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Deborah W. Denno
Fordham University School of Law

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I am most grateful to Michael Martin for comments and to Andrea Califano and Yvette LeRoy for research assistance.

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THE PRIVACY RIGHTS OF RAPE VICTIMS IN THE MEDIA AND THE LAW*

PERSPECTIVES ON DISCLOSING RAPE VICTIMS' NAMES

DEBORAH W. DENNO**

In this Essay, Professor Denno examines the century-long conflict between an individual's right to privacy and the freedom of the press in the context of the media's disclosure of rape victims' names. Part I briefly reviews the United States Supreme Court's primary rulings on this topic, explaining that the Court has generally protected the freedom of the press under the First Amendment. Part I emphasizes, however, that the Court has left available an opportunity for a contrary interpretation under certain circumstances in Florida Star v. B.J.F., the Court's last ruling concerning the disclosure of rape victims' names. Part II discusses some of the major arguments for and against disclosing rape victims' names. For example, while proponents of disclosure insist that withholding the victims' names increases the stigma attached to rape, opponents claim that this very stigma justifies why rape and its victims should be treated differently. This Essay concludes by raising pertinent questions, unanswered by past cases, that may provide additional considerations for the future. Lastly, the Essay introduces commentary on this topic by Michael Gartner, Linda Fairstein, and Helen Benedict.

INTRODUCTION

THe great majority of news organizations in this country do not publish the names of alleged rape victims either at the time the rape is reported or when the victim testifies at trial.1 This "conspiracy of silence"2 is based, in part, on the media's recognition that rape is more personal, traumatic, and stigmatizing than other crimes.3 Rape victims

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* This Symposium, given at Fordham Law School on January 28, 1993, was co-sponsored by the Fordham Law Review and the Fordham Law Women. What follows is an essay written by Professor Denno and commentaries based upon remarks given at the Symposium by Michael Gartner, Linda Fairstein, and Helen Benedict.

** Associate Professor of Law, Fordham University School of Law; B.A., 1974, University of Virginia; M.A., 1975, University of Toronto; Ph.D., 1982, J.D., 1989, University of Pennsylvania. I am most grateful to Michael Martin for comments and to Andrea Califano and Yvette LeRoy for research assistance.

1. See William Glaberson, Times Article Naming Rape Accuser Ignites Debate on Journalistic Values, N.Y. Times, Apr. 26, 1991, at A14 (explaining that prior to the William Kennedy Smith case, "virtually all" major news organizations protected the identities of alleged rape victims unless the victims chose otherwise); Alex S. Jones, Naming Rape Victim is Still a Murky Issue for the Press, N.Y. Times, June 25, 1989, at A18 (providing an estimate from Deni Elliott, executive director of the Institute for the Study of Applied and Professional Ethics at Dartmouth College, that 90 to 95% of news organizations do not disclose rape victims' names).

2. Michael Gartner, Naming Rape Victims: Usually, There Are Good Reasons to Do It, USA Today, Apr. 22, 1991, at 6A.

3. See Deirdre Carmody, News Media's Use of Accuser's Name is Debated, N.Y. Times, Apr. 18, 1991, at A22 ("[T]he prevailing view has been that there is a particular
are also treated differently than other crime victims by American society and the criminal justice system.\(^4\)

Two years ago,\(^5\) *NBC Nightly News* sparked a nationwide debate\(^6\) when it broadcasted the name of the woman who had accused William Kennedy Smith of rape after her identity had been disclosed by two tabloids.\(^7\) The accuser had not wanted her name revealed and was said to have been “shocked” by NBC’s decision.\(^8\) Although several news organizations,\(^9\) including *The New York Times*,\(^10\) subsequently revealed the accuser’s name, the other major television networks and most media did not.\(^11\)

To date, the United States Supreme Court has protected a news organization’s decision to disclose a rape victim’s name\(^12\) even though three

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\(^6\) See Glaberson, supra note 1, at A14 (noting that the disclosure of the rape victim’s name by news organization “ignited a bitter debate across the country”); James Warren, *Naming Rape Victims a Debate for Media*, Chi. Trib., Apr. 18, 1991, § 1 (News), at 5 (explaining the opposing views expressed by the media on revealing rape victims’ names).

\(^7\) The accuser’s identity was first disclosed in *The Sunday Mirror*, a British tabloid, on April 7, 1991, along with her photograph and a lurid description of the alleged incident. Her name and the same photograph were then published a week later in the *Globe*, a supermarket tabloid based in Boca Raton, Florida. See Gary F. Giampetruzzi, Note, *Raped Once, But Violated Twice: Constitutional Protection of a Rape Victim’s Privacy*, 66 St. John’s L. Rev. 151, 151 (1992).

\(^8\) See Warren, supra note 6, at 5.

\(^9\) Included among the news organizations that identified the accuser were *The Des Moines Register*, *The San Francisco Chronicle*, *The Denver Post*, *The Fort Worth Star-Telegram*, and *The Courier-Journal* of Louisville, Kentucky. See Carmody, supra note 3, at A22.


\(^11\) See Warren, supra note 6, at 5. For example, the other major networks, ABC, CBS, and CNN, did not disclose the alleged victim’s identity. See id.; Shann Nix, *Debate Over Naming Rape Victims*, S.F. Chron., Apr. 18, 1991, at A1.

\(^12\) See infra part II.
states—Florida, South Carolina, and Georgia—have statutes prohibiting the media from doing so. Florida Star v. B.J.F., the Court's most recent ruling on this issue, however, has left undetermined whether, in certain circumstances, a news organization violates a rape victim's constitutional right to privacy by revealing her name. Although no news organization was found liable for revealing the alleged rape victim's identity in the William Kennedy Smith case, the disclosure nonetheless touched a century-long conflict between two cherished values: the individual's right to privacy and the freedom of the press as

13. Under Fla. Stat. Ann. § 794.03 (West 1992), "[n]o person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree . . . ."

14. Under S.C. Code Ann. § 16-3-730 (Law. Co-op 1985), "[w]hoever publishes or causes to be published the name of any person upon whom the crime of criminal sexual conduct has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor . . . ."

15. Under Ga. Code Ann. § 16-6-23 (1992), a) It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical, or other publication published in this state or through any radio or television broadcast originating in the state the name or identity of any female who may have been raped or upon whom an assault with intent to commit the offense of rape may have been made. b) This Code section does not apply to truthful information disclosed in public court documents open to public inspection.

16. Although all three state statutes were originally enacted between 1911-1912, they have become controversial only within the last two decades. See Carey Haughwout, Prohibiting Rape Victim Identification in the Media: Is it Constitutional?, 23 U. Tol. L. Rev. 735, 736 & n.6 (1992). Florida's law was recently examined when the State filed criminal charges against the Globe for disclosing the alleged victim's name in the William Kennedy Smith case. See State v. Globe Comm. Corp., No. 91-11008MM A02 at 1 (Palm Beach County Ct. Oct. 21, 1991). The court dismissed the criminal information filed against the Globe, however, holding that the Florida statute at issue was "unconstitutionally broad" and unconstitutional as applied to the facts of the case. See id. at 13. Although the state has filed a Notice of Appeal, it appears that this case has not yet been briefed for the appellate court. See Haughwout, supra, at 736 & n.6. Such laws have not been litigated in the criminal courts of South Carolina and Georgia and, prior to the prosecution of the Globe, they had never been litigated in the criminal courts in Florida. See id. at 736. The statutes have been applied in civil cases, however, where the victims sued the media for damages relying on per se negligence standards created through the violation of the criminal statute. See Florida Star v. B.J.F., 491 U.S. 524 (1989) (Florida statute); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (Georgia statute); Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502 (4th Cir. 1963) (South Carolina statute).


18. See infra note 81 and accompanying text.


20. Samuel D. Warren and Louis D. Brandeis proposed the concept of a common law "right to privacy" over a century ago. See Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). Concerned with the intrusiveness of the press, which they viewed as "overstepping in every direction the obvious bounds of
guaranteed by the First and Fourteenth Amendments.\textsuperscript{21}

This conflict between privacy and the press becomes most apparent when the individual involved is an alleged victim of rape, a crime recently characterized as "one of the more controversial and divisive issues of our times."\textsuperscript{22} While proponents of disclosure insist that withholding the victims' names increases the stigma attached to rape, opponents claim that this very stigma justifies why rape and its victims should be treated differently.\textsuperscript{23}

The purpose of this Essay is not to resolve or exhaust this debate,\textsuperscript{24} but merely to present some of the major issues and concerns related to it. Part I of this Essay briefly reviews the Supreme Court's primary rulings on this topic, explaining that while the Court has protected the freedom of the press, it has left available in \textit{Florida Star} an opportunity for a contrary interpretation under certain circumstances. Part II discusses some of the major arguments for and against disclosing rape victims' names. This Essay concludes by raising pertinent questions, unanswered by past cases, that may provide additional considerations for the future.

\section{I. The Supreme Court and the Press' Disclosure of Truthful Information}

The Supreme Court generally has upheld First Amendment claims in cases concerning the conflict between privacy rights and the freedom of propriety and of decency," \textit{id.} at 196, Warren and Brandeis suggested a common law right of individuals "to be let alone," \textit{id.} at 195 (citation omitted), in order to protect their anonymity. Several years passed before their proposal for a private torts doctrine was adopted. \textit{See} Marcus \& McMahon, \textit{supra} note 4, at 1036-37. Eventually, however, an action for privacy was included in the Restatement of Torts. \textit{See} Restatement (Second) of Torts § 652D (1977) (current definition of the public disclosure tort). Today, nearly every state recognizes, through common law or statute, some kind of right that individuals have to control the public use of personal information about them. \textit{See} Sheldon W. Halpern, \textit{Rethinking the Right of Privacy: Dignity, Decency, and the Law's Limitations}, 43 Rutgers L. Rev. 539, 539-44 (1991). Such recognition, however, has resulted in "confusion and controversy" over the boundaries and constitutional implications of the right to privacy. \textit{id.} at 540; \textit{see} Peter B. Edelman, \textit{Free Press v. Privacy: Haunted by the Ghost of Justice Black}, 68 Tex. L. Rev. 1195, 1195-99 (1990). This confusion permeates the debate concerning the press' right to reveal a rape victim's identity.

21. The First Amendment of the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. Const. amend I. Under Thornhill v. Alabama, 310 U.S. 88 (1940), the First Amendment is applicable to the states through the Fourteenth Amendment. \textit{See} \textit{id.} at 95. 

22. James J. Tomkovicz, \textit{On Teaching Rape: Reasons, Risks, and Rewards}, 102 Yale L.J. 481, 481 (1992); \textit{see also} Joshua Dressler, Understanding Criminal Law § 33.01, at 515 (1987) ("No subject in the criminal law, with the possible exception of capital punishment, elicits stronger feelings when discussed by lawyers and lay people alike."); Lloyd L. Weinreb, Criminal Law: Cases, Comment, Questions 517 (5th ed. 1993) ("While public concern about 'crime in the streets' and a loss of a sense of personal security [has] increased generally, rape in particular has aroused attention and anger for reasons peculiar to it.").

23. \textit{See infra} notes 84-108 and accompanying text.

the press. This Part briefly examines the most significant cases comprising the Court's jurisprudence on the constitutionality of disclosing a rape victim's name. It then analyzes how these cases have contributed to *Florida Star*.

**A. The Beginning Cases: Cox Broadcasting, Oklahoma Publishing, and Daily Mail**

The press' liability for public disclosure of true, but "private," facts was first addressed in *Cox Broadcasting Corp. v. Cohn.* In that case, the father of a deceased seventeen-year-old rape victim brought suit under Georgia's statute. He claimed that the defendant television station violated his right to privacy because it identified his deceased daughter by name in a news report.

The Court rejected this claim, however, holding that the First and Fourteenth Amendments prohibit imposing civil liability on the news media for disclosing true information available to the public in official court records. The Court emphasized that "political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish." The Court concluded that the commission of a crime and the prosecutions and judicial proceedings relating to it "are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." Moreover, the press was to "guarantee the fairness of trials."

Two years later, the Court relied on *Cox Broadcasting* in *Oklahoma Publishing Co. v. District Court* and found unconstitutional a state court's pretrial order enjoining the media from publishing the name and picture of a juvenile obtained when the boy appeared at a juvenile deten-

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27. See supra note 15 (text of statute).


29. See id. at 496.

30. Id.

31. Id. at 492. Irrespective of the Court's holding in *Cox Broadcasting,* Florida and South Carolina still have no statutory exception for information acquired from public records, whereas Georgia's amended statute excludes the publication of such information. See Haughwout, supra note 16, at 743.

32. *Cox Broadcasting,* 420 U.S. at 492.

33. 430 U.S. 308 (1977) (per curiam).
tion hearing. The Court stated that, irrespective of whether the judge made an express order opening the hearing to the public, "members of the press were in fact present at the hearing." Moreover, the name and picture of the juvenile were "publicly revealed...much as the name of the rape victim in Cox Broadcasting was placed in the public domain."

Thereafter, in Smith v. Daily Mail Publishing Co., the Court, relying on both Cox Broadcasting and Oklahoma Publishing, held unconstitutional a West Virginia statute that provided criminal sanctions for media that published the name of any youth charged as a juvenile offender without the written approval of the juvenile court. In Daily Mail, a newspaper published the name of a juvenile arrested for allegedly killing another juvenile based on information a reporter obtained from witnesses, a local prosecutor, and police present at the crime scene. The Court expanded the holding in Cox Broadcasting and determined that disclosed information could include not only public court documents, but also information obtained from routine reporting methods.

Moreover, the Daily Mail Court noted that its earlier cases 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." The Court concluded that the state's interest in protecting the anonymity of juvenile offenders for purposes of rehabilitation did not constitute a sufficient "state interest of the highest order" and did not justify criminally sanctioning and limiting the First Amendment rights of the press.

B. Florida Star

In Florida Star v. B.J.F., the most provocative decision on the name disclosure issue, the Court reversed the lower courts' findings that a weekly newspaper was civilly liable under Florida's anti-disclosure statute for publishing the name of a rape victim that the newspaper had acquired from a publicly released police crime incident report. The victim's name had been inadvertently included in the police report. This report was posted, and made available to the media, in a room containing

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34. See id. at 308-10.
35. Id. at 311.
36. Id.
38. See id. at 102-03 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) and Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977)).
39. See id. at 99.
40. See id.
41. See id. at 103-04.
42. Id. at 103.
43. See id. at 104-05.
44. 491 U.S. 524 (1989).
45. See supra note 13 (text of statute).
46. See Florida Star, 491 U.S. at 529.
signs stating that rape victims’ names “were not matters of public record, and were not to be published.”47 One of the newspaper’s reporters copied the police report verbatim and gave the report to another reporter who included B.J.F’s full name in an article about the crime.48 This disclosure, which the newspaper claimed was inadvertent, violated the newspaper’s own internal policy of not publishing sexual offense victims’ names.49

In concluding that the imposition of damages on the newspaper violated the First Amendment, the Court noted first that Cox Broadcasting was not controlling in determining the outcome of Florida Star “[d]espite the strong resemblance” between the two cases.50 Second, in Cox Broadcasting, the Court did not address broader questions that were later introduced in Florida Star and limited its focus to the publication of information derived from “‘public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.’”51

Consistent with its previous analysis of press-and-privacy cases in a “discrete factual context,”52 the Court used the limited First Amendment standard that it fashioned in Daily Mail: “‘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.’”53

1. Selecting and Applying the Daily Mail Standard

The Court cited three reasons for why it supported the Daily Mail standard.54 First, because the Daily Mail standard protects only the pub-

47. Id. at 546 (White, J., dissenting).
48. See id. at 527. The article read as follows:
[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 incident because of a lack of evidence.

49. Id. at 528.
50. Id. at 532. The Court explained that Cox Broadcasting involved the acquisition of the rape victim’s name from the courthouse records. The Court invalidated the challenged damages award in that case because it considered that the press plays a significant role in scrutinizing trials and thereby enhancing their fairness. In contrast, the Court did not consider the press’ role to be “directly compromised” in Florida Star because the information in that case was derived from a police report prepared and released prior to any adversarial proceeding, and before the identification of a suspect. See id.
51. Id. at 533 (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975)).
52. Id. at 530.
53. Id. at 533 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).
54. See id.
lication of lawfully obtained information, the government still retains methods of safeguarding sensitive information, such as a rape victim’s name, from disclosure.\textsuperscript{55} According to the Court, “[t]he government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government’s mishandling of sensitive information leads to its dissemination.”\textsuperscript{56} Thus, the government bears the responsibility for prohibiting dissemination of facts it considers to be private, “a less drastic means than punishing truthful publication.”\textsuperscript{57} As the Court later noted, such a standard could have applied in the circumstances in the case presented before it, since Florida’s statute was “undercut” by the Sheriff’s Department’s erroneous, albeit inadvertent, inclusion of B.J.F.’s name in an incident report.\textsuperscript{58}

Second, as the Court noted in \textit{Cox Broadcasting},\textsuperscript{59} penalizing the press for disseminating publicly available information is not likely to serve the State’s interest. As the Court stated, “‘[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.’”\textsuperscript{60}

Third, the Court emphasized the “‘timidity and self-censorship’” that could stem from punishing the media for publishing true information.\textsuperscript{61} Alternatively, the media would have the onerous task of determining which government releases, reports, and other information warranted lawful publication.\textsuperscript{62}

Applying the first prong of this three-part standard, the Court concluded that the newspaper “‘lawfully obtain[ed] truthful information about a matter of public significance’”\textsuperscript{63} for three reasons: (1) the newspaper “lawfully obtained B.J.F.’s name”;\textsuperscript{64} (2) the news account of B.J.F.’s assault was accurate;\textsuperscript{65} and (3) the news article pertained to “‘a matter of public significance’”\textsuperscript{66} because it concerned a “matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.”\textsuperscript{67}

Concerning the second part of the standard, whether imposing liability serves “‘a need to further a state interest of the highest order,’”\textsuperscript{68} the Court emphasized that there are “‘highly significant’ state interests in a

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\begin{itemize}
\item \textsuperscript{55} See \textit{id.} at 534.
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} See \textit{id.} at 538.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} (quoting \textit{Cox Broadcasting Corp. v. Cohn}, 420 U.S. 469, 495 (1975)).
\item \textsuperscript{61} \textit{Id.} (quoting \textit{Cox Broadcasting}, 420 U.S. at 496).
\item \textsuperscript{62} See \textit{id.} at 536.
\item \textsuperscript{63} \textit{Id.} (quoting \textit{Smith v. Daily Mail Publishing Co.}, 443 U.S. 97, 103 (1979)).
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} See \textit{id.}
\item \textsuperscript{66} \textit{Id.} (quoting \textit{Daily Mail}, 443 U.S. 103).
\item \textsuperscript{67} \textit{Id.} at 537.
\item \textsuperscript{68} \textit{Id.} (quoting \textit{Daily Mail}, 443 U.S. at 103).
\end{itemize}
rule punishing the publication of a rape victim's name. These interests included the privacy and physical safety of victims who may be at risk of retaliation if their names are published, and the need to encourage such victims to report rapes free from the fear of exposure.69

Because of these interests, the Court did not discount the chance that, "in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the Daily Mail standard."70 Nonetheless, given the particular circumstances in Florida Star, the Court concluded that imposing civil sanctions was too extreme a method of promoting these interests. Therefore, the Court was not convinced that there was a "need" under the Daily Mail standard.71

2. Reasons for Not Imposing Liability in Florida Star

The Court discussed three reasons for not imposing liability in Florida Star. First, as it had stated previously,72 because the government provided the information to the media, it could be assumed that the government had available a more restricted means of preventing dissemination than "the extreme step of punishing truthful speech."73

Second, the negligence per se standard applied under the civil cause of action implied from the Florida statute would be overinclusive because liability would result automatically from publication.74 This result would occur even under the following circumstances: if the victim's identity is already known in the community; if the victim voluntarily announced her identity; or if the victim's identity has become a "reasonable subject" of the public's interest—because, for example, there is some question that the victim may have fabricated the assault.75 The Court emphasized its disallowance of such "categorical prohibitions" upon the

69. See id. During trial, B.J.F. testified that she had suffered emotional distress from the publication of her name. She stated that she had heard about the article from fellow workers and acquaintances; that her mother had received several threatening phone calls from a man who stated that he would rape B.J.F. again; and that these events had forced B.J.F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling. Id. at 528.
70. Id. at 537.
71. See id.
72. See supra notes 55-58 and accompanying text.
74. See id. at 539. Justice White disagreed with the Court's determination of this standard, stating that the jury found that the newspaper had "acted with 'reckless indifference towards the rights of others.'" Id. at 548 (White, J., dissenting) (citation omitted).
75. See id. at 539. As one commentator noted, under the Florida statute, Vanity Fair and People Weekly could be punished for their consensual interviews with the alleged victims in the William Kennedy Smith and Mike Tyson cases. See Haughwout, supra note 16, at 743.
media's access to information in other cases.  

Third, because the Florida statute was underinclusive, the Court questioned whether it served the significant interests of rape victims. As the Court noted, the statute only prohibited information presented in an "instrument[] of mass communication," an undefined term. Therefore, an individual who disseminates a rape victim's name by other means would not be covered by the statute, even though such means of communication would be comparably devastating. The Court stressed the need for an evenhanded application of the statute that would include both the "smalltime disseminator as well as the media giant." 

In holding that the newspaper was not liable to the rape victim, however, the Court emphasized that its conclusion was limited to the facts of the case, thereby acknowledging the possibility that civil sanctions could be imposed for the publication of a rape victim's name in a different context.

76. See Florida Star, 491 U.S. at 539 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608 (1982) (finding overbroad and unconstitutional a Massachusetts statute mandating courtroom closure during the testimony of a minor victim of a sexual assault, claiming that the two interests asserted by the state—the protection of such minor victims from further embarrassment and harm, and the encouragement of such victims to provide credible testimony—could be served by requiring the trial court to decide on a case-by-case basis whether the minor child's situation necessitated closure)); see also Arthur S. Frumkin, Note, The First Amendment and Mandatory Courtroom Closure in Globe Newspaper Co. v. Superior Court: The Press' Right, the Child Rape Victim's Plight, 11 Hastings Const. L.Q. 637 (1984) (contrasting the Supreme Court's holding in Globe with the decision by the Supreme Judicial Court of Massachusetts).


78. Id.

79. See id. According to the dissenters, however, the Florida statute excluded neighborhood gossips presumably because the Florida legislature considered "instrument[s] of mass communication" to be relatively more dangerous and intrusive. Id. at 549 (White, J., dissenting). Furthermore, they contended that the civil action at issue was not for a violation of the Florida statute but for the negligent publication of the victim's name. Therefore, because the action should be considered as part of Florida privacy tort law, an individual could be covered by the tort of publication of private facts, which Florida recognized. See id. at 549-50 (White, J., dissenting).

80. Id. at 540. Justice Scalia's concurrence focused on the issue of underinclusiveness:

[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 unprotected. In the present case, I would anticipate that the rape victim's discomfort at the dissemination of news of her misfortune among friends and acquaintances would be at least as great as her discomfort at its publication by the media to people to whom she is only a name. Yet the law in question does not prohibit the former in either oral or written form. Nor is it at all clear, as I think it must be to validate this statute, that Florida's general privacy law would prohibit such gossip.

Id. at 541-42 (Scalia, J., concurring) (citation omitted). Likewise, the Court had held in Daily Mail that a statute punishing the publication of a juvenile offender's name in newspapers was unconstitutional because it did not prohibit publication in the electronic media or any other type of publication. See Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104-05 (1979).

81. See Florida Star, 491 U.S. at 541.
Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . .

In sum, the Daily Mail standard set forth in Florida Star prompts three inquiries for resolving the conflicting interests in the disclosure of a rape victim’s name in a particular case: (1) was the true information “lawfully obtained”; (2) is the true information of “public significance”; and (3) is there a “state interest of the highest order” that is served by the limitation on publication.

These inquiries and the Court’s holding established Florida Star as one in a series of cases, starting with Cox Broadcasting, that upheld the media’s disclosure of truthful information even when that disclosure could have potentially harmful consequences for crime victims. Florida Star was unexpectedly different, however, not because the Court found for the media defendant, but because the Court used narrow and cautious language that acknowledged the state’s interest in protecting rape victims.

The next Part of this Essay discusses possible interpretations of the Florida Star holding in light of the arguments made by different commentators, both for and against the disclosure of rape victims’ names. The purpose in presenting these arguments is not to reach a resolution, but to set out the key issues in the debate between the freedom of the press and the privacy of rape victims.

II. THE ARGUMENTS FOR AND AGAINST DISCLOSING RAPe VICTIMS’ NAMES

Although numerous arguments have been made for and against disclosing rape victims’ names, the purpose of this Part is to present a brief commentary on those that appear most pertinent. The debate is largely pitted between those commentators who claim that nondisclosure only increases the stigma accorded to rape victims, and those who assert that rape victims are deserving of special protection. A number of collateral issues are also raised, including who or what institution should make the decision to release a rape victim’s name and what recourse is most fair for the accused.

82. Id.
83. Haughwout, supra note 16, at 744.
84. See Marcus & McMahon, supra note 4, at 1028.
85. See id. According to Marcus and McMahon, “[T]he Court for the first time appeared to recognize an important state interest in protecting the victims of sexual offenses against the disclosure of their names to the public.” Id.
A. Disclosing the Name Would Eliminate the Stigma of Rape

According to Michael Gartner, president of NBC News, society's incorrect impressions and stereotypes about rape can be eliminated if the press more fully informs viewers and readers about the key facts in a rape case including, in most circumstances, the rape victim's name.86 Geneva Overholser, editor of The Des Moines Register, agrees, claiming that society contributes to rape's stigma by treating rape differently from other crimes.87 She compares, for example, the failure to disclose a rape victim's name to the failure to reveal that an individual's death resulted from AIDS.88 In both cases, the stigma is perpetuated because the information is considered to be devastating.89

Similarly, others have commented that maintaining anonymity is a "demeaning form of self-censorship,"90 that puts the rape victim in a category apart from other violent crime victims, thereby perpetuating sexist stereotypes.91 Such isolation also implies that being raped is disgraceful.92 As Karen DeCrow, former president of the National Organization for Women has stated, "[n]ow is the time for us to understand that keeping the hunted under wraps merely establishes her as an outcast and implies that her chances for normal social relations are doomed forever more. Pull off the veil of shame. Print the name."93

This perspective was reinforced when, in the spring of 1990, a year before the William Kennedy Smith incident, a story about a rape victim published in The Des Moines Register94 won the Pulitzer prize. The story described the ordeal of Nancy Ziegenmeyer, a twenty-nine year-old Iowa housewife and mother of three who was raped in her car by a stranger.95 Ziegenmeyer decided to go public with her story after reading an editorial by Overholser in The Des Moines Register, contending that rape victims should reveal their identities in order to eliminate the stigma of rape.96

Other commentators counter these arguments, however, emphasizing the potential stigma and long term trauma experienced by rape victims.97 They note first that Ziegenmeyer, not the media, made the decision to go

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86. See Gartner, supra note 2, at 6A.
87. See Warren, supra note 6, at 5.
88. See Jones, supra note 1, at A18.
89. See id.
90. Warren, supra note 6, at C5.
91. See id.
92. See Marcus & McMahon, supra note 4, at 1031; Nix, supra note 11, at A1.
93. Karen DeCrow, Stop Treating Rape Victims as Pariahs; Print Names, USA Today, Apr. 4, 1990, at 8A.
94. See Jane Schorer, It Couldn't Happen to Me: One Woman's Story, Des Moines Reg., Feb. 25 - Mar. 1, 1990, at 1A (series of five articles).
95. See id.
96. See Geneva Overholser, American Shame: The Stigma of Rape, Des Moines Reg., July 11, 1989, at 6A.
97. See Jones, supra note 1, at A18.
public with her case. Furthermore, although Ziegenmeyer was hailed for her courage, she now claims that she would have never reported the crime if she had known at the time it occurred that her identity would be disclosed. She emphasizes that “[s]peaking out publicly is not for all victims.” Furthermore, “[n]o one should dictate to rape victims that they should speak out. It must be their choice.”

Other commentators emphasize evidence that “most public disclosures tend to reinforce rather than dispel sexual assault stereotypes,” for a variety of reasons. First, the great majority of rapes are committed by an acquaintance or relative and, therefore, the consent of the victim is often presumed. As a result, the victim may be rejected by friends or family or may appear unreliable to employers. Indeed, The National Women’s Study, a three-year longitudinal survey of a national probability sample of 4008 adult American women showed that over two-thirds of the women surveyed were “somewhat” or “extremely” concerned about the following: their family knowing that they were raped (seventy-one percent); people thinking that the rape was their fault or that they were responsible for it (sixty-nine percent); or non-family members knowing they were raped (sixty-eight percent). Based on these and other results, the study concluded that

[i]t is clear that rape victims are extremely concerned about people finding out and finding reasons to blame them for the rape. If the stigma of rape were not still a very real concern in victims’ eyes, perhaps fewer victims in America would be concerned about invasion of their privacy and other disclosure issues.

Because of these circumstances, the majority of raped women who voluntarily reveal their identities are white, middle class, in steady relationships, and most significantly, are raped by strangers. These women are far less apt to be stigmatized.

The remaining counter argument focuses on the assignment to rape

98. See Marcus & McMahon, supra note 4, at 1035.
100. See Rogers Worthington, Identifying Rape Victims Sparks Row, Chi. Trib., July 29, 1990, at C15.
102. Feedback: Other Views on the Crime of Rape, USA Today, July 20, 1990, at 13A.
103. Marcus & McMahon, supra note 4, at 1032-33.
105. See Marcus & McMahon, supra note 4, at 1033.
106. See National Victim Ctr. and Crime Victims Research and Treatment Ctr., Rape in America: A Report to the Nation (Apr. 23, 1992) [hereinafter Rape in America] (reporting the results of The National Women's Study).
107. See id. at 4.
108. Id.
109. See Marcus & McMahon, supra note 4, at 1033.
victims the task of enlightening society about rape. As some commentators have asked: "[W]hy must the victim, who has already suffered from the ordeal of rape, be forced to bear the responsibility of educating society and changing its prejudicial view toward rape and its victims?" They contend that change must come from the individuals in society who hold stereotypical views about rape, not from the victims themselves. As Ziegenmeyer notes further, "[w]e're not going to lessen the stigma by just publishing victims' names. We need to educate society to what rape is."

B. The Name Adds Credibility to the Story (or Journalists' Commitment to the Facts)

According to Gartner, names and facts are news that make readers better informed. "The more we tell our viewers, the better informed they will be in making up their own minds about the issues involved. We do not mean to be judgmental or to take sides; we are merely reporting what we have learned." Moreover facts such as names make a story more credible. "As wounding as revealing her name may be it's news. Specifics add credibility to the story." Overholser adds that the withholding of facts "goes against everything we believe as journalists in terms of commitment to printing the facts as we know them."

Opponents claim that this argument lacks merit. First, news organizations are able to provide specific details of an alleged rape based upon police reports, court files, and judicial proceedings. Other personal facts can be gathered through interviews with those who know the victim. If the press provides this kind of information, the victim's name becomes superfluous for making a story credible.

C. Withholding the Name Stems from Male Chauvinism

According to some commentators, the withholding of rape victims' names is the result of male chauvinism. "The newspaper publisher is big daddy saying, 'Don't you worry, little lady,'" according to Henry G. Gay, publisher of the *Shelton-Mason County Journal* in Washington, one of the few newspapers that discloses the names of rape victims as well as the names of all witnesses at trials.

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110. Id.
111. See id.
112. Feedback: Other Views on the Crime of Rape, supra note 102, at 13A.
113. See Gartner, supra note 2, at 6A.
117. See Marcus & McMahon, supra note 4, at 1034-35.
118. Jones, supra note 1, at A18.
THE PRIVACY RIGHTS OF RAPE VICTIMS

A Boston Globe staff writer contends, however, that this perspective assumes a "post-shame society." Although a social goal may be to identify the victims of rape as readily as those of theft, to do so now would push back any progressive changes made so far. "[P]rivacy is the covered bridge we need to cross over to the time when rape is indeed treated by the public like any other assault."

D. News Directors Should Make Editorial Decisions About Names, Not Courts or Legislatures

According to Gartner, producers, editors, and news directors should make editorial decisions, not the courts or legislatures. For this reason, he opposes military censorship, legislative mandate, and the policies of most organizations to suppress printing rape victims' names. As he emphasizes, there is no other news category that allows an individual the choice of remaining anonymous.

This perspective may be considered open to question, however, if editorial judgments differ from the public's desires, which appears to be the case. Polls show that most individuals support editorial policies that protect rape victims' names. For example, when the New York Daily News invited readers to call in their opinions concerning whether NBC's decision to disclose the alleged victim's name in the William Kennedy Smith case was appropriate, seventy-five percent of the nearly one thousand respondents said they opposed NBC's decision. In addition, a USA Today poll taken after the accuser's name was released reported that ninety-one percent of the 633 adults questioned by Gordon S. Black, Corp., said that rape victims, not news organizations, should decide whether to disclose their identity.

E. Disclosure is Justified if the Name Is Already Disclosed

Many news organizations, including The New York Times, stated that they disclosed the name of William Kennedy Smith's accuser because her name had already been released to the general public. The Times ex-
plained its reasoning as follows:

Like many other news organizations, *The New York Times* ordinarily shields the identities of complainants in sex crimes, while awaiting the courts’ judgment about the truth of their accusations. *The Times* has withheld [the accuser’s] name until now, but editors said yesterday that NBC’s nationwide broadcast took the matter of her privacy out of their hands.126

According to William German, executive editor of *The San Francisco Chronicle*, the accuser’s name was “clearly in the public domain” once it had been broadcast by NBC and printed in *The New York Times* and other major publications.127 “The name itself became part of the news story and controversy. Continuing to withhold the name from our readers served no real purpose in this case.”128

In contrast, critics said that by claiming NBC’s broadcast “took the matter of [the victim’s] privacy out of their hands,”129 *The Times* did not deserve whatever credit might have been attributed to Gartner for his original decision to disclose.130 As Susan Estrich, a professor at the University of Southern California Law Center, commented, *The Times*—“like any thoughtful toddler”—merely used NBC’s broadcast as a reason for following the network’s decision to disclose.131

Notably, *The Times*’ editors also may have been influenced by their expectation that most of the other mainstream news organizations would be publishing the victim’s name.132 This was not the case, however, as *The Toronto Star* made known in its assessment of the chain of media events concerning the William Kennedy Smith trial. “It was clear the journalistic world had been turned upside down yesterday when Dan Schwartz, editor of the *National Enquirer*, said of the *New York Times*: ‘I think we took a more ethical stand than they did.’”133 The *National Enquirer* and comparable news organizations continued to refuse to print the accuser’s name.134

Yet, critics have contended that giving original credit to NBC could also be considered unwarranted. For example, Gartner explained that he made the decision to reveal the accuser’s name because it “was well known in the Palm Beach area.”135 Yet, the NBC affiliate in West Palm Beach announced an on-the-air objection to disclosing the victim’s name

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126. *On Names in Rape Cases*, supra note 114, at A17.
128. *Id.*
129. *On Names in Rape Cases*, supra note 114, at A17.
130. See *Glaberson*, supra note 1, at A14.
131. *Id.*
132. See *id.*
134. See *id.*
prior to the NBC Nightly News broadcast. Furthermore, given Estrich's analogy, it could be contended that NBC News was also just another "toddler" following the lead taken from the two earlier tabloid reports.

**F. Withholding the Name Is Not Fair to the Accused**

According to Alan Dershowitz, a Harvard Law School professor, withholding the name not only further stigmatizes rape, it also endangers the civil liberties of those who are accused for two reasons: (1) it implies that the unnamed person was indeed a victim and, therefore, (2) hinders the presumption that the defendant is innocent.

"People who have gone to the police and publicly invoked the criminal process and accused somebody of a serious crime such as rape must be identified. . . . In this country there is no such thing and should not be such a thing as anonymous accusation. If your name is in court it is a logical extension that it should be printed in the media. How can you publish the name of the presumptively innocent accused but not the name of the accuser?"

Likewise, Gartner states that the alleged victim should be treated journalistically in the same way as the accused. For example, because William Kennedy Smith's reputation became a matter of debate and scrutiny, the accuser should be in a comparable position.

Others counter that the issue is not always whether the alleged victim's name is published, but the context in which the media publishes it. According to Karen Jurgenson, a senior editor of USA Today and also the victim of a gunpoint rape attack, revealing details of the accuser's life and creating the implication that she was responsible "doesn't balance the media attention the men in the case have received. It only takes the case to greater lows."

The sounder alternative, however, may be to enact legislation protecting the names of both the accused and the accuser, an approach potentially acceptable to both sides in an alleged rape case. This approach has received some support from a recent survey conducted with respondents from a national probability sample of 370 agencies that provide crisis counselling to rape victims. The survey found that nearly two-thirds (sixty-three percent) of the rape crisis counselling agencies supported...
laws prohibiting the disclosure of the names of those accused of rape until after an arrest is made. However, only forty percent of the agencies' respondents favored laws withholding the names of those accused until after indictment, and only twenty-four percent until after conviction.142

G. Non-Disclosure Laws Will Not Encourage the Reporting of Rape

According to one commentator, non-disclosure laws have failed to protect the privacy of rape victims. The number of reported and unreported rapes continues to climb, even in those states that punish the media for disclosure.143 "It therefore could be concluded that protecting the identity of victims has not affected the prosecution of offenders and has not affected the reporting of crimes."144

This argument may be too narrow, however. First, it ignores the fact that ninety to ninety-five percent of the media have non-disclosure policies irrespective of the law of the particular state where they are based.145 Moreover, there is no evidence to indicate that the small group of news organizations that do disclose are sufficiently close to one another geographically that they could have a measurable impact on the rape reporting rates of women in any particular area. Large scale surveys or case studies of individual rape victims, therefore, appear to be the more informative alternative.

Second, experts are "undecided" about whether the stable increase in rapes reported to the police over the past few years can be attributed to a higher incidence of sexual assault or an enhanced willingness to report.146 Again, deciphering the effect of this reporting behavior is difficult.

Third, The National Women's Study reported that seventy-six percent of the American women and seventy-eight percent of the rape victims surveyed favored legislation that prohibited the media from disclosing rape victims' names.147 One-half of the rape victims questioned also said that they would be "a lot more likely" to report rapes if the media were prevented by law from acquiring and revealing their names and addresses.148 Another sixteen percent were "somewhat more likely" to report under these circumstances,149 making a total of sixty-six percent who would be more likely to report rapes if their identities would be protected. Moreover, eighty-six percent of all those surveyed thought

142. See Rape in America, supra note 106, at 10.
143. See Haughwout, supra note 16, at 749.
144. Id.
145. See supra note 1 and accompanying text.
147. See Rape in America, supra note 106, at 9.
148. See id. at 6.
149. See id.
that victims would be “less likely” to report rapes if those victims believed that the news media would disclose their names. 150

Based on these data and in light of the considerable publicity surrounding the William Kennedy Smith case, The Women’s Study reached the following conclusion:

During the past year, several high profile rape cases received vast publicity, with several respected news agencies straying from their standard wise policies of not disclosing rape victims’ names. The argument has been made that disclosing rape victims’ names would “destigmatize” the crime of rape and encourage victims to report rapes to police. It is extremely significant that rape victims appear to strongly disagree with this argument. . . . [Moreover,] it appears that women are just as likely in recent years to fear negative evaluation by others if a rape is disclosed, and are more concerned about the possibility of their names being made public. 151

CONCLUSION

This Essay’s examination of the Supreme Court’s support for the press’ right to disclose, plus commentary on key issues relating to the privacy versus free press debate, raises several questions. Should the public’s or the rape victims’ strong support for non-disclosure curtail the media, or should news organizations continue to be allowed to disclose? Should there be alternatives to traditional non-disclosure laws, such as laws ensuring non-disclosure for both perpetrators and victims? Should the media ultimately have access to the names of rape victims and the choice thereafter to publish, or will future courts and state statutes begin to withhold names from public access? If states do indeed begin to protect such information, should they or the media be liable if such information is disclosed? Under what specific circumstances should rape victims’ names not be disclosed? If special legislation is enacted for rape victims, should such legislation also apply to the victims of other sorts of crimes, or alternatively, to the victims of potentially sensitive diseases?

These questions remain open for now, but courts will likely confront them at some point in the future. At that time, courts will need to consider how differently rape victims should be treated from other kinds of crime victims, and whether the non-disclosure net should be broadened to include others (including non-crime victims) whose identities, when revealed, could result in emotional or physical harm. In leaving these questions open, we turn next to our panel speakers for their thoughts on the social and legal complexities of rape victims’ privacy rights.

150. See id.
151. Id.