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## Florida Star v. B.J.F.: The Rape of the Right to Privacy, 23 J. Marshall L. Rev. 731 (1990)

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## CASENOTES

### *FLORIDA STAR v. B.J.F.*:\* THE RAPE OF THE RIGHT TO PRIVACY

The United States Supreme Court has held that the first amendment's protection of a free press<sup>1</sup> encompasses the media's right to print truthful information that has been legally obtained.<sup>2</sup>

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

1. The Bill of Rights guarantees the freedom of the press to all citizens through the first amendment. This amendment provides, in part: "Congress shall make no law . . . abridging the freedom of . . . the press." U. S. CONST. amend. I. The due process clause of the fourteenth amendment makes the first amendment's freedom of press mandate applicable to the states. The fourteenth amendment provides, in pertinent part: "No State shall make any law or enforce any law which shall abridge the privileges and immunities of citizens of the United States without due process of law." U.S. CONST. amend. XIV. *See also* *Gitlow v. New York*, 268 U.S. 652, 666 (1924). *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 11-2 to 11-3 (2d ed. 1988) (discussing the incorporation of the Bill of Rights).

2. The Supreme Court has primarily heard cases dealing with defamatory falsehoods. *See e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (plaintiff must offer concrete evidence in determining whether actual malice exists); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (plaintiff must show publisher to be at fault when liability not based upon a showing of knowledge of falsity or reckless disregard for truth); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (false reports on matters of public interest gain constitutional protection absent proof of media's knowledge of falsity or reckless disregard for truth); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (criticism of public officials is not subject to criminal libel sanctions in absence of knowingly false statements); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (public plaintiff must show media had knowledge of falsity before liability will be imposed). Defamation cases involve the truthfulness of the information published by the media and whether the defamed plaintiff is a public or private figure. The Supreme Court has held that a public figure must show malice on the part of the media before he can recover for defamation. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This holding is consistent with the belief that erroneous statements are inevitable in free debate and must be protected if such debate is to survive. *Id.*

However, *Florida Star v. B.J.F.* is not consistent with the case law on defamation. *Florida Star* does not deal with a defamatory falsehood but instead deals with an invasion of one's privacy through the publication of a private fact. The state of the law in this area is somewhat uncharted. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2607 n.5 (1989). However, in the past fifteen years the Supreme Court has prohibited a state from imposing liability on the media for publishing truthful information that is legally obtained in a public forum. *See, e.g.*, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1978) (newspaper learned of juvenile offender's identity from monitoring po-

In *Florida Star v. B.J.F.*,<sup>3</sup> the Court addressed the issue of whether a state may protect sexual offense victims by invoking the right to privacy<sup>4</sup> to prohibit the media from publishing the victims' names. The

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lice radio and interviewing eyewitnesses); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (reporter discovered name of rape victim from indictment documents available in open court proceeding); Note, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291 (1983) [hereinafter Note, *Requiem*] (elements of the privacy tort and vague and confusing concept of newsworthiness); Note, *Privacy and the Press: A Necessary Tension*, 18 L.A.L. REV. 949 (1985) [hereinafter Note, *Privacy and the Press*] (press and privacy rights create a necessary system of checks and balances).

Unlike defamation, suits for an invasion of privacy do not turn upon whether the plaintiff is a public or private figure, but whether the privacy interest the state is trying to protect rises to the level of a state interest of the highest order. The Supreme Court has employed this language in its strict scrutiny test under the fourteenth amendment. See *Kadmas v. Dickinson Public Schools*, 108 S. Ct. 2481, 2487 (1988) (statute invokes strict scrutiny when it interferes with fundamental right or discriminates against suspect class); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (racial classifications call for strict judicial scrutiny). The strict scrutiny test applied under the fourteenth amendment and the civil rights statutes carefully weighs the state's asserted interest against the right infringed upon by the statute. L. TRIBE, *supra* note 1, § 16-6, at 1451-54 (discussing the strict scrutiny standard).

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

4. The common law tort of privacy was "born" in 1890 when Samuel Warren and Louis Brandeis wrote an article on the subject. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis recognized a theory of legal redress for a violation of one's right "to be let alone." *Id.* at 193. They wrote the article in response to disconcerting and intrusive reports about Warren's daughter's wedding that the local society column published. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383-84 (1960) [hereinafter Prosser, *Privacy*]. Apparently, the local newspapers "had a field day." *Id.*

Since Warren and Brandeis first recognized the right to privacy, the concept has expanded into four distinct torts: (1) the unreasonable intrusion into seclusion; (2) public disclosure of a private fact; (3) false light in the public eye; and (4) the appropriation of name or likeness. *Id.* at 389-407. Although these four distinct torts seem incongruous, their common thread is a person's right to be let alone. See generally W. PROSSER & W. KEETON, *THE LAW OF TORTS* 117 (5th ed. 1984) [hereinafter PROSSER AND KEETON] (general discussion of the privacy torts); RESTATEMENT (SECOND) OF TORTS § 652A (1977) (introduction to the privacy torts). See also L. TRIBE, *supra* note 1, §§ 15-2 to 15-4, at 1304-14 (discussing the development of privacy); Trubow, *Information Law Overview*, 18 J. MARSHALL L. REV. 815 (1985) (commenting on privacy torts' effect on modern day technology).

Unreasonable intrusion into seclusion involves an intrusion into a person's solitude that a reasonable person would find objectionable. Prosser, *Privacy*, *supra*, at 389-92. See also *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (photographer intruded upon public figure's seclusion by constant harassment). As long as information is obtained in a manner that a reasonable person would find intrusive, no other element is necessary to fulfill this tort. *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969) (tort of intrusion upon seclusion is complete when information is obtained in an intrusive manner), *cert. denied*, 395 U.S. 947 (1969). See also RESTATEMENT (SECOND) OF TORTS § 652B (1977) (discussing tort of intrusion upon seclusion).

On the other hand, three elements are necessary to complete the tort for public disclosure of a private fact: (1) the disclosure must be public, not private; (2) the facts disclosed must be private; and (3) the matter made public must be highly objectionable to the reasonable person. Prosser, *Privacy*, *supra*, at 392-98. See *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) (reporter published facts about surfer's life not relevant to involvement in sport); *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir.

Court, applying a prior ruling,<sup>5</sup> held that the right to privacy cannot

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1940) (former child prodigy's later life as an unknown disclosed); RESTATEMENT (SECOND) OF TORTS § 652D (1977) (discussing elements necessary to complete the tort for public disclosure of a private fact); Note, *Requiem*, *supra* note 2, at 291 (discussing the elements of the private-facts tort). All three of these elements must be met before public disclosure of a private fact is actionable. RESTATEMENT (SECOND) OF TORTS § 652D (1977). In addition, the Restatement of Torts requires that the information not be of legitimate interest to the general public. *Id.*

The third distinct tort, placing a person in a false light in the public eye, involves two elements: (1) the false light must be highly offensive to the reasonable person; and (2) the actor must have acted with reckless disregard to the false nature of the publicized material. RESTATEMENT (SECOND) OF TORTS § 652E (1977). *See also* *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974) (false story causing public sympathy for plaintiffs held to be invasion of privacy); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (Supreme Court recognized the false light tort); PROSSER AND KEETON, *supra*, at 863-66 (discussion and review of false light tort); W. ZELERMEYER, *INVASION OF PRIVACY* 113-22 (1973) (discussing the invasion of privacy by newspapers and magazines).

Finally, the fourth privacy tort involves the appropriation of a person's name or likeness for the defendant's use. RESTATEMENT (SECOND) OF TORTS § 652C (1977). The interest protected is the person's exclusive use of his own identity. *Id.* In addition to the four distinct common law torts, the Supreme Court has recognized a zone of privacy in the penumbras of the Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (penumbras of the first, third, fourth, fifth, and ninth amendments lead to conclusion that there is constitutional zone of privacy). As yet, however, it is uncertain whether this zone of privacy is also a right of privacy that will enjoy the same protection as enumerated rights. *Compare* *Roe v. Wade*, 410 U.S. 113 (1973) (right to choose to have an abortion) and *Loving v. Virginia*, 388 U.S. 1 (1967) (right to choose partner in marriage and other related aspects) and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married persons to use contraceptives) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (education and discipline of children) with *Department of Justice v. Reporter's Comm. for Freedom of the Press*, 109 S. Ct. 1468 (1989) (media's request for rap sheet was an invasion of privacy) and *California v. Greenwood*, 108 S. Ct. 1625 (1988) (Brennan, J., dissenting) (no right of privacy in garbage) and *Katz v. United States*, 389 U.S. 346 (1967) (eavesdropping on telephone is an invasion of privacy).

The Court has recognized marriage and other family matters to be of paramount constitutional importance and allowed a penumbral right to protect the integrity of a person's physical being. *See* *Roe*, 410 U.S. at 113 (a woman has control over her own body in the early part of pregnancy); *Griswold*, 381 U.S. at 479 (a married couple can choose to practice birth control). However, the Court has refused to extend this protection to matters outside of procreation and marriage. The situation in *Florida Star* does not fall into this previously accepted category. Therefore, there is no issue of whether the penumbral zone of privacy could be extended into this limited area of the protection of sexual offense victims consistent with the first amendment's mandate for the freedom of the press. *See* *Dixon, The Griswold Penumbra: Constitutional Charter for An Expanded Law of Privacy*, 64 *MICH. L. REV.* 197 (1965) (discussion of the effects of *Griswold* in the privacy arena).

The state of Florida sought to protect B.J.F. from a public disclosure of her unfortunate attack. *Florida Star*, 109 S. Ct. at 2606. It can also be argued that the state sought to protect her from false light publicity. Rape victims still carry a social stigma and are subject to further humiliation and trial because of their "status" as sexual offense victims. *See infra* note 99 for an explanation of the stigma surrounding rape victims that still prevails in today's society. The Supreme Court did not evaluate B.J.F.'s situation in a penumbral constitutional light, but rather as a state protected right. Therefore, the justices did not consider the "zone of privacy" into which B.J.F.'s interests might fall.

5. The Court relied on its earlier decision in *Smith v. Daily Mail Publishing Co.*, 433 U.S. 97 (1978), in deciding *Florida Star*. *Florida Star*, 109 S. Ct. at 2609. In *Daily Mail*, the Supreme Court invalidated a West Virginia statute that made it a

prevent the media from publishing information in the public domain<sup>6</sup> absent a state interest of the highest order.<sup>7</sup>

crime for a newspaper to publish a juvenile offender's identity without the written approval of the juvenile court. *Daily Mail*, 433 U.S. at 98-99. The Court found the state's interest in protecting and rehabilitating juvenile offenders did not validate West Virginia's punitive action against the newspaper. *Id.* at 106.

The Court reasoned that the confidentiality of juvenile proceedings was not an interest of the highest order because the protection of the juvenile must be considered along with the rights created by the first amendment. *Id.* at 104-05. Therefore, the Court concluded that a constitutional right must prevail over a state's right to protect juveniles. *Id.* In reaching this conclusion, the *Daily Mail* Court relied on a previous case, *Davis v. Alaska*, 415 U.S. 308 (1974). *Id.* In *Davis*, a criminal defendant sought to impeach a prosecution witness on the basis of the witness' juvenile record. *Davis*, 415 U.S. at 308. The Supreme Court held that the defendant's sixth amendment rights must give way to the state's interest in protecting the anonymity of a juvenile offender. *Id.* Thus, the protection of a juvenile offender, in this situation, was a state interest of the highest order and justified restricting the defendant's sixth amendment rights. *Id.*

In addition, the *Daily Mail* Court reasoned that even if West Virginia's asserted interest met the highest order standard, the statute did not accomplish its stated purpose. *Daily Mail*, 443 U.S. at 105. Since West Virginia's statute did not restrict the broadcasting media or any form of publication except newspapers, the statute was not sufficiently tailored to accomplish the state's goal. *Id.* Furthermore, the state did not present any evidence to demonstrate that imposing a penalty was necessary to protect the confidentiality of its juvenile proceedings. *Id.*

6. It is difficult to define the parameters of the public domain because the Supreme Court has not put forth a clear cut definition. However, an examination of the recognized legal definitions of its components is helpful. A domain is the sphere of influence or realm of public control. BLACK'S LAW DICTIONARY 434 (5th ed. 1979). The adjective "public" means open to all; notorious; not limited or restricted to any particular class of the community. *Id.* at 1104. The Supreme Court has recognized certain areas of society to be included in the public domain. See generally *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (first amendment mandates open criminal trials); *Daily Mail*, 443 U.S. at 97 (eyewitnesses at scene and police radio monitoring); *Oklahoma Pub. Co. v. District Court, Okla. Cnty., Okla.*, 430 U.S. 308 (1977) (pretrial hearings); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (courthouse records); *Sheppard v. Maxwell*, 384 U.S. 33 (1966) (courtrooms and trials); *Rape Trial on T.V. Gets Good Response*, 8 THE NEWS MEDIA AND THE LAW 45 (1984) ("vital to direct democracy to allow people to watch a jury . . . handing down verdict"). These areas are in addition to those already recognized under the freedom of speech clause of the first amendment. See generally *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1976) (municipal theatres); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (grounds near school); *Cox v. Louisiana*, 379 U.S. 536 (1965) (streets in front of courthouse are public forum); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (state capitol grounds); L. TRIBE, *supra* note 1, § 12-24, at 986-97 (discussing public and semi-public forums).

7. *Florida Star*, 109 S. Ct. at 2611-13. The phrase "a state interest of the highest order" usually is incorporated in the strict scrutiny test that the Supreme Court employs in equal protection and due process cases involving discrimination. See generally *Palmore v. Sidoti*, 466 U.S. 429 (1984) (interracial marriage not grounds for removal of child from mother's custody); *Loving v. Virginia*, 388 U.S. 1 (1967) (no prohibition permitted against interracial marriage); *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) (separate treatment is not equal treatment under the law); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invidious use of licensing requirement). However, the Court also employs this test when a case involves a threat to a fundamental right. See *Kusper v. Pontikes*, 414 U.S. 51 (1973) (freedom to associate); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (poll tax violates right to suffrage); *Cantwell v. Con-*

On October 20, 1983, B.J.F.<sup>8</sup> reported to the Duval County Florida Sheriff's Department ("Department") that she had been raped. The Department prepared a report of the incident that included B.J.F.'s full name.<sup>9</sup> It then placed the report in its press room. A Florida Star<sup>10</sup> ("Star") reporter trainee copied the report verbatim<sup>11</sup> to use in an article for the newspaper's "Police Reports" section.<sup>12</sup>

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necticut, 310 U.S. 296 (1940) (freedom of religion). Since the fundamental right of the freedom of the press was at issue in *Florida Star*, one must assume that the Court's use of this term is meant to invoke the strict scrutiny test. The strict scrutiny test employed in other first amendment cases holds that in order for a state's action to rise to an interest of the highest order, its purpose must be closely linked to the burden it places on the fundamental right. L. TRIBE, *supra* note 1, § 14-13, at 1251 (discussing strict scrutiny under freedom of religion clause). If the government can approximately attain its goal without burdening the fundamental right, then it must follow that path regardless of how compelling the goal may be. *Id.* See also *Cantwell*, 310 U.S. at 296 (freedom of religion clause and strict scrutiny test).

8. All the trial court pleadings and the appellee's complaint refer to B.J.F. by her full name. All papers filed with the Florida District Court of Appeal also refer to her by name. The First District Court of Appeal of Florida, *sua sponte*, changed the caption of the case to protect the appellee's anonymity. *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986). The appellant used this style in its briefs before the Supreme Court and, therefore, this casenote will do the same. Brief for Appellant at 3, *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986) (No. 87-329) [hereinafter Brief for Appellant]. See also Jurisdictional Statement at 3, *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986) (No. 87-329) [hereinafter Jurisdictional Statement] (note regarding use of initials in place of B.J.F.'s full name).

9. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2606 (1989). The Department settled with B.J.F. for \$2,500. *Id.* at 2606.

10. The *Florida Star* is a weekly newspaper that primarily serves the community of Jacksonville, Florida. *Id.* at 2605. It has an average circulation of 18,000 copies. *Id.* Typically, the newspaper runs a "Police Reports" section that contains brief synopses of local criminal incidents awaiting police investigation. *Id.*

11. The Star relied on three witnesses to corroborate its position. The first witness, Jacqueline Lotson, testified that she was the reporter trainee responsible for initially copying the police report. Brief for Appellant, *supra* note 8, at 4. Ms. Lotson acknowledged that signs denoting that the publication of a rape victim's identity is illegal were posted in the press room. *Id.* She further acknowledged that she knew of the newspaper's policy against this type of publication. *Id.*

Girtha Morgan, the staff writer who drafted the article for publication, testified that she did not intend B.J.F.'s name to be printed. *Id.* at 4-5. Ms. Morgan also testified that she was aware of the paper's policy prohibiting this type of publicity. Brief for Appellee at 6, *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986) (No. 87-329) [hereinafter Brief for Appellee].

Finally, the newspaper's unidentified managing editor, owner, and publisher, testified to the newspaper's policy against printing the names of sexual offense victims. *Id.* at 7. The name of the managing editor was not included in any of the briefs argued before the Supreme Court. However, this editor also testified that other persons in the newspaper's hierarchy had missed the error and violated the policy. *Id.* In short, at least six people failed to catch the error and delete B.J.F.'s name from the article.

12. *Florida Star*, 109 S. Ct. at 2605. The article in question 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

When the Star published the article identifying B.J.F. by name, it violated<sup>13</sup> § 794.03 of the Florida Code ("Statute").<sup>14</sup> This statute prohibits the media from publishing the identity of a sexual offense victim.<sup>15</sup> In September, 1984, B.J.F. filed suit against the Department and the Star<sup>16</sup> for negligent violation of the statute.<sup>17</sup>

At trial, B.J.F. asserted that she suffered emotional distress from the publication of her name.<sup>18</sup> B.J.F. also stated that members of her household received threatening phone calls after the Star published her identity.<sup>19</sup> As a result, B.J.F. was forced to seek police protection.<sup>20</sup> In its defense, the Star explained that it had learned B.J.F.'s name from the Department's report.<sup>21</sup> At the conclusion of the testimony, the Star moved for a directed verdict. The court denied this motion.<sup>22</sup> The trial court found the Star negligent *per se*

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because of lack of evidence.

Brief for Appellant, *supra* note 8, at 5.

13. See *supra* note 11 for a summary of the testimony of those newspaper employees who knew of the newspaper's policy against the publication of sexual offense victims' names.

14. Section 794.03 provides:

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

FLA. STAT. § 794.03 (1987).

15. See *supra* note 14 for the complete statutory prohibitions.

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

17. B.J.F. filed a complaint alleging negligence and that the statute was used as the standard of care for imposing liability. *Florida Star*, 109 S. Ct. at 2617 (White, J., dissenting).

18. *Id.* at 2606. The transcript of the proceedings in the district court is unpublished, but parts were included in the briefs for the Appellant and Appellee to the United States Supreme Court.

19. B.J.F. testified that she learned of the article in the *Florida Star* from her fellow employees. Brief for Appellee, *supra* note 11, at 5. See also *Florida Star*, 109 S. Ct. at 2606. While B.J.F. was recuperating in the hospital, a co-worker brought the article to her attention. Brief for Appellee, *supra* note 11, at 5. At this time, B.J.F.'s mother, who was living at B.J.F.'s home caring for her children, received telephone calls from a man who said he would rape B.J.F. again. *Id.* at 5-6. B.J.F. testified that at the time of her attack, her phone number and address were listed in the telephone directory. *Id.* at 5.

20. See *supra* note 19 for the incidents that occurred subsequent to the publication of B.J.F.'s identity. In addition to B.J.F.'s need for police protection, she was compelled to seek psychiatric counseling after her name was published. Brief for Appellee, *supra* note 11, at 6.

21. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2606 (1989) (publication of B.J.F.'s name was "inadvertent").

22. The trial judge refused to grant either of the Star's two motions for directed verdict. *Florida Star*, 109 S. Ct. at 2606. Instead, the trial judge ruled that because the statute struck the necessary balance between the first amendment and the right to privacy, it was constitutional. *Id.* The judge was careful to point out that in this case the statute was applied to a limited area of concern ("sensitive criminal offenses"). *Id.*

based upon the Star's violation of the statute.<sup>23</sup> The jury awarded B.J.F. \$100,000 in compensatory and punitive damages.<sup>24</sup>

On appeal, the First District Court of Appeal of Florida affirmed the trial court's decision.<sup>25</sup> The appellate court concluded that the published information was private in nature and, therefore, the newspaper should not have published B.J.F.'s identity as "a matter of law."<sup>26</sup> The court further noted that the information fell under the auspices of the statute.<sup>27</sup>

The Florida Supreme Court denied review, and the Star filed a petition for certiorari.<sup>28</sup> On certiorari, the United States Supreme Court confronted the issue of whether the publication of a sexual offense victim's name warranted constitutional protection. The

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23. In its reply brief, the Star asserted that this decision was the equivalent of strict liability because B.J.F.'s cause of action derived from a criminal statute. Brief for Appellee, *supra* note 11, at 9, n.4. However, the cause of action was treated as a common law action for the negligent invasion of privacy through the entire proceeding. *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986) (appellate court ruled on negligent invasion of privacy basis not on strict liability).

24. The judge granted B.J.F.'s motion for a directed verdict finding the Star negligent *per se*. The only question left for the jury to consider was the issue of causation and damages. *Florida Star*, 109 S. Ct. at 2606. The judge instructed the jury to consider whether the Star had "acted with reckless indifference to the rights of others." *Id.* If they found this to be the case, the jury could award B.J.F. punitive damages. *Id.* The jury awarded B.J.F. \$25,000 in punitive damages and \$75,000 in compensatory damages. *Id.*

25. *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986). It is interesting to note that the appellate court unanimously affirmed the lower court's decision in less than three paragraphs.

26. *Id.* at 884. (citing *Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So. 2d 328, 330 (Fla. Dist. Ct. App. 1983)).

In *Doe*, the Florida appellate court held that first amendment rights should not be exercised when "unnecessary" and "detrimental" to the rights of others. *Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So. 2d 328, 330 (Fla. Dist. Ct. App. 1983). The plaintiff in *Doe* was a rape victim who testified against her assailant. The television station-defendant obtained her identity at trial. *Doe*, 436 So. 2d at 328. Since a trial is a recognized public forum, the appellate court refused to impose damages on the television station. *Id.* at 330. However, the court pointed out that when private persons are the subject of publicity because of their involuntary connection to a newsworthy event, the judgment of the media cannot be absolute. *Id.* at 331. Moreover, the court reiterated that the first amendment right of the public to know is not only for the protection of the press. *Id.* (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)). This right is for the protection of the average citizen as well. *Id.* Therefore, both the press' rights and those of the individual must be taken into consideration when a private person is subject to unwanted publicity. *Id.* at 331.

27. *Florida Star v. B.J.F.*, 499 So. 2d 883, 884 (Fla. Dist. Ct. App. 1986). In *Florida Star*, the appellate court concluded that the statute was applicable. However, in *Doe*, the court concluded that the statute was inapplicable because a trial was a form of public documentation. *Doe v. Sarasota-Bradenton Florida Television Co., Inc.*, 436 So. 2d 328, 330 (Fla. Dist. Ct. App. 1983).

28. Before noting jurisdiction, the United States Supreme Court certified to the Florida Supreme Court the question whether it possessed jurisdiction when it declined to hear the Star's case. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2607, n.4 (1989). The Florida Supreme Court answered in the affirmative. *Florida Star v. B.J.F.*, 530 So. 2d 286, 287 (Fla. 1988).



Court also considered the parallel issue of whether imposing damages upon a newspaper for publishing truthful information violated the first amendment.<sup>29</sup> In balancing a state's interest to protect its citizens against the press' right to print the truth, the Court held that the state cannot infringe upon the freedom of the press, absent a showing of a state interest of the highest order.<sup>30</sup> The Court determined that protecting the rape victim's identity did not rise to this

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29. *Florida Star*, 109 S. Ct. at 2605.

30. *Id.* at 2607. The Court based its conclusion on a trilogy of prior decisions where states with similar statutes attempted to prohibit the media from publishing the identity of certain individuals. The first case in this trilogy is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). A reporter for Cox Broadcasting obtained the name of a deceased rape victim from the indictment documents present at the trial of her assailant. He broadcast the victim's identity on the evening news. *Cox*, 420 U.S. at 472-73. The victim's father brought a damages action against Cox Broadcasting pursuant to a Georgia Statute that prohibited the publication of a rape victim's identity. *Id.* at 474. The Supreme Court held that the press' role in subjecting trials to public scrutiny thereby guaranteeing their fairness, outweighed the state's interest in protecting the victim. *Id.* at 492.

*Cox* would seem to control in this case. However, the Supreme Court in *Florida Star* distinguished *Cox* and held that it "cannot fairly be read as controlling here." *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2608 (1989). In *Cox*, the father of the rape victim, not the victim herself asserted a violation of his state protected right of privacy. Tragically, the victim died as a result of her attack. Moreover, the court documents contained her identity and were open to inspection by the general public during an adversarial proceeding. Court documents are always accessible to the general public during a trial. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (trial must be open to public in interest of accused's right to fair trial). See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (confidentiality of judicial disciplinary proceedings must yield to public interest in judiciary conduct); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (public right to know about "Pentagon Papers"). The Supreme Court in *Florida Star* pointed out that *Cox* could not control the outcome because of these distinctions. *Florida Star*, 109 S. Ct. at 2608. Furthermore, the press' role in the fairness of public trials was not "compromised," as no adversarial proceeding had begun. *Id.* at 2608.

The second case in the trilogy that the Supreme Court examined was *Oklahoma Publishing Co. v. District Court, Okla. Cnty., Okla.*, 430 U.S. 308 (1977). In *Oklahoma Publishing*, a judge entered an order prohibiting the news media from publishing a juvenile murder suspect's identity and picture. *Oklahoma Publishing*, 430 U.S. at 308-09. The trial judge entered this order after an open detention hearing at which the media was present. *Id.* at 309.

Relying on its earlier decision in *Cox*, the Supreme Court held that once information is publicly revealed in connection with a crime or hearing, a trial judge cannot suppress its publication. *Id.* at 310. However, it did note that the judge could have availed himself of the opportunity to prohibit media attendance at the initial detention hearing. *Id.* at 311. See also *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2609-10 (1989) (discussion of *Oklahoma Publishing*). In *Florida Star*, the Court did not specifically say that *Oklahoma Publishing* did not control the outcome of the case. However, in light of the fact that it also concerned public trials, which were not an issue in *Florida Star*, *Oklahoma Publishing* could not fairly be seen as controlling the case either.

The final case the Court examined was *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). See *supra* note 5 for the Court's examination and subsequent reliance on the principles in *Daily Mail*. The Supreme Court determined that of the three cases in the trilogy, *Daily Mail* specifically controlled the litigation in *Florida Star*. *Florida Star*, 109 S. Ct. at 2609. *Cox* and *Oklahoma Publishing* were used as support. *Id.*

standard;<sup>31</sup> therefore, the damages imposed on the Star were unjustified.<sup>32</sup>

The Court began its analysis by discussing the principles established in *Smith v. Daily Mail Publishing Company*.<sup>33</sup> In *Daily Mail*, the United States Supreme Court held that before a state may punish a newspaper for publishing a juvenile delinquent's name, it must demonstrate that its action was necessary to further the state interests asserted.<sup>34</sup> In examining these interests, the Supreme Court identified three considerations that supported its findings in *Daily Mail*: (1) the media must obtain information lawfully to be afforded protection; (2) the remedy must advance a state interest of the highest order; and (3) the remedy must not promote self suppression by the media.<sup>35</sup>

The Court first inquired whether the Star published lawfully obtained information.<sup>36</sup> The Court defined lawfully obtained information as information available to the general public or information of great public significance.<sup>37</sup> If information is in the public domain,

31. The Court noted that the protection of a rape victim was a "significant" interest although it failed to rise to the higher standard of a state interest of the highest order. *Florida Star*, 109 S. Ct. at 2611. However, the Court did not put forth any test to explain the shortcomings of the appellee's argument.

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

33. See *supra* note 5 for a discussion of the decision in *Daily Mail*.

34. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979). The *Daily Mail* Court noted that its holding was narrow. In addition, the Court noted that there was no issue of privacy or unlawful press access to confidential proceedings before the Court. *Id.* However, the Supreme Court in *Florida Star* seemed to disregard this warning. It decided that *Daily Mail* controlled the *Florida Star* litigation even though *Daily Mail* did not specifically confront an invasion of privacy situation.

35. *Florida Star*, 109 S. Ct. at 2609. *Daily Mail* does not expressly set out these three criteria as a test for "balancing" competing first amendment and privacy interests. But see *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (if newspaper legally procures truthful information of public importance, publication is not punishable absent state interest of highest order). However, these criteria are implied by prior decisions as well as by the facts of *Daily Mail*. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

36. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2609 (1989).

37. *Florida Star*, 109 S. Ct. at 2610. The Court linked the definition of legally obtained information to the definition of public domain. See *supra* note 6 for a discussion of the public domain. This definition is inconsistent with the Court's previously recognized forums under the freedom of speech clause.

The Court has recognized three categories of public forums. These categories are: (1) places which have been traditionally devoted to speech, such as streets and parks; (2) state created semi-public forums, such as university campuses or school board meetings; and (3) public property which is not by tradition or designation open to the public. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45-46 (1983). See also L. TRIBE, *supra* note 1, § 12-24 (discussion of *Perry* and public forums).

This formula adapts easily for use as a definition of legally obtained information. Any information received from places traditionally open to the public (category 1) or places specifically opened to the public by the states (category 2) would be legally obtained. However, information received from sources or places not traditionally accessible to the general public or from places forbidden to the general public would be

it is presumed to have been published lawfully. The majority concluded that because the Department released B.J.F.'s name without restrictions,<sup>38</sup> this information was in the public domain and, therefore, had been lawfully obtained. Thus, the state could not punish the Star for publishing B.J.F.'s name.<sup>39</sup>

Furthermore, the majority concluded that the information contained in the report was a matter of great public significance.<sup>40</sup> The Court found the crime and its subsequent investigation by the police to be of "paramount" public concern mandating publication.<sup>41</sup> In addition, the Court found the information was unqualified and,

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illegally obtained. However, the Court has denied access to the press in certain forums, even though the information imparted at this forum is of public significance and news gathering might be hampered. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (newspaper man cannot invoke reporter's privilege and refuse to testify at grand jury hearing). See also *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (restricting access of the press to trial is possible when defendant's right to an impartial trial is in jeopardy).

However, in *Florida Star*, the Court allowed its determination of the public domain to include the significance of the information obtained. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2611 (1989). This addition allows information that falls into the third category to slip through the cracks of legality if it is of great public importance. *Florida Star*, 109 S. Ct. at 2618-19 (White, J., dissenting). Thus, if it can be found that the information under investigation can somehow be classified as part of the public domain, it will be deemed lawfully obtained regardless of whether the press or the public actually had access to the information's source.

38. *Florida Star*, 109 S. Ct. at 2610. The Court concentrated on the fact that, although there were signs in the press room warning against publishing B.J.F.'s identity, the Department gave the Star the information. *Id.* at 2611. The Court's reasoning suggests that since the Department allowed B.J.F.'s full name to be published, its action nullified the warnings in the signs. *Id.* at 2610-11. In other words, if one person fails to follow the warning signs, then no one else can be accountable for following them either. See *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2616 (1989) (White, J., dissenting).

39. B.J.F. contended that under Florida law police reports are not open to the public for inspection, therefore, the information contained in them is not part of the public domain and cannot be legally obtained. Brief for Appellee, *supra* note 11, at 12, 17-18. The Court emphasized that the Star obtained the data from the Department after it had inadvertently failed to follow the policy of the statute. Brief for Appellant, *supra* note 8, at 12-13 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)). Moreover, the Court cited cases where the inability of the government to police itself prevented the state from imposing liability on the media. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (internal procedures should be employed to protect confidentiality); *Oklahoma Publishing Co. v. District Court, Okla. Cnty., Okla.*, 430 U.S. 308 (1977) (judge failed to avail himself of opportunity to use procedure to close juvenile hearing). *But see, e.g.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (restraint on publication of discovered information upheld); *Application of KTSP Television v. Ming Sen Shive*, 504 F. Supp. 360 (D. Minn. 1980) (media not permitted to publish tapes of rape because would impinge upon privacy rights of victim).

40. *Florida Star*, 109 S. Ct. at 2611. The majority examined the importance of reporting a crime such as rape and concluded that the commission and investigation of a violent crime was a matter of "paramount public import." *Id.* However, they did not specifically address the importance (or lack of importance) attached to the victim's name. See *supra* note 6 for a discussion of the requirements for the public domain.

41. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2611 (1989).

therefore, the Star could assume the state was serving the public interest by releasing it.<sup>42</sup> Since only information in the public domain is legally obtained and information of great public significance is part of that domain, the Court concluded the Star lawfully obtained B.J.F.'s identity.<sup>43</sup>

Next, the Court inquired into the appellee's contention that imposing liability for publishing information furthered a state interest of the highest order.<sup>44</sup> The appellee referred to three concerns in supporting her argument: (1) the privacy of the victims; (2) the protection of the victim's physical safety; and (3) the need to encourage victims to report sexual offenses without fear of exposure.<sup>45</sup> The Court found that, although these interests were "significant," they were not interests of the highest order.<sup>46</sup> Therefore, imposing liability upon the Star for publishing a victim's identity did not meet the *Daily Mail* criteria and could not be upheld.<sup>47</sup>

The Court then turned to an examination of the statute to determine whether it properly served the state's asserted purpose.<sup>48</sup>

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42. *Florida Star*, 109 S. Ct. at 2610 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975)). The Court cited to *Cox* as a reminder that when information is in a recognized public domain, the press can presume that the state intended to serve the public interest in releasing this information. *Id.* at 2610. However, the quote relied on by the Court only mentions court records as an incident when the media may presume this conclusion. *Id.* at 2610. The report in *Florida Star* had not yet been made a part of a court record.

43. *Florida Star*, 109 S. Ct. at 2610. See *supra* notes 6 and 38 for a discussion of the Court's definition of the public domain and its subsequent affect on the legality of obtained information.

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

45. *Id.* See also Brief for Appellee, *supra* note 11, at 29-30.

46. *Florida Star*, 109 S. Ct. at 2611. The Court did not put forth any test to explain the shortcomings of the appellee's arguments. See *infra* note 99 and accompanying text for the ramifications of this lack of analysis.

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

48. *Id.* at 2611-12. The trial court applied a negligence *per se* standard because of the statute's violation. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2612 (1989) (White, J., dissenting). However, the standard was not provided for in the statute. See *supra* note 14 for full text of the statute. The appellate court upheld this standard. *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. Dist. Ct. App. 1986). However, the Supreme Court was concerned with the fact that the standard was achieved legislatively, not judicially in this situation, because a statute was used to determine the standard of review. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2612 (1989).

The Court emphasized the statute's failure to require a case-by-case analysis and its lack of a scienter requirement. *Id.* at 2612-13. The Court concluded that the language of the statute did not require an examination of the circumstances surrounding the publication of a victim's identity for a violation to occur. *Id.* at 2613. Without these two prerequisites, the Court determined that the statute failed to advance a narrowly tailored state interest of the highest order. *Id.* at 2613. See generally *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (statute requiring mandatory, rather than case-by-case examination, does not meet state interest of the highest order test); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (statute prohibiting only newspapers, but not all members of media, does not further a state interest of the highest order); L. TRIBE, *supra* note 1, § 14-13 (discussing state interest of highest order).

The Court addressed the statute's underinclusiveness and its relation to the state's interest in protecting sexual offense victims.<sup>49</sup> The statute only prohibits "instrument[s] of mass communication" from disseminating information.<sup>50</sup> The Court reasoned that a more inclusive definition prohibiting all means of publication was necessary to "evenhandedly" advance the state's purpose.<sup>51</sup> Because the statute did not prohibit alternative forms of dissemination,<sup>52</sup> the Court concluded that the statute did not fully achieve its stated purpose.<sup>53</sup>

Finally, the Court cursorily inquired into whether self suppression would result from imposing liability on the media.<sup>54</sup> The Court cited cases supporting its belief that imposing liability would cause self censorship among the media.<sup>55</sup> The Court reaffirmed the position that once information is lawfully obtained a newspaper should not have the burden of pruning out unlawful material.<sup>56</sup>

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49. See *supra* note 48 for the Court's analysis of the standards applied to the statute.

50. See *supra* note 14 for the full text of the statute.

51. *Florida Star*, 109 S. Ct. at 2613. The Court was concerned that the statute did not extend its provisions to the "smalltime [sic] disseminator." *Id.* The majority believed that the statute's inability to be used against the local gossip prevented it from accomplishing its stated purpose. *Id.* However, in *Smith v. Daily Mail Publishing Co.*, the Court implied that a statute that applied to all forms of the media equally would advance sufficiently the purported state interest and survive judicial scrutiny. *Daily Mail*, 433 U.S. 97, 104-05 (1979).

52. The Court was concerned that the statute did not provide a remedy against the local gossip. *Florida Star*, 109 S. Ct. at 2613. However, the majority did not examine the whole of Florida privacy tort law. *Id.* at 2617 (White, J., dissenting). Florida recognizes the tort of publication of private facts. See, e.g., *Cape Publications, Inc. v. Hitchner*, 544 So. 2d 1374 (Fla. 1989); *Loft v. Fuller*, 408 So. 2d 619 (Fla. Dist. Ct. App. 1981). See also RESTATEMENT (SECOND) OF TORTS § 652D (1977) (setting forth elements of publication of private facts tort). Thus, as Justice White pointed out in his dissent, the local gossip would be subject to the same liability as the *Star*. *Florida Star*, 109 S. Ct. at 2617.

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

54. *Id.* at 2610. The Court did not devote much discussion to the issue of media self censorship. However, it noted that a newspaper should be able to rely on the "government's implied representations of the lawfulness of dissemination." *Id.* at 2610. Again, this argument ignores the qualified nature of the information and its admission into the public domain. See *supra* note 6 for a discussion of the Court's definition of a public domain.

55. In particular, the majority cited its discussion of overdeterrence in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975), as support for its belief that imposing liability on the media would promote self censorship. *Accord* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (media cannot be denied right to print certain information in transcript of court proceedings); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (prohibition of media would not advance confidentiality of juvenile proceedings).

56. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2610 (1989). See generally *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (media cannot be denied right to print information discovered in transcript of court proceeding); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (media does not have duty to suppress information discovered in open court); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (public right to know about "Pentagon Papers").

In *Florida Star*, the Court correctly held that a state cannot prohibit the publication of truthful information, in general.<sup>57</sup> Its analysis and ruling of the case, however, were incorrect. The Court failed to establish workable guidelines to achieve a balance between state protected privacy interests and truthful reporting.<sup>58</sup> Consequently, it is difficult to determine when a state interest will sufficiently outweigh the media's publication right.<sup>59</sup> Three areas of the Court's analysis prevented the Court from adopting workable guidelines. First, the Court incorrectly interpreted the standard of liability established in the statute as well as its specified purpose.<sup>60</sup> Second, the Court failed to distinguish between information accessible to the public and that provided to the press exclusively. Finally, the Court failed to find that the state's interest in protecting the identity of sexual offense victims was a state interest of the highest order.

First, the Court incorrectly interpreted the standard of liability established by the statute because it narrowly focused on the statute's language and not its application.<sup>61</sup> While the statute itself does not contain language delineating a standard, the Florida courts have interpreted the statute to require a higher standard of liability than that previously adopted by the Supreme Court.<sup>62</sup> In *Gertz v. Robert*

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57. The first amendment does not allow a government to infringe upon the freedom of the press. U.S. CONST. amend. I. The Supreme Court has consistently and correctly upheld this mandate in situations involving defamation, political conduct, and public records. See e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (defamation); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (political conduct); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (court records).

Justice White, in his dissent, argued that the majority based its decision upon excessive deference to a free press. *Florida Star*, 109 S. Ct. at 2676, n.2. He asserted that the Court's concern for a free press must be balanced against the competing interests of a humane society. *Id.* He stated that "an absolutist view of the former leads to insensitivity as to the latter." *Id.* Justice White was also concerned with the Court's reluctance to impose the requisite responsibility that accompanies a constitutional freedom upon the press. *Id.*

58. In *Florida Star*, as in previous decisions, the Court advocated a need to balance state protected privacy interests with the guarantees of the first amendment. *Florida Star*, 109 S. Ct. at 2606-13. However, it again failed to address the ultimate question of when, and how, a state interest can trump the first amendment's prohibition against infringing upon the freedom of the press.

59. Since the Court failed to address the issue of when a state interest sufficiently can outweigh the freedom of the press, it neglected to propose any clear guidelines toward achieving that end. See *supra* note 57 for Justice White's view on the proper balance of these competing interests.

60. See *supra* notes 14 and 48 for the full text of the statute and the Court's examination of its requirements.

61. See *supra* note 14 for the full text of the statute.

62. The Florida courts have determined that a standard of "reckless indifference" is necessary to impose liability under the statute. See generally *Cape Publications, Inc. v. Hitchner*, 549 So. 2d 1374 (Fla. 1989) (upholding reckless indifference standard); *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So. 2d 328 (Fla. Dist. Ct. App. 1983) (television station did not breach standard since information was

*Welch, Inc.*, the Supreme Court held that ordinary negligence is the minimum constitutional standard for imposing liability on the media.<sup>63</sup> In applying the statute, the Florida courts require a higher constitutional standard of negligence, namely "reckless indifference," before imposing liability.<sup>64</sup> Historically, the Court has considered both language and application when balancing the interests involved.<sup>65</sup> However, in *Florida Star*, the Court failed to follow its previous course of action.

Furthermore, while the language of the statute is precisely tailored to prevent widespread dissemination of private information,<sup>66</sup>

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obtained at open court proceeding); *Patterson v. Tribune Co.*, 146 So. 2d 623 (Fla. Dist. Ct. App. 1962), *cert denied*, 153 So. 2d 306 (Fla. 1963) (newspaper charged with knowledge of statutory provisions).

63. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, the Court examined a private individual's claim against a newspaper for defamation. An article appeared in a newspaper owned by Robert Welch, Inc., that linked Gertz with criminal activity and the Communist movement. *Id.* at 326. The Supreme Court found that a private person was more susceptible to injury from defamation than a public figure because he has less access to the media. *Id.* at 343-45. Moreover, the Court found that, so long as the states do not impose liability without fault, the states may define for themselves the appropriate standard of liability necessary for imposing liability on the media. *Id.* at 347-48. In addition, the Court established ordinary negligence as the minimum constitutional standard necessary to comply with the mandates of the first amendment. *Id.* at 348-50. *See also* *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2612 (1989) (Court's discussion of ordinary negligence under *Gertz*); M. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT* § 2:08(c)-(e) (Supp. 1989) (discussion of *Gertz* and the scope of the press); J. BARRON & C. DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* §§ 6:22, 7:1-2 (1980) (discussion of *Gertz* and the privacy interest in general).

64. Reckless indifference in publication exists when there is sufficient evidence to permit a jury to conclude that the media defendant entertained serious doubts about the credibility of its informant. *BLACK'S LAW DICTIONARY* 1142 (5th ed. 1979). At trial, the jury concluded that the *Star* acted with reckless indifference toward the rights of others when it published B.J.F.'s identity because the *Star* was aware of the statutory prohibition on disclosure. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2606 (1989).

65. In *Smith v. Daily Mail Publishing Co.*, the Court examined the specific language employed in the statute before invalidating it completely. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979). Furthermore, the Court has looked at the legislature's intent, as well as the statute's application, to determine if an unreasonable burden has been placed upon a penumbral right. *See Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n*, 413 U.S. 376 (1973) (injunction against future publication not an invalid prior restraint).

The majority of the cases where the Court upheld a statute that restricted a penumbral right dealt with the equal protection and due process clause of the fourteenth amendment. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Congress had latitude to try new techniques that may burden right of equal protection to reach remedial objectives); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (Court examined effect and application of university's affirmative action admission policy). The Court upheld a burden on the fourteenth amendment but has not pursued this course in cases concerning the first amendment. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (closure order invalidated in criminal trial even though publicity surrounding trial potentially prejudicial to defendant).

66. In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court suggested that states wishing to protect privacy rights may "respond [to the challenge] by means

the majority held that the statute was facially underinclusive.<sup>67</sup> In past decisions, the Court has found statutes underinclusive only when they fail to extend the prohibitions to all sectors of the *mass media*.<sup>68</sup> However, in *Florida Star*, the Court found the statute underinclusive for failing to prohibit the town gossip from disseminating information.<sup>69</sup> The Court has never invalidated a statute for failing to advance *absolutely* its purported interest.<sup>70</sup> In this case, however, the Supreme Court refused to accept anything less than an absolute prohibition on all forms of dissemination.

Second, the Court failed to recognize that the information concerning B.J.F.'s rape was not in the public domain<sup>71</sup> and, therefore, was not legally obtained. Information in the public domain is acces-

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which avoid public documentation or other exposure of private information." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1979). Justice White, in his dissent in *Florida Star*, argued that the state of Florida has done everything possible to comply with the Court's suggestion in *Cox. Florida Star*, 109 S. Ct. at 2616. Since additional areas of Florida tort law would cover offenders other than the media, Justice White suggested that this statute is indeed narrowly tailored to deal with the specific area of media offenders. *Id.* at 2616. See *supra* notes 51-52 for a discussion of the liability of the local gossip and other non-media offenders. Furthermore, Justice White noted that the neighborhood gossip does not pose a threat of intrusion to a rape victim because his publishing ability is severely limited when compared to the mass media. *Florida Star*, 109 S. Ct. at 2617.

67. When a statute is inclusive it "embrace[s] [and] comprehend[s] . . . the stated limits or extremes." BLACK'S LAW DICTIONARY 687 (5th ed. 1979). Section 794.03 was established to embrace the limits of the media's right to publish information. See *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So. 2d 328 (Fla. Dist. Ct. App. 1983). This Florida law covers the form, content, nature, and purpose of every sector of mass communication. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2617 (1989) (White, J., dissenting). It was not intended to cover other forms of dissemination. *Id.* at 2617.

68. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979) (statute did not achieve purpose because it did not restrict the electronic media or any form of publication except newspapers).

69. See *supra* notes 51-52 for a discussion of the Court's concern about the local gossip.

70. At the outset of the *Florida Star* case, the Court noted the issue was one of balancing competing interests. *Florida Star*, 109 S. Ct. at 2604. The Court's emphasis on an absolute prohibition in the statute against every conceivable form of publicity accorded too little weight to the rape victim's privacy side of the balancing scale. *Id.* at 2618 (White, J., dissenting). Research has not revealed any cases that adhere to the rule that a statute must absolutely advance its purported end. Absolute legislation must be complete and perfect within itself. BLACK'S LAW DICTIONARY 9 (5th ed. 1979). As the Court has recognized in equal protection cases, legislatures need not enact perfect legislation, just legislation narrowly tailored to achieve its stated end. See *generally* Fullilove v. Klutznick, 448 U.S. 448 (1980) (Congress can burden equal protection to reach remedial objectives); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (affirmative action in university admission upheld); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (equal protection not violated when tax system used to fund school district); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (use of gender descriptions in "want ads" not violation of sex discrimination statute).

71. See *supra* note 6 for a discussion of the public domain.



sible to the public without need for special clearance.<sup>72</sup> Because access to the information is not restricted, courts assume that it was legally obtained. Information in the public domain is clearly distinguishable from qualified information.<sup>73</sup> Qualified information is restricted, and its dissemination is limited. Therefore, only a select person or group can legally obtain qualified information.<sup>74</sup>

In this case, B.J.F.'s name was only made available to members of the press. The Florida legislature expected the press to be aware of the statute's prohibition against publishing a rape victim's name.<sup>75</sup> Furthermore, numerous warning signs against this type of publicity were posted in the Department's press room as an added precaution.<sup>76</sup> While the Star admitted it was aware of these warnings and the prohibitions contained in the statute, the Court refused to acknowledge the qualified nature of B.J.F.'s identity.<sup>77</sup>

The Court reasoned that the state can keep information out of the public domain by classifying the information,<sup>78</sup> which is the very action the Department took in this case. The Department only released B.J.F.'s name to persons charged with knowledge of the privileged nature of a sexual offense victim's identity.<sup>79</sup> In prior cases, the Florida courts have charged the media with knowledge of the statute's prohibitions.<sup>80</sup> The general public, on the other hand, has not been held accountable for the statute's provisions. The fact that

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72. Public is defined as that which is not limited to a particular sector of the community. *Peacock v. Retail Credit Co.*, 302 F. Supp. 418, 423 (Dist. Ct. Ga. 1972). See *supra* note 6 for a discussion of the public domain.

73. The Court distinguished public information from qualified information when it held that a state could classify information to protect its dissemination. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2609 (1989). In its analysis, the Court recognized a need for clearance to access qualified information. *Id.* at 2612. Thus, if clearance is needed, the information cannot be part of the public domain. *Id.*

74. See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972) (public and press regularly excluded from grand jury proceedings and meetings of other official bodies); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (press excluded if necessary to assure fair trial to defendant).

75. See *Cape Publications, Inc. v. Hitchner*, 514 So. 2d 1136 (Fla. Dist. Ct. App. 1987) (accredited news agencies must be aware of statutes prohibiting publication); *Patterson v. Tribune Co.*, 146 So. 2d 623 (Fla. Dist. Ct. App. 1962), *cert. denied*, 153 So. 2d 306 (Fla. 1963) (newspaper charged with knowledge of statutes prohibiting publication).

76. See *supra* notes 11 and 38 for a discussion of the presence of warning signs in the press room and the Star's awareness of same.

77. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2610-11 (1989) (Court refused to acknowledge qualified nature of B.J.F.'s identity).

78. *Florida Star*, 109 S. Ct. at 2609. Justice White, dissenting, argued that this procedure was exactly the same as Florida's procedure when it enacted this statute. *Id.* at 2616 (White, J., dissenting).

79. Only the press have been held accountable for knowledge of the statute's prohibitions. See *supra* note 75 for a sample of cases imposing knowledge of the statute's prohibitions upon the media. There is no issue in this case regarding releasing B.J.F.'s identity to the general public.

80. See *supra* note 75 for the media's knowledge of the statute's prohibitions.

only members of the press had access to the police reports strongly demonstrates that this information was classified and, therefore, not in the public domain.<sup>81</sup> According to the Court's own analysis, information not present in the public domain cannot be legally obtained.<sup>82</sup>

Furthermore, in prior cases the Court defined areas that are part of the public domain.<sup>83</sup> Areas that the Court previously recognized include judicial proceedings,<sup>84</sup> court records,<sup>85</sup> police radio reports,<sup>86</sup> and eyewitness testimony.<sup>87</sup> In each of these situations, the public could obtain access to the information either by witnessing the event or through verbal or written request. In the present case, B.J.F.'s identity was not available to the public by any of the previously recognized avenues.<sup>88</sup> In effect, the Court extended protection to non-public domains. According to the Court's analysis, any information that the media receives becomes part of the public domain and, therefore, is legally obtainable.<sup>89</sup> Consequently, if a state's classification efforts fail and the press gains access to classified information, the state may never refute the press' contention that it obtained the information legally.<sup>90</sup>

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81. *Florida Star*, 109 S. Ct. at 2616 (White, J., dissenting).

82. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2610-11 (1989). See *supra* notes 6 and 37 for a discussion on lawfully obtained information and the public domain.

83. See *supra* note 6 for a discussion of the public domain.

84. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (closure order invalidated even though open trial might prejudice defendant); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (media, in attendance at commission hearing, may publish divulged information); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (press allowed broad scope in publicity surrounding trial proceedings).

85. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (pre-trial publicity does not lead to unfair trial); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (information contained in indictment documents open to public). *But see* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (discovery evidence not allowed to be published); *Application of KSTP Television v. Ming Sen Shiue*, 504 F. Supp. 360 (D. Minn. 1980) (publication of videotape evidence of rape attack infringes upon victim's privacy right).

86. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (newspaper learned of incident by monitoring police radio); 18 U.S.C.A. § 2510 (West Supp. 1989) (definition of accessibility of radio communication to public); 18 U.S.C.A. § 2511g (West Supp. 1989) (not unlawful for person to intercept radio communications).

87. See *Daily Mail*, 443 U.S. at 97 (newspaper learned of offender's identity by speaking to eyewitnesses at scene).

88. B.J.F.'s identity was only available through the Department's report. The Department could not release this information to the public. FLA. STAT. § 794.03 (1987).

89. The Court held that the information the *Star* received was unqualified. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2612 (1989). Furthermore, it held that the media should not have to bear the burden of pruning the information it receives. *Id.* Therefore, it follows that if the media is given truthful information, they have the ability to publish the information without liability. *Id.* *But see* *Garrison v. Louisiana*, 379 U.S. 64 (1964) (Court hypothesizes that if national security were in jeopardy, media's ability to publish would be curtailed).

90. The Court's reasoning was circular. It defined information in the public do-

Since the Court failed to address the distinction between information in the public domain and qualified information, it did not answer the question whether qualified information can ever be kept out of the public domain.<sup>91</sup> The Court suggested that a state may classify information to protect its dissemination. However, the Court failed to provide any guidelines to prevent the media from publishing this information when classification efforts fail.

Finally, the Court erred in failing to find the state's interest in protecting the identity of sexual offense victims an interest of the highest order.<sup>92</sup> In reaching this conclusion, the Court made a distinction between the public significance of publishing information concerning the rape itself and that of publishing the victim's name.<sup>93</sup> The Court took the view, however, that the public's right to the information far outweighed a state protected right to privacy.<sup>94</sup> This position failed to give adequate consideration and importance to the state's authority to protect its citizens and their right to privacy.<sup>95</sup>

The Court's prior decisions, particularly in the area of discrimination, have recognized the state's authority to protect the significant interests of its citizens.<sup>96</sup> However, the Supreme Court refused to recognize this authority when its exercise concerned the protec-

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main as legally obtained information and legally obtained information as information in the public domain. This circular definition does little to aid state legislatures. See *supra* notes 6 and 37 for the Court's definition of public domain and legally obtained information.

91. The Court, by its own admission, has been avoiding the question of whether qualified information can be kept out of the public domain. See *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2607 (1989) (court resolved conflict only as arose in "discrete factual context"); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979) (narrow holding); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (focusing on narrower question of privacy of public records).

92. See *supra* note 7 for a discussion of the strict scrutiny test.

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

94. *Id.* at 2610. Justice White, in his dissent, argued that the Court's decision has effectively "obliterated" the right to privacy. *Id.* at 2618. He argued that the Bill of Rights did not give the public a right to pry into the unnewsworthy private affairs of their fellowmen. *Id.* (citing *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (1975), *cert. denied*, 425 U.S. 998 (1976)).

95. Historically, courts attempted to protect victims from invasive publicity in sexual offense cases. See *Application of KSTP Television v. Ming Sen Shiue*, 504 F. Supp. 360 (D. Minn. 1980) (television station not allowed to broadcast videotape of rape attack); *Briscoe v. Reader's Digest Ass'n*, 93 Cal. Rptr. 866, 483 P.2d 34 (Cal. 1971) (no social value in publishing victim's identity). In some instances, that same protection has been afforded to potential offenders as well. See *United States Dep't of Justice v. Reporter's Comm. for Freedom of the Press*, 109 S. Ct. 1468 (1989) (FBI not entitled to "rap" sheet on person suspected of bribing senators); *United States ex rel Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977) (public excluded from trial to prevent prejudice to defendant); Note, *Access to Taped Evidence: Bringing the Picture Into Focus*, 71 GEO. L.J. 193 (1983) (press should have access to taped evidence).

96. See *Martinez v. Bynum*, 461 U.S. 321 (1983) (state had legitimate interest in protecting the quality of its schools); *Richardson v. Ramirez*, 418 U.S. 24 (1974) (Court upheld California's statute disenfranchising convicted felons).

tion of a sexual offense victim.<sup>97</sup> In *Florida Star*, the Court dealt with protecting citizens from physical harm, not protecting their rights to equality or to attend public events that were dealt with in previous cases.<sup>98</sup> By publishing a rape victim's name, the media jeopardizes the victim's life and gives her assailant the opportunity to discover her whereabouts.<sup>99</sup> However, the Court did not seem to

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97. The Court refused to allow a state to use its police power to prohibit the publication of B.J.F.'s identity. However, in the past, the Court has allowed the states to invoke this power to advance other state protected rights, such as the right to vote, to receive an education, and to obtain employment. See *supra* notes 7, 66, and 95 for the equal protection and due process cases that upheld a state's police power.

98. In prior "state interest of the highest order" cases, the Court concerned itself with the free exchange of information and the public's right to know. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (public and press have right of access to criminal trials); *Oklahoma Publishing Co. v. District Court, Okla. Cnty., Okla.*, 430 U.S. 308 (1977) (once a pretrial is open to the public and press, it must remain open); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (courts are open to public). None of these prior cases dealt with the potential physical harm of a person if the public had access to the person's identity. See *infra* note 99 for a discussion on the danger of reporting a rape victim's identity.

99. Rape is the ultimate violation of an individual, short of homicide. *Coker v. Georgia*, 433 U.S. 584, 597 (1977). There is no social value in disclosing the rape victim's identity. Any such disclosure could affect detrimentally the rape victim for years to come. *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So. 2d 328, 331 (Fla. Dist. Ct. App. 1983). See, e.g., R. TONG, *WOMEN, SEX, AND THE LAW* 90-101 (1984) (history of traditional and contemporary definitions and beliefs surrounding the crime of rape); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1975) (rape laws based on traditional attitudes about sexual roles and mores in society). B.J.F. raised three concerns in support of her argument that the protection of a sexual offense victim should rise to the level of a state interest of the highest order.

B.J.F.'s first concern was in regard to the privacy of the victim. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2611 (1989) (citing Brief for Appellee, *supra* note 11, at 29-30). The rape victim feels as if she has lost her dignity when she is raped. J. TEMKEN, *RAPE AND THE LEGAL PROCESS* 1-6 (1987) (account of victim's psychological state after rape). See also *United States ex rel Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977) (rape is both physical and psychological intrusion, and society should attach the deepest sense of privacy to this intrusion); T. McCaHILL, L. MEYER, AND A. FISCHMAN, *THE AFTERMATH OF RAPE* 39-46 (1979) (information on the vital statistics of rape victims); L. CLARK & D. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* 89-95 (1977) (factors which affect classification of rape as crime); J. MACDONALD, *RAPE OFFENDERS AND THEIR VICTIMS* 3-21 (1971) (discussion of scope of crime and its prevalence in all strata of society). Many victims refuse to inform their families of the attack because of the social stigma attached to the crime. S. KATZ & M. MAZUR, *UNDERSTANDING THE RAPE VICTIM* 185-86 (1979). See also CLARK, *supra*, at 147-58 (society's view of the victim); S. SCHECHTER, *WOMEN AND MALE VIOLENCE* 209-41 (1982) (discussion of battered women and analysis of why sexual offense crimes continue in United States). Even today, society continues to live under the belief that a rape victim somehow "asked for it." CLARK, *supra*, at 121. See also H. FEILD & L. BIENEN, *JURORS AND RAPE* 54 (1980) (66% of society polled felt a rape victim asked to be abused). It is difficult enough to recover from this violent crime. However, publishing the victim's identity to the general public can make recovery almost impossible. McCaHILL, *supra*, at 21-39 (victims' accounts of adjustment period after attack and changes in behavior due to attack). See also S. BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 387-420 (victim's accounts of their attacks and the reactions of society). For example, the victim may be subjected to countless questions from newsminded citizens who read about her in the paper. *Id.* See also *Court Reporting and Open Justice*, 138 NEW

place much emphasis on these considerations. It did not consider the state's ability to protect a victim's identity separate from the information concerning the nature of the crime. Therefore, the Court left the states without any workable guidelines to determine when protecting the physical integrity of its citizens can fulfill the state interest of the highest order requirement.

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LAW J. 909 (1988) (discussion of conflict between open courtroom proceedings and victim's difficulties during trial). Psychologists recognize the need for a cloak of anonymity during which the victim can attempt to function as though her life had not been interrupted. McCahill, *supra*, at 73-79. Publicizing the victim's identity robs her of this cloak and leaves her without the protective shell of privacy that other citizens possess. See TEMKEN, *supra*, at 6-8 (victim in court and treatment once information revealed).

B.J.F.'s second and perhaps most important concern, involved the physical protection of the rape victim. Rape is the one crime that has steadily increased in incidence over the past two decades. LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FACILITIES & CRIMINAL JUSTICE AGENCIES 1 (1975) [hereinafter LEAA REPORT] (prepared by L. Brodyaga, M. Gates, S. Singer, M. Tucker, and R. White). Rape victims live in fear that their assailants will retaliate if they report the attack to the authorities. Katz, *supra*, at 186. Moreover, the number of repeat attacks has increased in recent years. UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 12-13 (1989) [hereinafter UNIFORM CRIME REPORTS]; LEAA REPORT, *supra*, at 1. Thus, the publication of a rape victim's identity directly threatens her physical safety by providing the assailant with the information necessary to complete his initial attack or harass the victim into not testifying. See *supra* notes 19-20 for a report of the events that occurred subsequent to B.J.F.'s attack. See also KATZ, *supra*, at 186 (reasons for delay or non-reporting of rape); MACDONALD, *supra*, at 70-71 (discussing techniques used by rapist to prevent detection).

Finally, B.J.F. expressed her concern over the need to encourage victims to report their attacks. Most rapes in the United States go unreported. KATZ, *supra*, at 186. See also S. ESTRICH, REAL RAPE 15-26 (1987) (discussing response of legal system to rape report); E. HILBERMAN, THE RAPE VICTIM 9 (1976) (between 50% and 90% of rape cases not reported). There are various reasons given for the failure to report the rape. Among these reasons are: (1) fear of retaliation; (2) social stigma; and (3) mistrust of government agencies and the media. KATZ, *supra*, at 185-86. See also FEILD & BIENEN, *supra*, at 54 (large number of population attribute rape crime to woman-victim); MACDONALD, *supra*, at 70-71 (discussing rapist's threats of retaliation); MCCAHILL, *supra*, at 103 (discussion of police and credibility of victims). In many cases, the police and government agencies are insensitive to the needs of the victim. KATZ, *supra*, at 192-96. See also Note, Rape and Rape Laws: Sexism in Society and Law, 61 CALIF. L. REV. 919, 928 (1973) (factors that cause police to consider rape "unfounded"). Police either refuse to pursue the attack as rape and attempt to classify it as some lesser, easier to prove offense, or they ignore the instance all together and try to convince the victim that it "really wasn't rape." McCahill, *supra*, at 107-12. See also CLARK, *supra*, at 147-59 (discussing "art" of victim blaming). Furthermore, most victims distrust the media and fear that their lives will be turned into a public event. See McDONALD, *supra*, at 26 (victims fear newspapers and publicity). Considering the media's handling of victims at trial, this fear is not unfounded. Rape victims who have testified as trials against their assailants, reported that the trial was like being raped a second time due to the media's mishandling of this sensitive situation. TEMKEN, *supra*, at 7 (three victims likened the ordeal of a trial to "bring crucified"). See also BROWNMILLER, *supra*, at 412-20 (discussion of legal treatment of rape and jury expectations at trial). For various books and articles on the psychological and physical impact of rape, see, e.g., C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); C. MACKINNON, FEMINISM UNMODIFIED (1987); C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); S. BROWNMILLER, *supra*.

The *Florida Star* decision reflects the Court's belief that competing interests must be balanced. However, this decision does not advance any workable guidelines to determine when a state protected interest can overcome the public's right to receive information. Rather than deciding the ultimate question of when the right to privacy will outweigh the freedom of the press, the Court slides to the "bottom of the slippery slope"<sup>100</sup> in the protection of individual rights. While the Court insisted that its holding is narrow,<sup>101</sup> its impact on victims' rights with regard to media publication is significant. A state can no longer protect the anonymity of a sexual offense victim who may seek its assistance in apprehending her assailant. Instead, the victim must rely on the media for protection.<sup>102</sup>

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100. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2619 (1989) (White, J., dissenting).

101. *Florida Star*, 109 S. Ct. at 2613.

102. Perhaps this reliance on the media to protect an individual's rights would be easier to accept if the Court took the advice of Benjamin Franklin. "The press should have the freedom to publish what it likes, so long as the public has the freedom to break the editor's pate." H. PURVIS, *THE PRESS: FREE AND RESPONSIBLE?* 30 (1982).

