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The Florida Star - Happy 200th to the First Amendment, but a Setting Sun for Victims' Privacy - The Florida Star v. B.J.F.

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THE FLORIDA STAR—"HAPPY 200TH" TO THE FIRST AMENDMENT, BUT A SETTING SUN FOR VICTIMS' PRIVACY?

The Florida Star v. B.J.F.,
109 S. Ct. 2603 (1989)

I. INTRODUCTION

"Short of homicide, [rape] is the 'ultimate violation of self.' "[1] So began Justice White's dissent in *The Florida Star v. B.J.F.*[2] As an after-effect of that violation, the sexual assault victim's right in not having her name published in the media can conflict with the first amendment guarantee of freedom of the press. Both the victim's privacy and the reinforcement of important public policy considerations, including the reporting of violent crimes, can be cast adversarially against the right to report newsworthy information to the public without threat of censorship or recrimination.

The relatively "uncharted state of the law"[3] in the publication of truthful information versus invasion of privacy in this context was addressed in *The Florida Star v. B.J.F.*[4] In this case, the United States Supreme Court invalidated a state statute which prevented publication of a sexual assault victim's name and provided civil liability for its violation. The focus of this note is to examine the recent decisions which have considered these two competing interests and the larger ramifications of the holding on the right to privacy for victims of sexual offenses.

II. FACTS

On October 20, 1983, B.J.F.[5] was robbed and raped at knifepoint in Jacksonville, Florida, by an unknown assailant.[6] B.J.F. reported this attack to the police on the same day, and the department later placed its report of the incident in its press room, following routine procedure.[7] What was apparently not routine was that the report contained B.J.F.'s full name. A reporter-trainee for the weekly newspaper, *The Florida Star,* copied the report in full, including B.J.F.'s name,[8] despite the presence of signs in the room stating that publication of sexual assault victims' names was prohibited.[9] Although *The Florida Star* had its own policy of

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1. The Florida Star v. B.J.F., 109 S. Ct. 2603, 2614 (1989) (White, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

2. 109 S. Ct. at 2614 (White, J., dissenting).

3. 109 S. Ct. at 2607 n.5.

4. 109 S. Ct. 2603, 2607 (1989).

5. Although the appellee filed her suit using her full name, both the Florida District Court of Appeal and the Supreme Court used only her initials in the caption, "[r]especting [her privacy] interests." *The Florida Star,* 109 S. Ct. at 2605 n.2; 499 So. 2d 883, 883 n.* (Fla. Dist. Ct. App. 1986). The same notation will be used here.

6. 109 S. Ct. at 2605-06.

7. *Id.*

8. *Id.* at 2611.

9. *Id.* at 2605-06, 2616.

not publishing rape victims' names, B.J.F.'s full name was contained in a "Police Reports" article published a few days later.[10]

A civil action was later filed by B.J.F. in county circuit court against the police department and *The Florida Star,* alleging that each party had negligently violated section 794.03 of Florida Statutes,[11] which prohibited publication of names of sexual offense victims.[12] Testimony was given by B.J.F. at trial concerning her emotional distress over the publication, harassing phone calls which included threats of another rape, a subsequent move to a different residence, the necessity of changing her phone number, and her need for counseling and police protection.[13] The trial judge found that section 794.03 did not violate the first amendment and gave a directed verdict against *The Florida Star* on the negligence issue due to its violation of the statute.[14] B.J.F. was awarded $100,000 in compensatory and punitive damages by the jury.[15]

In affirming the judgment, the First District Court of Appeal, in a brief per curiam opinion, held that a sexual offense victim's name "was of a private nature and not to be published as a matter of law."[16] After the Florida Supreme Court declined discretionary review,[17] *The Florida Star* appealed to the United States Supreme Court, which noted probable jurisdiction,[18] and reversed the decision of the Florida District Court of Appeal.[19] The Court held that in light of the first amendment freedom of the press,[20] no sufficient state interest was served by the imposition of liability under this statute, particularly where the newspaper lawfully obtained the truthful information which it published.[21]

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10. *Id.* at 2606.

11. The statute read in full:

> Unlawful to publish or broadcast information identifying sexual offense victim. – No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

FLA. STAT. § 794.03 (1987).

12. 109 S. Ct. at 2605-06. B.J.F. settled with the police department before trial for $2,500. *Id.* at 2606.

13. *Id.*

14. *Id.*

15. *Id.* Compensatory damages of $75,000 were awarded; the balance was for punitive damages, and the $2,500 settlement with the department was set-off by the judge. *Id.* The Supreme Court did not address the validity of the punitive damages award as it was not deemed essential to the holding. *Id.* at 2613 n.9.

16. The Florida Star v. B.J.F., 499 So. 2d 883, 884 (Fla. Dist. Ct. App. 1986). The court cited Doe v. Sarasota-Bradenton Fla. Television Co., 436 So. 2d 328 (Fla. Dist. Ct. App. 1983), which had stated "there certainly exist situations in which [FLA. STAT. §] 794.03 could be applied to protect privacy interests without running afoul of the first amendment"; however, the *Doe* court held that its case was not such a situation and followed Cox Broadcasting v. Cohn, 420 U.S. 469 (1975). *Doe,* 436 So. 2d at 329-30. The *Cox* decision is discussed *infra* at text accompanying notes 23-35.

17. The Florida Star v. B.J.F., 509 So. 2d 1117 (Fla. 1987).

18. The Florida Star v. B.J.F., 109 S. Ct. 216 (1988). Before it noted probable jurisdiction, the Court certified a question to the Florida Supreme Court as to "whether it had possessed jurisdiction when it declined to hear the newspaper's case." *The Florida Star,* 108 S. Ct. 499 (1987); 109 S. Ct. at 2607 n.4. The Florida Supreme Court held that it did have jurisdiction. 530 So. 2d 286, 287 (Fla. 1988).

19. 109 S. Ct. at 2607.

20. *Id.* at 2605.

21. *Id.* at 2613.

III. BACKGROUND AND LAW

In examining the Supreme Court's decision in *The Florida Star,* the Court's recent relevant opinions dealing with freedom of the press and the right to privacy of individuals provide useful insight. This issue concerns truthful publication of information as invasive of privacy and whether it must yield to the conflicting first amendment guarantee. In terms of the past case history of the Court, this area "contrasts markedly with the well-mapped area of defamatory falsehoods."[22]

A. Cox Broadcasting *and its Progeny*

The leading case in the truthful information/privacy area is *Cox Broadcasting Corp. v. Cohn.*[23] In *Cox,* the Court addressed the "face-off"[24] between constitutional freedom of the press and the privacy tort of public disclosure, involving the publication of private information "which, although wholly true, would be offensive to a person of ordinary sensibilities."[25] The father of a deceased rape victim who had not survived the attack filed suit against the owner of the television station which had broadcast the daughter's name on the date of the trial of her alleged attackers.[26] A reporter for the station had obtained the victim's name during a court recess in which he informally requested that the court clerk show him the indictments.[27]

The father sued for invasion of his own privacy in the broadcasting of his daughter's name, basing his claim on title 26, section 9901 of the Georgia Code,[28] which makes such dissemination a misdemeanor violation.[29] The United States Supreme Court reversed the Georgia Supreme Court's holding that the statute was

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22. *The Florida Star,* 109 S. Ct. at 2607 n.5. *See, e.g.,* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

23. 420 U.S. 469 (1975).

24. *Id.* at 489.

25. *Id.*

26. *Id.* at 471-74.

27. *Id.* at 472 n.3. The reporter testified at trial:

> I was handed the indictments . . . and was allowed to examine fully this document . . . . [T]he name of [the victim] appears in clear type . . . . [N]o attempt was made by the clerk or anyone else to withhold the name and identity of the victim from me . . . and the said indictments apparently were available for public inspection upon request.

Id.

28. *Id.* at 474. The statute read in full:

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

GA. CODE ANN. § 26-9901 (1972).

29. 420 U.S. at 472 n.1 (quoting GA. CODE ANN. § 26-9901 (1972)).

constitutional and that the public interest in revealing the victim's name did not "rise to the level of First Amendment protection."[30]

While acknowledging that the "sphere of collision" of privacy and free press presented interests on each side "plainly rooted in the traditions and significant concerns of our society,"[31] the Court stated that the privacy interests fade "[o]nce true information is disclosed in public court documents, open to public inspection,"[32] and no sanction can stand which would prohibit the press from publishing it.[33] The *Cox* decision focused on the public disclosure of the information the state had proscribed from publication, the accuracy of the information disseminated, the possible consequences of disallowing publication of matters already released, and a "presumption" against the State in that if the State placed the information in the public record it must have "concluded that the public interest was thereby being served."[34] The broader question of whether accurate publications will always prevail over contrary restrictions and any privacy interest was not addressed.[35]

The openness of a court proceeding coupled with the presence of the press were sufficient factors to invalidate a restrictive pretrial order in *Oklahoma Publishing Co. v. District Court.*[36] The order in that case came five days after a preliminary juvenile hearing in which the press learned the name of a juvenile homicide suspect whom they photographed, and later published and broadcast his name and identity.[37] Because the reporters were present at the earlier hearing and no action was taken by the court to exclude them and publications had been made in the interim,[38] the Supreme Court struck down the juvenile court's ex post facto attempt to prohibit this dissemination as violative of freedom of the press.[39] Truthful publi-

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30. *Id.* at 475-76 (quoting Cox Broadcasting v. Cohn, 231 Ga. 60, 68, 200 S.E.2d 127, 134 (1973)). The Georgia Supreme Court upheld the constitutionality of the statute on motion for rehearing after initially declining to pass on that issue on appeal and holding instead that the action was for a common law public disclosure tort, and that the statute did not encompass a civil privacy action. On rehearing, that court decided that the statute was "an authoritative declaration of state policy that the name of a rape victim was not a matter of public concern." *Cox*, 420 U.S. at 474-75.

31. 420 U.S. at 491.

32. *Id.* at 496.

33. *Id.*

34. *Id.* at 495-96. The Court stated that such a prohibition would work a hardship on the media in its attempts to inform the public "and yet stay within the law" and that the restriction would "invite timidity and self-censorship" and possible suppression of otherwise newsworthy material. The responsibility of protecting any privacy interests warranting the State's attention must be dealt with by the State "by means which avoid public documentation or other exposure of private information." *Id.* at 496.

35. *Id.* at 491. Responding to the media appellant's claim that the first and fourteenth amendments would protect its right to publish regardless of whether the information was obtained from public records or by its own investigative techniques, the Court noted that, since the case had been decided on more narrow grounds, "we need not address this broader challenge to the validity of [GA. CODE ANN.] § 26-9901 and of Georgia's right of action for public disclosure." *Id.* at 497 n.27. Nonetheless, following *Cox*, the statute was amended to exclude "truthful information disclosed in public court documents open to public inspection." GA. CODE ANN. § 16-6-23(c) (1988).

36. 430 U.S. 308 (1977).

37. *Id.* at 309.

38. *Id.* at 309, 311.

39. *Id.* at 311-12 (referencing the first and fourteenth amendments).

cation and the availability of the information in a public context were again dispositive.[40]

The fact that the government had not made the particular privacy matter public was not controlling in *Smith v. Daily Mail Publishing Co.*,[41] in which the Court did not differentiate between materials that are a matter of public record and information which is "lawfully obtained"[42] through "routine newspaper reporting techniques."[43] In *Daily Mail* the Court held that imposing criminal sanctions pursuant to a state statute against a newspaper which had published a juvenile offender's name did not serve "a state interest of the highest order."[44] The newspaper had obtained the juvenile's name at the scene of the alleged crime, and the *Daily Mail* made its decision to publish only after another newspaper and three radio stations had run stories on the incident, including the juvenile's name.[45]

The statute required judicial approval prior to publishing a juvenile's name in connection with a judicial proceeding and was implemented by a West Virginia Supreme Court writ of prohibition.[46] The state's interest in confidentiality to aid the juvenile's rehabilitation and to lessen the future negative consequences of making the minor's identity public was insufficient, according to the Court, to justify imposing criminal sanctions.[47] In addition, the statute failed to comply with constitutional requirements and achieve its stated purpose because it applied only to newspapers and not all forms of public media.[48]

The Supreme Court has also extended first amendment protection to the accurate publication of confidential judicial fitness proceedings, where the news media was absent from the inquiry[49] and the information printed had apparently "fall[en] into the hands" of the media.[50] The violation of a state statute prohibiting release of such information constituted a misdemeanor, but the Court held that this type of publication "lies near the core of the First Amendment" and prohibited such punishment.[51] While state interests in preserving the confidential nature of the pro-

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40. *Id.* at 310-11 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975)). *See also* Craig v. Harney, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property . . . . Those who see and hear what transpired can report it with impunity.").

41. 443 U.S. 97 (1979).

42. *Id.* at 106.

43. *Id.* at 103.

44. *Id.* at 105-06.

45. *Id.* at 99-100.

46. *Id.* at 98, 100.

47. *Id.* at 104.

48. *Id.* at 104-05.

49. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837-38 (1978). The newspaper had published a story reporting the proceedings of the Virginia Judicial Inquiry and Review Commission, which investigates complaints lodged against judges; the story named the judge who was the subject of that particular inquiry. *Id.* at 830 n.1, 831.

50. *Id.* at 849 (Stewart, J., concurring). Nowhere in the opinion is the source of the information actually stated.

51. *Id.* at 838.

ceedings were "legitimate," they were insufficient to justify encroachment on protected first amendment freedoms.[52]

The state interest in protecting victims was also deemed insufficient to uphold a mandatory-closure rule in *Globe Newspaper Co. v. Superior Court.*[53] At issue was a state statute which had been interpreted as requiring the clearing of the courtroom during a minor victim's testimony in a sexual offense trial.[54] The underlying interest of the state was safeguarding the victim's well-being during testimony and "the encouragement of minor victims of sex crimes to come forward and give accurate testimony."[55] The Court held that the mandatory nature of the closure rule rendered it unconstitutional under the first amendment and stated that only a case-by-case basis could justify such a restriction, if at all.[56] Coupled with the holdings in *Cox*[57] and *Oklahoma Publishing*,[58] this decision allows the press, if permitted to be present at the minor victim's testimony, to publish the name and testimony of the victim since they are no longer "confidential."

B. Truthful Public Disclosure of Private Facts

1. Elements of the Action

Actions for damages resulting from the publication of a sexual offense victim's name have been brought either as a common-law privacy tort[59] or under a relevant state statute.[60]

The common-law invasion of privacy action most relevant to truthful publication is one for the "public disclosure" of "private facts."[61] According to Prosser, the elements of such a tort are (1) the public disclosure (2) of private facts (3) which are "highly offensive and objectionable to a reasonable person of ordinary sensibil-

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52. *Id.* at 838, 841. *See also* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (responsible press "as the handmaiden of . . . judicial administration" subjects that process to "extensive public scrutiny and criticism"); Bridges v. California, 314 U.S. 252, 270-71 (1941) ("shielding judges from published criticism" would likely foster more contempt than respect).

53. 457 U.S. 596 (1982).

54. *Id.* at 602.

55. *Id.* at 609; *see also id.* at 607.

56. *Id.* at 608, 611 n.27. The dissent stated that the Court advanced "a disturbing paradox" in that "states are permitted . . . to mandate the closure of all proceedings . . . to protect a 17-year-old charged with rape, [but] they are not permitted to require the closing . . . in order to protect an innocent child who has been raped . . . ." *Id.* at 612 (Burger, C.J., dissenting).

57. *Cox*, 420 U.S. 469, 496 (1975), and *supra* note 33 and accompanying text.

58. *Oklahoma Publishing*, 430 U.S. 308, 311 (1977), and *supra* note 36 and accompanying text.

59. *See supra* note 30, and *infra* note 61. *See also* the noted early article on the privacy right, Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

60. *See supra*, at notes 11, 28.

61. W. PROSSER & W. KEETON, THE LAW OF TORTS 856 (5th ed. 1984) [hereinafter W. PROSSER]. The elements of the other three kinds of privacy actions identified by Prosser are beyond the scope of this note. See W. PROSSER, regarding these actions: appropriation of name or likeness, at 851-54; intrusion into another's seclusion, at 854-56; and the placement of one in a false light "in the public eye," at 863-66. *Id. See also* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) [hereinafter Prosser, *Privacy*]; Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964) [hereinafter Bloustein]; Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976) [hereinafter Hill].

ities."[62] *The Second Restatement of Torts* adds a fourth requirement in that the matter is not to be "of legitimate concern to the public."[63]

The attention given to the private facts must be something more than mere publication to a third person and mean "publicity" as in disseminated to "the public at large" through some form of mass communication or publication.[64] The publicity must concern "private" rather than "public" facts to be actionable,[65] and the availability of the information in a public record has proven dispositive in the finding of no liability.[66] The length of time between when the reported incidents occurred and the actual public revelation of such has also been held to be a decisive factor.[67]

The actionable publicity must involve a matter which is "highly offensive and objectionable to a reasonable person of ordinary sensibilities."[68] Information on a person's normal comings and goings, such as a business trip, or as part of a crowd photographed on a busy street usually would not be considered offensive, while the reporting of one's more intimate activities could meet the reasonable person threshold as judged by the standards and mores of the particular community.[69] The Supreme Court in *Time, Inc. v. Hill*,[70] while stating that "[t]he risk of [exposure of the self to others] is an essential incident of life in a society which places a primary value on freedom of speech and of press,"[71] also recognized that even truthful exposure could go too far and that "[r]evelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."[72]

If a claimant met the public disclosure tort criteria, both *Cox*[73] and the common law[74] require the additional showing that the matter is not of legitimate public con-

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62. W. PROSSER, *supra* note 61, at 856-57.

63. RESTATEMENT (SECOND) OF TORTS § 652D (1977) [hereinafter RESTATEMENT (SECOND)], which reads:
One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
(a) would be highly offensive to a reasonable person,
and
(b) is not of legitimate concern to the public.
Id. See also Hill, *supra* note 61, at 1258-62.

64. RESTATEMENT (SECOND), *supra* note 63, at § 652D comment a. *See* Bloustein, *supra* note 61, at 979-80 (distinguishing the public disclosure tort from a defamation action in that with the latter, communication of the matter to a single person satisfies the publication requirement).

65. RESTATEMENT (SECOND), *supra* note 63, at § 652D comment b; Prosser, *Privacy, supra* note 61, at 394-96.

66. *See, e.g., Cox*, 420 U.S. at 496; *Oklahoma Publishing*, 430 U.S. at 310. *But see* Cape Publications, Inc. v. Hitchner, 514 So. 2d 1136, 1138 (Fla. Dist. Ct. App. 1987).

67. *See, e.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940) (publication during adult's life of information regarding his childhood); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (Dist. Ct. App. 1931) (seven years).

68. W. PROSSER, *supra* note 61, at 857.

69. *Id.*; RESTATEMENT (SECOND), *supra* note 63, at § 652D comment c.

70. 385 U.S. 374 (1967).

71. *Id.* at 388.

72. *Id.* at 383 n.7 (quoting *Sidis*, 113 F.2d at 809).

73. *Cox*, 420 U.S. at 496.

74. W. PROSSER, *supra* note 61, at 860-62.

cern.[75] The right of the public "to know" and the right of the press to so inform the public cannot be abridged regarding newsworthy information,[76] particularly as where in *Cox*, the information is already available in a public record;[77] however, such a right may not be without its limits.[78]

2. Illustrative Cases

The earliest reported case brought under a state statute was *State v. Evjue*,[79] in which the Wisconsin Supreme Court upheld the statute because the "slight restriction of the freedom of the press"[80] was justified when balanced against the nature of the crime of rape, the situation of the victim, and the burden on the state absent the prohibition.[81] Although this case was a criminal proceeding brought by the district attorney rather than a civil action of the victim, the court stated that the statute's intent was "to save [the victim] from embarrassment and offensive publicity."[82]

In the more recent case of *Doe v. Sarasota-Bradenton Florida Television, Inc.*,[83] the plaintiff's claim was based on a statute rather than a public disclosure tort, and the newsworthy/public record element was not overcome since the press had access to the information in question—the identity of a rape victim.[84] The court followed the *Cox* holding in that in *Doe* the information was "already open to public view" and no liability could be found under section 794.03 of the Florida Stat-

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75. RESTATEMENT (SECOND), *supra* note 63, at § 652D comment d.

76. *Id.*

77. *Cox*, 420 U.S. at 496.

78. *See, e.g.*, Barber v. Time, Inc., 348 Mo. 1199, 1203, 1207, 159 S.W.2d 291, 293, 295 (1942) (information published in a magazine on a rare disease including name and picture of woman suffering from same, which involved an eating disorder ("[s]he eats for ten"); the court held that though the disease itself could be of public interest, the name of the woman was not).

79. 253 Wis. 146, 33 N.W.2d 305 (1948).

80. *Id.* at 162, 33 N.W.2d at 312.

81. *Id.* at 161-62, 33 N.W.2d at 312. The statute read:

> 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.

WIS. STAT. ANN. § 348.412 (1945).

82. 253 Wis. at 155, 33 N.W.2d at 309. *See also id.* at 161, 333 N.W.2d at 312. The court also stated that in relation to preventing the offensive publicity and assisting the authorities with prosecuting the rape crime, "the legislature of this and 19 other states" had formulated such laws. *Id.* at 155, 33 N.W.2d at 309. For a revealing accounting of the "19 states" contention, see Franklin, *A Constitutional Problem in Privacy Protection*, 16 STAN. L. REV. 107, 131, 132 n.108 (1963) (examination of briefs filed in *Evjue* and a separate study each reveal only four states with such statutes; "mystery of the figure 19 remains unsolved"). The appellant's brief in *The Florida Star* also lists four states as having criminal statutes prohibiting the publication of names of sexual assault victims: FLA. STAT. § 794.03 (1987); GA. CODE ANN. § 16-6-23 (1988); S.C. CODE ANN. § 16-3-730 (1976); WIS. CODE ANN. § 942.02 (1987). Appellant's Brief at 10, The Florida Star v. B.J.F., 109 S. Ct. 2603 (1989) (No. 87-329). *See also supra*, notes 11, 28.

83. 436 So. 2d 328 (Fla. Dist. Ct. App. 1983).

84. *Id.* at 329. The defendant's television news team videotaped the victim's courtroom testimony and displayed that footage on the evening news while also mentioning the victim's name. *Id.*

utes.[85] The court did recognize that, absent such a public disclosure, a privacy action could lie, and stated that it was even provided for under the state constitution, though that right appears to apply to "governmental intrusion."[86] The fact of becoming newsworthy[87] can elevate one's status to that of legitimate public interest, notwithstanding that the information published is embarrassing and in "bad taste."[88]

In *Hyde v. City of Columbia*[89] the plaintiff was a victim of an abduction attempt by an unknown assailant. The plaintiff sued the local government and media defendants for negligently publishing her name while her attacker remained at large.[90] In reversing the trial court's dismissal of her claim, the appellate court held that the victim's name was not an "official report" subject to publication, despite the fact that the local police department had already released her name to the media.[91] In addition, the court stated that the media had a "duty" to the victim "to use reasonable care not to give likely occasion for a third party . . . to do injury to the plaintiff by the publication."[92] The court focused on balancing "the public right to know and the individual right to personal security,"[93] and neither *Cox, Daily Mail,* nor *Oklahoma Publishing* were even mentioned in the opinion.[94]

The privacy rights of a rape victim were sufficient to warrant withholding of evidence requested by the media in *In re Application of KSTP Television.*[95] The station wanted copies of videotapes, shown at trial, which were made by the victim's attacker and showed conduct preliminary to the attacks.[96] The court chose to address first amendment claims as "form rather than substance" issues, and declined to release the tapes, noting that the station already had possession of the information contained in the tapes but had no right to the information in the form disclosed at trial.[97] The court also stated that release of the tapes would infringe on the "precious privacy rights" of the victim, although it referred to the victim by name throughout the opinion.[98]

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85. *Id.* at 329-30. This is the same statute on which B.J.F.'s claim was based in *The Florida Star; see supra* note 11 and accompanying text.

86. *Doe,* 436 So. 2d at 330. The constitutional provision reads as follows: "*Right of privacy*—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23.

87. RESTATEMENT (SECOND), *supra* note 63, at § 652D comment f.

88. *Id.* Cape Publications, Inc. v. Bridges, 423 So. 2d 426, 427-28 (Fla. Dist. Ct. App. 1982), *cert. denied,* 464 U.S. 893 (1983) (publication of hostage's picture taken at crime scene where victim covered only with "dish towel" held not invasive of her privacy).

89. 637 S.W.2d 251 (Mo. App. 1982).

90. *Id.* at 253.

91. *Id.* at 253, 269.

92. *Id.* at 269.

93. *Id.*

94. *Cf.* Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 131-32, 188 Cal. Rptr. 762, 771 (1983) (distinguishing *Cox,* as information in question was not shown to be part of public record).

95. 504 F. Supp. 360 (D. Minn. 1980).

96. *Id.* at 361.

97. *Id.* at 363-64.

98. *Id.* at 362.

In Mississippi the public disclosure tort was recognized in the context of publication of names and photographs of mentally retarded students in a news story concerning a special education class.[99] In *Deaton v. Delta Democrat Publishing Co.*, the Mississippi Supreme Court held that the identities of these students were "unavailable to the public" under state law and, therefore, were not part of a public record so as to allow publication under *Cox*.[100] This case was pre-*Daily Mail*, however, which allowed publication of information gathered through routine reporting methods, and might not have the same result today.[101]

IV. INSTANT CASE

In *The Florida Star v. B.J.F.*,[102] the United States Supreme Court addressed the issue of imposition of liability on a newspaper which had published the name of a rape victim lawfully obtained from a posted police report.[103] The Court analyzed this case in terms of a principle delineated in *Daily Mail*: "[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."[104] *Cox* did not directly control since the instant case involved information obtained prior to commencement of any criminal pre-trial or trial proceedings.[105] Instead, the Court stated that "three separate considerations" of the *Daily Mail* principle were particularly relevant.[106]

First, the government has means available to restrict or prevent the release of information such as a rape victim's name and can develop liability measures to prohibit the government itself from releasing this information—a "less drastic means" than punishing the press for truthful publication of lawfully obtained material.[107] Second, if the information is already public, then punishing the media for further dissemination is "relatively unlikely" to serve the interests which the state ostensibly seeks to protect.[108] Third, "timidity and self-censorship"[109] on the part of the media could result, with an ensuing "onerous obligation" to pick out acceptable material from publicly released records, if this type of punishment were al-

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99. Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471 (Miss. 1976).

100. *Id.* at 473.

101. *Daily Mail*, 443 U.S. at 103. *See also supra* note 41 and accompanying text.

102. 109 S. Ct. 2603 (1989).

103. *Id.* at 2605.

104. *Id.* at 2609 (quoting *Daily Mail*, 443 U.S. at 103).

105. *The Florida Star*, 109 S. Ct. at 2608.

106. *Id.* at 2609.

107. *Id.*

108. *Id.* at 2610. The Court reiterated the "presumption" of *Cox:* By placing the victim's name in the public record, the state is "presumed to have concluded that the public interest was thereby being served." *Id., quoting Cox*, 420 U.S. at 495.

109. 109 S. Ct. at 2610 (quoting *Cox*, 420 U.S. at 496).

lowed.[110] The Court, applying *Daily Mail,* concluded that these considerations required reversal of the lower court's affirmation of liability.[111]

The first inquiry to make in such a case is whether the information was lawfully obtained, was truthful, and concerned "a matter of public significance."[112] The Court answered this inquiry in the affirmative, since the information had come from a released police report and concerned "a matter of paramount public import," i.e., the commission of a reported violent crime.[113] The second inquiry, whether a state need "of the highest order"[114] would be served by imposing liability, was answered in the negative for "three independent reasons."[115] First, the information was lawfully obtained, and was initially made public as a result of the police department's erroneous listing of B.J.F.'s name in its report which was posted in the department's press room.[116] The only source of relief for a victim in this instance was from the government, not the media.[117] Second, the statute's *per se* negligence standard of imposing liability automatically upon publication was too broad, giving the "perverse result" that truthful publications are less protected than defamatory falsehoods of private persons, which require an ordinary negligence finding.[118] Finally, the Court interpreted the statute as facially underinclusive in that it applied only to an "instrument of mass communication," and not "evenhandedly, to the small-time disseminator as well as the media giant," only the latter of which could be seen as properly advancing the state's interest by prohibiting publication of truthful information.[119] The Court thus reversed the finding of liability against the media defendant, but also cautioned that its holding was limited, and did not hold that truthful publication warrants automatic constitutional protection, "or even that a State may never punish publication of the name of a victim of a sexual offense."[120]

Justice Scalia concurred in part and in the judgment, and stated that the law was not inclusive enough in that it failed to include dissemination of the information by the individual.[121] "This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself."[122]

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110. 109 S. Ct. at 2610.

111. 109 S. Ct. at 2610. Justice Marshall wrote the opinion of the Court and was joined by Justices Brennan, Blackmun, Stevens, and Kennedy. Justice Scalia concurred in part and concurred in the judgment. *Id.* at 2605. *See also* supra note 16 and accompanying text.

112. *Id.* at 2610 (quoting *Daily Mail,* 443 U.S. at 103).

113. *Id.* at 2610-11.

114. *Id.* at 2611 (quoting *Daily Mail,* 443 U.S. at 103).

115. *Id.* at 2611.

116. *Id.*

117. *Id.* at 2611-12.

118. *Id.* at 2612. The Court also stated that, under the statute, liability could be imposed even where a victim "voluntarily called public attention to the offense." *Id.*

119. *Id.* at 2612-13.

120. *Id.* at 2613.

121. *Id.* (Scalia, J., concurring).

122. *Id.* at 2614 (Scalia, J., concurring).

Justice White dissented[123] and attacked the "three independent reasons" relied upon by the majority in its result.[124] White pointed out that the press room had posted signs stating that such a publication was unlawful and that the *Star's* reporter-trainee understood that fact, and since "mistakes happen,"[125] "simple standards of decency" should have restrained publication.[126] The negligence *per se* nature of the statute, White asserted, reflects "that the standard of care has been set by the legislature, instead of the courts,"[127] and that the jury's finding of "reckless indifference" on the part of *The Star* (and thereby awarding punitive damages) went beyond an ordinary negligence standard.[128] Third, the "underinclusiveness" finding of the majority was misplaced in that past cases focused on whether all facets of the *media* are covered by a statute, and the Florida law accomplished this.[129] Any action against a "neighborhood gossip" not covered by the statute could likely be provided for in the state's common law of privacy.[130]

White concluded by stating that "the Court accepts appellant's invitation . . . to obliterate one of the most note-worthy legal inventions of the 20th-Century: the tort of the publication of private facts," and doubting whether any private facts can ever be protected from publication.[131]

V. ANALYSIS

A. The Cox *to* Star *Progression*

The Florida Star is the latest in a line of cases which have all explicitly avoided the question of whether liability can ever be imposed under the first amendment for the truthful publication of lawfully obtained information, and yet in an unbroken line have held for freedom of the press and against the privacy rights of the individual and/or the interests of the state.[132] Despite the "limited" nature of the *Florida Star* holding and those of the related cases, a fair question to ask is whether all the "dots" have been connected so that there now is, in fact, a sealed, impenetrable "wrap" for first amendment press rights regarding publication of truthful information, at least as applied to victims of sexual assault and those similarly situated.

The preparation of police reports following the reporting of a sexual assault by a victim and the requisite appearance of that victim at the appropriate time in the

123. White was joined by Chief Justice Rehnquist and Justice O'Connor. *Id.* at 2614.

124. *See supra* note 115 and accompanying text.

125. 109 S. Ct. at 2616 (White, J., dissenting) (the mistake having been the initial posting of the police report containing B.J.F.'s full name).

126. 109 S. Ct. at 2615-16 (White, J., dissenting).

127. *Id.* at 2617 (White, J., dissenting).

128. *Id.* at 2616-17 (White, J., dissenting).

129. *Id.* at 2617 (White, J., dissenting).

130. *Id.*

131. *Id.* at 2618 (White, J., dissenting). White had earlier stated that the "trilogy" relied on by the majority, *Cox* (which opinion White authored), *Daily Mail*, and *Oklahoma Publishing*, did not require "the harsh outcome reached today." *Id.* at 2614.

132. *Cox*, 420 U.S. at 491; *Daily Mail*, 443 U.S. at 105; *Oklahoma Publishing*, 430 U.S. at 310; *Landmark Communications*, 435 U.S. at 837, 840.

judicial proceedings which would ensue are foregone conclusions, although the latter is contingent upon the booking of a suspect. The *progression* which follows under *The Florida Star* and the related cases is thus: if *Cox* allows publication of truthful information acquired from public records;[133] and *Daily Mail* extends this right to information gathered through journalistic techniques rather than just from public records;[134] and *Globe Newspaper* makes closure of a sexual offense trial dubious at best,[135] particularly in light of the "presumption of openness" and right of the press and public to access to criminal trials under *Richmond Newspapers, Inc. v. Virginia;*[136] and *Oklahoma Publishing* dictates that whatever is obtained at a court proceeding is free and open to publication;[137] and *Landmark Communications* reinforces all of the above by invalidating criminal punishment of "strangers to the [judicial proceedings]" who, while not present at the inquiry, publish confidential but truthful information not unlawfully obtained;[138] *and,* finally, *The Florida Star* similarly protects information released, albeit inadvertently, prior to the commencement of any proceedings,[139] *then* perhaps, there is nothing left. Nothing for the victim, that is, except the stark realization that if she chooses to follow the course of reporting the crime against her, she must also be prepared to endure not only that process but also the resulting media exposure, absent any "grace" from the press. In addition, nothing may remain to litigate in this arena: while leaving itself an "out" by refusing to broadly declare all truthful publications constitutional, the Court has with *Star* and its predecessors effectively foreclosed this area from any viable challenge by a private facts case, a move marked by a cautious deliberateness but also perhaps by a glacier-like finality.[140]

B. The Star *Holding Itself*

In its "limited" holding in *Florida Star,* the Court stated its concern for the broad implications of a finding of liability in this situation: "timidity and self-censorship" by the press.[141] The Court coupled this concern with disapproval of the statutorily imposed negligence *per se* standard and what it termed as the "facial underinclusiveness" of that statute.[142] The Court appears to be imposing a negligence *per se* standard itself on the state. If a government official or entity inadvertently or in-

133. *Cox,* 420 U.S. at 496.

134. *Daily Mail,* 443 U.S. at 103, 105.

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

136. 448 U.S. 555, 573 (1980).

137. *Oklahoma Publishing,* 430 U.S. at 310.

138. *Landmark Communications,* 435 U.S. at 837-38.

139. *The Florida Star,* 109 S. Ct. at 2605, 2608. The holding in *The Florida Star* also declares the three-fold interests of the victim's privacy, her physical safety interest in not giving the assailant the opportunity to learn her name and address, and the state's interest in having victims report such crimes to be inadequate to support liability for publication under these circumstances. *Id.*

140. *See, e.g.,* Justice White's comments at 109 S. Ct. 2619: "[In *Cox*] we acknowledged the possibility that the First Amendment may prevent a State from ever subjecting the publication of truthful but private information to civil liability. Today, we hit the bottom of the slippery slope." *Id.* Perhaps it is ironic that White authored the majority opinion in *Cox.*

141. *Id.* at 2610, 2612 (quoting *Cox,* 420 U.S. at 496).

142. *Id.* at 2612-13.

tentionally releases a victim's name in any form whatsoever, it is the government that has then "muffed" the situation and which must suffer any resulting consequences from legal action by the victim, while the press is then "cleared" to publish at its own volition. Consequently, the government is the only wrongdoer in this instance, with any would-be responsibility which could be imposed upon the media disallowed as a chilling effect on freedom of the press and as an implied censorship upon its routine operations.[143] Assuming that the publication of the victim's name is, at a minimum, "improper," the Court has stated an old idiom in a new way: "two wrongs *do* make a right [to publish]," and any possibility of the imposition of elementary joint liability principles for the respective miscues was apparently not within the scope of the Court's deliberation.

While the use of the statute's *per se* negligence standard could lead to imposition of liability without a specific finding of fault, the Court in the instant case chose to address that "big picture" rather than the facts at hand, since the jury found the *Star's* action justified imposing punitive damages.[144]

The Court's characterization of the statute as facially underinclusive was based upon its not applying to the "smalltime disseminator," such as "the backyard gossip who tells 50 people that don't have to know."[145] This view appears to be inconsistent with the Court's holding in *Daily Mail,* where the focus was on the fact that the pertinent statute only prohibited one form of the media (newspapers) from publication of juveniles' names, rather than applying to the media across the board.[146] The apparent implication of the *Star* holding and Scalia's concurrence[147] is that any effort to address statutorily such dissemination must also include single individuals having propensities for spreading "gossip" among neighborhoods or communities, despite the fact that no such mention was made in the earlier *Daily Mail* case,[148] and notwithstanding the "evenhandedness" of the Florida statute's inclusion of all the media.[149]

The state's goal of encouraging victims of sexual offense crimes to report these incidents was not sufficient to justify liability in the *Star* case. Since this interest and that of the victim in having her attacker brought to justice are not adequate reasons under *Star* for retaining anonymity, the victim is left with the choice of reporting the crime and accepting possible public exposure, or not reporting at all.

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143. *Id.* at 2612 (noting the press reliance on news releases as a "routine" journalistic technique).

144. *Id.* at 2616-17 (White, J., dissenting), and at 2613 n.9.

145. *Id.* at 2612-13 (referencing statement of appellee B.J.F.'s counsel at oral argument).

146. *Daily Mail,* 443 U.S. at 104-05.

147. 109 S. Ct. at 2613 (Scalia, J., concurring) ("Nor is it at all clear, as I think it must be to validate this statute, that Florida's general privacy law would prohibit such gossip.").

148. *Daily Mail,* 443 U.S. at 104-05.

149. 109 S. Ct. at 2617. "It excludes neighborhood gossips . . . because presumably the Florida Legislature has determined that neighborhood gossips do not pose the danger and intrusion to rape victims that 'instrument[s] of mass communication' do." *Id.* (White, J., dissenting) (brackets in original). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 888-90 (2d ed. 1988) (nothing in the *Cox* and *Daily Mail* decisions "remotely suggests" that the "government must exalt an abstract right to know, here reduced to a right to gossip, above the deeper concerns of personhood"). It would be interesting to know whether that noted commentator would amend that statement in light of *The Florida Star.*

This dilemma could lead to a "de facto" deprivation of the victim's fourteenth amendment right to due process under the law, a point not addressed in the *Star* opinion.[150]

Juxtaposed against the above points on the *Star* holding and the *Cox/Star* progression are the candid concerns of a press free enough to report the information it lawfully obtains. Had a contrary result in *Star* and the other similar cases been reached, the "domino progression" expounded above could work in the opposite direction and result in a considerable restriction on the freedom of the press.[151] Indeed, if the plaintiffs in *Cox* and *Florida Star* had succeeded, it could be supposed that victims of other crimes or other unfortunate happenings could attempt to insist on anonymity and an accompanying right of action upon revelation of their identities.[152] The Court in *Florida Star* also mentioned the potential for abuse in situations in which the comprehensive liability under the statute is imposed where "questions have arisen whether the victim fabricated an assault by a particular person."[153]

C. Contrasted Situations

An area of the law in which closure of part of a trial has been upheld against first amendment freedom of the press is the preservation of trade secrets, as evidenced by *Standard & Poor's Corp. v. Commodity Exchange, Inc.*[154] The court in this case kept sealed a transcript containing trade secrets of Standard & Poor's, ruling against an order seeking the information by a trade newspaper service.[155] While the subject matter and the factual setting are quite different from that of B.J.F. in *Star* and other sexual assault victims, the case raises the serious question of whether trade secrets of corporate giants are afforded more protection than the identity of such victims, and, if answered in the affirmative, *why.* One can only speculate as to whether the Supreme Court would afford the same treatment to the interests of corporations in protecting trade secrets as was given to the victim and the state in *Florida Star.*

Whether a participant in the federal witness protection program could establish an invasion of privacy/public disclosure action for the publishing of that person's real name and location was held to be a jury issue in *Capra v. Thoroughbred Racing Association.*[156] The court stated that "[w]hile the federal witness protection program cannot by itself overcome the First Amendment, the program possesses

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150. *See* L. TRIBE, *supra* note 149, at 889-90.

151. *The Florida Star,* 109 S. Ct. at 2610; *Cox,* 420 U.S. at 496.

152. *See, e.g., Globe Newspaper,* 457 U.S. at 610 ("Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify.").

153. *The Florida Star,* 109 S. Ct. at 2612. Whether such a concern is justified in the actuality of the sexual assault field is beyond the scope of this note. *But see* Franklin, *Privacy Protection,* 16 STAN. L. REV. 107, 137-38 (1963).

154. 541 F. Supp. 1273 (S.D.N.Y. 1982).

155. *Id.* at 1278. The court relied on Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), in holding that the right to access to a civil trial was not absolute. *Id.* at 1275-76.

156. 787 F.2d 463 (9th Cir. 1986), *cert. denied,* 479 U.S. 1017 (1986).

some social values that weigh against unlimited free speech . . . ."[157] In this case the operative issue at trial would be the "newsworthiness" of publishing the witness' name and location as determined by "(1) the social value of the facts published, (2) the depth of the publication's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily assumed a position of public notoriety."[158] The court was applying the newsworthiness requirement of *Virgil v. Time, Inc.*,[159] which used a *Restatement of Torts (Second)* standard in determining whether publication of private facts was newsworthy and therefore privileged.[160] Had the Court in *Florida Star* used a similar standard for a person arguably possessing as viable a privacy interest as the witness in *Capra* and the "body surfer" in *Virgil*,[161] perhaps the victim's *name* at the very least would have been adjudged worthy of protection.

Although the representative cases did not reach the Supreme Court, the interests of corporate trade secrets, a federal witness protection program participant, a maverick body surfer, and jurors[162] have received more favorable judicial consideration in the lower courts than the rape victim in *Florida Star.*

VI. Illustrations and Conclusion

The Florida Star v. B.J.F.[163] presented the competing interests of a free press and the right to privacy in a context in which both the original release of the victim's name by the police department and the subsequent publication by the newspaper were apparently *inadvertent* acts, the latter's publication in violation of its own internal policy.[164] An example of a repeated *intentional* policy of publishing identities of rape victims was recently addressed in a television broadcast of the

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157. *Id.* at 465.

158. *Id.* at 464-65 (applying California law).

159. 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). *Virgil* involved a body surfer who sued the parent company of *Sports Illustrated* after publication of a story on the surfer's ventures and exploits. While originally agreeing to interviews with the writer and not disputing the authenticity of the article's content, the surfer later recanted his consent to the story's publication. The magazine published the story over his objections. The Ninth Circuit vacated the district court's denial of summary judgment for the publisher, remanding the case for consideration of the newsworthiness standard (*see infra* at note 158) as applied to the facts. *Id.* at 1123-24, 1129, 1131-32. On remand, the district court granted summary judgment for the publisher. 424 F. Supp. 1286, 1290 (S.D. Cal. 1976) ("the facts themselves – putting out cigarettes in his mouth and diving off stairs to impress women, hurting himself in order to collect unemployment so as to have time for body surfing," while "generally unflattering," do not reach the level of protection from publication). 424 F. Supp. at 1289.

160. The *Virgil* court used comment *f* of a 1967 tentative draft. While that comment was later eliminated, the court stated that it was "directly incorporated" in the later § 652D version. 527 F.2d at 1129 n.10. The comment *f* used reads as follows:

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

Id.

161. *See supra* note 159.

162. *See* United States v. Gurney, 558 F.2d 1202 (5th Cir. 1977) (protection of jurors' privacy by not releasing jury list was within discretion of trial judge). *Id.* at 1210 n.12.

163. 109 S. Ct. 2603 (1989).

164. *Id.* at 2606, 2616.

program *A Current Affair*.[165] The news story concerned a Washington state newspaper which follows such a policy and the ramifications of the policy within that community. A local rape crisis counselor interviewed on the program stated that victims whose names were published later received obscene telephone calls and obscene mail,[166] and said "how can that be helping."[167] The counselor was also presently assisting two victims who would not report their attacks due to the newspaper's policy. The local county prosecutor stated that the practice leads to the implication that a rapist can commit rapes in that community while knowing that his victims will not want to report the assault.[168] The newspaper's publisher had printed two editorials defending the paper's policy.[169]

The Washington community's situation may be an extreme example of the protection afforded the press under *Cox*, *The Florida Star*, and related cases. However, it is real. The Court's reluctance to "box in" the freedom of the press under these cases and the resultant holdings on the side of an expansive first amendment interpretation represent tough decisions which carry public policy considerations on each side of the competing interests of the "right to know" and the privacy of the individual. Possibly only the more cryptic cynics[170] would want decisions which would create in actuality the chilling effect of "timidity and self-censorship" warned against in these decisions.[171] The *Star* majority also stated its recognition of the "tragic reality of rape"[172] and, in a somewhat ironic twist, never used the victim's full name in the opinion.[173] In deciding for the press and against a statute it termed defective, the Court also placed the responsibility for keeping a victim's name private, if it can be done at all, squarely on the shoulders of the government which has access to the victim's identity in the first place,[174] as was done in *Cox*.[175]

If the Court's pronouncement on the government's means of keeping the victim's identity out of the public domain is carried to its logical conclusion, particularly in light of the "progression" noted above,[176] a "secret trial" would be needed

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165. *A Current Affair* (television broadcast of September 19, 1989), 20th-Century Fox Television Syndication Co.

166. Addresses of victims are also published. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* Little attention was given in the broadcast to the newspaper's source of information; presumably the information came from law enforcement reports.

170. As possibly expressed in the following:

I make my living off the Evening News
Just give me something – something I can use
People love it when you lose,
They love dirty laundry . . . .

Don Henley, *Dirty Laundry*, from the LP "I Can't Stand Still" (Elektra/Asylum Records, 1982).

171. *Florida Star*, 109 S. Ct. at 2610; *Cox*, 420 U.S. at 496.

172. 109 S. Ct. at 2611.

173. *See* 109 S. Ct. at 2605 n.2, and *supra* note 5.

174. 109 S. Ct. at 2611 (government had "far more limited means" of keeping identity private than by "extreme step of punishing truthful speech").

175. *Cox*, 420 U.S. at 496 (to protect private information "States must respond by means which avoid public documentation").

176. *See supra* text accompanying notes 133-40.

to truly ensure the victim's identity remained "private." Such proceedings would have to be carried out over any objections of the defendants, including deprivation of their sixth amendment rights,[177] "which would pose a constitutional problem at least as serious as the one the Court believed itself to be resolving [in Cox]."[178] The mandatory closure which would be necessitated would also present the same kind of situation that was invalidated in *Globe Newspaper.*[179] If the Court in *Florida Star* had adopted a case-by-case requirement of evaluating a victim's privacy needs as it had recommended in a different context in *Globe Newspaper,*[180] the Court could have invalidated the Florida statute (and B.J.F.'s claim) while still allowing the theory of action to survive. Instead, the difficulty of keeping victims' names out of any public record and the unlikelihood and ill-advisedness of "secret trials" leaves the existence of the tort of public disclosure in extreme doubt, at least with regard to sexual assault victims.

Despite its pronouncement of another "limited" holding,[181] the Court's decision in *The Florida Star v. B.J.F.* is apparently the death-knell for any hopes of privacy for rape victims. The victim can know for a near certainty that the reporting of her tragedy will also mark the beginning of life in the public eye, absent a collective and continuous show of discretion by all facets of the press. Whether a statute can be drafted or a form of action fashioned which will pass the scrutiny of the Court and still provide a remedy for the victim is doubtful. Until the simple dichotomy of separating the rape victim's name, as a privacy interest, from the reported crime, as a newsworthy event, is recognized judicially – even if that name is by necessity in some form of the public record – then the rights of the victim will continue to be subservient to a sweeping view which has incrementally but comprehensively set aside attempts to enforce those rights. Controversies such as the instant case represent close calls which require looking beyond the actual facts and crime presented. This case and ones like it, however, also involve victims who have involuntarily suffered an extreme tragedy too deep for words, which is precisely why the privacy interests in their cases are so compelling and should at least be judged in their individual settings. Absent such an approach, these victims, their families, and other observers can only wonder if the Court itself "[c]an't seem to face up to the facts"[182] of sexual assault and the policy considerations which accompany it.

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177. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, [and] . . . to be confronted with the Witnesses against him. . . ." U.S. CONST. amend. VI.

178. Hill, *supra* note 61, at 1267 ("The right of the public to access to official proceedings is clearly not of the same magnitude as the right of a person proceeded against to insist upon public access.").

179. 457 U.S. at 608.

180. *Id.*

181. 109 S. Ct. at 2613.

182. Talking Heads, *Psycho Killer,* Stop Making Sense (LP record version, 1985).