

COMMENT

Florida Star v. B.J.F.: The Wrongful Obliteration of the Tort of Invasion of Privacy Through the Publication of Private Facts

Introduction

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹ The United States Supreme Court has not interpreted this clause to mean that freedom of speech is an absolute right.² The First Amendment is vital to a free society, but it does not protect all speech regardless of the damaging effects that it may have. A competing interest is the right of privacy. State legislatures have criminalized dissemination of private facts and have created statutory rights to privacy that protect people from public disclosure of private facts.³

Historically, the right to privacy has been perceived as a necessary right in our society. Samuel Warren and Louis Brandeis first introduced the theory of the right to privacy in 1890.⁴ The *Restatement (Second) of Torts* section 652D defines the tort of invasion of privacy through the publication of private facts as the publication of a matter concerning the private life of another that is highly offensive to a reasonable person and that is not of legitimate public concern.⁵

1. U.S. CONST. amend. I.

2. *See* *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (first amendment “protection even as to prior restraint is not absolutely unlimited” in situations in which the disclosure of military information is involved); *see also* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).

3. *See, e.g.*, FLA. STAT. § 794.03 (1983) (states that an offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084); W. VA. CODE § 49-7-20 (1976) (a person who violates § 49-7-3 “shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment.”).

4. Warren & Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

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

The major cases dealing with the tort of invasion of privacy through the publication of private facts have balanced the right of privacy with the First Amendment. For example, in *Cox Broadcasting Corp. v. Cohn*, the Court held that the First Amendment protected the media from liability for publishing private facts that were a matter of public record.⁶ In *Oklahoma Publishing Co. v. District Court*, the Court held that the First Amendment protected the press from liability for publishing information placed in the public domain regarding a juvenile offender.⁷ In *Smith v. Daily Mail Publishing Co.*, the Court held that the First Amendment protected a newspaper from liability for the publication of lawfully obtained truthful information regarding a matter of public significance, "absent a need to further a state interest of the highest order."⁸ On the other hand, other courts, in balancing this issue, have concluded that the First Amendment did not protect the media from liability for the publication of private facts.⁹

In a recent case, *Florida Star v. B.J.F.*,¹⁰ the statutory right of privacy directly clashed with the freedom of the press. The United States Supreme Court held that imposing damages on the newspaper The Florida Star (Star) for publishing the name of a rape victim violated the First Amendment.¹¹ In *Florida Star*, the Star had obtained information regarding the identity of the rape victim from a record that was confidential under Florida statutes.¹² The rape victim's assailant remained at large. As a result of the publication, B.J.F. "received harassing phone calls, required mental health counseling, was forced to move from her home, and was even threatened with rape again."¹³

The District Court of Appeal of Florida affirmed the Florida trial court's award of \$75,000 in compensatory damages and \$25,000 in punitive damages for the newspaper's negligence based upon its violation of the confidentiality statute.¹⁴ The Supreme Court of Florida denied discretionary review.¹⁵ Upon petition, the United States Supreme Court granted certiorari.¹⁶ In reversing the District Court of Appeal of Florida, Justice Marshall, writing the five-vote majority opinion, ruled that "imposing damages on appellant for publishing B.J.F.'s name violates the

6. 420 U.S. 469 (1975).

7. *Oklahoma Publishing Co. v. District Ct.*, 430 U.S. 308 (1977).

8. 443 U.S. 97, 103-04 (1979).

9. See *infra* notes 80-105 and accompanying text.

10. 109 S. Ct. 2603 (1989).

11. *Id.* at 2608.

12. *Id.* at 2606; FLA. STAT. §§ 119.07(3)(h), 794.03 (1983) (making it unlawful to publish the name of a rape victim).

13. *Florida Star*, 109 S. Ct. at 2614 (White, J., dissenting).

14. *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986).

15. *Florida Star*, 109 S. Ct. at 2607.

16. *Id.*

First Amendment.”¹⁷ The Court held that “where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability . . . under the facts of this case.”¹⁸

Justice Scalia concurred in part and concurred in the judgment, finding the statute underinclusive. He reasoned that “a law cannot be regarded as protecting an interest ‘of the highest order,’ and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.”¹⁹ The statute in question imposed a prohibition on the press but did not place a prohibition on dissemination through gossip.²⁰ According to Justice Scalia, failure to prohibit other means of circulation leaves the rape victim subject to discomfort at least as great as her discomfort from publication by the media to people to whom she is only a name.²¹

Justice White, joined by Chief Justice Rehnquist and Justice O’Connor, strongly dissented. Stressing the drastic nature of the crime involved, the dissenters explained that “[s]hort of homicide, [rape] is the ‘ultimate violation of self.’”²² The dissenters further argued that by holding that protecting a rape victim’s right to privacy is not a state interest of the highest order, the Court accepted the appellant’s invitation to obliterate the tort of invasion of privacy through the publication of private facts.²³ Justice White reasoned that the public has no interest in the names, addresses, and phone numbers of victims of crime and there is “no public interest in immunizing the press from liability where a State’s efforts to protect a victim’s privacy have failed.”²⁴

This Comment examines the United States Supreme Court’s decision in *Florida Star v. B.J.F.* that a rape victim’s statutory right to privacy does not override a newspaper’s constitutional right to freedom of speech. To make this determination, the Court has balanced the value of publishing a rape victim’s name that is not a matter of public record and not open to public inspection against the first amendment right to freedom of speech. Part I of this Comment examines the background of the right to privacy and the conflict between that right and the First Amendment. Part II presents the facts, the procedural history, the majority

17. *Id.* at 2608.

18. *Id.* at 2613.

19. *Id.* at 2613 (Scalia, J., concurring) (citation omitted) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

20. *See id.*

21. *Id.*

22. *Id.* at 2614 (White, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

23. *Id.* at 2618.

24. *Id.* at 2619.

holding, the concurring opinion, and the dissenting opinion as discussed in *Florida Star v. B.J.F.* Part III criticizes the Court's constitutional analysis of the conflicting rights in *Florida Star* in light of the balance the Court struck, its interpretation of the applicable precedent, the intended application of *Cox Broadcasting*, and the test the Court applied based on noncontrolling case law.

This Comment concludes that the rape victim's right of privacy and the state's interest in nondisclosure necessarily outweigh the right of the press to publish the victim's name and deserve protection when the name is neither a matter of public record nor a matter of legitimate public concern. As Justice White indicated, the conclusion that imposing damages on the Star violates the First Amendment ignores the plight of the rape victim and virtually wipes out the tort of invasion of privacy through the publication of private facts.²⁵

I. Background

Background for the issues raised in *Florida Star v. B.J.F.* includes the precedents to *Florida Star* and the history of the tort of invasion of privacy. The following cases concern a tension between protecting the media's right to free speech and a person's interest in privacy. The courts have been forced to choose between these two valuable interests.

A. Precedents to *Florida Star v. B.J.F.*

This section first discusses cases in which the Court found that the media's disclosure of private facts was protected by the First Amendment. Next, this section addresses cases in which the Court placed limits on the media's disclosure of private facts.

1. *Protected Disclosure of Private Facts*

*Cox Broadcasting Corp. v. Cohn*²⁶ addressed first amendment protection of the press from an action for invasion of privacy based on the publication of a rape victim's name. Although factually similar to *Florida Star*, all of the Justices agreed that it did not control *Florida Star*. Unlike *Florida Star*, the victim's name in *Cox Broadcasting* was already a matter of public record. In *Cox Broadcasting*, the father of a deceased rape victim brought an action against the Cox Broadcasting Corporation for the broadcast of the deceased rape victim's name.²⁷ The reporter obtained the information from the indictments, which were public records open to public inspection.²⁸ The victim's father relied on a Georgia stat-

25. *Id.* at 2618.

26. 420 U.S. 469 (1975).

27. *Id.* at 474.

28. *Id.* at 472.

ute²⁹ that makes it a misdemeanor to broadcast a rape victim's name. He succeeded in the trial court and in the Georgia Supreme Court.³⁰ The Georgia Supreme Court declared that the statute was representative of a state policy that "a rape victim's name was not a matter of public concern," and upheld the statute as a "legitimate limitation on the First Amendment's freedom of expression."³¹

The United States Supreme Court reversed.³² Justice White delivered the opinion of the Court, which held that "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."³³ Justice White reasoned that in modern society, individuals have limited time and resources with which to observe first hand the operations of government. As a result, individuals must rely on the press to inform them in a convenient manner of the facts of those operations.³⁴ Thus, he declared, "[g]reat responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations."³⁵

Justice White found that the judicial proceedings arising from the prosecutions of crime are events of legitimate public concern and that the press has the responsibility of reporting these to the public.³⁶ Justice White then turned to the important nature of judicial proceedings and stated that the press serves to guarantee the fairness of trials by scrutinizing the administration of justice and thus permitting the public to benefit from the effects of public scrutiny.³⁷

Moreover, Justice White recognized that "the interests in privacy fade when the information involved already appears on the public record."³⁸ He concluded that because the state placed the information in the public domain on official court records, it must have decided that the public interest was being served.³⁹ Justice White did, however, limit the holding in *Cox Broadcasting* to the circumstances presented in that case.⁴⁰

In *Oklahoma Publishing Co. v. District Court*, the Supreme Court held that an order of the district court precluding the press from publish-

29. GA. CODE ANN. § 26-9901 (1972).

30. *Cox Broadcasting*, 420 U.S. at 474.

31. *Cox Broadcasting Corp. v. Cohn*, 200 S.E.2d 127, 134 (Ga. 1973).

32. *Cox Broadcasting*, 420 U.S. at 495.

33. *Id.*

34. *Id.* at 491.

35. *Id.* at 491-92.

36. *Id.*

37. *Id.* at 492.

38. *Id.* at 494-95.

39. *Id.* at 495.

40. *Id.* at 496-97.

ing the name or picture of a juvenile offender violated the First and Fourteenth Amendments.⁴¹ In that case the state charged an eleven-year-old boy, Larry Donnell Brewer, with second degree murder for the fatal shooting of a railroad switchman.⁴² The juvenile offender appeared at a detention hearing in Oklahoma County Juvenile Court attended by reporters who learned his name and took his photograph.⁴³ Newspapers in the county printed a number of stories using the boy's name and photograph.⁴⁴ The juvenile was arraigned at a closed hearing at which the judge entered a pretrial order enjoining publication of the name and picture of the juvenile.⁴⁵ The district court denied the newspaper's motion to quash the order. The Oklahoma Supreme Court also denied the newspaper's writs of prohibition and mandamus, relying on Oklahoma statutes.⁴⁶ These statutes provide that "juvenile proceedings are to be held in private 'unless specifically ordered by the judge to be conducted in public,' and that juvenile records are open to public inspection 'only by order of the court.'"⁴⁷

The United States Supreme Court reversed, concluding that the information was placed in the public domain and that the district court's order abridged the freedom of the press in violation of the First and Fourteenth Amendments.⁴⁸ Even though the judge did not expressly order the hearing to be public as the state statute permitted, members of the press were present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel.⁴⁹ The Court found that there was "no evidence that [the newspaper] acquired the information unlawfully or even without the State's implicit approval."⁵⁰

In *Smith v. Daily Mail Publishing Co.*, the Court struck down a West Virginia statute that made it a crime for a newspaper to publish the name of any juvenile offender without the juvenile court's approval.⁵¹ The statute prohibited publication even when the information was lawfully obtained.⁵² The challenged statute provided: "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court"⁵³

41. 430 U.S. 308, 311-12 (1977).

42. *Id.* at 309.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Oklahoma Publishing Co. v. Martin*, 618 P.2d 944 (Okla. 1980).

47. 430 U.S. at 309 (quoting OKLA. STAT. ANN. tit. 10, §§ 1111, 1125 (Supp. 1976)). The district court's decision is not published.

48. *Id.* at 311-12.

49. *Id.* at 311.

50. *Id.*

51. 443 U.S. 97, 106 (1979) (interpreting W. VA. CODE §§ 49-7-3, 49-7-20 (1976)).

52. *Id.*

53. W. VA. CODE § 49-7-3 (1976).

In *Daily Mail*, the newspaper learned the name of a juvenile, who had been arrested for allegedly killing another youth, by monitoring the police band radio frequency and by asking eyewitnesses.⁵⁴ They published articles including the juvenile's name in their description of the event.⁵⁵

The West Virginia Supreme Court of Appeals held that "[t]he asserted state interest in protecting the anonymity of the juvenile offender to further his rehabilitation cannot justify the statute's imposition of criminal sanctions for publication of a juvenile's name lawfully obtained."⁵⁶ Further, the court found that, assuming the statute served a state interest of the highest order, the statute failed to serve that interest because it was underinclusive.⁵⁷ It did not accomplish its stated purpose because it only restricted newspapers. The electronic media and any other forms of publication were left free from restrictions.⁵⁸

The Supreme Court granted certiorari and Chief Justice Burger delivered the opinion of the Court.⁵⁹ Looking for guidance from *Landmark Communications, Inc. v. Virginia*,⁶⁰ *Cox Broadcasting Corp. v. Cohn*,⁶¹ and *Oklahoma Publishing Co. v. District Court*,⁶² Chief Justice Burger reasoned that these opinions did not directly control *Daily Mail*; he did find, however, that they all suggested strongly that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."⁶³

The Court found that the statute advanced the state interest of protecting the anonymity of the juvenile offender with this criminal statute.⁶⁴ Chief Justice Burger concluded that this state interest did not justify the application of a criminal penalty.⁶⁵ Moreover, the Court found that because the statute did not include other forms of publication,

54. *Daily Mail*, 443 U.S. at 99.

55. *Id.*

56. *Smith v. Daily Mail Publishing Co.*, 248 S.E.2d 269 (W. Va. 1978).

57. *Id.*

58. *Id.*

59. *Daily Mail*, 443 U.S. at 98.

60. 435 U.S. 829 (1978). The Court found that a state must demonstrate that punishing a newspaper's publication of facts was necessary to further the state interests asserted in order to prove that the First Amendment was not violated. *Id.* at 843. The Court declared unconstitutional a Virginia statute making it a crime to publish information concerning confidential proceedings regarding complaints about alleged disabilities and misconduct of state court judges. *Id.* at 838. The Court held that the publication touched upon the core of the First Amendment and that the state's interests advanced by the imposition of criminal sanctions were insufficient to justify the encroachments on freedom of speech. *Id.*

61. 420 U.S. 469 (1975).

62. 430 U.S. 308 (1977).

63. *Daily Mail*, 443 U.S. at 103.

64. *Id.* at 104.

65. *Id.*

such as radio, it did not accomplish its stated purpose.⁶⁶

In his concurring opinion, Chief Justice Rehnquist cautioned, "Freedom of speech thus does not comprehend the right to speak on any subject at any time, . . . and the press is not free to publish with impunity everything and anything it desires to publish."⁶⁷ Chief Justice Rehnquist stated that the Court has rejected absolutes in favor of a more delicate balancing that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented.⁶⁸

In Chief Justice Rehnquist's view, a state's interest in preserving the anonymity of its juvenile offenders, which he perceived as an interest of the highest order, far outweighed any minimal interference with the First Amendment that a ban on publication of the youths' names would entail.⁶⁹ Chief Justice Rehnquist agreed with the Court, however, because the statute failed to mention other effective forms of publication and therefore largely failed to achieve its purpose.⁷⁰ Chief Justice Rehnquist believed that a generally effective ban on publication that applied to all forms of mass communication, including electronic and print media, would be constitutional.⁷¹

In *Doe v. Sarasota-Bradenton Florida Television Co.*, after a rape victim testified against her assailant at his trial for rape, the press ran her videotaped testimony on the evening news.⁷² The *Doe* court held that *Cox Broadcasting* was controlling and that the First Amendment protected the action taken by the press.⁷³ As in *Cox Broadcasting*, the television company obtained the information from a source already open to public view—a public criminal trial.⁷⁴ The court did not invalidate Florida Statute section 794.03, however, because it recognized that under certain circumstances, section 794.03 could be applied to protect privacy interests without violating the First Amendment.⁷⁵

Despite upholding the constitutionality of the media's actions, the court found the actions to be distasteful. The court added, "Although we affirm the trial court in all respects, we do so reluctantly because the information disclosed during the television broadcast appears to us to

66. *Id.* at 104-05.

67. *Id.* at 106 (Rehnquist, C.J., concurring) (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 394 (1950); *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972) (citations omitted)).

68. *Id.* at 106.

69. *Id.* at 107.

70. *Id.* at 110.

71. *Id.*

72. *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So. 2d 328, 329 (Fla. Dist. Ct. App. 1983).

73. *Id.*

74. *Id.* at 329-30.

75. *Id.* at 330.

have been completely unnecessary to the story being presented.”⁷⁶ The court criticized the media’s lack of sensitivity to the rights of others.⁷⁷ The court sympathized with the victim’s situation and reasoned that prior to this trial, the victim was simply an ordinary citizen, lacking fame and prominence, who unwillingly became a victim of the crime of rape.⁷⁸ The court reasoned that “[t]he publication added little or nothing to the sordid and unhappy story; yet, that brief little-or-nothing addition may well affect appellant’s well-being for years to come.”⁷⁹

2. *Unprotected Disclosure of Private Facts*

In *United States Department of Justice v. Reporters Committee For Freedom of the Press*, the United States Supreme Court held that publication of criminal identification records could constitute an invasion of privacy.⁸⁰ The Court stated that Exemption 7(C), an exception to the Freedom of Information Act,⁸¹ prohibits disclosure of the contents of an FBI rap sheet to a third party because it constitutes an unwarranted invasion of privacy.⁸² Exemption 7(C) excludes from the statute’s disclosure requirements “records or information compiled for law enforcement purposes . . . ‘to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.’”⁸³ Exemption 7(C) requires the balancing of the privacy interest in maintaining the practical obscurity of the rap sheets against the public interest in their release.⁸⁴

The United States Supreme Court rejected the argument that because the events in a rap sheet had been previously disclosed to the public, there is no privacy interest in avoiding disclosure of a federal compilation of these events.⁸⁵ The Court found that “there is a vast difference between the public records that might be found after a diligent search . . . and a computerized summary.”⁸⁶ The Court concluded:

The privacy interest in maintaining the practical obscurity of rap sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government’s control as a compilation, rather than as a record of “what the Government is up to,” the privacy interest . . . is in fact at its apex while the . . . public interest in disclosure is at its

76. *Id.*

77. *Id.*

78. *Id.* at 331.

79. *Id.*

80. 109 S. Ct. 1468, 1476-85 (1989).

81. *Id.*; Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C) (1982 Supp. IV).

82. 109 S. Ct. at 1476-85.

83. *Id.* at 1472 (quoting 5 U.S.C. § 552(b)(7)(o)).

84. *Id.* at 1476.

85. *Id.*

86. *Id.* at 1477.

nadir.⁸⁷

In *Nappier v. Jefferson Standard Life Insurance Co.*, the Fourth Circuit Court of Appeals upheld an action for invasion of the right of privacy even though the court acknowledged that the rapes that occurred were of public concern. In *Nappier*, the media did not mention the women's names but publicized their identity without names by televising the women.⁸⁸ A South Carolina statute⁸⁹ made it a misdemeanor to publish the name of a person who had been raped.⁹⁰ The object of the law was to foster personal protection of the woman involved and "to encourage a free report of the crime by the victim."⁹¹ The court reasoned, "Fear of publicity might deter her from notifying the police. Thus, the public interest is advanced by the statute: the crime is investigated promptly and the injured person is shielded."⁹²

The right to privacy and the First Amendment also directly conflicted in *Briscoe v. Reader's Digest Association, Inc.*⁹³ In *Briscoe*, the plaintiff filed suit for invasion of privacy because the defendant published an article disclosing truthful but embarrassing private facts about the plaintiff's past criminal act of hijacking a truck eleven years earlier.⁹⁴ The plaintiff claimed that as a result of the publication, his eleven-year-old daughter and his friends learned of the incident and thereafter scorned and abandoned him.⁹⁵

The California Supreme Court recognized that "[a]cceptance of the right of privacy has grown with the increasing capability of the mass media and electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze."⁹⁶ The court commented that thirty-six states now recognize a common law right to privacy and that California has recognized this right for forty years.⁹⁷

The court found that reports of current crimes are protected by the First Amendment because they serve to encourage witnesses to come forth and friends to give aid to victims.⁹⁸ The court stated, however, that identification of past offenders does not serve these "public-interest functions"⁹⁹ because identification of the actor in reports of long past crimes

87. *Id.* at 1485 (quoting from the NEW YORK REVIEW OF BOOKS at 7 (Oct. 5, 1972)).

88. 322 F.2d 502 (4th Cir. 1963).

89. S.C. CODE ANN. § 16-81 (1962).

90. 322 F.2d at 503.

91. *Id.* at 504.

92. *Id.*

93. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

94. *Id.* at 532, 483 P.2d at 36, 93 Cal. Rptr. at 868.

95. *Id.* at 533, 483 P.2d at 36, 93 Cal. Rptr. at 868.

96. *Id.*, 483 P.2d at 37, 93 Cal. Rptr. at 869.

97. *Id.* at 534, 483 P.2d at 37, 93 Cal. Rptr. at 869.

98. *Id.* at 536-37, 483 P.2d at 39, 93 Cal. Rptr. at 871.

99. *Id.* at 537, 483 P.2d at 39, 93 Cal. Rptr. at 871.

will not aid the administration of justice and will not serve "to bring forth witnesses or obtain succor for victims."¹⁰⁰

The court concluded that a reasonable jury could find that the plaintiff's identity as a former hijacker was not newsworthy and was of minimal social value, that the plaintiff had become an anonymous member of the community, that revealing one's criminal past is grossly offensive, and that the plaintiff did not voluntarily consent to the publicity.¹⁰¹ Further, the court argued that "the state has a compelling interest in the efficacy of penal systems in rehabilitating criminals and returning them as productive and law-abiding citizens to the society whence they came."¹⁰² Invading a person's privacy through the publication of private facts scars that person in the eyes of many and takes away his or her opportunity to return to society as an average citizen.

In *State v. Evjue*, the Wisconsin Supreme Court held that the slight restriction of the freedom of the press prescribed by a statute prohibiting the publication of the name of a rape victim was fully justified.¹⁰³ The court found that the statute was intended to save women who have been the subject of sexual assault from embarrassment and offensive publicity, and to aid law enforcement officers in more readily obtaining evidence for the prosecution of such crimes.¹⁰⁴ The court reasoned that rape victims suffer far more than victims of any other class of crime.¹⁰⁵ Therefore, rape victims' interest in privacy should be given greater weight than victims of other crimes.

These background cases are helpful in determining how the balancing of the two interests of free speech and privacy should be approached. They serve as examples of how various courts have dealt with the issue of balancing privacy interests against the First Amendment.

B. The Tort of Invasion of Privacy

In 1890, Samuel Warren and Louis Brandeis first developed the concept of a legal right to privacy in their famous law review article.¹⁰⁶ Warren and Brandeis began their article with the observation that the idea that "the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection."¹⁰⁷ They further commented that the scope of these legal rights broadened gradually, and now "the right to life has come to mean

100. *Id.*, 483 P.2d at 40, 93 Cal. Rptr. at 872.

101. *Id.* at 541-42, 483 P.2d at 43, 93 Cal. Rptr. at 875.

102. *Id.* at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

103. 33 N.W.2d 305, 312 (Wis. 1948).

104. *Id.* at 309.

105. *Id.*

106. Warren & Brandeis, *supra* note 4, at 193.

107. *Id.* at 193.

the right to enjoy life,—the right to be let alone.”¹⁰⁸

Warren and Brandeis warned that such protection of privacy was necessary because the press had overstepped the bounds of decency and because gossip had become a trade.¹⁰⁹ They stated:

The intensity and complexity of life . . . have rendered necessary some retreat from the world, and man . . . 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.¹¹⁰

The authors proposed that the right to privacy does not protect information that is of public or general interest.¹¹¹ They reasoned that the law must protect those persons whose affairs are no legitimate concern of the community from being dragged into an undesired publicity. In addition, all persons must be protected from having matters that they may properly prefer to keep private made public against their will.¹¹²

According to Warren and Brandeis, truth or falsehood should have no bearing on the right to privacy because redress is not sought for the injury to character, but for injury to the right to privacy.¹¹³ Thus, the authors concluded that common law provides the individual with a weapon to protect his right to privacy from idle or prurient curiosity.¹¹⁴

The *Restatement (Second) of Torts* is in concert with the Warren and Brandeis view of the right to privacy. *Restatement (Second) of Torts* section 652D states:

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.¹¹⁵

The drafters commented that *Cox Broadcasting Corp. v. Cohn* left open the question whether the First Amendment protects the publication of private facts, other than the identity of a rape victim whose name is a matter of public record, that would be highly offensive to a reasonable person and that are not of legitimate public concern.¹¹⁶ The case also left open the question whether liability can constitutionally be imposed for

108. *Id.*

109. *Id.* at 196.

110. *Id.*

111. *Id.* at 214.

112. *Id.* at 214-15.

113. *Id.* at 218.

114. *Id.* at 220.

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

116. *Id.* § 652D Special Note on Relation of § 652D to the First Amendment to the Constitution (1977).

publishing the identity of a rape victim that is not a matter of public record.

II. *Florida Star v. B.J.F.*

*Florida Star v. B.J.F.*¹¹⁷ extends first amendment protection to the publication of rape victims' names that are not a matter of public record. In *Florida Star*, the rape victim's name was not a matter of public record, nor did the case involve a juvenile offender.

A. Facts

On October 20, 1983, an unknown assailant raped and robbed B.J.F. at knife point while she was crossing a park in Jacksonville, Florida.¹¹⁸ The Duval County Sheriff's Department prepared a report that inadvertently contained B.J.F.'s full name¹¹⁹ and placed the police report in an unrestricted press room.¹²⁰

The Star, a weekly newspaper located in Jacksonville, sent a reporter-trainee to the press room to copy the police report for the "Police Reports" section of the newspaper.¹²¹ The trainee copied the report verbatim, including B.J.F.'s full name. Jacqueline Lotson, the trainee who obtained the information,¹²² later acknowledged that the Sheriff had posted a sign in the press room stating that it was against the law to publish the name of a victim of a sexual battery,¹²³ and also conceded that she was aware she was not supposed to copy the name of a rape victim from a police report.¹²⁴

On October 29, 1983, the article appeared in the "Robberies" subsection of "Police Reports."¹²⁵ Despite an internal policy of not publishing the names of sexual offense victims, the newspaper printed B.J.F.'s full name.¹²⁶ The article read:

[B.J.F.] reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, enroute to her bus stop, when an unknown black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch and gold necklace. Patrol efforts have been suspended concerning this

117. 109 S. Ct. 2603 (1989).

118. *Id.* at 2606.

119. *Id.* at 2605.

120. *Id.*

121. *Id.* at 2605-06.

122. Brief for Appellee at 6, *Florida Star* (No. 87-329).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

incident because of lack of evidence.¹²⁷

B.J.F. suffered emotional distress from the publication of her name. Not only was she disturbed because fellow workers and acquaintances mentioned that they had read the article, but she was also upset because of the effect on her family. Her mother received a number of telephone calls from a man who threatened to rape B.J.F. again. Ultimately, the harassment led B.J.F. to move from her home and to obtain a new telephone number. In addition, she sought police protection and mental health counseling.¹²⁸

B. Procedural History

B.J.F. filed suit on September 26, 1984, in the Circuit Court of Duval County, claiming that the Star negligently violated Florida Statute section 794.03, which made it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of the victim of a sexual offense.¹²⁹ The Sheriff's Department was also named as a defendant.¹³⁰ B.J.F. and the Sheriff's Department reached a settlement of \$2,500 before trial.¹³¹

The Star moved to dismiss the suit, claiming that section 794.03 violated its first amendment rights.¹³² The Florida trial court ruled that section 794.03 was constitutional because it contemplated "a proper balance between the First Amendment and privacy rights, as it applied to a narrow set of 'rather sensitive . . . criminal offenses.'" ¹³³ Furthermore, the court granted a directed verdict in favor of B.J.F., finding the newspaper negligent per se based on its violation of section 794.03.¹³⁴ The jury awarded B.J.F. \$75,000 in compensatory damages and \$25,000 in punitive damages in compliance with the jury instruction that punitive damages could be awarded upon a finding that the newspaper had "acted with reckless indifference to the rights of others."¹³⁵

The First District Court of Appeal affirmed.¹³⁶ The court upheld the directed verdict for B.J.F. because, under section 794.03, a rape victim's name is "of a private nature and not to be published as a matter of

127. *Id.*

128. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2606 (1989).

129. *Id.* (the Florida district court's decision was not published); FLA. STAT. § 794.03 (1983). The First District Court of Appeal is a state appellate court in Florida. The case originated in a Florida district court, which is referred to as a circuit court of Florida; the First District Court of Appeal of Florida affirmed, and the Florida Supreme Court denied certiorari. The United States Supreme Court granted certiorari.

130. *Florida Star*, 109 S. Ct. at 2606.

131. *Id.*

132. *Id.*

133. *Id.* (quoting App. 18-19).

134. *Id.*

135. *Id.*

136. *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986).

law.”¹³⁷ The Star appealed to the Supreme Court of Florida, which denied discretionary review.¹³⁸ The Star then appealed to the United States Supreme Court, which granted review and reversed the District Court of Appeal, holding that the imposition of damages on the newspaper violated the First Amendment.¹³⁹

C. Holding

In *Florida Star v. B.J.F.*, the Court held that when a newspaper publishes lawfully obtained, truthful information, the First Amendment protects the newspaper from punishment unless the punishment is narrowly tailored to serve a state interest of the highest order.¹⁴⁰

Five Justices agreed with the majority opinion, one Justice concurred, and three Justices dissented. Justice Marshall delivered the opinion of the Court, joined by Justice Brennan, Justice Blackmun, Justice Stevens, and Justice Kennedy. Justice Scalia wrote an opinion concurring in part and concurring in the judgment. Justice White wrote a dissenting opinion, joined by Chief Justice Rehnquist and Justice O'Connor.¹⁴¹

D. Majority Opinion

In his opinion, Justice Marshall acknowledged that the present case bore a “strong resemblance” to *Cox Broadcasting Corp. v. Cohn*.¹⁴² He was able to distinguish the case, however.¹⁴³

Although *Cox Broadcasting* also involved the publication of a rape victim’s name, the information was obtained from courthouse records open to public inspection.¹⁴⁴ The Court stressed the important public role the press plays in scrutinizing trials, thereby helping to guarantee fairness in judicial decisions.¹⁴⁵

Justice Marshall stated that *Cox Broadcasting* did not control *Florida Star* because the press’s role of guarding the fairness of trials was not directly compromised here. The information in question came from a police report prepared and disseminated at a time when no adversarial criminal proceedings had begun and no suspect had been identified.¹⁴⁶ The Court based its holding on the principle articulated in *Smith v. Daily*

137. *Florida Star v. B.J.F.*, 499 So. 2d 833, 884 (Fla. Dist. Ct. App. 1986).

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

139. *Id.* at 2607-08.

140. *Id.* at 2613.

141. *Id.* at 2604.

142. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1969); see *supra* notes 26-40 and accompanying text.

143. *Florida Star*, 109 S. Ct. at 2608.

144. *Cox Broadcasting*, 420 U.S. at 494-96.

145. *Florida Star*, 109 S. Ct. at 2608.

146. *Id.*

Mail Publishing Co.: If the media has lawfully obtained truthful information about a matter of public significance, then publication may not be constitutionally punished, “‘absent a need to further a state interest of the highest order.’”¹⁴⁷

The Court’s justification for applying the *Daily Mail* principle to *Florida Star* was threefold. First, the Court argued that because the formulation only protects publication of information lawfully obtained, the government retains ample power to protect a rape victim’s anonymity.¹⁴⁸ The majority reasoned that “[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.”¹⁴⁹ The majority concluded that the information was lawfully obtained because the Sheriff’s Department inadvertently placed the information within the media’s access even though it was not a matter of public record and the press was not permitted to take down the information. The Court cited *Landmark Communications, Inc. v. Virginia*,¹⁵⁰ *Oklahoma Publishing Co. v. District Court*,¹⁵¹ and *Cox Broadcasting Corp. v. Cohn*¹⁵² for the proposition that the states must implement means that avoid exposure of private information.¹⁵³

Second, the Court argued that “punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the state seeks to act.”¹⁵⁴ Thus, the Court reasoned that once the information is exposed, the press constitutionally may publish it despite the method used to expose the information.

Third, the Court argued that the *Daily Mail* formulation protects the press and the public from the dangers of self-censorship that may result from punishing the media for publishing certain truthful information.¹⁵⁵ The Court feared that the press would exercise excessive caution and not publish truthful information that constitutionally may be published due to fear of being held liable for invasion of privacy.

In its application of the *Daily Mail* rule, the *Florida Star* majority concluded that the principle “clearly commands reversal.”¹⁵⁶ According to *Daily Mail*, a court must first inquire whether the newspaper “lawfully

147. *Id.* at 2609 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

148. *Id.*

149. *Id.*

150. 435 U.S. 829 (1978); see discussion *supra* note 60.

151. 430 U.S. 308 (1977).

152. 420 U.S. 469 (1975).

153. *Florida Star*, 109 S. Ct. at 2609-10.

154. *Id.* at 2610.

155. *Id.*

156. *Id.*

obtain[ed] truthful information about a matter of public significance.”¹⁵⁷ The *Florida Star* majority found that “the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government.”¹⁵⁸ Further, the Sheriff’s Department’s failure to fulfill its obligation of preventing public dissemination of rape victims’ names under section 794.03 does not make receipt of the information unlawful.¹⁵⁹ The *Florida Star* majority reasoned that the article involved the commission and investigation of a violent crime that was a matter of paramount public import.¹⁶⁰

The majority then turned to the second inquiry: Whether imposing liability on appellant pursuant to section 794.03 serves “‘a need to further a state interest of the highest order.’”¹⁶¹ The majority found that the interests advanced by punishing publication, such as the privacy of victims of sexual offenses, the physical safety of such victims who may be subject to retaliation if their names become known to their assailants, and the goal of encouraging rape victims to report such crimes without fear of exposure, did not demonstrate a need to further a state interest of the highest order.¹⁶² The majority conceded that these are “highly significant interests,” a fact demonstrated by the Florida Legislature’s explicit enactment of a criminal statute prohibiting much of the dissemination of victims’ identities.¹⁶³ Nevertheless, the Court articulated three grounds for refusing to impose liability.¹⁶⁴

The Court first looked to the failure of the Sheriff’s Department to abide by its policy in disseminating information, and concluded that the imposition of damages against the press for its subsequent publication was not a narrowly tailored means of protecting rape victims from exposure.¹⁶⁵ The Court reasoned that the government failed to utilize this far more limited means of guarding against dissemination and that the press could not be punished for publishing information they would never have received but for the government’s error.

Justice Marshall next criticized the state court’s negligence per se rule, which did not allow for a case-by-case finding that the disclosure of a rape victim’s full name was a matter highly offensive to a reasonable person.¹⁶⁶ Further, the majority criticized Florida’s imposition of liability for publication because section 794.03 lacked a scienter requirement

157. 443 U.S. 97, 103 (1979).

158. *Florida Star*, 109 S. Ct. at 2610.

159. *Id.* at 2610-11.

160. *Id.* at 2611.

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

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 2612.

of any kind, thereby giving less protection to truthful publication than to defamatory falsehoods regarding a private figure.¹⁶⁷

Finally, the majority contended that the facial underinclusiveness of section 794.03 raised serious doubt about whether it served the significant interest that B.J.F. invoked in support of affirmance.¹⁶⁸ Section 794.03 only prevented publication of this information by mass communication; yet, an individual who disseminated the information to someone who lives near or works with the victim may cause equally devastating consequences.¹⁶⁹

The majority concluded, "We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."¹⁷⁰ The Court held that imposing liability under section 794.03 to appellant under the facts of this case would not serve any interest of the highest order.¹⁷¹

E. Concurring Opinion

Justice Scalia concurred but believed it sufficient to decide the case based on the underinclusiveness of section 794.03.¹⁷² Justice Scalia stated that he would anticipate that the rape victim's discomfort at the dissemination of the news of her misfortune among friends and acquaintances would be at least as great as her discomfort at its publication by the media to strangers, and the law in question fails to prohibit the former.¹⁷³ Justice Scalia concluded that the law "has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself."¹⁷⁴ Therefore, he reasoned, the prohibition does not protect an interest "of the highest order."¹⁷⁵

F. Dissenting Opinion

The dissent strongly disagreed with the majority's holding and would have struck the balance in favor of B.J.F. Chief Justice Rehnquist and Justice O'Connor joined in Justice White's dissenting opinion. In discussing the gravity of the crime of rape and the rape victim's interest in privacy, Justice White cited his *Coker v. Georgia* opinion, stating that

167. *Id.*; see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (requiring that a private figure prove some type of scienter in order to recover for defamation, and leaving it up to the states to decide if negligence was sufficient or actual malice was required).

168. *Florida Star*, 109 S. Ct. at 2612.

169. *Id.*

170. *Id.* at 2613.

171. *Id.*

172. *Id.* at 2613 (Scalia, J., concurring).

173. *Id.*

174. *Id.* at 2614.

175. *Id.*

“[s]hort of homicide, [rape] is the ‘ultimate violation of self.’ ”¹⁷⁶ Justice White recognized that the rape of B.J.F. at knifepoint marked only the beginning of an ordeal that was perpetuated by the Star’s negligence.¹⁷⁷

Justice White disagreed with the majority’s view that *Cox Broadcasting Corp. v. Cohn*,¹⁷⁸ *Oklahoma Publishing Co. v. District Court*,¹⁷⁹ and *Smith v. Daily Mail Publishing Co.*¹⁸⁰ compelled or supported the result in *Florida Star*.¹⁸¹ Justice White argued that *Cox Broadcasting* was wholly distinguishable from *Florida Star* on three bases.¹⁸² First, in *Cox Broadcasting* the victim’s name had been disclosed in the hearing in which her assailants pled guilty; second, judicial records have always been considered public information; and third, these judicial proceedings were open as a matter of state law.¹⁸³ Justice White explained that in *Cox Broadcasting* the Court warned, “If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information”¹⁸⁴ For example, states could enact statutes prohibiting the public dissemination of private information. Justice White indicated that in this case, Florida had done exactly that by enacting means which avoid public exposure of private information.¹⁸⁵ Thus, *Cox Broadcasting* does not control in this circumstance.¹⁸⁶

Justice White also argued that the Court’s reliance on the rule from *Smith v. Daily Mail Publishing Co.* was misplaced.¹⁸⁷ Justice White warned that the rule was introduced in *Daily Mail* with the cautious qualifier that such a standard was only suggested by cases that did not directly control in *Daily Mail*.¹⁸⁸ Justice White concluded that the principle the Court relied upon was merely a hypothesis, not a standard that should be applied in future cases, and that “it should not be so uncritically accepted as constitutional dogma.”¹⁸⁹

Justice White distinguished the facts in *Florida Star* from the facts in *Daily Mail*, arguing that *Daily Mail* involved the disclosure of the

176. *Id.* at 2614 (White, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

177. *Id.*

178. 420 U.S. 469 (1975).

179. 430 U.S. 308 (1977).

180. 443 U.S. 97 (1979).

181. *Florida Star*, 109 S. Ct. at 2614 (White, J., dissenting).

182. *Id.*

183. *Id.*

184. *Id.* at 2615.

185. *Id.* (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975)).

186. *Id.* at 2608.

187. *Id.* at 2615.

188. *Id.* (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

189. *Id.*

name of the perpetrator of murder rather than a victim of rape.¹⁹⁰ He stated that “[s]urely the rights of those accused of crimes and those who are their victims must differ with respect to privacy concerns,”¹⁹¹ and he argued that the rights of victims are greater than the rights of criminals.¹⁹² Reasoning that alleged criminals have only minimal rights to maintain their anonymity pending an adjudication of guilt, he concluded that, compared to criminals, the victims must have infinitely more substantial rights to maintain their anonymity.¹⁹³

Justice White also found that *Florida Star* was profoundly different from *Oklahoma Publishing Co.*¹⁹⁴ The majority suggested that the manner in which the *Star* obtained B.J.F.’s name was similar to the situation in *Oklahoma Publishing Co.*, in which a judge invited reporters into his courtroom and then tried to forbid them from reporting on the proceedings.¹⁹⁵ Justice White argued that the release in the instant case could be distinguished because posted signs made it clear that names of rape victims were not matters of public record and were not to be published.¹⁹⁶ Further, the *Star*’s reporter admitted that she understood she was not allowed to transcribe the information and was not supposed to take it from the police department.¹⁹⁷ Justice White concluded, “Thus, by her own admission the posting of the incident report did not convey to the *Star*’s reporter the idea that ‘the government considered dissemination lawful’; the Court’s suggestion to the contrary is inapt.”¹⁹⁸

According to Justice White, the behavior of the press should not be excused because the Sheriff’s Department mistakenly released private information. The state had attempted to prevent the exposure of the private information by amending its public records statutes to exempt rape victims’ names from disclosure and to forbid officials from releasing this information.¹⁹⁹ Justice White stated that unfortunately, mistakes happen even when states take measures to prevent public disclosure.²⁰⁰ According to Justice White, “[I]t is not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victim’s name, address, and/or phone number.”²⁰¹

Justice White found inapposite the Court’s argument that the appellant was judged under too strict a standard. According to Justice White,

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 2616.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* (quoting 109 S. Ct. at 2612 (majority opinion)).

199. *Id.* (citing FLA. STAT §§ 119.007(3)(h), 794.03 (1983)).

200. *Id.*

201. *Id.*

the jury found that the appellant acted with reckless indifference, which is a higher standard than the *Gertz v. Robert Welch, Inc.* scienter standard for which the Court argued.²⁰²

The majority argued that negligence per se was too strict because it allowed liability without a case-by-case finding that a reasonable person would find the disclosure of the private fact to be highly offensive.²⁰³ Justice White attacked this argument because “the legislature—reflecting popular sentiment—has determined that disclosure of the fact that a person was raped is categorically a revelation that reasonable people find offensive.”²⁰⁴

Justice White found that section 794.03 should not be struck down due to underinclusiveness. Generally, laws that have been struck down for underinclusiveness have concerned a legislature singling out one of the news media or press for adverse treatment or singling out the press when compared to other similar enterprises.²⁰⁵ Justice White found that “[h]ere, the Florida law evenhandedly covers all ‘instrument[s] of mass communication.’”²⁰⁶ Further, Justice White contended that Florida recognizes the tort of invasion of privacy through the publication of private facts, making it possible that neighborhood gossip would be subjected to liability similar to that of the newspaper.²⁰⁷

In his analysis, Justice White also pointed out the irony of the majority’s decision in light of a recent decision by the Court that struck the balance in favor of the right to privacy.²⁰⁸ In that case, *United States Department of Justice v. Reporters Committee for Freedom of the Press*,²⁰⁹ the Court concluded that disclosure of rap sheets would categorically constitute an unwarranted invasion of privacy.²¹⁰ Justice White logically reasoned, “The same surely must be true—indeed, much more so—for the disclosure of a rape victim’s name.”²¹¹

Justice White concluded that by holding that protecting a rape victim’s right to privacy is not a state interest of the highest order, the Court “accepts appellant’s invitation . . . to obliterate one of the most noteworthy inventions of the 20th-Century: the tort of [invasion of privacy

202. *Id.*; see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (private figure was not required to prove reckless disregard of truth or falsity in order to recover in a defamation action).

203. *Florida Star*, 109 S. Ct. at 2617 (White, J., dissenting).

204. *Id.*

205. *Id.*

206. *Id.* (quoting FLA. STAT. § 794.03 (1983)).

207. *Id.*

208. *Id.* at 2619 (citing *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468 (1989)).

209. 109 S. Ct. 1468 (1989).

210. *Id.* at 1485 (rap sheets are criminal identification records).

211. *Id.*

through] the publication of private facts.”²¹² Justice White would protect “B.J.F.’s desire for privacy and peace of mind in the wake of a horrible personal tragedy.”²¹³ Justice White reasoned that there is no public interest in publishing the names, addresses, and phone numbers of the victims of crime, and there is no public interest in immunizing the press from liability in the rare cases in which a State’s efforts to protect a victim’s privacy have failed.²¹⁴

III. Criticism of *Florida Star v. B.J.F.*

This section criticizes the majority opinion in *Florida Star v. B.J.F.* on four major grounds including: (1) the majority performed a skewed balancing test; (2) the majority placed unjustified reliance on *Daily Mail* and *Oklahoma Publishing Co.*; (3) the majority ignored the intended application of *Cox Broadcasting*; and (4) the majority applied an improper test taken from case law that does not control *Florida Star*.

A. The Majority Applied an Inappropriate Balancing Test

In *Florida Star*, the majority concluded that punishment could not be imposed against the Star because the statute involved was not narrowly tailored to a state interest of the highest order.²¹⁵ The majority placed too much weight on the freedom of the press to publish rape victims’ names and placed too little weight on the state’s interest in protecting the privacy rights of rape victims. The majority gave only passing reference to the rights of the rape victims themselves.

The majority should have given greater consideration to the particular plight of the rape victim. Rape is the “ultimate violation of self.”²¹⁶ Publicizing the name of the rape victim adds additional injury to the victim in the form of embarrassment, humiliation, degradation, and further psychological injury.²¹⁷ It also detracts from the rehabilitation of the victim.²¹⁸ Identification of the name of the rape victim through mass communication adds to the stigma attached to being raped.²¹⁹

Further, the state has an interest of the highest order in enforcing statutes such as Florida Statute section 794.03. The state has an interest in the prosecution of crime and in encouraging rape victims to report

212. *Id.* at 2618.

213. *Id.* at 2619.

214. *Id.*

215. *Id.* at 2613; see *supra* notes 142-71 and accompanying text.

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

217. Brief of Amicus Curiae Pacific Legal Foundation in Support of Appellee at 7-8, *Florida Star* (No. 87-329).

218. *Id.* at 8.

219. *Id.*

rapes to facilitate the prosecution and conviction of criminals.²²⁰ Criminal statistics reveal that rape is one of the most unreported crimes; the main reasons given by victims who do not report rapes are that they believe it is a private or personal matter, that they have a fear of reprisal, and that they perceive the police as insensitive and ineffective.²²¹

Balanced against these strong interests in privacy is the minimal interference with freedom of the press concerned in this situation. The press remains free to publish all of the details of the crime that are of any legitimate public concern. The press can describe the details of the offense including the name of the perpetrator and any proceedings that may follow. Thus, the press can still fully inform the public and satisfactorily perform its role as public watchdog. The public has a need to know the details of crime committed so that the community can protect itself; the name of the rape victim, however, is not an essential element of the story.²²²

The actual circumstances involved in *Florida Star* compel the conclusion that the state's interest in protecting B.J.F.'s right to privacy must prevail. B.J.F.'s assailant was still at large when her name was identified to the public as the rape victim.²²³ After the publication of her name, B.J.F. received harassing phone calls, required mental health counseling, was forced to move from her house to avoid harassment, and was threatened with rape again.²²⁴ In light of the extreme needs of a rape victim and B.J.F.'s particular ordeal, the balance should have been struck in favor of B.J.F.

Finally, in 1989, a few weeks before the United States Supreme Court considered *Florida Star*, the United States Supreme Court held in favor of protecting the privacy interests of criminals in their rap sheets.²²⁵ In *United States Department of Justice v. Reporters Committee For Freedom of the Press*, the Supreme Court relied on a statutory right to privacy granted in Exemption 7(C) of the Freedom of Information Act.²²⁶ Certainly, the statutory right to privacy granted by the Florida statute requires a similar balancing approach. A rape victim's interest in privacy outweighs a past criminal's interest in privacy and at a minimum should be treated equally. A rape victim has undergone a traumatic experience that is deeply degrading and causes the victim to experience

220. *Id.*

221. *Id.* at 8-9 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *Criminal Victimization in the United States* (1986); National Crime Survey Report, NCJ-11456, Table 102 at 88-89 (Washington, D.C. 1988)).

222. *Id.* at 17-18.

223. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2614 (1989) (White, J., dissenting).

224. *Id.*

225. *United States Dep't of Justice v. Reporter's Comm. for Freedom of the Press*, 109 S. Ct. 1468 (1989).

226. *Id.* at 1485.

heightened sensitivity. Publishing the name of the victim while the victim's wounds are still fresh causes the victim to suffer embarrassment from knowing that what has happened to her is public knowledge. On the other hand, a past criminal has had time to deal with society's reaction to the crime that he or she personally committed.

B. The Majority Unjustifiably Relies on *Daily Mail* and *Oklahoma Publishing Co.*

The *Florida Star* majority relied heavily on *Daily Mail* and *Oklahoma Publishing Co.* to establish that the First Amendment forbids the punishment of a newspaper for publication of a rape victim's name unless it furthers a state interest of the highest order and is unlawfully obtained.²²⁷ The Supreme Court's application of these two cases to the facts of *Florida Star* is subject to criticism.

The facts presented in *Daily Mail* were completely different from the facts presented in *Florida Star*. In *Daily Mail*, the name of a juvenile who was accused of shooting and killing a fifteen-year-old student was published by a newspaper.²²⁸ The ordeal that a rape victim is involuntarily forced to endure cannot be analogized to the predicament a juvenile offender finds himself or herself in after killing another human being. A rape victim's right to privacy must be worthy of more protection than that of a juvenile offender. The voluntary nature of committing a crime results in an assumption of the risk of losing one's privacy interest in one's identity. This element of voluntary action is not present in a rape victim's involuntary, unconsenting submission to force and sexual abuse.

Further, the statute at issue in *Daily Mail* only applied to newspaper publication. Other channels of publication were left open, and therefore the statute failed to accomplish its stated purpose.²²⁹ In contrast, Florida Statute section 794.03 applies to "any instrument of mass communication" and therefore avoids the problems associated with underinclusiveness.²³⁰

Oklahoma Publishing Co. is also distinguishable in important ways from *Florida Star*. In *Oklahoma Publishing Co.*, the name of a juvenile who was accused of second-degree murder was published by the press.²³¹ As previously stated in discussing *Daily Mail*, the two situations (the rape victim and the juvenile delinquent) are not comparable.²³²

Further, the majority in *Florida Star* wrongfully concluded that the

227. See *Florida Star*, 109 S. Ct. at 2609-12.

228. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99-100 (1979).

229. *Id.* at 104-05.

230. FLA. STAT. § 794.03 (1983).

231. *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 309-10 (1977).

232. See *supra* notes 190-93, 228 and accompanying text.

information was lawfully obtained and published.²³³ In *Oklahoma Publishing Co.*, the press was present at the hearing and the parties had full knowledge of the presence of the press. Thus, the information was lawfully obtained.²³⁴ On the other hand, the Star reporter obtained the information in an entirely different manner. The Sheriff's Department failed to keep the document confidential and inadvertently allowed the press access to the information, but the mere fact that the government created an opportunity to violate a law easily should not absolve the press of responsibility for violating the law.²³⁵ Florida Statute section 794.03 places responsibility on the person publishing the information regardless of the method used to obtain the information.²³⁶ The error of the Sheriff's Department did not place the actions of the press beyond the reach of the statute. Just as a bank customer who receives a cash windfall because of a teller's error cannot legally enjoy the money, the press must not take advantage of illegally obtained information.²³⁷

C. The Majority Ignored the Limited Application of *Cox Broadcasting*

In analyzing *Florida Star*, it is particularly significant that Justice White wrote the majority opinion in *Cox Broadcasting* and the dissenting opinion in *Florida Star*. This suggests that *Florida Star* was the type of case the Court had in mind in *Cox Broadcasting* when it indicated that a case could arise in which the rape victim's right to privacy should prevail.²³⁸ Justice White limited his opinion in *Cox Broadcasting* to the specific circumstances of the case and left open the possibility that a situation might exist in which a rape victim's rights would outweigh the rights of the press under the First Amendment.²³⁹ B.J.F.'s name was not a matter of public record and therefore was outside of the holding of *Cox Broadcasting*. The Star managed to obtain B.J.F.'s name; under Florida law and under the Star's own policy, however, the Star was prohibited from publishing B.J.F.'s name. Thus, in this case, B.J.F.'s interest in privacy outweighed the rights of the press.

D. The Majority Applied an Improper Test

The test applied in *Florida Star*, that officials may not constitutionally punish publication of information absent a need to further a state interest of the highest order,²⁴⁰ is a vague standard and does not fit into

233. See *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2611-12 (1989).

234. *Oklahoma Publishing Co.*, 430 U.S. at 311.

235. Brief of Amicus Curiae Pacific Legal Foundation in Support of Appellee at 13, *Florida Star* (No. 87-329).

236. *Id.* at 14.

237. *Id.* at 13-14.

238. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975).

239. *Id.*

240. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2613 (1989).

the previous categories of first amendment law. As Justice White pointed out, the test was first introduced in *Daily Mail* as a mere suggestion or hypothesis that should not be uncritically accepted as constitutional dogma.²⁴¹

Perhaps a more appropriate test would be a substantial interest test or a clear and present danger test. Using these tests, the Court has allowed restrictions on freedom of speech to prohibit advocacy of illegal action²⁴² and to prohibit the burning of draft cards despite the expressive component of this type of activity.²⁴³ These tests are not as heavily skewed in favor of the press and allow for a more equal treatment of the two valued interests.

IV. Conclusion

The privacy right of a rape victim necessarily outweighs the right of the press to publish the victim's name when it is not a matter of public record. The plight of the rape victim presents the clearest and most demanding case for the right to privacy and the right to prevent the publication of truthful private facts. The victim's interest in privacy and solitude following a horrifying ordeal, coupled with the state's interest in having crimes reported and in protecting its citizens' rights to privacy, justify punishing a newspaper or other form of mass media for publication of the name of a rape victim when it is of no possible legitimate public concern. The majority's holding in *Florida Star* ignores the plight of the rape victim and wipes out this form of the tort of invasion of privacy. If this tort is to coexist with the First Amendment, then rape victims whose names are not a matter of public record must be protected because their predicament presents the most compelling justification for the tort.

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241. See *supra* notes 85-86 and accompanying text.

242. *Brandenburg v. Ohio*, 395 U.S. 444 (1969), held that a state could forbid advocacy of the use of force when such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. The Court returned to an imminent lawless action requirement similar to that used in the clear and present danger test created by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919).

243. *United States v. O'Brien*, 391 U.S. 367 (1968), held that Congress has a legitimate and substantial interest in preventing the destruction of draft cards.

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