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Bad News: Privacy Ruling To Increase Press Litigation, The Florida Star v. B.J.F.

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BAD NEWS: PRIVACY RULING TO INCREASE PRESS LITIGATION

THE FLORIDA STAR v. B.J.F.

INTRODUCTION

"The press is overstepping in every direction the obvious bounds of propriety and of decency."[1] So began the tort of invasion of privacy. The tort signaled the expansion of the legal protection of an individual's "right to be let alone"[2] and the limitations of the press' freedoms to print the truth.

On June 21, 1989, the United States Supreme Court decided *The Florida Star v. B.J.F.*[3] On the heels of a string of cases which protected the media's First Amendment rights and privileges, the Court held that the U.S. Constitution precludes imposing criminal or civil liability on a newspaper which publishes the name of a rape victim, except when the state sanctions are narrowly tailored to a state interest of the highest order.[4]

This note analyzes the history and precedent upon which the Court relied in reaching *Florida Star's* "harsh outcome."[5] Next, the note discusses how the Court, by refusing to extend its holding beyond the facts of the case and give broad Constitutional protection to publications of truth, failed to provide lower courts with any guidance in deciding future invasion of privacy actions. Finally, the note examines the Court's balancing test: weighing the privacy interests of a crime victim against the newspaper's freedom to print truthful information.

STATEMENT OF THE CASE

THE FACTS

The Florida Star ("Star") is a weekly newspaper in Jacksonville with an average circulation of 18,000 copies.[6] The paper prints a regular feature, entitled "Police Reports," which consists of brief articles describing local criminal incidents under police investigation.[7]

B.J.F.[8] reported that she had been robbed and sexually assaulted to the

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[1] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

[2] COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888).

[3] 109 S. Ct. 2603 (1989) (6-3 decision) (Marshall, J.).

[4] *Id.*

[5] *Id.* at 2614 (White, J., dissenting).

[6] *Id.* at 2605.

[7] *Id.*

[8] To preserve the victim's privacy, the appellate *court sua* sponte amended the caption of this case. Florida

Sheriff's Department ("Department").[9] The Department completed a written report, which identified B.J.F. by her full name, and placed it in the Department's press room.[10] Access to this room and the information in it was unrestricted.[11]

A reporter-trainee for the Star[12] copied the police report verbatim. The Star subsequently printed B.J.F.'s full name in a "Police Reports" story.[13] In printing a rape victim's name, the newspaper violated its internal rule against such publication.[14]

More importantly, the Star, and the Department, violated Florida statute section 794.03[15] which makes it unlawful to "publish, or allow to be published . . . in any instrument of mass communication the name of the victim of any sexual offense."[16]

After B.J.F.'s name appeared in the Star, her mother received threatening phone calls from a man saying that he would rape B.J.F. again.[17] B.J.F. learned of the Star article from co-workers and acquaintances, and she was eventually compelled to change her phone number and residence, to obtain police protection, and to seek mental health counseling.[18]

Star, Inc. v. B.J.F., 499 So. 2d 883, 884 (Fla. Dist. Ct. App. 1986) (per curiam), *cert. denied*, 509 So. 2d 1117 (Fla. 1987).

[9] *Florida Star*, 109 S. Ct. at 2605.

[10] *Id.*

[11] *Id.*

[12] The trainee was known at the newspaper as the "human photocopying machine." Sanford & Noble, *For the Press, Privacy Ruling Not Good News*, Nat'l L.J., Aug. 21, 1989, at S7, col. 4.

[13] *Florida Star*, 109 S. Ct. at 2606. *See* Billard, *Truth Was No Defense*, 8 AM. LAW., Sept. 1986, at 89. The three line article was one of 54 separate "Police Reports" entries in the October 29, 1983 edition of the *Star*. The article, printed under the "Robberies" section of the column, read:

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

Billard, *supra*, at 89.

[14] *Florida Star*, 109 S. Ct. at 2606.

[15] FLA. STAT. ANN. § 794.03 (West 1976) provides:

> No person shall print, 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.

[16] *Forida Star*, 109 S. Ct. at 2606.

[17] *Id.*

[18] *Id.*

PROCEDURAL HISTORY

B.J.F. filed a claim against the Star and the Department in the Circuit Court of Duvall County. She alleged the negligent violation of Florida Code section 794.03.[19] Before the trial, the Department settled with B.J.F. for $2,500.[20] At trial, the Star's defense was based upon evidence that it had learned B.J.F.'s name through the Department's incident report and that it only inadvertently violated its own internal policy against publishing the names of sexual offense victims.[21]

The Star moved to dismiss.[22] The Star claimed the imposition of civil sanctions on the newspaper pursuant to Florida Code section 794.03 violated the First Amendment of the U.S. Constitution.[23] The trial judge rejected the motion.[24]

The Star moved for a directed verdict at the close of B.J.F.'s case and again at the close of its defense.[25] The judge denied both motions.[26] The judge ruled that Florida Code Section 794.03 was constitutional because it reflected a proper balance between the competing interests of the First Amendment and the right to privacy. The court found it significant that the law only applied to a narrow set of "rather sensitive . . . criminal offenses."[27] The judge granted B.J.F.'s motion for a directed verdict, finding the Star negligent per se based upon the violation of the statute.[28] Thus, the jury only decided the issues of causation and damages.[29] The jury ultimately awarded B.J.F. $75,000 in compensatory damages and $25,000 in punitive damages.[30]

The First District Court of Appeals affirmed per curium. It held that a rape victim's name is a private matter and is not to be published as a matter of law.[31] The Supreme Court of Florida declined discretionary review.[32] The Star appealed to the United States Supreme Court which reversed the trial court's decision.[33] It held that absent a state interest of the highest order, truthful publication could not be punished

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id. See* U.S. CONST. amend. I, §1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
[24] *Florida Star*, 109 S. Ct. at 2606.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* The punitive damages were based upon the judge's instruction that the jury could award punitive damages if it found that the Star had acted with "reckless indifference to the rights of others." *Id.*
[31] Florida Star v. B.J.F., 499 So. 2d 883.
[32] Florida Star v. B.J.F., 509 So. 2d 1117 (Fla. 1987).
[33] *Florida Star*, 109 S. Ct. at 2603.

consistent with the First Amendment.[34]

HISTORICAL BACKGROUND

In 1890, two young Boston lawyers, Samuel D. Warren and Louis D. Brandeis, deemed the law a source of protection for the core of human dignity. They published an article[35] urging that the courts recognize a law of privacy to support the individual's self-development and self-conception by guaranteeing privacy.[36] Prior to publication of their article, there was no generally recognized common law action for invasion of privacy. Warren and Brandeis concluded, by analyzing other common law actions, that there was a cognizable and protectable individual privacy right.[37]

After a battered beginning when the high court of New York denied the existence of any right to privacy at common law,[38] public outrage induced the New York legislature to enact a privacy statute. The statute made it a misdemeanor or a tort to use the portrait, name or picture of any person for advertising purposes or for the purposes of trade, without his or her consent.[39]

Judicial acceptance of a common law right to privacy first came in 1905.[40] By the 1930s, with the endorsement of the First Restatement of Torts,[41] the tide turned toward the recognition of a right to privacy.[42] By 1980, Rhode Island was the only state not recognizing some form of the right to privacy.[43]

The tort of invasion of privacy eventually evolved and expanded into four distinct branches: (1) unreasonable intrusion upon the seclusion or solitude of

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[34] *Id.* at 2613.

[35] Warren & Brandeis, *supra* note 1, at 193. The authors were reacting to the editorial practices of Boston newspapers, particularly a report about a family gathering the Warrens had thought private. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 300 (3d ed. 1987).

[36] PROSSER AND KEETON ON THE LAW OF TORTS 350 (W.P. Keeton 5th ed. 1984).

[37] *See* Warren & Brandeis, *supra* note 1, at 205-06; FRANKLIN, *supra* note 35, at 300.

[38] Robertson v. Rochester Folding-Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). A woman's photograph was lithographed on a flour mill's boxes without her consent. *Id.* at 542, 64 N.E. at 442. In a 4-3 ruling, the Court of Appeals held there was no privacy right at common law. *Id.* at 543, 64 N.E. at 443. It had to be established by an act of the legislature. *Id.* The *Robertson* court's reasoning was based upon the lack of precedent; pure mental character of the injury; the vast amount of litigation which was expected to result; difficult of drawing a distinction between public and private characters; and the feat of undue restrictions of liberty of speech and freedom of the press. It held that the legislature must create such a right to privacy. *Id.*

[39] 1903 N.Y. Laws Ch. 132, §§ 1-2. (The statute is now N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976)). The basic provision was that "a person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor." Other sections provided for actions for damages or injunction.

[40] Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[41] RESTATEMENT (FIRST) OF TORTS § 867 (1939).

[42] PROSSER & KEETON, *supra* note 36, at 851.

[43] *Id.*

another; (2) appropriation of the name or likeness of another for commercial advantage; (3) publicity that unreasonably subjects another to a false light in the public eye; and (4) the public disclosure of embarrassing private facts about another.[44]

The expansion of individual privacy rights has predictably conflicted with the media's First Amendment rights to print truthful information.[45] For example, in *Landmark Communications, Inc. v. Virginia*,[46] the state had an expressed interest in non-dissemination of judicial disciplinary proceedings to preserve confidentiality. The U.S. Supreme Court struck down the law which prohibited the unauthorized divulging of judges' names who are under investigation.

The Supreme Court's *Florida Star* decision is not a radical departure from previously charted waters.[47] As the *Florida Star* dissent points out, the Court's ruling has been foreshadowed in prior decisions.[48] The trend in "modern" jurisprudence has been to eclipse the individual's right to keep private any truthful information that the press wishes to publish.[49]

In *Florida Star*, the Supreme Court held that where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order, and no such interest was satisfactorily served by imposing liability under the facts of this case.[50]

The Court based its holding on a trilogy of prior cases which addressed and resolved the conflict between truthful reporting and state-protected privacy interests in favor of truthful reporting: *Cox Broadcasting Corp. v. Cohn*;[52] *Oklahoma Publishing Co. v. District Court*;[53] and *Smith v. Daily Mail Publishing Co.*[54]

In *Cox Broadcasting*, the court held that a television station could not be punished for invasion of privacy for broadcasting the name of a rape-murder victim

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[44] Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389 (1960).

[45] *See, e.g.*, Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931); Garrison v. Louisiana, 379 U.S. 64 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

[46] 435 U.S. 829 (1978).

[47] Florida Star v. B.J.F., 109 S. Ct. at 2619 (White, J., dissenting). *See infra* notes 51 through 58 and accompanying text.

[48] *Florida Star*, 109 S. Ct. at 2619 (White, J. dissenting).

[49] *Id.* (White, J., dissenting).

[50] *Id.* at 2613.

[51] *Id.* at 2607.

[52] 420 U.S. 469 (1975).

[53] 430 U.S. 308 (1977).

[54] 443 U.S. 97 (1979).

when it lawfully obtained her name from judicial records, which were open to the public, and maintained in connection with a public prosecution. In *Oklahoma Publishing*, when a judge permitted a reporter to attend the detention hearing of juvenile, which he was not required to do, he could not subsequently forbid the publication of the truthful information obtained. And in *Daily Mail*, the court held that a state cannot, consistent with the First and Fourteenth Amendments, punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper through routine reporting practices.

The holdings in each case, protecting the publication of truthful information, were limited. The Court consistently refused to address the sweeping contentions that truthful publication may never be punished.[55] In *Florida Star*, the Court again refused such a bright line rule.[56] Rather, Justice Marshall's analysis was conducted with reference to a limited First Amendment principle:[57] "We continue to believe that the sensitivity and significance of 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."[58]

ANALYSIS

I. Narrow holding fails to provide guidelines

The *Florida Star* Court's narrow holding fails to provide lower courts with any guidelines to decide future invasion of privacy cases. The Court did not address whether the states may ever define and protect an area of privacy free from unwanted publicity in the press.

The limited First Amendment principle, followed by Justice Marshall in *Florida Star*, was first articulated in *Daily Mail*[59] as a synthesis of prior decisions.[60] In *Cox Broadcasting* the information was obtained from public judicial records. In *Oklahoma Publishing*, the juvenile court judge had permitted spectators and the press into the courtroom, and then sought to prohibit the press from reporting on the proceedings. The decisions were based on the rationale that judicial proceedings must be monitored.[61]

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[55] "Indeed, in *Cox Broadcasting*, we pointedly refused to answer even the less sweeping question 'whether truthful publications may ever be subjected to civil or criminal liability,' for invading 'an area of privacy' defined by the State." *Florida Star*, 109 S. Ct. at 2609.

[56] "Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." *Id.* at 2608 (citations omitted).

[57] *Id.* at 2609.

[58] *Id.*

[59] The dissent points out that this rule was offered only as a hypothesis in *Daily Mail*, 109 S. Ct. at 2615 (White, J., dissenting). *See infra* notes 63 through 71 and accompanying text.

[60] *Florida Star*, 109 S. Ct. at 2609.

[61] *Id.* at 2614 (White, J., dissenting).

The *Daily Mail* Court tried to reconcile these prior cases, which involved public records and proceedings, with the facts of *Daily Mail.* The facts simply involved truthful reporting procedures. If a newspaper lawfully obtains truthful information about a matter of public significance then, absent a state interest of the highest order, the state officials may not constitutionally punish publication of the information.[62]

Despite the precedent, none of the majority's reasoning can be controlling in this case.[63] In *Cox Broadcasting*, the matter concerned judicial records, which have always been open as a matter of law; even Warren and Brandeis recognized this.[64] *Oklahoma Publishing* concerned an open judicial proceeding. In fact, even under Florida Statute section 794.03, the news media was only prohibited from publishing or broadcasting any information regarding the victim of a sexual assault until it is by law made part of an open public record, or is made public in an open judicial proceeding or public court record.[65] In this case, the Department's incident report was, pursuant to state law, to be withheld from public release.[66] Justice White's dissent pointed out that:

> The flat rule from *Daily Mail* on which the Court places so much reliance . . . was introduced . . . with the cautious qualifier that such a

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[62] Smith v. Daily Mail Publishing Co., 443 U.S. at 103.

[63] *Florida Star*, 109 S. Ct. at 2615 (White, J., dissenting). *See also supra* note 59.

[64] Warren & Brandeis, *supra* note 1, at 216-17. *See also supra* note 35 and accompanying text.

[65] Public Records Law, Op. Att'y Gen. No. 075-203 (July 14, 1975).

[66] FLA. STAT. ANN. § 794.03 (West 1976); *see supra* note 15. FLA. STAT. ANN. § 119.07(1) (West 1982 & Supp. 1990) provides for the reasonable inspection of public records by the public, including the press. Excepted from general inspection are confidential records. "The name, address and any other identifying information of the victim of a sexual offense, in law enforcement records are confidential and are not subject to public disclosure in any manner under § 119.07(1)." Op. Att'y Gen. No. 075-203, *supra* note 65.

FLA. STAT. ANN. § 119.07(3)(h) (West 1982 & Supp. 1990) provided that:

> Any criminal intelligence information or criminal investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim of any sexual battery as defined by chapter 794...and any criminal intelligence information or criminal investigative information or other criminal record, including those portions of court records, which may reveal the identity of a person who is a victim of any sexual offense, including a sexual offense proscribed in chapter 794...is exempt from provisions of subsection (1).

Probably sensing the potential conflict which could arise, the Florida Attorney General issued an opinion to limit this conflict:

> Information which reveals the identity of the victim of the crime of sexual battery of the victim of the crime of child abuse, which is contained in public records made part of a court file and not specifically closed by an order of the court is not excepted or exempted from the public disclosure and inspection provisions of [this section] pursuant to [the provision] thereof which directs that such public records are not exempted.

Records of Circuit Court Clerks, Op. Att'y Gen. No. 84-81 (Aug. 21, 1984).

> rule was 'suggest[ed]' by our prior cases, "[n]one of which . . . directly control[led] in *Daily Mail*. . . . The rule the Court takes as a given was thus offered only as a hypothesis in *Daily Mail*; it should not be so uncritically accepted as constitutional dogma.[67]

In fact, *Daily Mail* is distinguishable from the instant case because the press was protected when it revealed the identity of a *perpetrator* of a crime as opposed to a *victim* of a crime.[68] The Court expressly refused a broad holding that truthful publication may never by punished consistent with the First Amendment.[69] However, it also refused to set any standards in this "uncharted"[70] area. Privacy law therefore contrasts greatly with defamation law, where relatively detailed legal standards chart a course for individuals injured by damaging untruths.[71]

As such, inconsistent decisions will follow from the lack of a national liability standard in privacy law as injured plaintiffs seek retribution through invasion of privacy suits.[72]

The Court should have followed the guidelines from the law of defamation. In *New York Times Co. v. Sullivan*,[73] the Court eliminated the power of the states to impose strict liability for defamatory communications. It held that where the plaintiff was a public official, he could recover only upon a showing that the defendant acted with "actual malice."[74] The Court later interpreted the phrase "actual malice" to require the plaintiff (i.e., public official) to prove that the defendant (i.e., media) entertained serious doubts as to the truth of its publication.[75] The actual malice standard was subsequently extended to "public figure" plaintiffs.[76] A plurality of the Court extended the *Times-Sullivan* standard to all

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[67] *Florida Star*, 109 S. Ct. at 2615 (White, J., dissenting) (citations omitted).

[68] *Id.*

[69] *Id.*

[70] *Id.* at 2607 n.5.

[71] *Id. See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965); Rosenblatt v. Baer, 383 U.S. 75 (1966); Time, Inc. v. Hill, 385 U.S. 374 (1967); Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Herbert v. Lando, 441 U.S. 153 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[72] Sanford & Noble, supra note 12, at S7, col. 2. (By foregoing the opportunity to firmly establish law that the press can never be punished for publishing truthful information, the Supreme Court has permitted the potential for misuse of privacy law to circumvent the protections afforded the media.)

[73] 376 U.S. 254 (1964). (This was the Supreme Court's first major decision addressing constitutional limitations on imposing liability upon a media defendant.)

[74] Actual malice is defined as "knowledge that it [the statement] was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. at 280.

[75] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[76] Curtis Publ. Co. v. Butts, 388 U.S. 130, 162-65 (1967). The Court later clarified the differences between public officials/public figures and private persons. The "public [plaintiff has] voluntarily exposed [himself]

discussions of public concern, without regard to the status of the individuals involved.[77] However, with *Gertz v. Robert Welch, Inc.*,[78] the Court began to pull back some of its liberal protection for the media. It held that a person no longer becomes a public figure merely because he has become involved in a controversy of public interest.[79]

If a plaintiff is neither a public official nor a public figure, there is no constitutional requirement that he prove actual knowledge or reckless disregard of the truth.[80]

By permitting liability for invasion of privacy to be imposed only upon a showing of fault, the Court would protect both the media's First Amendment rights to print truthful information and an individual's right to privacy. Several courts, including the U.S. Supreme Court, have applied this reasoning. The U.S. Supreme Court, in *Time, Inc. v. Hill*[81] held that the *Times-Sullivan* standard of actual malice applied to "false light"[82] invasion of privacy cases. In *Taylor v. K.T.V.B., Inc.*,[83] the Idaho Supreme Court held that liability may only be imposed for disclosing embarrassing private facts if there is malice in the *Times-Sullivan* sense (i.e., if there is purpose to embarrass or if there is reckless disregard whether the disclosure will embarrass.) The Oregon Supreme Court expressly stated that fault is a prerequisite to an invasion of privacy cause of action.[84]

II. Balancing test applied improperly

The majority's three independent means for reversal, using the factual setting of the case in a balancing test, "miss the mark."[85] The Court improperly applied this balancing test to find that a rape victim's privacy is not a state interest of the highest order.

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to increased risk of injury from defamatory falsehood.... [A private individual] has not accepted public office or assumed an `influential role in ordering society.' He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by a defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (citations omitted).

[77] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) ("If a matter is a subject of general or public interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not `voluntarily' choose to become involved.") *Id.* at 43.

[78] 418 U.S. 323. "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree we find unacceptable." *Id.* at 346.

[79] *But cf. Rosenbloom*, 403 U.S. at 44, quoted *supra* note 77. (*Times-Sullivan* standard should be extended to all discussions of public concern, without regard to the person's status.)

[80] *Gertz*, 418 U.S. at 347.

[81] 385 U.S. 374, 380-91 (1967).

[82] *See supra* note 44 and accompanying text.

[83] 96 Idaho 202, 525 P.2d 984 (1974).

[84] Anderson v. Fisher Broadcasting Co., 300 Or. 452, 712 P.2d 803 (1986).

[85] *Id.* at 2617 (White, J., dissenting).

Justice Marshall supported the *Florida Star* holding with three separate considerations, in addition to the overarching "public interest, secured by the Constitution, in the dissemination of truth."[86]

The first consideration is that the *Daily Mail* formulation only protects publication of information lawfully obtained. Thus, when the information is obtained unlawfully, the government retains ample means to safeguard significant interests upon which the publication may impinge, including the protection of a rape victim's anonymity.[87]

If the information rests in the hands of a private citizen, the government can forbid its nonconsensual acquisition. This would place the publication of information received without consent outside the parameter of the *Daily Mail* formulation.[88] Documents can be classified and conditionally released to the proper persons.[89] The government may establish and enforce procedures ensuring information's redacted release and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination.[90] "Where information is entrusted to the government, a less drastic means that punishing truthful publication almost always exists for guarding against the dissemination of private facts."[91]

The second consideration underlying *Daily Mail* is the principle that punishing the press for its dissemination of publicly available information is unlikely to advance the State's interest.[92] Justice Marshall stated, "[W]here the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release."[93]

The final consideration is the "timidity and self-censorship" which may result from allowing the media to be punished for publishing certain truthful information.[94] When information is released without qualification by the government,[95] the media would be forced to withhold any information that could arguably be unlawful for publication.[96]

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[86] *Id.* at 2609. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. at 491 (quoting Garrison v. Louisianna, 379 U.S. at 73).

[87] *Florida Star*, 109 S. Ct. at 2609.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 2610.

[93] *Id.* (This seems to imply that the proper defendant would have been the Department, the "source" of the report's release.)

[94] *Id.* (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. at 496.)

[95] *Id.*

[96] *Id.* The Court states that "A contrary rule, depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material

Justice Marshall's opinion does not rule out the possibility that there may be situations in which imposing civil sanctions on the publication of a rape victim's name may be overwhelming necessary to protect the State's interests.[97] However, *Florida Star* was not such a case.[98] Its reasons were as follows: The Star obtained B.J.F.'s name when the Sheriff's Department failed to follow its own procedures[99] and placed the information in the press room. Justice Marshall felt that imposing sanctions on the press for subsequent publication is not a narrowly tailored means of safeguarding the privacy of the victim. Self-censorship would most likely result when the press is punished for reproducing a government press release.[100]

The facts demonstrate that the government's release was *not* "without qualification."[101] The Star's own reporter conceded at trial that the crime incident report that inadvertently included B.J.F.'s name was placed in a room that contained signs making it clear that the names of rape victims were not matters of public record and were not to be published.[102] The reporter indicated that she understood that she was not to take down B.J.F.'s name, and that she could not take the information from the police department.[103] Thus by her own admission, the posting of the incident report did not convey to the reporter that the government considered dissemination lawful.[104]

Florida attempted to protect the rape victim's privacy by enacting nondisclosure statutes.[105] Florida had done precisely what the Court suggested it do in *Cox Broadcasting* to protect the privacy of rape victims: "respond [to the challenge] by means which *avoid* public documentation or other exposure of private information."[106] Florida amended its public records statute to exempt rape victims names from disclosure,[107] and forbade its officials from releasing such information.[108] "This case presents a far cry, then, from *Cox Broadcasting* or *Oklahoma Publishing*, where the States asked the news media not to publish information it had made generally available to the public; here, the State is not asking the media to do the State's job in the first instance."[109]

Although statutory restrictions on public records could raise serious questions

arguably unlawful for publication."

[97] *Id.* at 2611.

[98] *Id.* "Imposing liability for publication under the circumstances of this case is too precipitous a means of advancing these interests to convince us that there is a `need' within the meaning of the *Daily Mail* formulation for Florida to take this extreme step."

[99] These procedures were established by FLA. STA. §§ 119.07(3)(h) and 794.03. *See supra* notes 15, 66.

[100] *Florida Star*, 109 S. Ct. at 2612.

[101] *Id.* at 2616 (White, J., dissenting).

[102] *Id.* (White J., dissenting) (citing to 2 Record at 113, 115, 117).

[103] *Id.* (White, J., dissenting).

[104] *Id.* Justice White states that the "Court's suggestion to the contrary is inapt." *Id.* (White, J., dissenting).

[105] *Id.* at 2616 (White, J., dissenting). *See supra* notes 15, 66.

[106] *Id.* (White, J., dissenting).

[107] FLA. STAT. ANN. § 119(3)(h) (West 1982 & Supp. 1990). *See supra* note 44 and accompanying text.

[108] FLA. STAT. ANN. § 794.03 (West 1976). *See supra* notes 65-66 and accompanying text.

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

as to the constitutionality of such provisions per the freedom of press guaranties,[110] it also has been indicated that sealing judicial records did not operate as a restriction on freedom of the press.[111] The right of privacy has been expressly noted as a significant factor in the context of restricting public access to judicial records. Thus, the sanctity of the right of privacy was invoked by the courts as justification for the sealing of judicial records in certain cases.[112]

In *Estate of Hearst*,[113] the court held that the temporary sealing orders under scrutiny did not operate as a prior restraint on the press.[114] It rejected news reporters' arguments that orders sealing the probate records of the estate of a member of a well-known, wealthy family constituted a prior restraint on their First Amendment rights to gather and publish information in the public domain.[115] The court held that since neither the press nor the petitioning reporters were named in the protective orders, they were not directly restrained from publishing information.[116]

Justice Marshall also objected to Florida's use of negligence per se to impose liability following a violation of Florida Statute section 794.03.[117] The common law definition of the tort of invasion of privacy requires a showing that the facts revealed are those that a reasonable person would find highly offensive.[118] Negligence per se permits no such case by case finding. On the contrary, liability follows automatically from publication, regardless of whether the identity of the victim was already known in the community or whether her identity is reasonably a subject of public concern.[119]

Justice Marshall also observed that a negligence per se standard precluded any showing of fault -- a knowing publication of the private facts that would offend a reasonable person.[120] This "engender[ed] the perverse result that truthful publications are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures which require proof of at least negligence."[121]

Justice White countered the majority's argument that the statute imposed strict liability on the Star. He pointed out that the jury, in order to award punitive damages,

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[110] Times-Call Publishing Co. v. Wingfield, 159 Colo. 172, 410 P.2d 511 (1966).
[111] *See, e.g.*, Dansiger v. Hearst Corp., 304 N.Y. 244, 107 N.E.2d 62 (1952); Estate of Hearst, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977).
[112] Application of Lascaris, 65 Misc. 2d 787, 319 N.Y.S.2d 60 (1971); Tomlinson v. Tomlinson, 338 Mich. 274, 61 N.W.2d 102 (1953).
[113] 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977).
[114] *Id.* at 783, 136 Cal. Rptr. at 824.
[115] *Id.* at 782, 136 Cal. Rptr. at 823.
[116] *Id.* at 783, 136 Cal. Rptr. at 824.
[117] *Florida Star*, 109 S. Ct. at 2612.
[118] RESTATEMENT (SECOND) OF TORTS § 652D (1981).
[119] *Florida Star*, 109 S. Ct. at 2612.
[120] *Id.*
[121] *Id.*

found that the Star had recklessly disregarded the rights of others.[122] This level of fault is even higher than *Gertz's* minimum requirement of a showing of negligence when a media defendant defames a private person,[123] and it follows that the Star was not held strictly liable.[124]

Justice White also attacked the final branch of the majority opinion -- the argument that section 794.03 is underinclusive because it allows neighborhood gossips to escape unscathed by their revelation of a rape victim's name.[125] The Court did not look at the entire context of Florida's privacy law. Florida does recognize the tort of publication of private facts, and the neighborhood gossip would be held liable.[126]

CONCLUSION

In *Florida Star*, the United States Supreme Court rejected an opportunity to hold that *truthful* publication is constitutionally protected per se or that states may never punish publication of the name of a victim of a sexual offense. The Court, in a limited holding, provided no guidelines to lower courts for deciding future invasion of privacy cases. In holding that a rape victim's privacy was *not* a state interest of the highest order, which deserved protection from invasions by the media, one must wonder what the Court would consider a "state interest of the highest order." Requiring a specified level of fault as a prerequisite to imposing liability on a media defendant for invading an individual's privacy will protect the First Amendment rights of the press without obviating the common law right to privacy.

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[122] *Id.* at 2616 (White, J., dissenting). A plaintiff seeking to recover punitive damages in an invasion of privacy action has the burden of proving the defendant acted with malice. *See, e.g.*, Thompson v. Jacksonville, 130 So. 2d 105 (Fla. Dist. Ct. App. 1961); Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (1962); Genesis Publications, Inc. v. Goss, 437 So. 2d 169 (Fla. Dist. Ct. App. 1983).

[123] Gertz v. Robert Welch, Inc., 418 U.S. at 347-48.

[124] *Florida Star*, 109 S. Ct. at 2617 (White, J., dissenting).

[125] *Id.* (White, J., dissenting).

[126] *See e.g.*, Cape Publications, Inc. v. Hitchner, 514 So. 2d 1136, 1137-38 (Fla. Dist. Ct. App. 1987); Loft v. Fuller, 408 So. 2d 619, 622 (Fla. Dist. Ct. App. 1981). *See also* 19 FLA. JUR. 2d *Defamation and Privacy* §§ 143-57 (1980).