THE FULL-COURT PRESS: SACRIFICING VITAL PRIVACY INTERESTS ON THE ALTAR OF FIRST AMENDMENT RHETORIC

IRWIN R. KRAMER*

I. INTRODUCTION

Nearly one hundred years ago, when Samuel D. Warren and his family found themselves victimized by what they regarded as an overzealous and invasive press, American courts did not provide any redress for the harm resulting from the media's unwarranted disclosure of the intimate details of one's private life. Lacking such a remedy, Warren enlisted the aid of his law partner, Louis D. Brandeis, to vent his frustration with abusive journalism in a manner that would have a far more potent impact than any single lawsuit could possibly muster. In what has been described as perhaps the "most influential law review article of all,"[1] Warren and Brandeis set out to fill this gap in the law by calling for judicial recognition of a "right to be let alone" or "right to privacy."[2]

According to these esteemed commentators, the right to privacy is essential in shielding private citizens from the harm which can result from the needless publication of vicious gossip:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle . . . . [M]odern enterprise and invention have, through invasions upon [man's] privacy, subjected him to mental pain and

 Associate, Weinberg & Green, Baltimore, Maryland. B.A., 1984, Towson State University; J.D., 1987, University of Maryland; LL.M., 1989, Columbia University.

1 Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

2 Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96 (1890) [hereinafter Warren & Brandeis]. For an interesting account of the circumstances that prompted Warren and Brandeis to write this landmark article, see Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383-84 (1960) [hereinafter Prosser].

> distress, far greater than could be inflicted by mere bodily injury.[3]

These words touched off a century of lawsuits, controversy and conflict. As more courts began to entertain such suits, the right to be left alone evolved into four separate torts: (1) intrusion upon an individual's solitude or seclusion; (2) commercial appropriation of a person's name, likeness, or personality; (3) publicity which places an individual in a false light in the public eye; and (4) public disclosure of embarrassing private facts.[4] The last of these torts, commonly called the "public disclosure tort," soon came into conflict with another right which in the last century has also received a rapid expansion of protection—freedom of the press.[5]

This conflict arose from the legal tension created by the press' first amendment right to disclose embarrassing facts and the individual's privacy interest in concealing them. In the typical situation,

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[3] Warren & Brandeis, *supra* note 2, at 196.

[4] *See* Prosser, *supra* note 2, at 389. Dean Prosser arrived at these distinct categories after reviewing over 300 cases decided between 1905 and 1960. *Id.* at 386-89. The first of these cases, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), became the leading case in this area when it refused to follow the New York Court of Appeals which rejected the right of privacy three years earlier. *See* Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (superseded by statute as stated in Brinkley v. Casablancas, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1st Dep't 1981)).

In *Pavesich*, the Georgia Supreme Court accepted the views of Warren and Brandeis by ruling for a plaintiff who based his theory of recovery on the right of privacy. *Pavesich*, 122 Ga. at 213-16. Specifically, the plaintiff claimed that his right to privacy was violated when the defendant insurance company used his name, portrait, and a fictitious testimonial in its newspaper advertisement without obtaining his consent. *Id.* at 192. Adopting the dissenting opinion in *Roberson*, the court recognized the right to privacy as an independent ground for recovery, and allowed the plaintiff's claim to proceed. *Id.* at 213-16.

By 1939, so many courts had followed *Pavesich*'s lead that the American Law Institute codified the right of privacy in the RESTATEMENT OF TORTS. *See* RESTATEMENT OF TORTS § 867 (1939) ("A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."). The Second Restatement, under the guidance of Dean Prosser himself, expanded this treatment of the privacy right by expressly adopting his four categories of torts. *See also* RESTATEMENT (SECOND) OF TORTS § 652A (1977).

[5] Although freedom of the press has long occupied a prominent place in American law, members of the fourth estate, the press, have never before enjoyed the extent of protection afforded them by recent Supreme Court decisions. Indeed, the Court has built for the press what one constitutional scholar has referred to as a " 'wall of immunity' " in such cases as New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (giving the press substantial "breathing space" in publishing defamatory falsehoods) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)), New York Times Co. v. United States, 403 U.S. 713 (1971) ("The Pentagon Papers case") (upholding the press' freedom to publish despite the government's strong national security claims), and Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (invalidating judicial interference with freedom of the press through the use of gag orders). *See* Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 330 (1979) [hereinafter Emerson]. Considering the recent expansion of press freedoms, "the constitutional foundations for a free press are solidly established in American law and show no signs of serious deterioration." *Id.* at 331.

members of the press argue that it is not only their job, but their constitutional privilege, to inform the public by reporting those true facts contained within news stories that are of public interest, no matter how embarrassing those facts may be to certain individuals. Conversely, the subjects of these stories seek to conceal these embarrassing facts by arguing that such publications do not serve the legitimate public interest. They contend that these articles merely satisfy the morbid curiosity of certain members of the public, destroying individual privacy and spawning the enormous suffering that accompanies its loss.

Although this conflict did not surface in actual litigation until recent years,[6] Warren and Brandeis themselves recognized this problem. In an apparent effort to solve this dilemma, Warren and Brandeis emphasized that the "right to privacy does not prohibit any publication of matter which is of public or general interest."[7] This "public interest" or "newsworthiness" defense was recognized by several courts[8] and was later incorporated as an element of the tort itself by the drafters of the *Restatement (Second) of Torts*.[9]

Unfortunately, rather than settling the conflict between the right to privacy and the first amendment, this element merely provided a new battleground on which to litigate the controversy — litigants began to fight over the meaning of the terms "newsworthy" and "public interest." Some courts, resolving these disputes as Warren and Brandeis would, construed these terms to deny the press a privilege to serve the public's curiosity by publishing information for which readers have no legitimate need.[10] Others have taken a much broader view of the public interest and have allowed the press to print anything that satisfies reader curiosity, regardless

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[6] Before 1975, the only public disclosure case in which the press even attempted to assert a first amendment defense was Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942). *See* Comment, *An Accomodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1387 n.15 (1976). All of the other cases concerned "the press' protection under state law rather than [under] the first amendment." *Id.*

[7] Warren & Brandeis, *supra* note 2, at 214.

[8] *See, e.g.*, Hubbard v. Journal Publishing Co., 69 N.M. 473, 368 P.2d 147 (1962); Jenkins v. Dell Publishing Co., 251 F.2d 447 (3d Cir.), *cert. denied*, 357 U.S. 921 (1958); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956); Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948).

[9] RESTATEMENT (SECOND) OF TORTS § 652D (1977). As codified in the Second Restatement, a plaintiff seeking to recover for damages suffered by the publication of facts involving her private life must prove that the matter "would be highly offensive to a reasonable person, and . . . is *not of legitimate concern to the public*." *Id.* (emphasis added).

[10] *See, e.g.*, Briscoe v. Reader's Digest Ass'n, 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (Dist. Ct. App. 1931). The *Melvin* case was superseded by an amendment to the California State Constitution. CAL. CONST. art. 1, § 1 (as amended by the 1974 initiative). Roberts v. Gulf Oil Corp., 147 Cal. App. 3d 770, 195 Cal. Rptr. 393 (Ct. App. 1983).

of the harm it may cause.[11] Courts taking the latter approach have generally deferred to reporters' bare assertions of public interest.[12] By contrast, those adopting a narrower view of the public interest have decided for themselves whether, in view of the plaintiff's privacy interest, the public really had a legitimate need for the published facts.[13]

Nowhere has this controversy been litigated with more fervor than in cases involving the media's coverage of judicial proceedings. These cases, presenting what one court referred to as a "head-on collision" between privacy and first amendment interests,[14] often involve the strongest assertions of both. Advocating a broad construction of the public interest, the press claims that it has an absolute first amendment right to publicize all aspects of such proceedings to enable the public to scrutinize the workings of the judicial system and to prevent the abuse of judicial power. In attempting to refute these assertions of an absolute first amendment privilege, trial participants contend that not all aspects of judicial proceedings need be publicized in order to serve this interest, particularly in view of the grave harm that would result from the disclosure of many of the damaging facts that surround these proceedings.

While this conflict can only properly be resolved through a first amendment analysis that accommodates both interests, a recent line of Supreme Court cases declined to take this approach, disregarded the trial participant's privacy interests, and granted the press what amounts to an absolute first amendment privilege to serve the morbid curiosity of its readers through unwarranted disclosures of private facts.[15] This Article will examine the privacy interests that the

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11 *See, e.g.*, Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940). In rejecting the plaintiff's privacy claim, the Second Circuit in *Sidis* focused on the public's actual interest in the information, not on the view of Warren and Brandeis of what *ought* to interest the public: "Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population." *Id.* at 809.

12 *See Sidis*, 113 F.2d at 809.

13 *See Briscoe*, 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866; *Melvin*, 112 Cal. App. 285, 297 P. 91.

14 Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 64, 200 S.E.2d 127, 131 (1973), *rev'd*, 420 U.S. 469 (1975).

15 Florida Star v. B.J.F., 109 S. Ct. 2603 (1989); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In addition, on October 30, 1989, the Court denied a writ of certiorari in Ross v. Midwest Communications, Inc., 110 S. Ct. 326 (1989), letting stand a Fifth Circuit decision permitting a television station to broadcast the first name of a rape victim and a picture of her residence in connection with a documentary on her alleged attacker. *See* 870 F.2d 271 (5th Cir.), *cert. denied*, 110 S. Ct. 326 (1989) (finding legitimate public interest in rape victim's identity).

Supreme Court ignored,[16] review the current imbalance in the Court's analysis,[17] and propose a more balanced first amendment analysis that would protect the trial participant's privacy without unduly impairing the legitimate interests of the press and public.[18]

II. THE TRIAL PARTICIPANT'S PRIVACY INTEREST

Though the right to privacy is of relatively recent origin, it has quickly come to be regarded as a right of fundamental importance. Brandeis himself helped to establish this importance when, as a Justice of the United States Supreme Court, he observed that "the right to be let alone . . . [is] the right most valued by civilized men."[19] More recently, Justice Douglas expressed the view that "[t]he right to be let alone is indeed the beginning of all freedom,"[20] and Justice Fortas touted the right as one of the "great and important values in our society . . . which [is] also fundamental and entitled to this Court's careful respect and protection."[21] While a broad constitutional right of privacy has yet to gain the acceptance of a majority of the Court,[22] the Court has protected privacy under the Constitution in a variety of contexts[23] and has acknowledged that privacy interests are "plainly

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16 *See infra* notes 19-57 and accompanying text.

17 *See infra* notes 58-100 and accompanying text.

18 *See infra* notes 101-13 and accompanying text.

19 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled*, Katz v. United States, 389 U.S. 347, 352 (1967).

20 Public Utils. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

21 Time, Inc. v. Hill, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting).

22 Although the Court's recent treatment of the public disclosure tort strongly suggests that it has yet to attain constitutional status, *see infra* notes 58-100 and accompanying text, there presently exists a split in the circuits on whether the Court has, in fact, recognized a broad constitutional right to the privacy of personal information. *Compare* Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980), and Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) *with* J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981).

This disagreement stems from varying interpretations of Justice Stevens' dicta in Whalen v. Roe, 429 U.S. 589 (1977). Writing for the majority, Justice Stevens observed that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters . . . ." *Id.* at 598-99 (citations omitted). He then rejected the plaintiff's public disclosure claim, finding that the acts complained of did not "pose a sufficiently grievous threat to either interest to establish a constitutional violation." *Id.* at 600. The Third and Fifth Circuits have accepted this language as a clear indication of the Court's recognition of a constitutional right to avoid disclosure of personal matters. *See, e.g., Fadjo*, 633 F.2d 1172; *Westinghouse*, 638 F.2d 570. The Sixth Circuit has rejected this ambitious reading of *Whalen*, observing that the *Whalen* court only held that the acts complained of did not violate any *possible* right to informational privacy, whether or not such a right even existed. *DeSanti*, 653 F.2d at 1089.

23 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-56 (1973) (recognizing control over one's body as a privacy right); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (protecting the

rooted in the traditions and significant concerns of our society."[24]

Yet, while most everyone agrees that privacy is important, few agree on what privacy actually is. As one commentator has remarked, "Perhaps privacy is not given the recognition it deserves as a fundamental value simply because the concept is so difficult to formulate or justify in nonsubjective terms."[25] Indeed, ever since Warren and Brandeis first articulated the "right to be let alone," legal scholars have been hard at work defining it. To date, these efforts have produced little more than the type of sweeping, subjective language that has failed to provide a foundation for the development of a comprehensive law of privacy. For example, Professor Edward Bloustein has defined privacy in tort cases as the "interest in preserving human dignity and individuality."[26] According to Professor Bloustein,

> What is really at issue when, for instance, a magazine gives an account of the emotional crisis that a man faced . . . is not merely the distress the individual suffers as a result of the reawakening of his agony, but the debasement of his sense of himself as a person that results because his life has become a public spectacle against his will.[27]

By contrast, Professor Charles Fried focuses not on individual autonomy, but on privacy's ability to foster intimate relations with others. In fact, Professor Fried believes that "privacy is . . . necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable."[28] Professor Thomas Gerety combines both of these theories in his three elements of privacy: "autonomy, identity, and intimacy."[29]

Although these commentators provide valuable insights, they have not been able to articulate a theory of privacy that will enable

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sanctity of a home); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (protecting privacy in marital relationships).

24 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

25 Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 588 (1977). *See* Miller, *The William O. Douglas Lecture: Press Versus Privacy*, 16 GONZ. L. REV. 843, 845 (1981) [hereinafter Miller] ("The difficulty with formulating a generalized right of privacy is that it is an extraordinarily subjective value.").

26 Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1005 (1964).

27 Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 619 (1968).

28 Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968).

29 Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

this right to compete effectively with conflicting first amendment interests. Before plaintiffs can even hope to defeat the media's assertions of a first amendment privilege, they must base their privacy claims on concrete and severe harm, not on abstract notions of "autonomy, identity, and intimacy."

"Even if we agree on these outlines of a value structure," Professor Thomas Emerson believes that "we are still some distance from having a definite, workable theory of privacy" that will be useful in litigation.[30] "Privacy is a developing right. It must emerge gradually from the traditions, experiences, and needs of our society. One cannot expect it to take final, concrete shape at this point in our history."[31]

Perhaps the best that one can expect at this time is the continuing evolution of this right through the identification of specific situations in which privacy interests demand recognition. Thus far, the Supreme Court has assisted this development by recognizing significant privacy interests in such areas as intimate marital relationships, control over one's body and the sanctity of the home.[32] Given the similarly strong privacy interests of many persons whose lives have become the subject of judicial proceedings, the Court should further this development by recognizing significant privacy interests in the courtroom as well.

These interests are particularly compelling in the cases of rape victims, juvenile offenders, and rehabilitated ex-convicts. In all three cases, protecting the privacy of these trial participants would serve not only the interests of the individual, but also those of society, which has a stake in their rehabilitation. In particular, the mutual interest in maintaining confidentiality is essential in preventing the kind of public stigma and psychological harm that may seriously impair the rehabilitation efforts that the individual and society seek to promote.

The need to protect this "rehabilitation interest" is rather forcefully illustrated by the plight of rape victims subjected to highly publicized trials. Though rape victims certainly have nothing to be ashamed of, neither the individual victim nor society responds rationally to the crime. Unlike other crimes, "[t]he myth that still pervades thought about sexual assault is that respectable girls do not get raped; the victim's failure to escape demonstrates immorality."[33] Despite laws enacted to prevent the humiliation of rape victims in

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30 *See* Emerson, *supra* note 5, at 340.
31 *Id.*
32 *See supra* note 23 and accompanying text.
33 Comment, *Protecting Child Rape Victims from the Public and Press After* Globe Newspa-

court, at trial, many rape victims have been forced to prove that they were "innocent of soliciting the assault in some way."[34] Publicizing these trials in reports that name the rape victim further perpetuates the myth that the victim "asked for it."[35]

This publicity, and the public stigma that it provokes, only serves to compound the psychological trauma following the rape and to delay the victim's rehabilitation. Rape victims frequently internalize the skepticism, blame, and condemnation placed on them by insensitive members of the press and public.[36] As one newspaper reporter even observed, "Rare is the woman who can endure both the trauma of rape and the trauma of a highly publicized trial."[37] In fact, many rape victims do not even report the crime for fear that reliving the incident at trial would prolong their trauma.[38] For this

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per *and* Cox Broadcasting, 51 GEO. WASH. L. REV. 269, 281 (1983) [hereinafter *Protecting Child Rape Victims*] (footnotes omitted).

34 Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398 (1975).

35 *In re* Pittsburgh Action Against Rape, 494 Pa. 15, 40, 428 A.2d 126, 139 (1981). According to Professor Susan Estrich, herself a former rape victim, the criminal justice system has done little to combat this myth:

> Far from challenging that bias, common law judges have given it the force of law. By adopting and enforcing the most insulting stereotypes of women victims of . . . rapes, they have enshrined distrust of women in the law, legitimated the male fantasy [that women actually want to be raped], and ensured that rape trials would indeed be *real* nightmares—for the women victims.

S. ESTRICH, REAL RAPE 56 (1987) (emphasis in original) [hereinafter ESTRICH].

While publicizing these trials is essential in exposing the insensitivity of the legal system and in fostering reforms, it is probably not necessary to expose the victim's identity. Considering the grave harm that frequently results from such publicity, the rape victim's privacy should not be lightly sacrificed for whatever marginal benefit that may result from reporting her name. This is particularly true in the majority of these reports which do not focus on the insensitivity of the judicial system, but, rather, on the morbid and embarrassing details of the crime itself.

Furthermore, should the rape victim wish to champion the cause of legal reform by voluntarily sharing her own story with members of the public, and by identifying herself as a victim of rape, she is certainly free to waive her privacy for what she perceives to be the greater good. Indeed, Professor Estrich, by sharing her own experiences in a book designed to reform our insensitive system of justice, provides an excellent example. *See generally id.* While such voluntary disclosures may be beneficial in prompting these reforms, our legal system would hardly become more "sensitive" to the plight of rape victims by granting the press an absolute privilege to disclose their identities against their will.

36 *Protecting Child Rape Victims*, *supra* note 33, at 281.

37 Randolf, *Tavern Rape Case Prompts Hearing Into How Open To Make Trials*, Wash. Post, Apr. 25, 1984, at A3, col. 1. Though the public benefits little from press reports publishing the rape victim's name, the effect on the victim can be devastating. Thus, in one case involving such a needless report, the court observed that "[t]he publication added little or nothing to the sordid and unhappy story; yet, that brief little-or-nothing addition may affect appellant's well-being for years to come." Doe v. Sarasota-Bradenton Florida Television Co., 436 So. 2d 328, 331 (Fla. Dist. Ct. App. 1983). *See* State v. Evjue, 253 Wis. 146, 161, 33 N.W.2d 305, 312 (1948) ("At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim.").

38 *See* J. BODE, FIGHTING BACK: HOW TO COPE WITH THE MEDICAL, EMOTIONAL AND

reason, protecting the rape victim's privacy would not only serve individual interests, it would benefit society as a whole by encouraging more victims to report the crime and to testify against their attackers at trial.[39]

While one may understandably feel less sympathy for juvenile delinquents charged with the commission of various crimes, the harm that results from publicizing the juvenile's identity in connection with these crimes is very much the same. Public stigma and psychological trauma can seriously impair the juvenile's ability to rehabilitate himself, lead a productive life, and put the past behind him. Even before he is convicted of any crime, the juvenile's "conviction-in-the-press" may well carry a life sentence of stigmatization. To avoid this emotional injury, society, acting through the juvenile justice system, has endeavored "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."[40] Unfortunately, when the press digs up these buried facts, the youth, branded as a criminal, may never be able to escape the imprisoning effects of such publicity. Shunned by his community and unable to obtain meaningful employment or the educational opportunities needed to advance in society, the juvenile may find it impossible to dispel the suspicion with which others regard him.[41] Furthermore, the juvenile whose youthful indiscretion has made the headlines may experience great stress, either in the form of severe personal embarrassment and disgrace, or through peer pressure to

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LEGAL CONSEQUENCES OF RAPE 26, 84-88, 91-92 (1978) (for various factors determining whether a rape is reported). *See also Evjue*, 253 Wis. at 146, 33 N.W.2d at 312. "[I]t is a well known fact that many crimes of the character described go unpunished because the victim of the assault is unwilling to face the publicity which would follow prosecution. . . . " *Id.*

39 As one federal court has noted, allowing the press to further victimize the rape victim by publicizing her pain is no way to thank her for performing her civic duty in testifying:

> The privacy rights of . . . the unfortunate victim, must be respected. As a cooperating key witness in the prosecution, she sacrificed much of herself and overcame a challenge to her personal dignity to respond as a good citizen to the duty to testify. She did so with candor and courage. She is entitled to the consideration and protection of the court from improper out of court dissemination of her forced embarrassing experiences.

In re Application of KSTP Television, 504 F. Supp. 360, 364 (D. Minn. 1980). *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 618 (1982) (Burger, C.J., dissenting) (press should not be present when child rape victim testifies).

40 *In re* Gault, 387 U.S. 1, 24 (1967) (quoting State v. Guerrero, 58 Ariz. 421, 430, 120 P.2d 798, 802 (1942)).

41 *See* Comment, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation*, 65 IOWA L. REV. 1471, 1485 (1980) ("Publicity can prolong and exacerbate adverse public reaction to a single offense and injure a juvenile's reputation, thus playing a destructive role in the rehabilitative process and even later in the juvenile's life.").

attempt more serious acts of delinquency.[42] In either event, the resulting psychological damage may severely impede a youth's ability to grow beyond the impulses that led him to commit a crime originally.

Like juveniles, who deserve the chance to rehabilitate themselves and put their misdeeds behind them, adults who have actually succeeded in doing this deserve the same chance to lead honorable lives without fear that their past crimes will surface to destroy their progress. While the adult criminal justice system places a greater emphasis on punishment than on rehabilitation and, hence, a lesser emphasis on privacy,[43] society undoubtedly has a strong interest in protecting the privacy of those who have already "paid their debt to society" and have proceeded to lead honorable lives. While society affords these adults few privacy interests at the time of their crimes, they may "earn" significant privacy interests years later through successful rehabilitation. Although not phrased in precisely these terms, this was essentially the holding in two prominent California cases, *Melvin v. Reid*[44] and *Briscoe v. Reader's Digest Ass'n.*[45]

In *Melvin*, the plaintiff, a former prostitute who was acquitted in a widely reported murder trial, "had abandoned her life of shame, had rehabilitated herself, and had taken her place as a respected and honored member of society."[46] Seven years after her acquittal, the defendants produced a movie entitled "The Red Kimono," detailing her shameful past and the facts of the murder charge and trial, and revealing her true name, which also appeared in advertisements promoting the film.[47] Although the court recognized the public interest in the incidents of the plaintiff's life, it did not find it necessary for the defendants to destroy her rehabilitation by publishing her name in connection with these events:

> One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology, it is our object to lift up and sustain the unfortunate rather than tear him down. Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in

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42 *Id.*

43 *See generally* Cohen, *Reconciling Media Access with Confidentiality for the Individual in Juvenile Court*, 20 SANTA CLARA L. REV. 405, 406-10 (1980) (comparison between adult and juvenile treatment in the court system).

44 112 Cal. App. 285, 297 P. 91 (Dist. Ct. App. 1931).

45 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

46 *Melvin*, 112 Cal. App. at 286.

47 *Id.* at 287.

> the path of rectitude rather than throw him back into a life of shame or crime.[48]

Accordingly, the court concluded that the plaintiff "should have been permitted to continue [her honorable life] without having her reputation and social standing destroyed" by the publication of her name in connection with the story of her former life, and permitted her to sue for this injury.[49]

Forty years later, in *Briscoe v. Reader's Digest Ass'n*,[50] the California Supreme Court relied on *Melvin* in permitting the plaintiff to maintain a similar claim for invasion of privacy. As in *Melvin*, the plaintiff in *Briscoe* successfully rehabilitated himself only to find his past crimes reported years later in the pages of *Reader's Digest*. The *Reader's Digest* article, which focused on the problem of truck hijacking, named the plaintiff in connection with his conviction of this crime without mentioning that the hijacking occurred eleven years earlier.[51] Upon learning of this incident, the plaintiff's eleven year-old daughter and many of his friends scorned and abandoned him.[52]

Fortunately for the plaintiff, while the press ignored his privacy interests, the *Briscoe* court did not. In deciding upon the plaintiff's right to sue for the harm resulting from the publication, the court found it necessary to balance his privacy interests with the first amendment interests of the press:

> [T]he great general interest in an unfettered press may at times be outweighed by other great societal interests. As a people we have come to recognize that one of these societal interests is that of protecting an individual's right to privacy. The right to know and the right to have others *not* know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.[53]

Acknowledging that "newsworthy" information is constitutionally protected, the court outlined a three-part test for newsworthiness. This test balances the conflicting interests by weighing: "[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which

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48 *Id.* at 292.

49 *Id.*

50 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

51 *Id.* at 532-33.

52 *Id.*

53 *Id.* at 540-41 (footnote omitted) (emphasis in original).

the party voluntarily acceded to a position of public notoriety."[54] After weighing these factors, the court held that a jury could reasonably find that the plaintiff's identity was not a newsworthy element of the *Reader's Digest* story. In so holding, the court placed particular emphasis on the ostracism, isolation, and alienation that the plaintiff suffered as a result of the publication—consequences which could not be justified by the diminished public interest in the plaintiff's identity years after legal proceedings had ended.[55] Moreover, the mere curiosity of *Reader's Digest* subscribers is hardly sufficient to overcome the state's "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."[56]

Since a jury could reasonably conclude that the interests of both the individual and society in protecting privacy were greatly undermined, the court refused to immunize the press from liability for a publication that totally disregarded them.[57] By refusing to limit its focus to the first amendment, the *Briscoe* court gained prominence for its balanced consideration of all of the interests implicated. Unfortunately, the United States Supreme Court refused to follow suit.

III. Supreme Court Doctrine and the Current Imbalance

In a series of what it has described as "narrow" holdings, the United States Supreme Court has virtually ignored the trial participant's privacy interests and has instead embarked on an absolute first amendment analysis that places freedom of the press above all competing considerations.[58] Taken collectively, all that these "narrow" holdings accomplish is a narrowing of the trial participant's privacy and an expansion of the press' first amendment privilege to invade it.

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54 *Id.* at 541 (citations omitted). This test was set forth in Kapellas v. Kofman, 1 Cal.3d 20, 36, 459 P.2d 912, 922, 81 Cal. Rptr. 360, 370 (1969).

55 *Briscoe*, 4 Cal.3d at 542. The court stated that disclosure of the plaintiff's identity had only minimal social value because a jury could reasonably find that he was once again an anonymous member of his community whose life provoked no special interest. In addition, the court pointed out that he did not consent to the publicity he received. Had the plaintiff invited his notoriety, the court would have been more inclined to find his identity newsworthy. *Id.* at 541-42.

56 *Id.* at 542.

57 *Id.* at 543.

58 *See* Florida Star v. B.J.F., 109 S. Ct. 2603 (1989); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (Douglas, J., concurring).

A. Cox Broadcasting *and Its Progeny*

The Court cast the first stone in *Cox Broadcasting Corp. v. Cohn*.[59] There, the father of a deceased rape victim claimed that the defendant's television station invaded his privacy by obtaining his daughter's name from court papers and broadcasting it in a report on the trial of her attackers. Relying on *Briscoe*, the Georgia Supreme Court rejected the defendant's assertion of an absolute first amendment privilege. Instead, the Georgia court resolved the conflict between the right of privacy and freedom of the press by balancing the interests served by both:

> When the situation of the victim of the assault . . . is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime, there can be no doubt that the slight restriction of the freedom of the press [in sanctioning such publications] is fully justified.[60]

Consequently, the court upheld the plaintiff's claim and remanded the case for trial.[61]

In reversing this decision, the United States Supreme Court rejected this balancing approach and created an absolute first amendment privilege allowing members of the press covering a trial to " '*report it with impunity*.' "[62] After recognizing that "powerful arguments can be made, and have been made, that . . . there *is* a zone of privacy surrounding every individual . . . within which the State may protect him from intrusion by the press, with all its attendant publicity,"[63] the Court proceeded to ignore these arguments. Instead, the Court readily accepted the press' abstract assertions of a public interest in all facts contained in public records, without considering the significant privacy interests threatened by the publication of these facts:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge

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59 420 U.S. 469 (1975).

60 Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 200 S.E.2d 127, 134 (1973) (on motion for reh'g) (quoting State v. Evjue, 253 Wis. 146, 161, 33 N.W.2d 305, 312 (1948)), *rev'd*, 420 U.S. 469 (1975).

61 *Cox Broadcasting*, 200 S.E.2d at 133.

62 *Cox Broadcasting*, 420 U.S. at 492 (quoting Craig v. Harney, 331 U.S. 367, 374 (1947) (Douglas, J.)) (emphasis added in *Cox Broadcasting*).

63 *Id.* at 487 (footnote omitted) (emphasis in original).

of the proper conduct of public business.[64]

While this patriotic rendition of press freedoms sounds good in the abstract, the Court made no attempt to connect the publication of a rape victim's name with self-government, fair trials or any other public interest. Contrary to the Court's understanding of the public interest, the public has a strong interest in *preventing* such publications in order to encourage rape victims to report the crime and to testify against their attackers at trial.[65] Furthermore, the Court's assumption that "the interests in privacy fade when the information involved already appears on the public record"[66] overlooks the significant harm caused by further dissemination through the mass media.

As a practical matter, few citizens ever bother to investigate facts contained in public records and, without further publicity, little harm to the individual's privacy occurs. "[I]t is questionable whether any reasonable person not involved in news gathering or other research would desire to inspect and duplicate the record of a criminal trial."[67] Nonetheless, after *Cox Broadcasting*, any member of the press, whether reasonable or not, may inspect and publicize all matters of public record regardless of any actual public interest or of the devastating effect on individual privacy.

"If there are privacy interests to be protected in judicial proceedings," the *Cox Broadcasting* Court invited the individual states to "respond by means which avoid public documentation or other exposure of private information."[68] Yet, only two years after extending this invitation, the Court began rescinding it by striking down several state efforts to protect the trial participant's privacy. In *Oklahoma Publishing Co. v. District Court*,[69] the Court, in a short *per curiam* opinion that ignored the privacy interests of juvenile offenders, invalidated a state court's pretrial order enjoining members of the press from publishing the identity of a juvenile in connection with a pending proceeding. After obtaining the juvenile's name and picture at an open detention hearing held prior to the court's order, the press violated that order, and an Oklahoma statute holding juvenile proceedings private,[70] by publishing the juvenile's name and

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64 *Id.* at 495.

65 *See supra* notes 36-39 and accompanying text.

66 *Cox Broadcasting*, 420 U.S. at 494-95.

67 Comment, *Identifying the Rape Victim: A Constitutional Clash Between the First Amendment and the Right to Privacy*, 18 J. MARSHALL L. REV. 987, 1001 (1985).

68 *Cox Broadcasting*, 420 U.S. at 496.

69 430 U.S. 308 (1977).

70 OKLA. STAT. ANN. tit. 10, § 1111 (West 1987). The statute provides, *inter alia*, that hearings involving children shall be private unless specifically ordered by the judge to be

picture in stories on his arraignment.[71] Because "[n]o objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse,"[72] the Court found that the juvenile's identity was placed in the public domain to the same extent as that of the rape victim in *Cox Broadcasting*[73] and held that the pretrial order abridged the freedom of the press by prohibiting further publication.[74]

While the open nature of these proceedings makes this decision an easy one in light of *Cox Broadcasting*, the Court further expanded press freedoms the very next term in *Landmark Communications, Inc. v. Virginia*,[75] where the proceedings were privately held pursuant to a Virginia state statute mandating strict confidentiality. The Virginia legislation was designed to protect the privacy of state judges under preliminary investigation by Virginia's Judicial Inquiry and Review Commission.[76] One section of the statute in particular prohibited the press from publishing the names of these judges prior to the filing of formal complaints alleging judicial misconduct.[77] The Virginia Supreme Court affirmed the defendant newspaper's conviction for violating this provision, identifying three important functions served by maintaining the confidentiality of these proceedings: (1) protecting the judge's reputation from the publication of frivolous grievances; (2) maintaining confidence in the judicial system by preventing the premature disclosure of complaints that may be unfounded; and (3) encouraging the reporting of grievances and the cooperation of witnesses by protecting complainants and witnesses from possible retaliation by the judge.[78]

Although recognizing these privacy interests, the United States Supreme Court had little trouble rejecting them and reversing the defendant's conviction on the bare assertion that the defendant's article "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect."[79] By extending first amendment immunity to publications

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open to the public. *Id.* Records of cases brought before the court are open to public inspection only by order of the court and access is limited to those persons having a legitimate interest in the proceedings. *Id.* at § 1125.

71 *Oklahoma Publishing*, 430 U.S. at 309.

72 *Id.* at 311.

73 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975).

74 *Oklahoma Publishing*, 430 U.S at 311-12.

75 435 U.S. 829 (1978).

76 *Id.* at 831.

77 VA. CODE ANN. § 2.1-37.13 (1987).

78 Landmark Communications, Inc. v. Virginia, 217 Va. 699, 712, 233 S.E.2d 120, 128-29 (1977), *rev'd*, 435 U.S. 829 (1978).

79 *Landmark Communications*, 435 U.S. at 839. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

that invade the privacy of confidential proceedings, the Court conveniently ignored its suggestion in *Cox Broadcasting* that states do exactly what the Commonwealth of Virginia did here — enact legislation to protect privacy by keeping information off the public record.

The Court struck down legislation similar to the Virginia statute the following year in *Smith v. Daily Mail Publishing Co.*[80] In *Smith*, the State of West Virginia tried to protect the privacy of juvenile offenders by holding all juvenile proceedings in private and by enacting a statute[81] prohibiting the publication of juveniles' names in connection with these proceedings. In *Smith*, the defendant newspaper violated this statute by publishing the name of a juvenile offender which it obtained from witnesses at the crime scene. Despite the devastating effects that such publications have been shown to have on the juvenile's privacy, the Court simply cited *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark Communications* to "demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards"[82] and used the first amendment in a similar fashion to justify the defendant's invasion.

While concurring in the judgment on other grounds, Justice Rehnquist departed from the majority's absolute first amendment analysis "in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented."[83] Under this approach, Justice Rehnquist found the state's interest in protecting the juvenile's privacy to be of the

> "highest order"—far outweigh[ing] any minimal interference with freedom of the press that a ban on publication of the youths' names entails.
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> . . . The press is free to describe the details of the offense and inform the community of the proceedings against the juvenile. It is difficult to understand how publication of the youth's name is in any way necessary to performance of the press' "watchdog" role.[84]

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80 443 U.S. 97 (1979).

81 W. VA. CODE § 49-7-3 (1986).

82 *Smith*, 443 U.S. at 102.

83 *Id.* at 106 (Rehnquist, J., concurring).

84 *Id.* at 107-09. Justice Rehnquist stressed that "[p]ublication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public." *Id.* He supported this view with empirical evidence derived from a case study on the juvenile subjected to publicity in *Oklahoma Publishing*. *See supra* notes 69-74 and accompanying text; Howard, Grisso & Neems, *Publicity and Juvenile Proceedings*, 11

By failing to determine whether strong first amendment interests truly warranted the press' invasion of the youth's privacy, the majority's decision protects all such press reports regardless of the state's efforts to protect privacy or of the vital interests served by doing so.

B. *The Conflict Revisited:* Florida Star v. B.J.F.

Just last term, the Supreme Court revisited the conflict between privacy and the press when it decided a case presenting the strongest of privacy claims—those of the rape victim. In *Florida Star v. B.J.F.*,[85] a community newspaper took the name of a rape victim from police reports and published it in an account of her assault. Not only did this story violate the paper's own policy against releasing the names of rape victims, it violated a Florida criminal statute prohibiting such publications.[86] After learning about this story from friends and co-workers, the rape victim identified in this story suffered severe emotional distress and received several threats to her personal safety.

At the trial of her negligence action against the newspaper, the victim, identified thereafter only as "B.J.F.," testified 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."[87] While the newspaper defended its position on the grounds that its publication of her name was "inadvertent" and protected by the first amendment, the trial judge was not persuaded. The judge directed a verdict in favor of B.J.F. on the issue of negligence and sent the case to the jury, who awarded her $100,000 in damages.[88] In a brief *per curiam* opinion that did not mention a single Supreme Court case in this area, the Florida District Court of Appeal affirmed this award, finding "that the information published, the rape victim's name, was of a private

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CLEARINGHOUSE REV. 203, 210 (1977). The study, which focused on the effects of this publicity on the juvenile's rehabilitation, found "that publicity placed additional stress on [the youth] during a difficult period of adjustment in the community, and it interfered with his adjustment at various points when he was otherwise proceeding adequately." *Id.* Although Justice Rehnquist did not believe this study to be controlling, he cited it to show "that the concerns that prompted enactment of state laws prohibiting publication of the names of juvenile offenders are not without empirical support." *Smith*, 443 U.S. at 108 n.1.

85 109 S. Ct. 2603 (1989).

86 *See* FLA. STAT. ANN. § 794.03 (West 1976 & Supp. 1989).

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

88 *Id.* The jury awarded B.J.F. $75,000 in compensatory damages and $25,000 in punitive damages.

nature and not to be published as a matter of law."[89]

Predictably, the Supreme Court reversed this damage award and, under the guise of yet another "narrow" holding, afforded the press a first amendment privilege to publish the rape victim's name. As in its prior decisions, the Court made no effort to articulate any of the first amendment interests served by disclosing her identity and suggested that the press be shielded from liability even where these interests are totally absent. Rather than requiring a specific public interest in the rape victim's name, the Court only required that "the article generally, as opposed to the specific identity contained within it, involve[] a matter of [public significance]."[90] In so doing, the Court allowed the press to publish the rape victim's name even where the first amendment interests in the article may be fully served without it.

Though conceding that the rape victim's privacy concerns are "highly significant interests, a fact underscored by the Florida Legislature's explicit attempt to protect these interests by enacting a criminal statute prohibiting much dissemination of victim identities,"[91] the Court did not believe that this statute was needed to further a state interest of the highest order, as required in its *Smith* decision.[92] Applying the *Smith* rule to the facts before it, the Court found that the State of Florida could have used less restrictive means to protect the rape victim's privacy:

> [T]he government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. That assumption is richly borne out in this case. B.J.F.'s identity would never have come to light were it not for the erroneous, if inadvertent, inclusion by the [Police] Department of her full name in an incident report made available in a press room open to the public. . . . Where, as here, the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity.[93]

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89 Florida Star v. B.J.F., 499 So. 2d 883, 884 (Fla. Dist. Ct. App. 1986), *rev'd*, 109 S. Ct. 2603 (1989).

90 *Florida Star*, 109 S. Ct. at 2611.

91 *Id.*

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

93 *Id.* at 2611. The Court added that, by inadvertently making the rape victim's name available to the press, " 'the State must be presumed to have concluded that the public

While the Court did not rule out the possibility that damages may be appropriate in a "proper case,"[94] it gave no indication of what a proper case would involve. Instead, the Court simply reaffirmed its "limited" holding in *Smith* 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"—an interest that the Court found lacking under the facts of this case.[95]

Ironically, although the Court relied entirely on the rule set forth in *Smith*, a key member of the *Smith* majority, Justice White, vigorously dissented.[96] Joined by Chief Justice Rehnquist and Justice O'Connor, Justice White criticized the Court for an absolutist view that places too much emphasis on press freedoms and too little emphasis on privacy.[97] In his opinion, since the State of Florida did everything possible to protect the rape victim's privacy, the press should assume at least some responsibility for subverting these protections:

> Florida has done precisely what we suggested, in *Cox Broadcasting*, that States wishing to protect the privacy rights of rape

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interest was thereby being served.' " *Id.* at 2610 (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1978)). Yet, by presuming the state's intent in this manner, the Court has adopted the ludicrous position that the unintentional act of a single member of a state's police force is a better measure of that state's intent than the action of its legislature in passing a statute prohibiting such disclosures. Furthermore, the Court's reliance on *Cox Broadcasting* to support this questionable presumption is misplaced since, unlike this case, the state officials in *Cox Broadcasting* deliberately placed the rape victim's name in public court records and the State of Georgia had not adopted any legislation prohibiting such disclosures.

94 *Id.* at 2611.

95 *Id.* at 2613. Writing for the majority, Justice Marshall observed the Court's fondness for "limited" holdings in this area. In declining the newspaper's invitation to hold that truthful information may never be punished, Justice Marshall observed that

> [o]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

Id. at 2608-09. Unfortunately, while the Court has certainly taken pains to resolve these clashes through holdings which it characterizes as "limited" and "narrow," the effect of these decisions has been anything but narrow. Indeed, the Court's own application of these holdings to the facts of *Florida Star* demonstrates that the principles established in *Cox Broadcasting* and its progeny are not limited to narrow fact patterns, but sweep broadly to shield the press from liability in a variety of contexts.

96 *Id.* at 2614. Justice White distinguished *Smith* from *Florida Star* by reasoning that the privacy interests of rape victims are "infinitely more substantial" than those of juvenile delinquents who perpetrate crimes such as those considered in *Smith*. *Id.* at 2615.

97 *Id.* at 2618. While observing that "[t]he Court's concern for a free press is appropriate," Justice White cautioned that "such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter." *Id.* at 2616 n.2.

> victims might do: "respond [to the challenge] by means which *avoid* public documentation or other exposure of private information." . . . By amending its public records statute to exempt rape victims [sic] names from disclosure . . . and forbidding its officials from releasing such information . . . the State has taken virtually every step imaginable to prevent what happened here. . . . Unfortunately, as this case illustrates, mistakes happen: even when States take measures to "avoid" disclosure, sometimes rape victim's [sic] names are found out. As I see it, it 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.[98]

Expressing "doubt that there remain any 'private facts' which persons may assume will not be published in the newspapers, or broadcast on television,"[99] Justice White questioned whether the Court's holding was truly as "limited" as the majority professed:

> By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts [the newspaper's] invitation . . . to obliterate one of the most note-worthy legal inventions of the 20th-Century: the tort of the publication of private facts.[100]

IV. Proposal for a More Balanced Analysis

Although the Court's recent reaffirmance of an absolute privilege to invade privacy makes it unlikely, the Court would do well to depart from the *Cox Broadcasting* line of cases by modifying its first amendment analysis to better accommodate both privacy and first amendment interests.

As Professor Arthur Miller has stated, "A conflict between rights that reflect deeply held and important values cannot be resolved simply by sacrificing one of them."[101] Rather than sacrifice vital privacy interests on the altar of general first amendment rhetoric, the Court should balance the specific public interests served by publication with the privacy interests of the individual and society in order to formulate a "bright-line" test that will help define those facts which the press may freely report.

Instead of engaging in the somewhat unpredictable process

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98 *Id.* at 2616 (footnote and citations omitted) (emphasis and brackets in original).
99 *Id.* at 2618 (footnote omitted).
100 *Id.*
101 Miller, *supra* note 25, at 844.

of ad hoc balancing, this approach, which Professor Melville Nimmer called "definitional balancing,"[102] would allow the court to obtain the predictability of a general rule while retaining some of the equities that otherwise could be achieved only through a case-by-case consideration of competing interests.[103] Under definitional balancing,[104] "the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech [deserve protection] within the meaning of the first amendment."[105]

In balancing the competing interests, the Court should distinguish, as does Professor Bloustein, between " '[p]ublic interest,' taken to mean curiosity . . . [and] 'public interest,' taken to mean value to the public of receiving information of governing importance."[106] In the first case, where the published facts merely cater to the luxury of the press and public in exchanging titillating gossip, press freedoms serve no other purpose than the

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102 *See* Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 (1968) [hereinafter Nimmer].

103 *Id.* at 942-44.

104 *Id.* at 942.

105 *Id.* According to Professor Nimmer, the Court first employed "definitional balancing" in formulating the "actual malice" rule in the landmark libel case of New York Times Co. v. Sullivan, 376 U.S. 255 (1964):

> [T]here *was* balancing in *Times*, but . . . it was not ad hoc balancing. There was balancing in the sense that not all defamatory speech was held to be protected by the first amendment. The Court could not determine which segment of defamatory speech lies outside the umbrella of the first amendment purely on logical grounds, and no pretense of logical inexorability was made. By in effect holding that knowingly and recklessly false speech was not "speech" within the meaning of the first amendment, the Court must have implicitly . . . referred to certain competing policy considerations. This is surely a kind of balancing, but it is just as surely not ad hoc balancing.

Nimmer, *supra* note 102, at 943 (footnotes omitted) (emphasis in original).

Just this year, the Court applied a similar "categorical balancing" approach in litigation involving the privacy exemption prescribed in the Freedom of Information Act ("FOIA"). In United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468 (1989), the press filed a FOIA request for the release of FBI "rap-sheets" on private citizens. In rejecting this request, the Court balanced the citizens' privacy interests with the public's need to know "what the Government is up to." *Id.* at 1485. The Court defined an entire category of information that would be exempt from disclosure under FOIA:

> [W]e hold as a categorical matter that a third party's request for law-enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted" [under the FOIA exemption].

Id. In so holding, the Court extolled the virtues of this "categorical balancing" by observing that "the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided." *Id.*

106 Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 56-57 (1974).

preservation of freedom itself. This interest in press autonomy fails to provide a sufficient justification for reporting facts that identify the trial participant and destroy her privacy. Considering society's strong interest in furthering the trial participant's rehabilitation by concealing her identity, and the devastating loss of personal autonomy caused by reports that name her, one must seriously question whether a public interest in "unregulated talkativeness" should take precedence.[107] Indeed, any corresponding loss of autonomy suffered by the press would constitute a marginal interference with its freedom. The restriction would only limit the press' ability to publish the trial participant's identity, while leaving reporters free to disclose all other facts pertaining to the proceedings. Thus, in this instance, the Court can best accommodate the interests of the press and of the trial participant by limiting the press' freedom to publish those facts that identify her.

By contrast, where the reporting of a trial participant's identity significantly furthers the public's interest in scrutinizing judicial proceedings and thereby helps to prevent the abuse of judicial power, the high value placed on society's interest in self-government may well outweigh the privacy interests of individual trial participants. Recognizing the importance of this value in justifying reports which disclose the trial participant's identity, the Court in *Cox Broadcasting* and its progeny repeatedly relied on "the function of the press . . . to guarantee the fairness of trials [by] bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice."[108] " 'The press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.' "[109] Unfortunately, while the *Cox Broadcasting* line of cases correctly identified this vital press function, it failed to justify properly the disclosure of all trial participant identities in those cases by determining whether the public truly needed to know these names in order to scrutinize the judicial process.

According to Professor Bloustein, this "need to know" is the only justification for publications that invade privacy:

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107 *See* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 26 (1965) ("The First Amendment . . . is not the guardian of unregulated talkativeness.").

108 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) (citing Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

109 Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978) (quoting *Sheppard*, 384 U.S. at 350).

> The test for freedom of speech under the first amendment is whether discussion of the given subject matter contributes to the public understanding essential to self-government. If the communication fulfills this purpose, it should not be restricted. If it does not fulfill this purpose, the communication may be subject to reasonable limitation in the public interest just like the exercise of any other private right.[110]

Under the "need to know" test, it is hard to imagine how reporting the identities of such trial participants as rape victims, juvenile offenders and rehabilitated ex-convicts contributes to the public understanding essential to self-government or to the extensive public scrutiny needed to guard against miscarriages of justice. Even assuming some marginal public benefit from the release of these names, protecting privacy in these cases would, at worst, entail only a minimal interference with freedom of the press. Journalists will still be able to foster the public scrutiny essential to self-government by informing the public of all other details surrounding the crime and its prosecution.

In those rare instances where the public does need to know the trial participant's name, the press may escape liability by demonstrating the legitimate public interest served by its disclosure.[111] While difficulties in determining whether the public actually needs to know this information may create a slight chilling effect on the editorial decision to publish it, the minimal interference with press freedom that this approach would entail is far superior to the present system in which vital privacy interests always succumb to expan-

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110 E. BLOUSTEIN, INDIVIDUAL and GROUP PRIVACY 61 (1978). While first amendment tests based on determinations of whether the published facts are of legitimate public concern are frequently criticized as unworkable, Professor Bloustein's test is virtually identical to the "matter of public concern" test that the Court already employs in certain defamation cases. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749 (1985), the Court held that the first amendment affords significantly less protection to speech that does not advance self-government:

> [W]e must . . . balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. . . .
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> . . . We have long recognized that not all speech is of equal First Amendment importance. It is speech on "matters of public concern" that is "at the heart of the First Amendment's protection." . . . In contrast, speech on matters of purely private concern is of less First Amendment concern. . . . [When the state regulates such expression], "there is no threat to the free and robust debate of public issues; [and] there is no potential interference with a meaningful dialogue of ideas concerning self-government[.]. . ." While such speech is not totally unprotected by the First Amendment, . . . its protections are less stringent.

Id. at 757-60 (footnotes and citations omitted).

111 *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 109 (1979) (Rehnquist, J., concurring).

sive interpretations of the first amendment.[112]

Although news reporters may suggest otherwise, an approach that accommodates interests other than those of the press would not destroy the fourth estate. Indeed, as Professor Miller has observed,

> The press seems to regard anyone who wants to limit its freedom in order to protect another important social value as a threat, someone who, by definition, is bent on destroying the media. Journalists apparently think that they are challenged by one Goliath after another and that they, media Davids, must sally forth to slay the enemy. . . . The special status of the press will not come tumbling down like a house of cards unless every competing interest is subordinated to it. . . . Why, despite their power, do the media react like a terrified hemophiliac to the slightest pinprick of criticism? No doubt journalists feel that recognizing the importance of any other public policy may inhibit news gathering and lead ultimately to the debilitation of their special status.[113]

While an approach that considers privacy interests along with first amendment interests will obviously not lead to the debilitation of the press, the Court's present approach has already led to the debilitation of many individuals by granting the press an absolute privilege to invade their privacy. Unless the Court abandons this approach, the press will continue to destroy the privacy of anyone whose life has attracted its morbid curiosity and trial participants will have little to celebrate on the one hundredth anniversary of Warren and Brandeis' landmark article.

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[112] Although the "need to know" test may be applied in all public disclosure tort cases, this standard is particularly important in helping to prevent the needless intrusion of such privacy interests as those explored in this Article. Of course, the mere fact that the press has published titillating gossip will not and should not subject it to liability. Before the press may be held liable for unnecessary public disclosures, plaintiffs must prove that these facts "would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652D (1977). *See supra* note 9. Considering the difficulty in sustaining this burden, plaintiffs will likely succeed in holding the press liable only where the press has invaded such compelling privacy interests as those held by the trial participants discussed above.

[113] Miller, *supra* note 25, at 849.