Loyola of Los Angeles Entertainment Law Review

Volume 19
Number 2 *Symposium—The Right of Privacy versus the Right to Know: The War Continues*

Article 3

1-1-1999

Peeping Press vs. Private Persecution: A Resolution of the Conflict between Freedom of the Press and Freedom from the Press

Kunoor Chopra

PEEPING PRESS VS. PRIVATE PERSECUTION: A RESOLUTION OF THE CONFLICT BETWEEN FREEDOM OF THE PRESS AND FREEDOM FROM THE PRESS

Kunoor Chopra[*]

I. INTRODUCTION

> *[People] fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to define one's circle of intimacy—to choose who shall see beneath the quotidian mask. Loss of control over which "face" one puts on may result in a literal loss of self-identity, and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.*[1]

An underlying tenet of our society is the right to life, liberty, and the pursuit of happiness.[2] Unfortunately, the enjoyment of these rights may also infringe on the rights of others. The question thus becomes, what—if anything—do we have to do to resolve this conflict?

Courts have struggled with this question for over a century.[3] Constant tension remains between the right to privacy and the public's right to know,

---

[*] Attorney at the law firm of Nossman, Gunther, Knox & Elliot, LLP. B.A., 1995, University of California, Los Angeles. J.D., 1998, Loyola Law School. I want to first thank Dawn Sanchez, Stephanie Smith, and my family, whose support and patience constantly motivate me to accomplish great things. I want to thank the staff of the *Loyola of Los Angeles Entertainment Law Journal* for their hard work, and particularly Dovan Calumpang, for helping make this Article look so good! Finally, I want to thank my inspiration, Professor Gary Williams. You have always believed in me and given me the confidence to write about this topic I am so passionate about. I hope we can find a good balance.

1. Briscoe v. Reader's Digest Ass'n, Inc., 483 P.2d 34, 37 (Cal. 1971) (en banc) (citations omitted).

2. THE DECLARATION OF INDEPENDENCE preamble (U.S. 1776).

3. Brett Jarad Berlin, *Revealing the Constitutional Infirmities of the "Crime Victims Protection Act," Florida's New Privacy Statute for Sexual Assault Victims*, 23 FLA. ST. U. L. REV. 513, 514 (1995).

as advanced by a free press.[4] While the United States Constitution, through the First Amendment, guarantees freedom of the press,[5] states have attempted to guarantee a person's right to privacy by enacting legislation and amending their Constitutions. A fair balance is necessary because these two rights cannot absolutely co-exist.

This Article focuses on finding a proper balance between the right to free press and a rape victim's right to privacy. After analyzing the rationale behind a free press, the recent court decisions in this area, and a reasonable person's reactions, this Article argues that the freedom of the press is not sacrificed when the name and identity of a rape victim is not published. A balance may be accomplished by a new statute which would prohibit the publication of a rape victim's name in particular circumstances, while maintaining the goals and guarantees of the First Amendment.

Part II of this Article discusses the development of the right to privacy. Part III discusses the policy arguments in favor of free press and privacy. Part IV outlines and analyzes the development of the current United States Supreme Court standard in determining whether or not to publish a rape victim's name. Finally, Part V proposes a solution through a new standard balancing the right to privacy and the rights to free press.

II. THE DEVELOPMENT OF THE RIGHT TO PRIVACY

The right to privacy protected under the U.S. Constitution is historically rooted in the First, Third, Fourth, Fifth, and Ninth Amendments.[6] The federal constitutional right to privacy originated in *Griswold v. Connecticut*,[7] where the Supreme Court held that a Connecticut law which prohibited the use and distribution of contraception was unconstitutional.[8] The Court did not base this decision on any explicit privacy right, but rather found it implicitly in the First, Third, Fourth, and Ninth Amendments to the U.S. Constitution.[9] Many years later, controversial cases such as *Roe v. Wade*[10] based privacy rights on the word "liberty" contained in the Due Process clause of the Fourteenth

4. *Id.* at 514–15.

5. U.S. CONST. amend. I.

6. Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965); *see* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1392 (1992).

7. 381 U.S. 479 (1965).

8. Dennis F. Hernandez, *Litigating the Right to Privacy: A Survey of Current Issues*, *in* 1 LITIGATING LIBEL AND PRIVACY SUITS 425, 430 (1996).

9. *Id.*

10. 410 U.S. 113 (1973).

Amendment.[11] However, the right to privacy in the "free press vs. privacy" context is not a pre-existing right with direct textual protection in the U.S. Constitution. Rather, this right to privacy is a creature of invention, ultimately derived from state legislation.

A. The Tort of the Invasion of Privacy

The concept of an individual right to privacy originated in 1890 in a law review article co-authored by Samuel D. Warren and Louis D. Brandeis.[12] Warren and Brandeis felt that people had a "right to be let alone."[13] They articulated their concern for the changes in society by stating:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that 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.[14]

It was not until the twentieth century that courts began to recognize some form of a privacy right through tort law. In 1905, the Georgia Supreme Court upheld the right to privacy in a case of commercial exploitation of a person's name in advertising.[15] Subsequently, in 1927, a court first recognized a cause of action for invasion of privacy based on the dissemination of private information.[16] In 1934, the *Restatement (First) of Torts* adopted the tort of invasion of privacy.[17]

A 1960 law review article written by William L. Prosser was a major stimulus for the new tort.[18] Prosser recognized four different categories of privacy torts: (1) intrusion, (2) private facts, (3) false light, and (4)

---

11. *Id.* at 153; *see* Gormley, *supra* note 6, at 1393.

12. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

13. *Id.*

14. *Id.* at 196.

15. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80 (Ga. 1905).

16. Brents v. Morgan, 299 S.W. 967, 971 (Ky. Ct. App. 1927).

17. RESTATEMENT OF TORTS § 867 (1939). The Restatement provides that "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." *Id.*

18. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

misappropriation.[19] The *Restatement (Second) of Torts* codified Prosser's private facts tort,

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of hisprivacy, 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.[20]

B. The States' Response

Many states have codified the right to privacy in their statutes.[21] Other states have added this new right to their constitutions.[22] For example, the California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*."[23] The California Supreme Court held that this constitutional provision "creates a legal and enforceable right of privacy for every Californian."[24] However, this right is not unfettered. An invasion of privacy may still be allowed, provided that the invasion is justified by a compelling state interest.[25]

III. THE TENSION BETWEEN THE RIGHT TO PRIVACY AND THE RIGHT TO A FREE PRESS

Neither the "right to be let alone" nor the right to a free press is absolute. Although these rights conflict, justifications exist for why neither right should be abridged. The outcome of an individual case hinges on which policy argument prevails.

---

19. *Id.* at 389.

20. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

21. *See, e.g.*, NEB. REV. STAT. § 20.201 (1994); N.Y. CIV. RTS. LAW §§ 50–51 (McKinney 1995); OKLA. STAT. tit. 21 §§ 839.1–839.3 (West 1996); UTAH CODE ANN. §§ 76-9-401 to 76-9-406 (1995); VA. CODE §§ 2.1-377 to 2.1-386 (Michie 1995); WIS. STAT. ANN. § 895.50 (West 1995).

22. *See* Alaska CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

23. CAL. CONST. art. I, § 1 (emphasis added).

24. White v. Davis, 533 P.2d 222, 234 (Cal. 1975).

25. Board of Med. Quality Assurance v. Gherardini, 156 Cal. Rptr. 55, 61 (Cal. Ct. App. 1979).

A. Policy Arguments in Favor of the Right to Privacy

"The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers."[26]

The privacy of a rape victim is necessary for many reasons. One reason is that women have traditionally lacked power in society.[27] As a result, they are often victims of many types of crimes, including rape.[28] Consequently, the effects of rape and the rationale for preserving privacy in this arena will be explored by looking through a woman's viewpoint. Keeping a rape victim's identity private is paramount because rape is viewed as the most stigmatizing and traumatic of assaults.[29] The United States Supreme Court has acknowledged that "[s]hort of homicide, [rape] is the 'ultimate violation of the self.'"[30] Even though it is women who are the victims of rape, society tends to shift the blame to them.[31] When a woman is raped, she suffers emotional and physical pain, as well as an additional decrease in status by being blamed for the rape.[32]

Some commentators argue that publishing a rape victim's name will help erase such stigma.[33] However, publicizing a victim's name will instead strengthen the stigma by focusing the attention on the victim, and may even perpetuate prejudicial views.[34] Indeed, according to the Sexual Violence Center in Minneapolis, such public disclosures reinforce sexual assault stereotypes.[35] Since sixty to eighty percent of rapes are committed by a victim's acquaintance, date, or husband; the community usually does not support the victim; the victim is often rejected by friends and family,

---

26. Berlin, *supra* note 3, at 518 (citations omitted).

27. *See* Terri Villa-McDowell, *Privacy and the Rape Victim: The Inconsistent Treatment of Privacy Interests in Two Recent Supreme Court Cases*, 2 S. CAL. L. & WOMEN'S STUD. 293, 331 (1992); Carol S. Goldstein, *The Dilemma of the Rape Victim: A Descriptive Analysis*, 7 INST. CONTEMP. CORRECTION & BEHAVIOR SCI. 1, 3 (1976).

28. Many of the arguments I advance with regard to women can be applied to men. Other issues will not be discussed due to the limited scope of this Article.

29. Berlin, *supra* note 3, at 518.

30. Coker v. Georgia, 433 U.S. 584, 597 (1977).

31. Berlin, *supra* note 3, at 518.

32. *Id.*

33. Michael Gartner, *Naming Rape Victims: Usually, There Are Good Reasons To Do It*, USA TODAY, Apr. 22, 1991, at A6.

34. Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019, 1021 (1991).

35. *Id.* at 1032–33.

and questioned by employers.[36] If such stereotypes about rape victims are to be eradicated, change must begin with the people who foster such views, such as parents, the media and politicians.[37]

Another reason exists to protect the identity of a rape victim. If a woman is afraid that her identity will be made public, she may not report the rape.[38] Studies indicate that rape victims are more willing to report the crime and assist authorities if they feel that their anonymity will be guaranteed.[39] The National Women's Study reports that seventy-six percent of American women surveyed and seventy-eight percent of rape victims surveyed favor legislation that prohibits publishing a rape victim's identity.[40] One-half of the rape victims surveyed said they would be "a lot more likely" to report rapes if the media was legally prevented from acquiring and revealing their names and addresses.[41] Sixteen percent said they would be "somewhat more likely" to report being raped if they knew their identity would remain confidential.[42] In addition, eighty-six percent of everyone surveyed felt that a victim would be "less likely" to report a rape if a victim believed the media would disclose her identity.[43] Thus, keeping a victim's identity confidential would likely encourage the reporting of rape.

One commentator said that the result in *Florida Star v. B.J.F.*[44] "perpetuated the crime of rape."[45] She opined that the *B.J.F.* Court was reluctant to impose per se liability for disclosing a rape victim's identity because of concerns about the victim's truthfulness.[46] Consequently, while rape was already underreported, after this case police have had more discretion to consider "unfounded" reported rapes by refusing to investigate them, and prosecutors may then decide not to file cases.[47] Not only will women be less likely to report rapes, but there will also be fewer

---

36. *Id.* As such, the majority of women who go public are white, middle-class women in stable relationships who were raped by strangers. *Id.*

37. *Id.* at 1033–34.

38. Berlin, *supra* note 3, at 520.

39. *Id.*; *see* Deborah W. Denno, *The Privacy Rights of Rape Victims in the Media and the Law: Perspectives on Disclosing Victims' Names*, 61 FORDHAM L. REV. 1113, 1130 (1993) (citing National Victim Ctr. and Crime Victims Research and Treatment Ctr., *Rape in America: A Report to the Nation* (Apr. 23, 1992)).

40. Denno, *supra* note 39, at 1130.

41. *Id.*

42. *Id.*

43. Denno, *supra* note 39, at 1130–31.

44. 491 U.S. 524 (1989).

45. Villa-McDowell, *supra* note 27, at 330; *see* discussion *supra* Part III.A.

46. Villa-McDowell, *supra* note 27, at 330.

47. *Id.*

convictions.[48] The number of rapists will rise as perpetrators realize that the chances of getting caught are very low.[49] As Germaine Greer reported:

> A man has to be very unlucky to be convicted of the crime of rape. He has to be stupid enough, or drugged or drunk enough to leave a mile-wide trail of blood, bruises, threats, semen, screaming, and what have you, and he has to have chosen the kind of woman about whom the neighbors have nothing but good to say, who has enough chutzpah to get down to the police station at once and file her complaint, and if it results in a trial, to face down the public humiliation, for hearsay evidence about her morals and demeanors is admissible.[50]

Another reason the identity of a rape victim should be protected is that a victim's identity is not truly newsworthy.[51] An attack may be reported without including the name, address, phone number and other information that may identify the victim.[52] The victim's identity does not assist the public's understanding of the rape because it rarely correlates to the reason for the crime.[53] Free press advocates such as Michael Gartner, have argued that this information is necessary to add credibility and substance to the story.[54] However, this claim is without merit.

The media has access to and may cite various sources—including police reports, court files, and judicial proceedings, which provide specific details about the alleged rape.[55] In addition, the press may obtain other facts by interviewing the victim or through other investigative measures.[56] As one commentator stated, "With [such] comprehensive information available, whether the victim was named Jane Doe or Sue Smith is not a necessary element to make a story believable."[57]

The rationale behind the First Amendment also supports protecting the identity of a rape victim.[58] Non-disclosure furthers an important goal of the First Amendment, namely, the search for truth.[59] When people fear

---

48. *Id.*
49. *Id.*
50. *Id.*
51. Berlin, *supra* note 3, at 520.
52. *Id.*
53. *Id.*
54. *See, e.g.*, Gartner, *supra* note 33, at A6.
55. Marcus & McMahon, *supra* note 34, at 1034.
56. *Id.*
57. Marcus & McMahon, *supra* note 34, at 1034–35.
58. Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 711 (1996).
59. *Id.* at 708.

media scrutiny of their private lives, they will be less likely to learn and talk about issues, and thus will be discouraged from seeking the truth.[60] However, if the victim's identity is protected, they will be encouraged to "participat[e] in public debate," thus promoting the First Amendment value of truth.[61] This public dialogue is necessary for victims to acknowledge the rape and come forward with information.[62] Such disclosure will facilitate the apprehension of assailants, and encourage other victims to come forward.[63] This begins to eradicate the stigma associated with rape.

In addition, privacy promotes self-governance, a theory emphasizing the necessity of free expression in a democracy.[64] Affording individuals privacy will allow them to form their own thoughts, question their wisdom and come to their own conclusions.[65] People can then "make valuable contributions to the public debate by questioning the status quo, first privately, then publicly . . . . Thus, privacy is necessary to actualize our vision of ourselves as a nation."[66] Privacy contributes to women coming forward and to educating the public. If victims are allowed to come to terms with these issues first, they will provide positive contributions to help make society safer.

Finally, privacy protects autonomy, which includes individualism and self-realization.[67] This allows people to better themselves by forming their own values and opinions.[68] When women are given developmental opportunities, they will have more to offer society.[69] With autonomy, more women will be willing to express themselves and offer this strength and experience to other women.[70]

B. Policy Arguments in Favor of the Right to a Free Press

"Regardless of how [beneficial] the purpose of controlling the press might be, we . . . remain intensely skeptical about those measures that

60. *Id.* at 710–711.
61. *Id.* at 711.
62. *Id.*
63. *See id.* at 710, 711.
64. *Id.* at 713.
65. Scott, *supra* note 58, at 717.
66. *Id.*
67. Scott, *supra* note 58, at 717–18.
68. Scott, *supra* note 58, at 717–22.
69. Scott, *supra* note 58, at 723.
70. *Id.*

would allow the government to insinuate itself into the editorial rooms of this Nation's press."[71]

Our society prides itself on allowing people the freedom to express their opinions, to engage in debate, and to be informed. To advance such values, the First Amendment guarantee of free press is crucial. Among explanations for affording protection to freedom of speech are: (1) self-governance, (2) self-fulfillment and (3) a safety valve function.[72]

Freedom of the press encourages the decision-making process. In the marketplace of ideas, this exchange of ideas should lead to the truth.[73] Freedom of the press also encourages self-fulfillment. It is important for people to freely say, read, and hear, so that they will feel better about themselves and contribute to society.[74] Free press fulfills a safety-valve function. If people can freely express themselves, they will be less likely to resort to violence caused by pent-up feelings and thoughts.[75]

These rationales, based on the goals of the First Amendment, are related to the "chilling effect" argument.[76] The press argues that legislative prohibitions lead to timidity and editorial self-censorship.[77] If the press is held liable for the truthful publication of a rape victim's name, the press may become overly cautious of what it publishes.[78] This may decrease the "quality and quantity of information available to society."[79]

Another policy argument in favor of publishing a rape victim's name is that publication will help eliminate the stigma attached to rape.[80] The press will educate the public to eradicate impressions and stereotypes which currently tend to blame a victim.[81] Furthermore, if the rape victim's name is not published, newspapers would be contributing to this "conspiracy of silence."[82] Finally, publicizing a rape victim's name informs the public and adds credibility to the story.

---

71. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring).

72. MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT §§ 1.02–1.04 (1984).

73. *Id.* § 1.02[A], at 1-7.

74. *Id.* § 1.03, at 1-49 to 1-50.

75. *Id.* § 1.04, at 1-53.

76. Berlin, *supra* note 3, at 522–23.

77. *Id.*

78. Berlin, *supra* note 3, at 523.

79. *Id.*

80. *Id.*

81. Gartner, *supra* note 33, at A6.

82. *Id.*

IV. THE CONSTITUTIONAL LIMITATION ON THE RIGHT TO PRIVACY: THE CURRENT STANDARD

Critics argue that the tort of invasion of privacy is unconstitutional. The Supreme Court has torn away at the privacy tort and established its own standard.

A. Important Supreme Court Decisions

Four Supreme Court cases define the current standard regarding disclosure of a rape victim's name. The standard took root in *Cox Broadcasting Corp. v. Cohn*,[83] where the father of a deceased rape victim brought an invasion of privacy action against a broadcasting company that revealed his daughter's identity during television coverage of the rape trial. One of the company's reporters obtained the victim's name by examining the indictments that were in the courtroom.[84] The Georgia statute at issue made revealing the identity of a rape victim a misdemeanor.[85]

The broadcasting company asserted that the information was a record open to public inspection, and that the victim's name was of public importance.[86] The Georgia Supreme Court held that the statute was constitutional and could find "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection."[87] Although the statute did not create a civil cause of action, the court allowed the plaintiff to proceed under the tort of public disclosure.[88]

The U.S. Supreme Court reversed this decision.[89] Justice White, in a majority opinion, acknowledged that a zone of privacy exists for each individual, which the state can protect from the press' intrusion.[90] However, the Court held the statute was unconstitutional and that the press could publish facts in the public record.[91] The Court focused on the media's duty to inform the public and on the fact that the information

---

83. 420 U.S. 469 (1975).

84. *Id.* at 472.

85. *Id.* at 471–72; *see* GA. CODE ANN. § 26-9901 (1972).

86. *Id.* at 475.

87. Marietta Broad. Co. v. Advance Marketing Research, Inc., 200 S.E.2d 134 (1973).

88. *Id.*; *see* Suzanne M. Leone, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 NEW ENG. L. REV. 883, 890 (1993).

89. *Cox*, 420 U.S. at 497.

90. *Id.* at 487.

91. *Id.* at 496–97.

published was already publicly available.[92] However, the Court failed to address whether the press would be free from sanctions regardless of the source of the information.[93]

Two years later, the Court defined the standard for disclosing a rape victim's name in *Oklahoma Publishing Co. v. District Court*.[94] That Court considered the constitutionality of a pre-trial order enjoining the press from publishing the name or picture of a juvenile defendant. The Oklahoma Supreme Court upheld the order, relying on state statutes limiting public access to juvenile proceedings unless otherwise ordered by the judge.[95] The goal of these statutes seemed to be preventing the identities of juvenile defendants from becoming public. However, the U.S. Supreme Court held that the pre-trial order violated the First and Fourteenth Amendments.[96] Under *Cox*, the media would avoid sanctions for publishing the names of juveniles because the information was public.[97] The Court did not rule on the constitutionality of the Oklahoma statutes prohibiting public access to juvenile proceedings.[98]

The third case contributing to the current standard used in determining the propriety of rape victim anonymity is *Smith v. Daily Mail Publishing Co.*[99] At issue was a West Virginia statute prohibiting the press from publishing the name of a juvenile offender without prior written court authorization.[100] The defendant learned the name of the child by interviewing witnesses at the scene of the shooting,[101] and subsequently published the juvenile's name after it had been revealed by other media sources.[102] The Supreme Court held that the statute was unconstitutional.[103] For the first time, the Court expressly set forth a First Amendment balancing test.[104] The Court stated that "if a newspaper lawfully obtains truthful information about a matter of public significance then state

92. *Id.* at 495.
93. *Id.* at 495 n.26.
94. 430 U.S. 308, 310 (1977).
95. *See id.* at 309–10.
96. *Id.* at 311–12.
97. *Id.* at 311.
98. *Id.* at 310.
99. 443 U.S. 97 (1979).
100. W. VA. CODE §§ 49-7-3, 49-7-20 (1976).
101. *Smith*, 443 U.S. at 99–100.
102. *Id.*
103. *Id.* at 104–05.
104. Scott, *supra* note 58, at 694.

officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[105]

The state's interest in *Smith* was protecting the identity of the juvenile offender in order to further his rehabilitation.[106] However, the Court struck down the statute because the state interest was not furthered by criminal penalties against newspapers.[107] The state statute was flawed because the ban on publication did not apply to all types of media; therefore, according to the Court, the state's purpose in enacting the statute was not accomplished.[108]

The above-mentioned trilogy of cases led to the present standards for publishing a victim's identity as enunciated in *Florida Star v. B.J.F.*[109] In *Florida Star*, B.J.F. sued the Florida Star for publishing her name in an article concerning her rape.[110] A reporter-trainee copied the victim's police report on the victim verbatim.[111] The report was available in the police department pressroom, where signs were posted warning people not to publish the identity of the rape victim.[112] The paper published the victim's name violating Florida's statute, in addition to the paper's internal policy.[113] At the time of the publication, the assailant had not been caught.[114] As a result, B.J.F. was harassed and even threatened with rape again.[115]

The Florida statute at issue made it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the identity of a rape/sexual assault victim.[116] In finding this statute unconstitutional, the Court synthesized the *Daily Mail* test and the principles set forth in the trilogy of cases, and created a two step analysis.[117] First, the Court had to determine whether the newspaper "lawfully obtain[ed] truthful information about a matter of public significance."[118] "Public significance" refers to

105. *Smith*, 443 U.S. at 103.

106. *Id.* at 104.

107. *Id.* at 104–05.

108. *Id.* at 107–08; *see* Leone, *supra* note 88, at 894.

109. 491 U.S. 524 (1989).

110. *Id.* at 528.

111. *Id.* at 527.

112. *Id.* at 546 (White, J., dissenting).

113. *Id.* at 528; *see* Leone, *supra* note 88, at 896.

114. *Florida Star*, 491 U.S. at 528.

115. *Id.* Victim's mother received threatening phone calls from a man who said he would rape victim again. *Id.*

116. FLA. STAT. ANN. § 794.03 (1987).

117. *Florida Star*, 491 U.S. at 536–37.

118. *Smith*, 443 U.S. at 103.

whether the article concerned a matter of paramount public import, which in this case was the commission and investigation of a crime.[119] The second step required determining whether imposing liability served "a need to further a state interest of the highest order."[120]

Even though the Court acknowledged that there were significant state interests in not reporting a rape victim's name, it held that the Florida statute was unconstitutional. However, the Court's reasoning for allowing the publication of the victim's identity is unconvincing. The Court made a weak attempt at protecting the First Amendment over what appears to be a more compelling interest in privacy.[121] Thus, it seems that the Court found that the state's interests in protecting the privacy of rape victims, ensuring their safety, and encouraging victims to report crimes, were not compelling.

B. Analyzing the Court's Balancing Test

The standards enunciated in *Florida Star* give undue deference to the press and undervalues the state's interest in privacy.[122] The standard has two components. The first part of the analysis, composed of two sub-elements, asks: (1) whether the identity of the rape victim was lawfully obtained and (2) whether the name is a matter of public significance.[123] The *Florida Star* Court's main focus was whether the information was lawfully obtained.[124] The Court concluded that because the government was at fault for leaving the victim's name in the record,[125] it should then bear full responsibility.[126] This decision gives the press free reign to disclose this information, with the press having little or no responsibility regarding the protection of the victim's identity.[127] Through the use of this test, the Court is allowing the media to print any truthful information it legally obtains.[128] This standard is troublesome because it gives future courts a dangerous precedent to rely on.[129] The media should not be

119. *Florida Star*, 491 U.S. at 536–37.
120. *Smith*, 443 U.S. at 103.
121. *Florida Star*, 491 U.S. at 541.
122. Leone, *supra* note 88, at 906.
123. Leone, *supra* note 88, at 902.
124. *Id.*
125. *Florida Star*, 491 U.S. at 538.
126. *Id.* at 534–35.
127. Leone, *supra* note 88, at 903.
128. *Id.*
129. *Id.*

allowed to capitalize on any information they receive, but should instead be held accountable for their actions.[130]

The second part of the *Florida Star* analysis considers whether the name of the rape victim is of public significance, and thus newsworthy.[131] The Supreme Court did not set out a standard for defining newsworthiness, but the California Court of Appeal in *Diaz v. Oakland Tribune, Inc.*[132] summarized the California case law into a three part test. Under that standard, a court must look at: "[1] the social value of the facts published, [2] the depth of the article's intrusion ostensibly into private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety."[133]

Although rape is an extremely private affair and the victim does not intend to place herself in the limelight, the debate continues over whether there is any social value to the publication of a victim's name. As mentioned above, a victim's name has little or no social value.[134] It does not add to the credibility of the story.[135] If a story about a rape is published in a reputable paper, readers will generally accept it as true.[136] The victim's name will not make the story more believable. If necessary, a pseudonym may be used. With all the resources available to the media and police, fact-finding about the rape is possible without publishing the victim's name.[137] Under this test, it would seem that a victim's name falls short of being newsworthy. However, the Court did not focus on the newsworthiness of the *victim's name* but rather on whether the *article* itself was newsworthy.[138] Removing the victim's name does not detract from its newsworthiness.

Another way to define newsworthiness is to focus on self-governance as a basis for the press' First Amendment protection.[139] The public has the right to know the truth to aid in its decision making.[140] To determine whether something is newsworthy, one only needs to consider whether the information at issue is "useful to citizens in making them better able to

130. Leone, *supra* note 88, at 904.

131. *Id.*

132. 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).

133. *Id.* at 772; *see* Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969) (en banc) (citations omitted).

134. Leone, *supra* note 88, at 907.

135. Marcus & McMahon, *supra* note 34, at 1034–35.

136. *Id.*

137. *Id.*

138. *Florida Star*, 491 U.S. at 536.

139. Leone, *supra* note 88, at 907.

140. *Id.*

govern themselves."[141] Following this rationale, it seems that any reasonable person would say that the name does not contribute to self-governance. On the contrary, publication would detract from self-governance.[142] Victims must feel free to report rape without fear of reprisal. The public is interested in information regarding the commission of a violent crime and the rape victim's name adds little to the value of the information. On the other hand, publicizing the victim's name discourages the victim from reporting the rape and reduces the legitimate self-governance information available to the public.[143] Holding the media liable may result in a positive effect on society.[144] If rape victims are allowed recourse, they will continue to come forward and provide information for the public.[145]

The next component of the *Florida Star* test is whether the limitation on the media is necessary to further a compelling state interest.[146] Three state interests were given in *Florida Star*: "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure."[147] These are important state interests because rape victims should have the right to control information about themselves and should not be subjected to the stigma attached to rape.[148] Also, if the attacker has not been apprehended, a state has an interest in protecting the victim's physical safety.[149] Lastly, rape victims are more likely to report a rape if they feel that their identities will not be released.[150]

The *Florida Star* Court however, held that the statute did not serve these interests. First, by making the victim's name public, the government implied that the information was of public importance.[151] Second, the statute was overbroad because it imposed liability without regard for whether the victim was already known in the community, voluntarily called

141. Suzanne Reynolds Greenwood, *Privacy: The Search for a Standard*, 11 WAKE FOREST L. REV. 659 (1975).

142. Julia A. Loquai, *Keeping Tabs on the Press: Individual Rights v. Freedom of the Press Under the First Amendment*, 16 HAMLINE L. REV. 447, 459–60 (1993).

143. *Id.* at 460.

144. *Id.*

145. *Id.*

146. *Florida Star*, 491 U.S. at 537.

147. *Id.*

148. Leone, *supra* note 88, at 910–11.

149. Leone, *supra* note 88, at 911.

150. Leone, *supra* note 88, at 912.

151. *Florida Star*, 491 U.S. at 538–39.

public attention to the offense, or whether the identity of the victim had already become of public concern.[152] Lastly, the statute was underinclusive and only applied to mass communication, making no provision for the public's dissemination of the victim's name.[153]

It appears that the Court wanted to find the statute unconstitutional. The majority of the Court failed to consider that Florida had an interest in protecting the identity of rape victims despite the fact that Florida had enacted a privacy statute and had signs in the police pressroom warning against revealing the identity of rape victims.[154] Furthermore, the Court did not inquire whether the victim's name had been made public. Instead, the Court struck down Florida's statute without giving sufficient weight to the state's interests.

The flaw in the Court's reasoning may be better understood by comparing the reasoning in *Florida Star* with that in *United States Department of Justice v. Reporter's Committee for Freedom of the Press*.[155] In *Reporter's*, the media brought a request under the Freedom of Information Act[156] for criminal records that the Justice Department and FBI possibly had regarding individuals involved in organized crime.[157] The issue was whether there was a privacy interest in not disclosing the names of these individuals even though the once public records were now hard to find.[158]

The Court balanced the right to privacy with the public's right to know, and argued that there was a "vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[159] The Court stated that the identities of individuals in rap sheets were not important to the public's understanding of the law enforcement system.[160] The Court applied this rule categorically, and did not provide for a case-by-case determination.[161]

---

152. *Id.* at 539.
153. *Id.* at 540.
154. *Id.* at 528.
155. 489 U.S. 749 (1989).
156. Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7)(C) (Supp. V 1982).
157. Villa-McDowell, *supra* note 27, at 300.
158. *Id.*
159. *Reporter's*, 489 U.S. at 764.
160. *Id.* at 766 n.18.
161. Villa-McDowell, *supra* note 27, at 302.

The interests advanced in *Reporter's* were the same interests advanced in *Florida Star*.[162] However, the *Reporter's* Court and the *Florida Star* Court conveniently used two different understandings of "public significance."[163] In its normative sense, "public significance" refers to speech that contributes to the public's understanding essential to self-government.[164] In its descriptive sense, "public significance" includes matters of public curiosity.[165] In *Reporter's*, the rap sheet was considered in its descriptive sense, and in *Florida Star* it was considered to be of paramount public importance.[166] There appears to be flawed reasoning in both of these cases, as the Court used two different meanings of "public significance." Consequently, these holdings should be reversed.

V. THE NEW RIGHT TO PRIVACY: A FAIR BALANCE

There are many problems with the *Florida Star* Court's approach and reasoning. It appears as though the Court viewed the case with a predetermined outcome in mind, and failed to consider all the factors involved in the case. Admittedly, there were problems with the statute at issue in *Florida Star*. Most importantly, it was unconstitutional due to overbreadth and vagueness. However, it is possible to draft a constitutional statute that protects the names of rape victims.

A. The Recently Enacted Crime Victims Protection Act

In 1995, Florida passed a new Crime Victims Protection Act[167] ("CVPA") after the Court invalidated the previous statute in *Florida Star* and in *State v. Globe Communications Corp.*[168] Section 92.56 of the CVPA requires that five independent factors be satisfied in order for the rape victim to receive protective anonymity.[169] The factors are:

(a) The identity of the victim is not already known in the community;

(b) The victim has not voluntarily called public attention to the

---

162. *Id.* at 303.

163. *Id.* at 311–312.

164. *Id.* at 311.

165. *Id.*

166. *Id.* at 312.

167. Crime Victims Protection Act, § 1, 1995 Fla. Sess. Law Serv., ch. 95–207 (codified at FLA. STAT. § 92.56).

168. 648 So. 2d 110 (Fla. 1994); *see* Berlin, *supra* note 3, at 541.

169. FLA. STAT. ANN. § 92.56 (West Supp. 1999). This section applies to many crimes including rape/sexual assault, child abuse and sexual performance by a child.

offense;

(c) The identity of the victim has not otherwise become a reasonable subject of public concern;

(d) The disclosure of the victim's identity would be offensive to a reasonable person; and

(e) The disclosure of the victim's identity would: . . . [e]ndanger the victim; . . . [c]ause severe emotional or mental harm to the victim; . . . [m]ake the victim unwilling to testify as a witness; or . . . [b]e inappropriate for other good cause shown.[170]

Once these factors are satisfied, all court records revealing the victim's name, address, or photograph become confidential and exempt from Florida's constitutional public disclosure provisions.[171] Anyone who makes the records public will be held in contempt.[172] However, the restriction on using a victim's name is not absolute. States may use pseudonyms instead of the victim's name in public documents.[173] Additionally, the defendant is not precluded from obtaining the victim's name in preparation of his defense and may therefore petition the trial court for an order of disclosure.[174] Lastly, the victim may waive the protection of this section.[175]

B. The Proposed Rape Victims Protection Act

The CVPA was a clear attempt by the Florida legislature to correct the constitutional problems with the previous privacy statute. However, even this Act is unconstitutional under *Florida Star*.[176] With some changes however, the Act would probably be found constitutional.

First, section 92.56 is overbroad, because it applies to a multitude of crimes.[177] The statute is not limited to protecting rape victims but also

---

170. *Id.* § 92.56(1).

171. *Id.*

172. *Id.* §§ 92.56(2), 92.56(6).

173. *Id.* § 92.56(3).

174. *Id.* § 92.56(4).

175. FLA. STAT. ANN. § 92.56(4).

176. Berlin, *supra* note 3, at 541, 545–559. The First Amendment objections include: overbreadth with respect to what is covered by the statute; problematic statutory language regarding the prohibited speech-act and the susceptible speakers; problematic statutory language regarding what will become confidential; problematic statutory language limiting the reproduction of testimony; problems regarding who may argue for anonymity under the Act; and problems regarding individualized adjudication under the Act. *Id.*

177. In addition to rape victims, the section applies to victims of child abuse, aggravated child abuse or sexual performance by a child in addition to rape victims. FLA. STAT. ANN. § 92.56(2) (West Supp. 1998).

shields victims of other sexual crimes and some non-sexual child abuse.[178] The result is that the Act suppresses more speech than necessary—"speech that the state does not have a compelling interest to suppress."[179]

The Florida legislature has not shown that the social stigma associated with rape, and the reluctance to report or assist authorities also exists in instances of aggravated child abuse or child molestation.[180] The state's interests are not equally significant for all of the crimes covered by the Act.[181] There are different interests to be protected when rape is involved and so the act needs to be specific.[182] Therefore, the new Act will be called the Rape Victims Protection Act and will only apply to rape victims.

Four of the five requirements of section 92.56 should be retained in a revised statute in order for the rape victim to receive protective anonymity. First, the victim's identity cannot be newsworthy, or a reasonable subject of public concern.[183] Courts have held that names are not always newsworthy.[184] For instance, in *Y.G. and L.G. v. Jewish Hospital of St. Louis*,[185] the plaintiffs had participated in an *in vitro* fertilization program.[186] The hospital held a social function for them, and plaintiffs specifically told the media that they did not want to be filmed.[187] The media nevertheless filmed the function and aired it on television.[188] The court found that even though the *in vitro* program was a matter of public interest, the identity of the parties participating in it were private, or in other words, not of public concern.[189] The court stated that matters of procreation, sexual relations, and medical treatment are all private matters.[190] Ironically, this means that a woman's identity is only protected if the sexual encounter is consensual.

In *Barber v. Time, Inc.*,[191] the plaintiff sued for a violation of her right to privacy when the defendant published an article with plaintiff's picture

178. Berlin, *supra* note 3, at 545.

179. *Id.* at 545.

180. *Id.* at 546.

181. *Id.*

182. *Id.*

183. *Id.* at 545–559.

184. *See Y.G. & L.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488 (Mo. Ct. App. 1990); *Barber v. Time* 159 S.W.2d 291 (Mo. 1942).

185. 795 S.W.2d 488 (Mo. Ct. App. 1990).

186. *Id.* at 492.

187. *Id.*

188. *Id.*

189. *Id.* at 500.

190. *Id.*

191. 159 S.W.2d 291, 292 (Mo. Ct. App. 1942).

about a physical ailment for which she was being treated. The court held that the right to privacy, at the very least, should include an individual attaining medical treatment without publicity.[192] This is beneficial to patients as it allows them to be open about their illness, which is necessary for physicians to treat them properly.[193] A patient's candor about their illness is more likely when the patient harbors no fear of the publication of any potentially embarrassing or harmful information.[194]

These arguments exemplify why the names of victims are private and not newsworthy. Both *Jewish Hospital* and *Barber* involved issues of public concern—*in vitro* fertilization and physical ailment. Medical information is very newsworthy, but courts have held that publishing patients' names is not of public concern. Likewise, in areas of rape, where the incident is of public concern, the names of rape victims' should be deemed private. The public is well informed by receiving information on the particular issue. Adding the victim's name into a news story does not add to the public's understanding of the incident.

The courts in medical cases have particularly stated that the names are not newsworthy.[195] Rape victims deserve similar protection. In medicine, one reason for privacy is to allow people to obtain medical treatment without the fear of embarrassing information being revealed.[196] This same protection is necessary for rape victims. To ensure that victims will report rapes and assist authorities, victims must be confident that they will not receive unwanted publicity. Critics argue that names are necessary for credibility and to assist in finding witnesses or other information.[197] However, with the extensive array of resources available to the media and police, it is entirely possible for them to obtain information without disclosing the identity of rape victims.

Second, the victim must not *voluntarily* call public attention to the offense.[198] In *Diaz v. Oakland Tribune*,[199] the plaintiff underwent gender corrective surgery but took every measure to ensure that it remained confidential.[200] The defendant publicized the plaintiff's surgery.[201] Even though the plaintiff was the first female student body president of her

192. *Id.* at 295.
193. *Id.* (citing 21 R.L.C. 378 § 24).
194. *See id.*
195. *Y.G. & L.G*, 795 S.W.2d at 488, 500.
196. *Barber*, 159 S.W.2d at 295.
197. *See* discussion *supra*, Part III.A-B.
198. *See, e.g.*, FLA. STAT. ANN. § 92.56 (West Supp. 1999).
199. 188 Cal. Rptr. 762 (1983).
200. *See id.* at 765.
201. *Id.* at 766.

college and was well-known, the California court found that she did not voluntarily draw attention to her surgery.[202] Under that reasoning, if a rape victim is in the public eye, it cannot be found that she has voluntarily called attention to the rape. Drawing voluntary attention is specific to the crime and not to the rest of the rape victim's life.

Third, the disclosure should be considered offensive to a reasonable person. This standard would not apply to an abnormally sensitive person.[203] However, this does not require that the information be considered repulsive.[204] There are many disclosures that courts have found to be offensive. In *Gallon v. Hustler Magazine*,[205] the court found that the unpermitted publication of a nude photograph of a person is "highly offensive to a reasonable person of ordinary sensibilities."[206] In *Hillman v. Columbia County*,[207] disclosing HIV test results was also considered to be offensive, even when the disclosure affected a person in jail.

Also, in *Miller v. Motorola, Inc.*,[208] the court held that an employer's disclosure of the plaintiff's mastectomy surgery could be considered offensive and left it for the jury to decide.[209] In light of the holdings from these cases, disclosure of the fact that a victim was raped would seem extremely offensive. Rape is involuntary, similar to contracting HIV or requiring most surgeries. Rape is embarrassing and stigmatizing, similar to having a nude picture of an individual published without consent or having an individual's HIV status revealed. Any reasonable person would be offended by such disclosures.

Lastly, a compelling state interest in protecting the victim's privacy must exist. The statute should protect privacy when disclosing the victim's identity would endanger the victim because the assailant has not been apprehended, is not otherwise known, or when there is the likelihood of retaliation, harassment, or intimidation. Privacy should also be protected

202. *See id.* at 773.
203. Scott, *supra* note 58, at 691; *see* Prosser, *supra* note 18, at 397.
204. Scott, *supra* note 58, at 691 n.39.
205. 732 F. Supp. 322 (N.D.N.Y. 1990).
206. *Id.* at 325.
207. 474 N.W.2d 913 (Wis. Ct. App. 1991).
208. 560 N.E.2d 900 (Ill. Ct. App. 1990).
209. *Id.* at 903.

where disclosure would cause severe emotional or mental harm to the victim or would make the victim unwilling to testify.

A court should have flexibility to account for unpredictable situations. Therefore, disclosure may also be prohibited if other good cause is shown. For example, if one of the four factors is not met, but there is great likelihood that the victim's life is in danger, the court may prohibit disclosure. The statute should also provide for disclosure if good cause is shown; this includes when a state's interest in non-disclosure is outweighed by a competing First Amendment interest because the victim is dead or is a foreigner. The burden to demonstrate good cause should rest on the defendant.

An example of a compelling state interest is present in *Times-Mirror Co. v. Superior Court*.[210] The plaintiff discovered the dead body of her roommate and was able to identify the killer to the police.[211] The defendant got this information, including the plaintiff's name, from the coroner's office.[212] The plaintiff told friends, family, and neighbors, and then confronted the murderer.[213] In addition, the police and employees of the coroner's office knew her name and identity.[214] The plaintiff was also questioned about the incident by the police in public.[215] Based on these facts, the court concluded that:

> [W]here an individual observes and can identify a suspected murderer who is still at large, the First Amendment provides no absolute protection from liability for printing the witness's name. The individual's safety and the state's interest in conducting a criminal investigation may take precedence over the public's right to know the name of the individual.[216]

The court in *Hyde v. Columbia* also found that the news media could be held liable for publishing of a victim's name where safety is involved.[217] The court held that:

> [T]he name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news medium owes a

---

210. 244 Cal. Rptr. 556 (1988).
211. *Id.*
212. *Id.* at 558.
213. *Id.* at 560.
214. *Id.* at 560-61.
215. *Id.* at 561.
216. *Times-Mirror*, 244 Cal. Rptr. at 560.
217. 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983).

> duty in such circumstances to use reasonable care not to give likely occasion for a third party [the assailant still at large] to do injury to the plaintiff by the publication.[218]

Based on this reasoning, a rape victim's name should not be disclosed when the assailant is at large or judicial proceedings have not begun. In these instances, there is the risk that the assailant may escape or that his family or friends will try to take revenge on the plaintiff. These risks far outweigh any interest in disclosing the rape victim's name.

Once these four factors are met, all court and other legal records that reveal the victim's name, address, and photograph (or any other information from which a reasonable person could identify the victim) become confidential and exempt from a state's constitutional disclosure provisions. Types of records included are reporter, clerk, and deposition transcripts, and also witness testimony. Records become confidential when they reveal the victim's identity. Once the identity revealing information is blackened out, redacted, or replaced by a pseudonym, the record is no longer confidential.

A person or institution may not knowingly or maliciously spread word of or publish the victim's identity. This applies to anyone, including media, small-time disseminators, and people discussing the crime on the street. However, this prohibition does not apply to the victim's close family, friends, or police. This is necessary to assist the victim in reporting the rape, to assist authorities in gathering information about the rape, and to decrease the stigma and embarrassment. Courts have not considered this to be publication. For example, in *Times-Mirror*, the plaintiff's identity was not public just because she was questioned by police in public or because she told certain neighbors, friends and family members about the crime.[219] Also, in *Diaz*, the plaintiff telling her family that she had a sex change was not considered a public fact.[220]

In addition, any person who questionably, unethically or unlawfully obtains and publishes or reveals the identity revealing information may be held in contempt. This is an area where the courts should give more deference. For example, in *Florida Star*, the press revealed the victim's identity despite the fact that the police pressroom had signs warning against such publication.[221] Although this was not considered to be unlawfully obtained, it should have been punished as being unethical or questionable

---

218. *Id.* at 269.

219. *Times-Mirror*, 244 Cal. Rptr. at 560.

220. Diaz v. Oakland Tribune, 188 Cal. Rptr. 762, 771 (1983).

221. Florida Star v. B.J.F., 491 U.S. 524, 546 (1989).

conduct. Similarly, in *Macon Telegraph Publishing Co. v. Tatum*,[222] the result was improper. A sexual assault victim brought an action against a newspaper that published her name.[223] The investigating officers gave her name to two reporters admonishing them not to publish it, yet they published it anyway.[224] The court held that the newspaper legally obtained truthful information.[225] In these types of situations, courts need to be more conscientious of the importance behind not disclosing the victim's identity. While government officials should take necessary measures to keep identities private, the media must also abide by some standards of decency. If one is asked not to publish something, such a request should be honored.

The Act also applies to repeaters, people who publish the victim's name after it has been revealed by other sources. There are still compelling interests in not further publishing victims' names. The victim's identity may have been revealed, but the disseminator of this information may still be sued or held in contempt of court. Furthermore, the information may only be public to a limited amount of people and further publication could cause more damage. There may be a point at which publication would cause no further damage, and the defendant would then be able to show good cause for why the information should be disclosed.

In accord with section 92.56, pseudonyms must be used instead of the victim's name to designate the rape victim in all court records. The defendant may apply to the trial court for an order disclosing the victim's identity in order to prepare a defense. A court order would direct that this information not be revealed or used for any other purpose. The protection of this section may be waived by the victim in a writing filed with the court, in which the victim consents to the use or release of identifying information during court and pre-trial proceedings and their records.

This proposed section should apply to all pre-trial proceedings. Once trial begins, broadcasting the victim's identity is permitted because many of the compelling interests supporting the victim's privacy may no longer exist. However, if interests in protecting the victim's privacy continue, these interests would more likely be outweighed by First Amendment interests in a free press.[226] In addition, the judge has discretion on whether to allow cameras, but media personnel and members of the public would be allowed. If good cause is shown, the judge may admonish the media and public not to publish any identity revealing information.

---

222. 430 S.E.2d 18 (Ga. Ct. App. 1993).

223. *Id.* at 20.

224. *Id.* at 20–21.

225. *Id.*

226. *See* discussion *supra* Part III.A-B.

VI. CONCLUSION

There are tensions between the right to privacy and the First Amendment. These tensions may be resolved to some extent when the Court applies a balancing test. In previous cases, statutes have been found unconstitutional, and the states' interests in protecting the privacy of rape victims have been discredited and not properly balanced with the media's First Amendment right to a free press. Florida attempted to resolve these problems in the CVPA. This statute, however, is not likely to survive judicial scrutiny in its present form. The New Rape Victims Act as proposed by this Article attempts to resolve the constitutional infirmities of the CVPA. If such changes are adopted by state legislatures, rape victims may finally receive fair treatment in the courts.