textsuperscript{136} \textit{Id.} at 1307-08.  
\textsuperscript{137} \textit{Id.} at 1302. The protection provided by this type of “gag order” is limited because a rape victim can be identified by the media attending the open judicial proceeding.  
\textsuperscript{139} 443 U.S. 368 (1979).  
\textsuperscript{140} \textit{Id.} at 370-71.
the trial judge.\textsuperscript{141} In affirming the state court order, the Supreme Court held that, under the First, Sixth, and Fourteenth Amendments, the public does not have a constitutional right to attend criminal trials.\textsuperscript{142} Although the Court acknowledged the existence of a common-law tradition of open civil and criminal proceedings, it asserted that the Sixth Amendment confers the right to a public trial "only upon a defendant and only in a criminal case."\textsuperscript{143} Furthermore, in dismissing the First Amendment claims, the Court reasoned that, under the circumstances of the case, societal interests outweighed First Amendment concerns, and that "any denial of access in this case was not absolute but only temporary" because a transcript of the suppression hearing was made available after the danger of prejudice had subsided.\textsuperscript{144}

It is submitted that when transcripts are made available after a courtroom closure, additional precautions are necessary to protect the identity of rape victims. Because the victim's name may be publicized freely once a transcript becomes available, this type of closure would not be effective in preventing the disclosure of a rape victim's identity. However, court officials alternatively could implement a documentation system utilizing only the victim's initials.\textsuperscript{145}

In \textit{Richmond Newspapers, Inc. v. Virginia},\textsuperscript{146} the Supreme Court addressed the broader question of "whether the right of the public and press to attend criminal trials is guaranteed under the

\textsuperscript{141} \textit{Id.} at 375. The press and the district attorney initially did not contest the request for closure. \textit{Id.} Although the press subsequently requested access to the courtroom, the trial judge determined that there was a reasonable probability of prejudice to the defendants. \textit{Id.} at 376. The court concluded that the defendants' right to a fair trial outweighed the interests of the press and public. \textit{Id.} at 375-76.

\textsuperscript{142} \textit{Id.} at 391, 393.

\textsuperscript{143} \textit{Id.} at 385-87. "In conspicuous contrast with some of the early state constitutions that provided for a public right to open civil and criminal trials, the Sixth Amendment confers the right to a public trial only upon a defendant and only in a criminal case." \textit{Id.} at 386-87 (footnote omitted); \textit{see also} Lewis F. Powell, Jr., \textit{The Right to a Fair Trial}, 51 A.B.A. J. 534, 538 (1965) ("[T]he primary purpose of a public trial and of the media's right as a part of the public to attend and report what occurs there is to protect the accused."); Stephen Madsen, Note, \textit{The Right to Attend Criminal Hearings}, 78 COLUM. L. REV. 1308, 1321 (1978) (because Sixth Amendment confers right to public trial on accused, "to elaborate a parallel and possibly adverse public right of access from the public trial guarantee clause strains even flexible constitutional language beyond its proper bounds").

\textsuperscript{144} \textit{Gannett}, 443 U.S. at 393.

\textsuperscript{145} \textit{See, e.g., Florida Star}, 491 U.S. at 527 n.2 (referring to rape victim by her initials in order to preserve her privacy interests).

\textsuperscript{146} 448 U.S. 555 (1980).
The case involved a murder trial in which, pursuant to statutory authority, the trial judge had issued a closure order because of the possibility of an unfair trial. Noting the "prophylactic" role of the criminal justice system, the Supreme Court held that right to attend criminal trials is implicit in the First Amendment guarantees and that absent an overriding interest, "the trial of a criminal case must be open to the public." The Court attached special significance to the media's right to attend trials because the media are the public's primary source of information concerning trials.

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1. *Id.* at 558. The Court noted that it had never addressed this precise issue, *Gannett* having involved a right of access to hearings on pretrial motions. *Id.* at 563-64. Moreover, *Gannett* did not preclude a public right of access to trials under the First and Fourteenth Amendments. *Id.* at 564.

2. *Id.* at 560. The statute provided that "[i]n trial of all criminal cases . . . the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated." Va. Code Ann. § 19.2-266 (Michie 1980).

3. *Richmond Newspapers*, 448 U.S. at 560. The case involved the fourth trial of a man indicted for murder. *Id.* at 559.

4. *See id.* at 571. The Court noted that an open system of justice, serving a "prophylactic purpose," provides an outlet for "community concern, hostility, and emotion." *Id.* In the absence of such a system, "natural human reactions of outrage and protest are frustrated and may manifest themselves in . . . vengeful 'self-help.'" *Id.* From accusation and trial, through punishment, the justice system restores the imbalance created by the offense. *Id.* (citing Gerhard O.W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. Pa. L. Rev. 1, 6 (1961)); *see also Henry Weihofen, The Urge to Punish* 130-31 (1956) (crime gives rise to community reaction of outrage).

5. *Richmond Newspapers*, 448 U.S. at 580. According to the Court, in the absence of such freedoms, the "freedom of speech and 'of the press could be eviscerated.'" *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

6. *Id.* at 581. The Court suggested that options such as the exclusion of witnesses from the courtroom or sequestration could have been implemented instead of closing the courtroom. *See id.* However, the Court noted that First Amendment rights are not absolute and that a trial judge may, "in the interest of fair administration of justice, impose reasonable limitations on access to a trial." *Id.* at 581 n.18.

7. *See id.* at 571-73. The Court elaborated its position as follows:

Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ."

*Id.* at 572-73 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)).
In *Globe Newspaper Co. v. Superior Court*, the Court considered the constitutionality of a Massachusetts statutory closure provision. The statute excluded the press and general public from trials for specified sexual offenses involving a victim under the age of eighteen during the testimony of that victim. In support of the provision, the state asserted that it was designed "to encourage young victims of sexual offenses to come forward . . . [and] to preserve their ability to testify by protecting them from undue psychological harm at trial."

Acknowledging the precedent established by *Richmond Newspapers*, the Supreme Court reaffirmed that "the press and general public have a constitutional right of access to criminal trials." Although this right "is not absolute," the Court added that a closure order will be upheld only if the state shows that the closure is narrowly tailored and serves a compelling governmental interest. The *Globe Newspaper* Court found the governmental interests posited by the state compelling, but held that these interests did not justify mandatory closure because determination on a case-by-case basis would be less-restrictive, yet equally effective. Thus, in ruling upon a courtroom closure, a court should consider the victim’s age, psychological maturity, and understanding, the

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155 Id. at 598. The trial involved the alleged forcible rape of three minor girls. *Id.* During the trial, the *Globe* newspaper unsuccessfully attempted to gain access to the proceedings. *Id.* Pursuant to the statutory provision, the trial court denied the *Globe*'s motions for access. *Id.* at 599.
156 See Mass. Gen. Laws Ann. ch. 278, § 16A (West 1981). The Massachusetts statute provided, in pertinent part, the following:
At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.
157 *Id.*
158 *Id.* at 603. Although the right of access to criminal trials was not explicitly mentioned in the First Amendment, the Court acknowledged that this right was "firmly established" in *Richmond Newspapers*. *Id.* at 603-04.
159 *Id.* at 605; accord *Richmond Newspapers*, 448 U.S. at 581 n.18 (imposing limitations permissible in interest of justice).
161 *Id.* at 607-08. A case-by-case determination of whether the state's interests necessitate closure ensures that the constitutional right of the press and public will not be restricted except when necessary. *Id.* at 609.
desires of the victim, parents, and relatives, and the nature of the crime.\textsuperscript{162}

Based on these principal cases, it appears that considerable constitutional barriers must be overcome in closing a courtroom for the protection of a rape victim. In addition, the Supreme Court has developed a qualified right of access to preliminary hearings under the First Amendment.\textsuperscript{163}

**CONCLUSION**

The Palm Beach prosecution of Globe Communications has renewed the public's interest in laws, and other measures such as gag orders and courtroom closures, that restrict the disclosure of a rape victim's identity. Such laws protect a rape victim's privacy and physical safety, and thus encourage victims of rape to report these violent crimes. However, such laws also clash with the First Amendment in that they restrict the media's ability to report truthful information.

Although the interests advanced by prohibitions against the disclosure of a rape victim's identity undoubtedly are compelling, the Supreme Court has never upheld such prohibitions. The holdings of the relevant Supreme Court cases, however, have been narrow and do not preclude the statutory protection of rape victims. As a prerequisite to proscribing the publication of a rape victim's identity, a state must demonstrate its compelling interest by implementing other preliminary protective measures, such as "gag orders" and courtroom closures.

The constitutionality of laws that punish the disclosure of a rape victim's identity will turn on several factors. First, the prohibitions must be narrowly tailored in order to be valid under the Constitution. Thus, because the state may not punish the dis-

\textsuperscript{162} Id. at 608. For instance, if the victim wants publicity, the legislative justifications in support of closure should be inapplicable. Id. at 608 n.21 (quoting Globe Newspaper Co. v. Superior Court, 423 N.E.2d 773, 782 (Mass. 1981) (Wilkins, J., concurring)).

\textsuperscript{163} See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10 (1986). In Press-Enterprise, a California court, at the request of the defendant in a murder trial, ordered the courtroom closed because of national publicity. Id. at 3-4. Based on the precedent established by Richmond Newspapers and Globe Communications, the Supreme Court concluded that the qualified First Amendment right of access to criminal proceedings was applicable to preliminary hearings as conducted in California. Id. at 13. Consequently, if the interest asserted is the right to a fair trial, a preliminary hearing may be closed if (1) closure would prevent a substantial probability of prejudicial publicity and (2) reasonable alternatives cannot adequately protect the defendant's right to a fair trial. Id. at 14.
closure of a victim's identity if that identity was placed in the public record, either expressly or by acquiescence, the state should be careful to keep the victim's identity classified and off the public record. Second, the state must apply the prohibitions to all forms of publication indiscriminately. A prohibition that does not punish those persons outside of the communications industry, for example, may be declared unconstitutional for being underinclusive and violative of the Equal Protection Clause. Third, because the identity of the victim may have already been widely known, or because the victim may have otherwise become a reasonable subject of public concern, or because the victim may have voluntarily generated public attention to the offense, individualized adjudication must be provided to any person punished under the statute.

Although the media's historical self-restraint has not necessitated many confrontations with the First Amendment, rape victims require legal protection, as the Palm Beach incident illustrates. Under proper circumstances, the Supreme Court may uphold proscriptions on the dissemination of truthful information and collateral measures which protect the privacy of a rape victim's identity. The *Globe Communications* case, unfortunately, will "leave[] unanswered the question of how the state will protect alleged sexual assault victims against a disclosure of their identities."164

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164 *Globe Communications Corp.*, No. 91-11008MM A02, at 19.