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Identifying the Rape Victim: A Constitutional Clash between the First Amendment and the Right to Privacy, 18 J. Marshall L. Rev. 987 (1985)

Ellen B. Fishbein

IDENTIFYING THE RAPE VICTIM: A CONSTITUTIONAL CLASH BETWEEN THE FIRST AMENDMENT AND THE RIGHT TO PRIVACY

As long as its reports are accurate[1], the media has a constitutional privilege to report information of public record.[2] The press has utilized this source-based privilege to reveal the names of rape victims that are found in official records.[3] Notwithstanding the acknowledged right of a free and vigorous press, it is of questionable propriety for the media to disclose the identity of a sexual assault victim.[4] Publication of a rape victim's name severely invades the personal privacy interests of the victim and exposes the victim to a variety of social and psychological problems.[5] Therefore, the rape

1. The constitutional privilege to publish documented facts extends to the press where its judicial reports are true, but not when its judicial reports are false. Time, Inc. v. Firestone, 424 U.S. 448, 455 (1976) (press can be liable for defamation if it relied on judicial records which were inaccurate).

2. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975) (publication of accurate reports of judicial proceedings is a privilege under the first amendment against a cause of action for invasion of privacy). *See* Montesano v. Donrey Media Group, 99 Nev. 644, 649, 668 P.2d 1081, 1085 (1983) (liability does not attach for disseminating facts that are already made public), *cert. denied*, 104 S. Ct. 2172 (1984); Hubbard v. Journal Publishing Co., 69 N.M. 473, 474, 368 P.2d 147, 148 (1962) (since court records are in the public domain, the published identity of a child rape victim was not actionable).

3. As recently as March 23, 1984, NBC's "Today" morning news program revealed the identity of the rape victim in the highly publicized New Bedford gang rape case, also referred to as Big Dan's Barroom Rape Case. Allegedly, four men assaulted the rape victim in a tavern in New Bedford while the patrons cheered. Friendly, *Naming of Rape Victim Spurs Debate*, N.Y. Times, April 11, 1984, at Y14, col. 1. In another recent case, the press revealed the names of four victims in a series of rapes in Connecticut. The Journal-Inquirer of Manchester, Connecticut, published the victims' names which were obtained from police records. The editor of the Journal-Inquirer claimed the disclosure served a legitimate public interest and protected the defendant rapist from a presumption of guilt before proven innocent. Frank, *Naming Victims, Paper Feels Heat in Rape Case*, A.B.A.J., Sept., 1984, at 28.

4. There is no social value in disclosing the rape victim's identity. Any such disclosure can detrimentally affect the rape victim's well-being for years to come. Doe v. Sarasota-Bradenton Fla. Television Co., 436 So.2d 328, 331 (Fla. Dist. Ct. App. 1983).

5. Although psychological harm is not sufficient cause for recovery in a privacy claim, courts sympathize with the rape victim's grevious suffering. *See, e.g.*, Doe v. Sarasota-Bradenton Fla. Television Co., 436 So.2d 328, 331 (Fla. Dist. Ct. App. 1983) (publicizing the name can cause irreparable harm); Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 177, 584 P.2d 1310, 1317 (1978) (it cannot be that important to the freedom of the press to reveal a child rape victim's name). *See also* Cape Publications, Inc. v. Bridges, 423 So.2d 426, 427 (Fla. Dist. Ct. App. 1980) (bad taste for newspaper to print a photograph showing a naked

victim's right to anonymity is not adequately protected.

Since 1963, the unwarranted publication of a rape victim's name has constituted the basis of a tort action for invasion of personal privacy, namely, the public disclosure of a private fact.[6] Beginning in 1975, however, where the reported rape is of public record, the victim's right to anonymity is foreclosed.[7] Thus, based on the Supreme Court's holding in *Cox Broadcasting Corp. v. Cohn*,[8] the rape victim is twice assaulted: once as the victim of a sex crime and then as the victim of a callous and impractical press.[9]

Although courts generally recognize the rape victim's right to be free from humiliating and harmful publications of her name, it is a right of privacy that often goes unprotected because of the first amendment guarantee of freedom of the press.[10] Moreover, the Constitution does not mandate media responsibility.[11] In light of the media's power to exercise its constitutional privilege to publish facts of public record, the rape victim must frequently rely on the discretion and judgment of those persons who decide what information to print or broadcast.[12] The rape victim should be afforded a

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woman fleeing from her estranged husband), *cert. denied*, 104 S. Ct. 239 (1983); Rawlins v. Hutchinson Publishing Co., 218 Kan. 295, 305, 543 P.2d 988, 996 (1975) (ill-advised and in poor taste to publish a police officer's past misdeed); Roshto v. Hebert, 439 So.2d 428, 432 (La. 1983) (a careless and insensitive press revealed information about a man's past misdeed); Hood v. Naeter Bros. Publishing Co., 562 S.W.2d 770, 771-72 (Mo. Ct. App. 1978) (unwise for name and address of sole witness to a violent crime to be printed while criminals were still at large).

6. *See* Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502, 505 (4th Cir. 1963) (publication of identity of sexual assault victim was an invasion of privacy for which victim was entitled to recover). *But see* Hubbard v. Journal Publishing Co., 69 N.M. 473, 475, 368 P.2d 147, 148-49 (1962) (newspaper article that identified plaintiff as the victim of a sexual assault by her older brother was held to be a privileged report of information found in public records and, thus, not an invasion of the victim's right of privacy).

7. "[T]he interests in privacy fade when the information involved already appears on the public record." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95 (1975). In *Cox*, a television station reported the rape victim's name and, thus, identified Cynthia Cohn as the 17-year-old who was brutally raped and subsequently died. *Id.* at 474 n.5.

8. 420 U.S. 469 (1975).

9. Rape is the ultimate violation of an individual, short of homicide. Coker v. Georgia, 433 U.S. 584, 597 (1977).

10. The first amendment of the U.S. Constitution provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. 1.

11. The virtue of the press cannot be legislated. Rawlins v. Hutchinson Publishing Co., 218 Kan. 295, 305, 543 P.2d 988, 996 (1975) (the insensitivity of the press was not sufficient grounds for a privacy action even though the court determined that the press acted in poor taste when it "dredged" up a police officer's past misdeed).

12. The press is not liable for its insensitivity or carelessness when the publication is truthful and accurate. Roshto v. Hebert, 439 So.2d 428, 431-32 (La. 1983) (in dictum, the court speculated that malice can give rise to liability even if the report is accurate). *Accord* Hyde v. City of Columbia, 637 S.W. 2d 251, 273 (Mo. Ct. App. 1982) (crime victim prevailed on a negligence theory against

premium of protection because of the adverse impact that ensues when her identity is disclosed.[13] It is evident that there is a need to reconcile the constitutional privilege afforded the press with the privacy rights afforded the rape victim.

This comment seeks to determine whether courts can constitutionally shield the rape victim's identity.[14] First, this comment examines the competing interests involved in the publication of a rape victim's identity. In an attempt to balance these competing interests, this comment discusses the rape victim's right of personal privacy,[15] the press' fundamental right to publish what is newsworthy,[16] and the states' dual interests in prosecuting rapists and shielding the rape victim from public scrutiny.[17] This comment subsequently analyzes the United States Supreme Court decision that created the presumption that publicly documented information is newsworthy.[18] An analysis of this presumption gives rise to the

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newspaper for its accurate report of victim's name that was of public record), *cert. denied sub nom.* Tribune Publishing Co. v. Hyde, 459 U.S. 1226 (1983).

13. *See infra* note 151.

14. It was held in Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502, 504 (4th Cir. 1963), that "identity" could be synonymous with "name" for purposes of a statute that prohibited publication of a rape victim's name. Although the rape victims in *Nappier* were not identified by name, the picture of the victims' vehicle, in effect, divulged the names of the rape victims. *Id.* at 504. For further discussion on what constitutes identity, see Cohen v. Herbal Concepts, Inc., 100 A.D.2d 175, 191, 473 N.Y.S.2d 426, 428-32 (1984) (photograph depicting rear and side of two women, but not their faces, was sufficient to create a fact question for jury determination as to identification because it revealed recognizable physical characteristics).

15. One Florida court clearly recognized circumstances that give rise to the right of the rape victim to remain anonymous:

> Prior to this trial, appellant was simply an ordinary citizen; she lacked fame and prominence . . . but she had the unhappy circumstance of becoming a victim of a crime. The publication added little or nothing to the sordid and unhappy story; yet, that brief little-or-nothing addition may well affect appellant's well-being for years to come.

Doe v. Sarasota-Bradenton Fla. Television Co., 436 So.2d 328, 331 (Fla. Dist. Ct. App. 1983).

16. *See infra* note 32 and accompanying text.

17. Rape victims are more likely to come forward and testify if there is no fear of public scrutiny. Additionally, the quality of a victim's testimony is enhanced if the press is not present. *See* Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 618-20 (1982) (Burger, C.J., dissenting) (press should not be present while child rape victim testifies). The majority in *Globe* held that state interests in encouraging minor victims of rape to report crimes were insufficient to overcome a first amendment attack. *Id.* at 610. Prior to *Globe*, the Supreme Court had excepted a child rape victim's testimony from exposure to the press. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 600 n.5 (1980). The *Richmond* Court noted that the "sensibilities of a youthful prosecution witness in a rape trial" did not necessarily mandate constitutional considerations. *Id.* In *Globe*, the Supreme Court changed its position. *Globe*, 457 U.S. at 604-05 (1982) (the criminal system of justice cannot favor the child victim of a sex crime in light of the first amendment).

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

last issue of whether the Supreme Court further insulated the press from liability for printing a rape victim's name when it is publicly documented.[19] Finally, this comment concludes with suggestions to state legislatures and courts to advance the protection of the rape victim's anonymity.

THE RAPE VICTIM'S RIGHT TO PRIVACY

Rape victims have frequently sued the press for publication of their names under claims of invasion of privacy; specifically, for publication of a private fact.[20] A private fact must be confidential and of no legitimate public concern in order to be actionable.[21] If a private fact is already known or is of public record,[22] then publication of that fact will not constitute grounds for an invasion of privacy action. In an invasion of privacy suit, the rape victim

19. The Supreme Court left undecided whether the courts can protect the individual from disclosure of private facts other than those that are of public record, which would be highly offensive to a reasonable person and are of no legitimate concern. *Id.* at 497 n.27. *See* RESTATEMENT (SECOND) OF TORTS § 652D (h)(g) (1977). *But see* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104-06 (1979) (there is a constitutional privilege for disclosing accurate information from nongovernmental sources which includes information properly obtained in routine reporting practices); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845-46 (1978). In *Landmark*, the Supreme Court extended the press' constitutional privilege to publish accurate reports derived from confidential proceedings. *Id.* at 841. *Landmark* involved a state statute that prohibited disclosure of any state judge who was under investigation. *Id.* at 831. A newspaper published an accurate report of such a pending investigation, naming the judge. *Id.* The Court held that the state could not criminally sanction disclosure of truthful facts pertaining to a closed governmental proceeding. *Id.* at 845.

20. The tort for invasion of privacy is divided into four branches. They are: misappropriation of someone's name or likeness, intrusion into a person's private life, placing a person in a false light, and public disclosure of private facts. *See* RESTATEMENT (SECOND) OF TORTS § 652A-E (1977). The required elements of a tortious invasion of privacy based on public disclosure of private facts are 1) a public disclosure, 2) that the facts disclosed are private facts, and 3) that the disclosure is offensive and objectionable to a reasonable person of ordinary sensibilities. *See* Forsher v. Bugliosi, 26 Cal. 3d 792, 808-09, 608 P.2d 716, 725, 163 Cal. Rptr. 628, 637 (1980).

21. Often the disclosed embarrassing fact is found to be of legitimate public concern. The media defendant, therefore, is usually successful in asserting a newsworthiness defense against a privacy claim. Furthermore, the courts will likely continue to be generous in permitting a newsworthiness defense whenever privacy actions implicate the first amendment. *See generally* Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting*, 16 STAN. L. REV. 107, 115 (1963). However, all privacy claims for publicity given to a private fact do not necessarily bring the first amendment into play. Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1762 (N.J. Super. 1982) (rape victim's claim against hospital did not implicate freedom of press).

22. For examples of facts held in the public domain see Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 193, 238 P.2d 670, 671 (1951) (member of marine corps.); Bell v. Courier Journal & Louisville Times Co., 402 S.W.2d 84, 86 (Ky. 1966) (tax delinquency); Meetze v. Associated Press, 230 S.C. 330, 333-34, 95 S.E.2d 606, 607-08 (1956) (dates of birth and marriage).

commonly asserts that her name is private and not of public interest, and that disclosure would be highly objectionable to a reasonable person.[23] Irrespective of the gravity of the crime of rape and the traumatic consequences of having one's name broadcast to the world, unconsented disclosures of rape victims' names have become routine.[24] Since 1975, moreover, public disclosures of victims' identities have not been actionable under an invasion of privacy claim.[25]

The principle element of a cause of action for the publication of a private fact is that the disclosed private fact is not of legitimate concern to the public. Any matter which is considered a legitimate public concern is said to be newsworthy.[26] The first amendment guarantees that if a fact is newsworthy, it is publishable and, therefore, is not actionable as an invasion of privacy.[27] The issue is

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23. The rape victim feels shame and a loss of dignity when she is raped. United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977) (the intrusion of the rape crime is both physical and psychological and society should attach the deepest sense of privacy to the intrusion), *cert. denied sub nom.* Latimore v. Sielaff, 434 U.S. 1076 (1978). There are occasions when publishing a name benefits a state interest. *See* Office of the Attorney General of California, No. 83-906, slip op. (Oct. 11, 1984) (available July 1, 1985, on LEXIS, All A.G. file) (publicizing names of absent parents who failed to pay child support).

24. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 473-74 (1975); Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502, 503 (4th Cir. 1963); Doe v. Sarasota-Bradenton Fla. Television Co., 436 So.2d 328, 329 (Fla. Dist. Ct. App. 1983); Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1761 (N.J. Super. 1982); Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 171-72, 584 P.2d 1310, 1311-12 (1978); Hubbard v. Journal Publishing Co., 69 N.M. 473, 473, 368 P.2d 147, 147 (1962); Ayers v. Lee Enters., Inc., 277 Or. 527, 529, 561 P.2d 998, 999 (1977); State v. Evjue, 253 Wis. 146, 148-49, 33 N.W.2d 305, 306 (1948).

25. Privacy claims are generally subordinate to first amendment rights when the defendant is the media. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975). However, in Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760 (N.J. Super. 1982), one of the defendants was a hospital. *Id.* at 1761. The court in *Griffith* held that the rape victim's privacy claim against the hospital did not undermine freedom of speech because the hospital records containing the victim's name were confidential pursuant to state law. *Id.* at 1762.

26. The court defines what newsworthy is. For example, *Cox* makes a fact of public record automatically newsworthy. 420 U.S. 469, 495 (1975). Public record means a document, book, paper, photograph, file, or sound recording recorded pursuant to state law. Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted To Know About Public Records But Were Afraid to Ask*, 57 IOWA L. REV. 1163, 1167-69 (1972). Courts do not agree on whether a police report is a public record. *See, e.g.*, Hyde v. City of Columbia, 637 S.W.2d 251, 263 (Mo. App. 1982) (law enforcement form was confidential, but a police arrest report was in public domain), *cert. denied sub nom.* Tribune Publishing Co. v. Hyde, 459 U.S. 1226 (1983); Office of the Attorney General of Texas, Open Records Dec., No. 339, slip op. (Dec. 31, 1982) (available July 1, 1985, on LEXIS, All A.G. file) (interprets state statute as exempting from public domain any information on police report that identified a rape victim). *Contra* Ayers v. Lee Enters., Inc., 277 Or. 527, 530-31, 461 P.2d 998, 1001 (1977) (name and address of rape victim on police record open to public inspection in accordance with Oregon law, even though law was changed subsequent to rape victim's suit).

27. *See* Sipple v. Chronical Publishing Co., 154 Cal. App. 3d 1040, 1049, 201 Cal. Rptr. 665, 670 (1984) (publication did not constitute disclosure of private

whether a rape victim's name is newsworthy and, if it is not, whether it is entitled to constitutional protection from publication.[28] The answer ultimately depends upon how a given court chooses to define and apply the term "newsworthiness."[29]

FIRST AMENDMENT RIGHTS: NEWSWORTHINESS AND RIGHT OF ACCESS

Newsworthiness is a vague concept which has consistently perplexed courts because it is often viewed as a factor that is too subjective and not conclusive.[30] Newsworthiness, in its broadest sense, reflects an almost unqualified public right to be informed;[31] whereas in its strictest sense, newsworthiness imposes an emphasis on the individual's right to privacy. The press is constitutionally privileged to facilitate the public in its endeavor to be informed about newsworthy affairs.[32] From this broad concept of newsworthiness, three guidelines have emerged for evaluating a legitimate public interest.[33] These guidelines are the source-based privilege,[34]

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fact when newspaper revealed homosexuality of man who averted an assassination attempt on former President because plaintiff's sexual orientation was well known and assassination attempt was of public interest).

28. A reasonable limitation on the press to protect privacy does not infringe on first amendment rights. Deaton v. Delta Democrat Publishing Co., 326 So.2d 471, 474 (Miss. 1976) (children should have been protected from a publication regarding a public school class for mentally retarded children because the fact that a child has limited mental capabilities is a delicate, private matter and of no legitimate concern to the public).

29. The idea of what is newsworthy is broader today than what was implied by the famous Warren and Brandeis article on the emerging tort of privacy. *See* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 217 (1890). At the time of the Warren and Brandeis article, the written word was the supreme means of communication, whereas, the present view is that the spoken work is as pervasive. Winegard v. Larsen, 260 N.W.2d 816, 819 (Iowa 1977).

30. Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting From The Publication of Accurate Information*, 52 UMKC L. REV. 421, 444-45 (1984). In fact, the Supreme Court, in *Cox*, may have abandoned the concept of newsworthiness. *Id.* at 445.

31. The Mikeljohn theory on the first amendment provides that the privilege is not the press' right to speak, but the public's right to know. Bloustein, *Privacy Tort Law And The Constitution: Is Warren And Brandeis' Tort Petty And Unconstitutional As Well?* 46 TEX. L. REV. 611, 624 (1968). An informed public is essential to a thriving democracy. *See* Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 COLUM. L. REV. 1298, 1314 (1984) [hereinafter cited as *Press Passes and Trespasses*]. On the other hand, "to share everything could jeopardize the sharing of anything." A. WESTIN, PRIVACY AND FREEDOM 42 (1968).

32. The press provides a checking function by serving as the public's watchdog. *See Press Passes and Trespasses*, *supra* note 31, at 1320 (press is an effective medium by which to watch government abuses and, thus, is performing a public benefit).

33. Public interest in privacy suits often involves the feature known as lapse of time which considers the continuing interest in an "old fact." Briscoe v. Reader's Digest Ass'n, 4 Cal.3d 529, 537-39, 483 P.2d 34, 40-41, 93 Cal. Rptr. 866, 872-73 (1971). In *Briscoe*, the court considered whether a fact can lose its public

the logical nexus theory,[35] and the three-part newsworthiness test.[36]

The Supreme Court has mandated that there is a constitutional source-based privilege of the press to publish an otherwise private fact contained in public records.[37] The source-based privilege operates on the legal fiction that if the source containing the private fact is of public record, then that fact is presumed to be newsworthy.[38] Newsworthiness is presumed because official records are in the public domain and are open to inspection and copy. Based on the first amendment, the press is free to disseminate information revealed in a public record.[39] It is argued, therefore, that the press is

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status and become a private fact under the circumstances where an individual who committed a past misdeed has since rehabilitated himself. *Id.* at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875. Since the plaintiff had reformed and family and friends did not know about plaintiff's criminal past until the defendant publisher revealed the past misdeed, the *Briscoe* court concluded there was no justification for dredging up an "old fact." *Id.* at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876. *See* Office of the Attorney General in California, No. 83-906, slip op. (Oct. 11, 1984) (available July 1, 1985, on LEXIS, All A.G. file) (tortious disclosure of old facts, depends on degree of dissemination). *See also* Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 188, 132, 188 Cal. Rptr. 762, 772 (1983) (court relied on *Briscoe* test to determine newsworthiness). *Contra* Beruan v. French, 56 Cal. App. 3d 825, 829, 128 Cal. Rptr. 869, 871 (1976) (refused to follow *Briscoe* when a reformed criminal ran for office in his union); Rawlins v. Hutchinson Publishing Co., 218 Kan. 295, 303-04, 543 P.2d 988, 995 (1975) (stated that *Cox* would dictate a different result in *Briscoe* because name of plaintiff in *Briscoe* was of public record).

34. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494 (1975) (public records are a source of information privileged under first amendment for purposes of publication).

35. *See, e.g.*, Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1762 (N.J. Super. 1982) (court found a logical nexus existed between the private fact and the publication in that the rape victim's name was substantially relevant to newspaper article depicting the rape). *See also* Gilbert v. Medical Economics Co., 665 F.2d 305, 309 (10th Cir. 1981) (article on medical malpractice revealed private fact that physician had undergone psychiatric care and had a history of marital strife; court found a logical nexus between the fact that plaintiff was emotionally unstable and the article on medical malpractice); Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) (logical nexus existed in that plaintiff's private facts about her marital problems substantially related to the content of autobiography by former brother-in-law). *But see* Deaton v. Delta Democrat Publishing Co., 326 So.2d 471, 474 (Miss. 1976) (fact that plaintiff's children were mentally retarded was relevant to the subject matter of the article on special education classes, but constituted an invasion of privacy).

36. For examples of the application of the three-part newsworthiness test, see Forsher v. Bugliosi, 26 Cal. 3d 792, 808-09, 608 P.2d 716, 725, 163 Cal. Rptr. 628, 637 (1980); Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 541, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971); Diaz v. Oakland Tribune Inc., 139 Cal. App. 3d 118, 132, 188 Cal. Rptr. 762, 772 (1983).

37. *See supra* note 2.

38. See text accompanying notes 86-88 for a discussion of the legal fiction that any single public record imputes wide-spread knowledge despite the volume of information documented in our society.

39. There is a difference between trying to prevent the press from gathering the information in the first place, and preventing the dissemination of infor-

only making known to the public what is already constructively known. As a consequence, an item that is not necessarily of legitimate public concern is presumed newsworthy simply by virtue of its presence in a public record.

An independent concept has emerged in some jurisdictions that newsworthiness encompasses all facts in the public domain, including information not in public records, but which has a logical nexus to information already in the public domain.[40] The logical nexus theory merely requires that the private fact relate to the newsworthy content of the publication.[41] Therefore, under the logical nexus theory, even though a private fact is not of public record, the fact may be published if it pertains to the subject matter of a newsworthy article.[42]

Finally, some jurisdictions follow a narrower view of newsworthiness and apply a three-part newsworthiness test in cases involving publication of private facts.[43] The first part of the test addresses whether there is any social value in publishing the private fact.[44] The second part addresses whether the nature of the intrusion into a private life is offensive, morbid, or sensational.[45] The third part

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mation that has been learned from a public record. Supreme Court decisions subsequent to *Cox* have expanded the constitutional right to gather information. *See, e.g.*, Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 606-10 (1982) (right of access to hear child rape victim's testimony); Chandler v. Florida, 449 U.S. 560, 584-86 (1981) (Constitution does not prohibit electronic media in the courtroom).

40. As long as there is a logical relationship between the complaining party and the newsworthy matter, there is no invasion of privacy. Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) (logical nexus exists even if matter relating to article was not newsworthy in and of itself).

41. *Id.* at 397.

42. Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1762 (N.J. Super. 1982) (where freedom of the press is not in conflict with the rape victim's right of privacy, determine whether the victim's name lends credibility to the story).

43. The three parts of the test are: 1) the social utility of the published fact, 2) the nature and extent of the intrusion into the individual's private life, and 3) the degree of publicity sought by the complaining party. Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 132, 188 Cal. Rptr. 762, 772 (1983).

44. A fact that is not highly offensive to a reasonable person may have social value. *See, e.g.*, Davis v. Forbes, 10 Med. L. Rptr. 1272, 1274-75 (N.D. Tex. 1984) (failure to show that publication of name, included in newsworthy list of 400 wealthiest persons in America, would disclose a fact highly offensive to a reasonable person). *See* Johnson v. Harcourt, Brace, Jovanonvich, Inc., 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (1974). In *Johnson*, a newspaper reported that a janitor received a $10,000 reward for returning a lost bankroll, to the scorn of his neighbors. *Id.* at 893, 118 Cal. Rptr. at 380. The article was reprinted in a textbook. *Id.* at 883, 118 Cal. Rptr. at 373. The court rejected the janitor's privacy claim for publicity given to private facts because the publication had social value in that it highlighted a theme of honesty. *Id.* at 893, 118 Cal. Rptr. at 380.

45. The test for determining newsworthiness is whether the intrusion is a morbid and sensational prying into private lives for its own sake. Virgil v. Time, Inc., 527 F.2d 1122, 1126 (9th Cir. 1975) (it is the intrusion into the private

addresses the degree to which a complainant voluntarily entered the public eye.[46] A court will generally apply the three-part test once it is established that the published fact is not of public record and, therefore, is not presumed newsworthy under a source-based privilege. Courts, however, have never applied the three-part test to a rape victim's claim of an invasion of privacy for publication of her identity. Clearly, under the three-part test, the inclusion of a rape victim's name in a publication would not be newsworthy if it was not contained in a public record.

Additionally, to be privileged under the media's first amendment rights, the publication of a private fact must not only be newsworthy, but must be properly obtained and accurate.[47] Information which is obtained from a judicial proceeding, such as a rape trial, is properly obtained if gathered in accordance with lawful reporting customs and practices.[48] Minimal restraints on the press' right to gather information at a judicial proceeding increases the likelihood of publication of that information.[49] Lack of judicial orders restraining television coverage in the courtroom expands the media's

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life that is controlling, not the manner in which the information was obtained), *cert. denied*, 425 U.S. 998 (1976).

46. *See, e.g.*, Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 132, 188 Cal. Rptr. 762, 772 (1983) (embarrassing fact kept from all but immediate family and close friends); Deaton v. Delta Democrat Publishing Co., 326 So.2d 471, 474 (Miss. 1976) (children identified as mentally retarded did not voluntarily put themselves in public eye and, therefore, were entitled to bring an action for invasion of privacy). *See also* Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496, 501 (1966) (activity open to public view, like exotic dancing on a public stage, cannot be actionable under publication given to private facts).

47. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

48. The consequences can be grave for the press where there is liability for disseminating the truth because the decision in *Cox* did not make absolute that the press cannot be civilly or criminally liable for disclosing a true fact. *Id.* at 490.

49. Prior restraint orders in judicial proceedings are rare when the orders rely upon a protectable interest such as invasion of privacy. Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607-08 (1982). For example, it is unconstitutional to restrain the press from hearing a child rape victim testify at a judicial proceeding despite the need to shield the child from trauma and embarrassment. *Id.* at 607-10. Prior restraint orders are subject to very narrow exceptions and an invasion of privacy is not among them. Here the presumption is against restraints under the guarantee of freedom of expression. *Id.* at 604. However, courts can restrain media access to evidentiary records as opposed to transcripts of a rape victim's testimony. *In re* Application of KSTP Television, 504 F. Supp. 360 (D. Minn. 1980). In *KSTP*, the evidentiary record was a videotaped account of the actual assault on a rape victim. *Id.* at 361. The court denied release of the videotapes to the press in deferrence to the privacy rights of the rape victim. *Id.* at 364. The *KSTP* court reasoned that release of the tapes would only cater to the public's prurient interests and exploit the victim's right to retain her dignity. *Id.*

> The privacy rights of . . . the unfortunate victim must be respected. As a cooperating key witness in the prosecution, she sacrificed much of herself and overcame a challenge to her personal dignity to respond as a good citizen to the duty to testify. She did so with candor and courage. She is enti-

access to judicial proceedings.[50] Consequently, the ultimate degradation of a rape victim can occur through television coverage.

The media has been allowed to broadcast a rape trial on television. As a means of gathering information at a trial proceeding, most courts have made no distinction between the presence of the press and the presence of electronic media.[51] Televising rape trials has made it more difficult to protect the rape victims' anonymity. Recently, a cable news network televised a rape trial three hours a day for three weeks.[52] Even though the victim's face was not shown, her name was reported throughout the broadcast and was subsequently rebroadcast on a national television network.[53]

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tled to the consideration and protection of the court from improper out of court dissemination of her forced embarrassing experiences.

Id. at 364.

50. Since Chandler v. Florida, 449 U.S. 560 (1981), television cameras are permitted in the courtroom to further facilitate the public in its endeavor to be informed and educated about newsworthy events. *Id.* at 565-66. Although television coverage is not constitutionally prohibited it does not mean it is constitutionally mandated. Nixon v. Warner Communications, Inc., 435 U.S. 589, 609-10 (1978) (there is no first amendment right to record and broadcast the testimony of a live witness).

51. The electronic media includes television, film, videotape, cameras, and radio broadcast equipment. *In re* Post-Newsweek Stations Fla., Inc., 370 So.2d 764, 765 n.1 (Fla. 1979). In Florida, a test has been developed to measure whether the electronic media should be allowed at a trial proceeding. It is called the "qualitatively different" test. State v. Green, 395 So. 2d 532, 535 (Fla. 1981). The qualitatively different test prohibits television coverage if there will be a wider dissemination of information regarding the trial proceedings. *Id.* at 536-37. Traditional means of media coverage such as sketch artists and newspaper reporters are preferred over television coverage if televising prejudices the trial participants in a manner "qualitatively different" from that caused by traditional coverage. *Id.* at 536. According to the *Green* court, rape proceedings meet the "qualitatively different" test and therefore television cameras should be excluded. *Id.* at 537. *But see* Doe v. Sarasota-Bradenton Fla. Television Co., 436 So.2d 328, 329 (Fla. Dist. Ct. App. 1983) (permitting television cameras to broadcast rape trial).

52. The television ratings were high and viewer mail was 5 to 1 in favor of televising the rape trial. Kaplan, *Should Rape Trials Be Televised?*, N.Y. Times, June 30, 1984, at W13, col. 1 (rape trials, like soap operas, have dramatic appeal and are enormously entertaining). Cable News Network (CNN) broadcasted a rape trial in Massachusetts and seeks to televise a child molestation case in California. *Id.* Televising a rape trial, however, perpetuates the woman as a sex object and applauds male aggression. *Rape: TV Reply (Broadcast of New Bedford Rape Trial)*, NAT'L, April 7, 1984, at 403.

53. *See supra* note 3. In the New Bedford gang rape case, the rape victim's name was initially disclosed because the judge did not exercise the court's power to edit the live television coverage. Friendly, *Naming of Rape Victim Spurs Debate*, N.Y. Times, April 11, 1984, at Y14, col. 1 (ironically, once the media rebroadcast the victim's name, the judge, admonished the press for its lack of discretion).

STATE INTERESTS

Many states have enacted rape shield statutes to restrict the defendant's right to introduce evidence of a victim's sexual history.[54] Although these statutes indicate the states' interests in protecting the rape victim from accusations of promiscuity, no comparable statute addresses the similar problems that arise from publishing the rape victim's identity. Given the limits on prior restraints to access of information or suppression of information already made public, state interests are not advanced by statutes which do not maintain the confidentiality of a rape victim's name.[55] There was a time, however, when state legislatures enacted statutes that punished the press for revealing a rape victim's identity.[56] The purpose of these statutes was to encourage the victim to report the crime and testify at trial without fear that her right to privacy would be lost upon disclosure of her identity.

Prior to 1975, these statutes imposed criminal sanctions for the publication of a rape victim's name even where the name was of public record.[57] In 1975, however, the Supreme Court found that those statutory proscriptions did not advance prescribed state interests because the state's prevailing interests are served when information is publicly documented.[58] The state is presumed to have made the information available for publication and is, therefore, estopped from asserting a more compelling purpose. Accordingly, the Supreme Court struck down those statutes that prohibited printing the rape victim's name as violative of the press' first amendment right to publish matters of public record.

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54. *See* ALA. CODE § 12-21 (1979); FLA. STAT. ANN. § 918.16 (West Supp. 1980); N.Y. JUD. LAW § 4 (McKinney 1968); W. VA. CODE § 18-2-67 (1965).

55. Prior to *Cox*, a Wisconsin court upheld the constitutionality of a state statute that provided for the punishment of any person who published the identity of a woman who had been sexually assaulted. State v. Evjue, 253 Wis. 146, 161-62, 33 N.W.2d 305, 312 (1948). Even though statutes that sanctioned publication of a rape victim's name had been on the books for years, *Evjue* was the first case of its kind to have led to a reported criminal prosecution. *Id.* at 148-49, 33 N.W.2d at 306. The statute in *Evjue* was first enacted in 1925. *Id.* at 153, 33 N.W.2d at 308. *See also* Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibition on Reporting*, 16 STAN. L. REV. 107, 122-25 (1963).

56. *See, e.g.*, S.C. CODE ANN. § 16-81 (1962) (misdemeanor to publish sexual assault victim's name). *See* Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502, 504 (4th Cir. 1963) (because South Carolina statute made it unlawful to publish name of rape victim, it gave rise to tort liability for invasion of privacy).

57. *See* GA. CODE § 26-9901 (1975). However, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Supreme Court struck down the Georgia state statute which made publication of a rape victim's name unlawful even if it was contained in official court records. *Id.* at 496-97.

58. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494 (1975).

Cox Broadcasting Corp. v. Cohn

Two primary justifications for the right to publish a rape victim's name are the publication of public records and the publication of newsworthy matters. On the sliding scale of competing interests of the rape victim, the press, and the state, a balance has been struck in favor of the press' right to identify the rape victim. In *Cox Broadcasting Corporation v. Cohn*,[59] the Supreme Court confronted a privacy action for the accurate publication of a private fact: the publication of a rape victim's name.[60] The Court ruled that an accurate report of a fact taken from a judicial proceeding may be published even though it impinges upon a right of privacy.[61] *Cox* has subsequently controlled four decisions favoring the press' right to publish sexual assault victims' names.[62] An analysis of *Cox* and its progeny will indicate under what circumstances, if any, courts can shield the rape victim's identity.

In *Cox*, a reporter obtained the name of a 17-year-old rape victim from an official court record and disclosed the information in a news broadcast.[63] The rape victim's father sought recovery for the invasion of his privacy,[64] relying upon a Georgia statute that criminally sanctioned the disclosure of a rape victim's name.[65] The Supreme Court found that the state could not criminally sanction the disclosure of accurate information contained in court records which were open for public inspection. Moreover, the *Cox* court

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59. 420 U.S. 469 (1975).

60. "[T]he plaintiff claims the right to be free from unwarranted publicity about his private affairs . . . the dissemination of which is embarrassing or otherwise painful to an individual . . . . [T]he interests are plainly rooted in the traditions and significant concerns of our society." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489-90 (1975).

61. *Id.* at 493.

62. *See* Doe v. Sarasota-Bradenton Fla. Television Co., 436 So.2d 328, 329 (Fla. Dist. Ct. App. 1983); Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1761 (N.J. Super. 1982); Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 171-72, 584 P.2d 1310, 1311-12 (1978); Ayers v. Lee Enters., Inc., 277 Or. 527, 537 n.10, 561 P.2d 998, 1003 n.10 (1977).

63. The telecast in part said:

> Six youths went on trial today for the murder-rape of a teenaged girl. The six Sandy Springs high school boys were charged with murder and rape in the death of the seventeen year old Cynthia Cohn following a drinking party . . . the girl was taken to a wooded area and raped. She passed out . . . and the liquids in her stomach were forced upward causing suffocation.

Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 60-61 (1973), *rev'd*, 420 U.S. 469 (1975).

64. Even though the privacy invaded was not that of the deceased rape victim, the father was held to have a valid claim for invasion of his own privacy by reason of the disclosure of his daughter's identity. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 474 (1975).

65. *Id.* at 474. *See* GA. CODE § 26-9901 (1972) (unlawful for media to print, broadcast, or disseminate name or identity of any victim of a sexual assault, punishable as a misdemeanor).

found that the publication could not constitute the basis for tort liability in an invasion of privacy suit.[66]

The Court focused on the source of the obtained information and carved out a source-based privilege that allows the publication of facts that are in the public domain.[67] The Court reasoned that the value and function of a free press, as mandated by the first amendment, is weakened where the media cannot fully and accurately report information taken from official public documents.[68] In creating this source-based privilege, the *Cox* court accorded no deference to state interests in prosecuting rapists and shielding victims from social and psychological harm.[69] The Supreme Court did acknowledge, however, the legitimate privacy concerns of rape victims and their families in fostering anonymity.[70] The rape victim's and her family's substantial right of privacy interests, however, were not sufficiently compelling to overcome the first amendment right to a free and vigorous press.

In reaching its conclusion, the *Cox* Court did not correctly balance the competing state and individual interests. Because the issue was not before the Court, the *Cox* Court failed to address whether a rape victim could maintain a right of privacy action when her name

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66. *Cox* does not foreclose a privacy claim where the name was obtained in an improper fashion or not contained in an official court document. *Cox*, 420 U.S. at 496. Improper methods of obtaining information will influence a court's decision-making. Barber v. Time, Inc., 348 Mo. 1199, 1207-08, 159 S.W.2d 291, 293 (1942) (photograph of a man hospitalized with a rare disease was taken without consent). *See* Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1761 (N.J. Super. 1982) (information about rape released to reporter by hospital staff member while victim was hospitalized and without her consent). *But see* Doe v. Sarasota-Bradenton Fla. Television Co., 436 So.2d 328 (Fla. Dist. Ct. App. 1983) (television station used proper methods to telecast rape trial); Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 172, 584 P.2d 1310, 1312 (1978) (because child's name could have been obtained from court record, it was properly derived from a public source); Ayers v. Lee Enters., Inc., 277 Or. 527, 535, 561 P.2d 998, 1002 (1977) (police officers handed police reports containing victim's name to reporter).

67. The focus on the source-based privilege theory presumes that a rape victim's name is newsworthy. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495-96 (1975). Critics of *Cox* say that it is illogical to presume a source-based privilege just because a reporter obtained a fact off a public record. *See, e.g.*, Linder, *supra* note 30, at 432 (*Cox* does not make clear the relevance of the source of the media's information to the protection publication of the information enjoys under the first amendment).

68. *Cox*, 420 U.S. at 496. The Supreme Court has tried and evaluated almost every conceivable first amendment issue and has, in the final analysis, concluded that an uninhibited, robust, and creative press is a paramount interest in a democratic society. *See, e.g.*, Daily Mail Publishing Co. v. Smith, 443 U.S. 97, 106 (1979) ("Historically, we have viewed freedom of speech and of the press as indispensable. . . .").

69. The *Cox* Court never mentions state interests in aiding law enforcement or protecting a citizen's right of privacy. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975).

70. *See supra* note 60.

is derived from a police record, as opposed to an official court record.[71] The *Cox* Court did not discuss whether disclosure of a rape victim's name has social utility, and therefore could give rise to an invasion of privacy action.[72] The Court found, instead, that when the victim's name is of public record, publication is at the absolute discretion of the press.

The *Cox* decision forces states to devise methods to avoid public documentation of private facts.[73] Although the Court presented examples, it never explicitly defined when a fact disclosed by record is no longer private, other than by documentation of a criminal trial proceeding.[74] Court records, if not sealed under a court order,[75] are public records and the subjects of these records cannot prevent publication. The rationale is that the press and the public should enjoy

71. The holding in *Cox* is narrow because it focuses on information contained in official court records. *See supra* note 66. Determining whether a police record falls within the scope of official records may depend on how a court defines police report. *See, e.g.*, Gallagher v. Marion County Victim Advocate Program, Inc., 401 N.E.2d 1362 (Ind. App. 1980). *Gallagher* considered whether reports made at the scene of a crime or accident were official police records open to public inspection. *Id.* at 1363. The court found that state law did not require the detective to make this type of on-the-scene report. *Id.* at 1368. The defendant Victim Advocate Program sought release of the victims' names contained in the detectives' reports. *Id.* at 1363. The *Gallagher* court, however, reasoned that the reports were collected as an investigative aid, not in the discharge of a duty and, therefore, the detectives' reports were not official police records available for public inspection. *Id.* at 1368. Accordingly, release of the victims' names contained in the detectives' reports was denied. *Id.*

72. Usually ethical questions abound in privacy actions, however, none were raised in *Cox*. See *supra* note 55 for a discussion of abuse of the press. *Cox* condones an intrusion into the rape victim's privacy and, therefore, the decision in "*Cox* is not held in high esteem." Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 178, 584 P.2d 1310, 1318 (1978). *Cox* fails to appreciate the sensitive nature of the intrusion into an individual's right of privacy when she is publicly identified as a victim of a sexual assault. *See* Linder, *supra* note 30, at 430.

73. According to a recent Florida decision, Florida's statute which prohibits publication of a rape victim's name is effective when the victim's name is not yet available for public inspection. Doe v. Sarasota-Bradenton Fla. Television Co., 436 So.2d 328, 330 (Fla. Dist. Ct. App. 1983); FLA. STAT. ANN. § 794.03 (1975) (unlawful to publish information identifying the victim of a sexual offense). *Cf.* Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1762 (N.J. Super. 1982). Information contained in hospital records are not open to public inspection pursuant to New Jersey state law. N.J. ADMIN. CODE tit. 8:43B, § 7.1(c)(3)(4) (1981) (declares hospital records to be confidential).

74. The cases cited by *Cox* involved motor vehicle registration records and similar public documentation. *See, e.g.*, Thompson v. Curtis Publishing Co., 193 F.2d 953 (3d Cir. 1952) (patent on invention is a public record); Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y.), *aff'd mem.*, 386 F.2d 449 (2d Cir. 1967) (motor vehicle registration), *cert. denied*, 391 U.S. 915 (1968).

75. *See* Cianci v. New Times Publishing Co., 88 FRD 562, 563 (S.D.N.Y. 1980). Documents can lose the protected status provided by a court order when the documents become a part of the judicial proceeding. *Id.* at 564. An exhibit not yet admitted into evidence, if used in arguments on a motion to dismiss, becomes a part of the judicial proceeding and, thus, available to inspect and copy. *Id.* at 565.

equal access to public records.[76]

From a practical standpoint, the likelihood that court records can be readily located by someone who does not have knowledge of a sexual assault is remote.[77] Moreover, it is questionable whether any reasonable person not involved in news gathering or other research would desire to inspect and duplicate the record of a criminal trial.[78] It is reasonable to assume that the public does not want to know the name of the rape victim, and therefore the victim's desire to remain anonymous should outweigh the public's limited interest. Yet, according to *Cox*, it is the limitation of the public's ability to observe the operations of the court proceeding that makes the press responsible for informing the public.[79]

Additionally, the *Cox* Court failed to specifically address whether publication of a victim's name in a police report is newsworthy and, consequently, privileged under the first amendment.[80] The Court implied, instead, that states should omit the rape victim's

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76. Nixon v. Warner Communications, Inc., 435 U.S. 589, 609-10 (1978) (public never had privileged access to Nixon tapes and, therefore, press was denied access). However, the resources to obtain and/or disseminate information are not available to the general public. See *Passes and Trespasses*, *supra* note 31, at 1313. The press gets preferred treatment over the public because the media has the resources and means to discover and disseminate information concerning public affairs. *Id.* *See also* United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), *cert. denied sub nom.* Latimore v. Sielaff, 434 U.S. 1076 (1978). In *Latimore*, spectators were excluded but the press was permitted to hear the victim's testimony. *Id.* at 693. The court determined that it was protecting the dignity of the rape victim by excluding spectators, but not the press. *Id.* at 694. *See also* Commonwealth v. Hobbs, 385 Mass. 863, 865, 434 N.E.2d 633, 636 (1982) (public, but not press, excluded from sexual assault victim's testimony).

77. Still, names and addresses contained in official court records are available for public inspection. Craig v. Municipal Ct., 100 Cal. App. 3d 69, 72, 161 Cal. Rptr. 19, 20 (1979). However, the *Craig* court demonstrated that names and addresses contained in official police files held to be of public record did not have to be released. *Id.* at 78-9, 161 Cal. Rptr. at 24. In *Craig*, at the request of the criminal defendant, a police patrol was ordered to produce names and addresses of all persons arrested by the patrol for charges similar to the defendant's over a particular two year period. *Id.* at 72, 161 Cal. Rptr. at 20. The court denied the disclosure fearing the persons whose names and addresses were released would be sought out by the defendant. *Id.* at 78, 161 Cal. Rptr. at 23.

78. Even if a person is permitted to search the court records which are open to the public, there is no guarantee that the first amendment will protect improper dissemination of the information. *See* Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 136, 188 Cal. Rptr. 762, 774 (1983) (disclosing plaintiff's transsexuality was a malicious, actionable act at plaintiff's expense).

79. *Cox* holds in high esteem the press' judgment in its determinations of what to publish and broadcast. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975). *Contra* Doe v. Sarasota-Bradenton Fla. Television, Co., 436 So. 2d 328, 330-31 (Fla. Dist. Ct. App. 1983) (press must exercise more compassionate discretion).

80. According to the court, this case presented the narrow question of "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records-more specifically, from judicial records . . . ." *Cox*, 420 U.S. at 491.

name in filing public records, thus permitting states to regulate certain information outside the public domain.[81] Because *Cox* did not require release of the rape victim's name prior to a judicial hearing, it is within the state's power to protect a rape victim's name at the time the crime is reported.

In many cases the victim's name is obtained from a police file rather than an official court record.[82] In each instance, however, when the police promised to keep the victim's identity confidential, the assurances proved ineffective.[83] Since *Cox*, state courts have, in effect, held that a rape victim has no protectable privacy right in her name after it has been reported in a police record.[84] The reasoning of the courts is that because police files are public records, information contained therein is presumed newsworthy.

Even if the press guarantees the rape victim that it will not publish her name, such a promise does not waive the media's consti-

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81. *Id.* at 495-96. "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation. . . ." *Id.* at 496.

82. In Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760 (N.J. Super. 1982), it was not clear that the rape victim's name was obtained from a police record rather than derived from a hospital source. The court, therefore, felt compelled to apply a more definitive test of newsworthiness rather than rely on the uncertainty of whether the source-based privilege, under *Cox*, came into play. *Id.* at 1761.

83. *See, e.g.*, Ayers v. Lee Enters., Inc., 277 Or. 527, 531, 561 P.2d 998, 1002 (1977). In *Ayers*, the promise from police to conceal the rape victim's identity was not actionable. *Id.* The *Ayers* court, however, conceded that the rape victim was justifiably distressed at the disclosure of her name in light of the unkept promise. *Id.* In addition to unkept promises from the police, promises from the media are not legally binding. Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 172, 584 P.2d 1310, 1312 (1978). Moreover, promises made by state prosecutors to conceal the victim's identity are not enforceable. Doe v. Sarasota-Bradenton Fla. Television, Co., 436 So. 2d 328, 329 (Fla. Dist. Ct. App. 1983).

84. *See, e.g.*, Ayers v. Lee Enters., Inc., 277 Or. 527, 532, 561 P.2d 998, 1000 (1977) (name contained in police file was available for public inspection and, therefore, not actionable under an invasion of privacy claim). Yet, under a negligence theory, a crime victim has an actionable right for publicity given to her name after it has been reported in a police record. Hyde v. City of Columbia, 637 S.W.2d 251, 273 (Mo. App. 1982) (publication of a witness-victim's name while her assailant was still at large rose to the level of negligence on part of newspaper that revealed victim's name), *cert. denied sub nom.* Tribune Publishing Co. v. Hyde, 459 U.S. 1226 (1983). *See* Office of the Attorney General of California, No. 83-906, slip op. (Oct. 11, 1984) (available July 1, 1985, on LEXIS, All A.G. file) (courts must protect a citizen's security, particularly if the citizen is the only witness to a murder case). *But see* Hood v. Naeter Bros. Publishing Co., 562 S.W.2d 770 (Mo. App. 1978). The *Hood* court stated that it was unwise, but not unlawful, for a newspaper to publish the name and address of a sole witness to a violent crime while the criminals were still at large. *Id.* at 772. The plaintiff in *Hood* sought recovery on a theory of outrageous conduct causing mental distress. *Id.* at 770. The court concluded that the publication of the witness' name did not rise to the level of extreme and outrageous conduct. *Id.* at 771-72.

tutional privilege to print what is contained in public records.[85] In *Poteet v. Roswell Daily Record, Inc.*,[86] for instance, a 14-year-old sexual assault victim's name was published in a newspaper after the reporter promised that he would not reveal the child's identity.[87] The parents sued the newspaper for an invasion of privacy.[88] The *Poteet* court read into the *Cox* opinion the premise that as long as the victim's name could have been located in a public record, the name was available for publication.[89]

The parents contended that the newspaper had waived its right to publish what was publicly documented. The court found that the reporter did not have the newspaper's authority to promise not to publish the child's name.[90] Thus, there was no waiver of the privilege to report information of public record.[91] *Poteet* reflects the majority view that the media is not obligated to maintain the victim's anonymity, notwithstanding its express promise to do so.[92]

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85. A promise not to print a victim's name is insufficient to constitute a waiver of the privilege to print matters of public record without raising the additional requirement of the reporter's authority to speak for the defendant newspaper. Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 172, 584 P.2d 1310, 1312 (1978).

86. *Id.* at 170, 584 P.2d at 1310.

87. *Id.* For a discussion on moral obligations that are not legally binding see *supra* note 83.

88. *Poteet*, 92 N.M. at 171, 584 P.2d at 1311.

89. *Id.* at 711-12, 584 P.2d at 1311-12. Even though a fact was not actually obtained from a public record, it is sufficient that the fact could have been obtained from a public record. *See* Anonymous v. Dun & Bradstreet, 3 Med. L. Rptr. 2376, 2376 (N.D. Ill. 1978) (facts expunged from public record could be obtained from newspaper clipping, however, not certain that facts were taken off newspaper story). *But see* Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 132, 188 Cal. Rptr. 762, 771 (1983) (there was no proof that the reporter learned the plaintiff's true gender from a birth certificate which is of public record and, therefore, the court concluded the information was not in the public domain and available for publication).

90. *Poteet*, however, does not foreclose the possibility of a waiver of the right to publish a rape victim's name, when the proper authority authorizes it. 92 N.M. at 173, 584 P.2d at 1313. *Poteet* does not address how the victim knows whether the reporter is the proper agent of the newspaper. *Id.*

91. In contrast to the waiver of a first amendment right alleged by the rape victim in *Poteet*, 92 N.M. at 171, 584 P.2d at 1311, the assertion of a waiver in a privacy action is usually raised by the defendant newspaper who alleges that the complainant has waived a right of privacy by injecting himself into the public eye. *See* Taylor v. KTVB, Inc., 96 Idaho 202, 207, 525 P.2d 984, 989 (1974) (Shepard, C.J., dissenting) (privacy right waived due to criminal behavior; displaying himself in nude while committing criminal act). *See also* Werner v. Times-Mirror Co., 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961); Smith v. National Broadcasting Co., 138 Cal. App. 2d 807, 292 P.2d 600 (1956); Cohen v. Marx, 94 Cal. App. 2d 704, 211 P.2d 320 (1949).

92. Since the reporter's promise to maintain the child rape victim's name was unenforceable in *Poteet*, the child's family raised an alternative allegation that they had relied on the newspaper's policy to withhold printing a rape victim's name and, therefore, the newspaper was estopped from raising a newsworthiness defense. *Poteet*, 92 N.M. at 172, 584 P.2d at 1312 (court held there was no proof that plaintiffs had knowledge of policy not to print victim's name).

Because the rape victim cannot rely on the discretion of the police or the press to conceal her identity, a possible solution rests in the legislature's ability to enact a statute that would secure a victim's anonymity at the time she reports the rape.[93] States do have laws that classify certain police information as confidential; however, many state statutes are poorly drafted and are vague regarding what information in a police file may be kept confidential.[94] For example, the Missouri Supreme Court in *Hyde v. City of Columbia*[95] confronted the question whether, under a state statute, a victim's name contained in an investigative police file should be considered confidential, even though the police arrest reports were open to public inspection.[96]

In *Hyde*, a woman reported to the police that she had been abducted at gunpoint.[97] The crime was reported on an official criminal investigation form.[98] A local newspaper printed the story based on the facts alleged in the police record.[99] After printing the victim's identity in the paper, the assailant, while still at large, repeatedly harrassed her.[100] The court held that the disclosure of the

93. *See* Doe v. Sarasota-Bradenton Fla. Television, Co., 436 So.2d 328 (Fla. Dist. Ct. App. 1983) (states can provide protection to privacy rights of citizens prior to open judicial proceedings).

94. *See, e.g.*, Hyde v. City of Columbia, 637 S.W.2d 251, 262-63 (Mo. App. 1982) (*Hyde* court interpreted MO. ANN. STAT. §§ 610.010 to 610.120 (Vernon 1982), to exclude from public, crime victim's name and address taken down in a criminal investigation form, whereas a record of arrest is open to public inspection). *See also* Office of the Attorney General of Texas, Open Records Dec., No. 339, slip op. (Dec. 31, 1982) (available July 1, 1985, on LEXIS, All A.G. file). The Attorney General in Texas refused to make available to the press a police record containing the name of a sexual assault victim. *Id.* Texas law permits the front page of the police record to be made public and the victim's name was on the front page of the police report. The Attorney General, however, held that there was a constitutional right to obtain information from a police record. *Id.* However, the Supreme Court has never recognized such a right. *Id.* Accordingly, the Attorney General refused release of the information based on a common law right of privacy, rather than a constitutional right, to protect the rape victim from such a highly intimate disclosure. *Id.*

95. 637 S.W.2d 251 (Mo. App. 1982), *cert. denied sub nom.* Tribune Publishing Co. v. Hyde, 459 U.S. 1226 (1983).

96. *Id. See also* State v. Stauffer Communications, Inc., 225 Kan. 540, 592 P.2d 891 (1979); KAN. STAT. ANN. § 21-3827 (1975). In *Stauffer*, the court struck down a statute that permitted only courthouse reporters access to information contained in police warrants for arrest. *Id.* at 547-48, 592 P.2d at 896. The statute was unconstitutional because it gave special privileges to courthouse reporters over rights of access to all reporters. *Id.* at 548, 592 P.2d at 897.

97. The *Hyde* court believed the abduction was for sexual purposes even though the assailant did not assault or try to molest her. Hyde v. City of Columbia, 637 S.W. 251, 254 n.2 (Mo. App. 1982), *cert. denied sub nom.* Tribune Publishing Co. v. Hyde, 459 U.S. 1226 (1983).

98. *Id.* at 263.

99. *Id.* at 253.

100. On one occasion, the victim received a phone call from her assailant in which the man said, "I'm glad you're not dead yet, I have plans for you before you die." *Id.* at 254-55 n.2.

victim's name placed her in a "clear and present" danger.[101] The *Hyde* court concluded that the press' right to publish a story is qualified by an accompanying duty to protect a citizen's security.[102]

The *Hyde* court's limitation on the right to publish a crime victim's name derived from its construction of a state statute that did not clearly permit disclosure of facts obtained from a police investigation file.[103] In construing the statute, the court accorded great significance to protecting an individual from danger.[104] The court

101. The injury alleged in Hyde's cause of action for negligence was mental anguish and nervous and physical shock as a result of exposure to clear and present danger. *Id.* at 272-73. To compare the injury suffered in a negligence action for publication given to a victim's name and a privacy action for publication given to a victim's name see Brown v. American Broadcasting Co., 704 F.2d 1296, 1299-1300 (4th Cir. 1983) (emotional distress and embarrassment are required to show the publication was offensive to a reasonable person); Hubbard v. Journal Publishing Co., 69 N.M. 473, 474, 368 P.2d 147, 148 (1962) (rape victim alleged that printing her name caused humiliation, mental distress, and ruined her future prospects for marriage). Compared to a privacy action which requires that the publication be offensive to a reasonable person, there is an emerging tort called breach of confidence that allows even the hypersensitive to recover for an unwarranted publication. *See* Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 587-88, 367 P.2d 284, 290 (1961) (private disclosure of complainant's finances was not an invasion of privacy but there was tort liability for breach of confidential relation). *See generally* Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426 (1982) (breach of confidence protects distinct interests present in a confidential relationship that would otherwise go unprotected under a cause of action for invasion of privacy).

102. One of the elements satisfied in Hyde's negligence cause of action for publication of a crime victim's name was the duty owed to foresee the likelihood of injury. The breach of duty occurred because the newspaper failed to protect the crime victim from her assailant. Hyde v. City of Columbia, 637 S.W.2d 251, 257 (Mo. App. 1982). The negligence theory used by the plaintiff in *Hyde* is one of the three principal tort theories that have been used in actions against the press for publicity given to a private fact. *Id.* at 265-67. In addition to negligence and privacy, the third tort theory is defamation. *Id.* at 254. In *Hyde*, a court, for the first time, allowed a plaintiff to prevail on a negligence theory against the media for its accurate reporting of a crime victim's name that was of public record. *Id.* at 273. *See generally* Linder, *supra* note 30. The element of causation was also satisfied in *Hyde*, since the court found the publication caused the crime victim to be put in clear and present danger. *Hyde*, 637 S.W.2d at 271-72.

103. *See supra* note 94.

104. "To construe the Sunshine Law to open all criminal investigation information to *anyone* with a request subserves neither the public safety policy of our state nor the personal security of a victim . . . ." *Hyde*, 637 S.W.2d at 263. (It is the police's self-imposed rule in Columbia, Missouri to conceal a crime victim's name prior to the criminal's arrest). Generally, courts construe a statute to conform to the court's predisposed position on an issue. *See, e.g.*, Office of the Attorney General of California, No. 83-906, slip op. (Oct. 11, 1984) (available July 1, 1985, on LEXIS, All A.G. file) (court found social utility in exposing names in newspaper of absent parents wanted on a charge of child support and, thus, construed the ambiguity in the statute to include publication of names of persons sought under warrants of arrest, even though access to this information was restricted to authorized agencies); Office of the Attorney General of Texas, Open Records Dec., No. 422, slip op. (July 26, 1984) (available July 1, 1985, on LEXIS, All A.G. file) (because attempted suicide is a matter of privacy, court choose to construe state statute as exempting details of a suicide attempt con-

emphasized that construing the police report to be within the public domain would render hazardous results, particularly when the abductor was still at large.[105]

Hyde demonstrates that courts retain the capacity, without undermining *Cox*, to advance state interests when the victim's personal safety outweighs freedom of the press. According to the *Hyde* court, the Missouri statute established when the press and public have a right to inspect police files. Statutory interpretation in favor of the crime victim is one method of protecting public disclosure of the victim's identity.[106] According to the *Hyde* court, the press does not have a constitutional right to publish information contained in police files that are not of public record.[107]

Given the limited means of applying a workable statutory construction, however, an alternative means is for the legislature to unequivocally classify, as confidential information, a crime victim's name contained in a police record.[108] For rape victims who wish to remain anonymous, this legislative protection may provide an incentive to report the crime. Yet, keeping the rape victim's name confidential in a police report does not extend the necessary protection to the rape victim who also wishes to remain anonymous at the rape trial.[109]

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tained in a police report from public domain, even though ordinary meaning of statute permits disclosure of a crime victim's name).

105. *Hyde*, 637 S.W.2d at 269.

106. On the other hand, statutory construction in favor of the press is one means of restricting a victim's right of privacy. For example, in Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 608-09 (1982), it was not certain that the state statute which denied the press access to hear a child rape victim's testimony either encouraged the child to testify or improved the quality of the testimony, as was the state's asserted purpose. *Id.* The *Globe* Court held that it was too speculative to say that the rape victim would not have come forward and testified except for the statute that restrained the media's presence in the courtroom. *Id.* at 609.

107. *Hyde*, 637 S.W.2d at 269-70 n. 25 (discusses *Cox*).

108. *See, e.g.*, Houston Chronical Publishing Co. v. City of Houston, 531 S.W.2d 177, 186-87 (Tex. 1975) (only information required to be disclosed is that which appears on front page of offense report). The statute must be narrowly tailored to serve the state purpose or it may be struck down as unconstitutional. *See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97, 110 (1979). In *Smith*, the West Virginia statute, W. VA. CODE § 49-7-3 (1976), made it a misdemeanor for a *newspaper* to publish the name of any youth charged as a juvenile offender without a written order from the court. *Id.* at 98. The *Smith* Court held that any effective ban on publication must apply equally to all forms of communication, otherwise a statute restraining just one form of communication does not achieve the statute's purpose. *Id.* at 110.

109. Exposing a child rape victim to a judicial proceeding may be only the beginning of the child's and family's loss of anonymity. Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 174, 584 P.2d 1310, 1314 (1978) (a tragic event such as a rape can be indelibly printed in law reporters, law books, and law review articles for years to come).

Many rape victims refrain from taking their attackers to court because they fear public scrutiny and criticism. For this reason alone, trial courts should take precautions to shield disclosure of the victim's name during any trial or hearing.[110] A court, at its discretion, has the right to use initials or pseudonyms[111] in place of the victim's name when the potentially harmful psychological consequences to the victim outweigh the defendant's sixth amendment right to a public trial.[112] Even though most courts concede that use of a pseudonym does not implicate the defendant's sixth amendment rights,[113] the use of a pseudonym is not an established practice in criminal cases but, rather, is often restricted to civil litigation.[114] The courts, however, have the power to adopt a mandatory rule of procedure which informs the rape victim that, at her request, she has the absolute right to be referred to by a pseudonym.[115] Such a rule would maintain the victim's anonymity without affecting the press' right to publish any information contained in the court record.

A pseudonym, however, cannot guarantee adequate personal privacy protection when television cameras are permitted in the

110. In instances of serious sexual assaults, in order to shield the victim, courts sometimes refer to her only by initials. King v. State, 631 S.W.2d 486, 488 n.3 (Tex. Crim. App.), *cert. denied*, 459 U.S. 928 (1982).

111. Juvenile delinquency cases are often identified by initials. *In re* Welfare of K, 269 N.W.2d 367 (Minn. 1978); *In re* L., 24 Or. App. 257, 546 P.2d 153 (1976). *See* Note, *Anonymity in Civil Litigation: The "Doe" Plaintiff*, 57 NOTRE DAME LAW. 580, 582 (1982) (discusses procedural and substantive hurdles to justify using a pseudonym).

112. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend VI. The sixth amendment's guarantee of a public trial is for the benefit of the defendant alone. Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979). The Constitution does not mention right of access to a criminal trial on the part of the public. *Id.* at 379. Therefore, the history of the sixth amendment's public trial guarantee demonstrates no more than the existence of a common-law rule of open criminal proceedings, not a constitutional right of the public to attend a criminal trial. *Id.* at 385.

113. Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 176, 584 P.2d 1310, 1316 (1978). *See also* United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691, 694 (7th Cir. 1977), *cert. denied sub nom.* Latimore v. Sielaff, 435 U.S. 1076 (1978) (mitigation of the rape ordeal is a justifiable concern of a trial court).

114. *See supra* note 111.

115. Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 176, 584 P.2d 1310, 1316 (1978) (state supreme courts have absolute power to adopt rules that shield name of child rape victims during any trial or hearing). Any restriction on who may attend a criminal proceeding is more likely to infringe on the defendant's sixth amendment right than exercising the right to use a pseudonym in place of the rape victim's name. *See*, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 89-90 (1977) (the basic presumption in favor of openess at trial is partly based on encouraging greater testimonial veracity).

courtroom.[116] In *Doe v. Sarasota-Bradenton Florida Television Co.*,[117] for instance, Jane Doe sought recovery from a television station that broadcast a videotape of her testimony at a rape trial which identified her by name.[118] The *Doe* court held that, under *Cox*, the television station was privileged to give further publicity to information learned in the courtroom.[119] Moreover, the television station was permitted to film the trial proceeding in accordance with Florida law.[120]

Because the presence of television cameras at a rape trial is discretionary,[121] the *Doe* court emphasized the trial court's gross lack of consideration for the *Doe* victim and her family in light of the lasting and devastating effect of the broadcast.[122] Furthermore, because a transcript of the rape trial was available for publication, the

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116. The presence of television cameras makes a rape trial a spectator's sport. *When News Becomes Voyeurism: Live Cable Coverage of Rape Trial Redefines Journalism*, TIME, March 26, 1984, at 64.

117. 436 So.2d 328 (Fla. Dist. Ct. App. 1983).

118. While the videotape ran on the evening newscast, the newscaster identified the rape victim by name. *Id.* at 329 (the state prosecutors made no effort to ensure that rape victim's name and picture remained closed to public).

119. *Id.* at 329-30.

120. In 1981 the Supreme Court upheld a Florida law that permitted television coverage of judicial proceedings. Chandler v. Florida, 449 U.S. 560, 582-83 (1981). Thirty seven states permit electronic coverage in the courtroom. DEVAL, MASS MEDIA AND THE SUPREME COURT, THE LEGACY OF THE WARREN YEARS, 419 (1982). For a further discussion of electronic media in the courtroom see *supra* notes 50 & 51.

121. *In re* Post-Newsweek Stations, Fla., Inc. 370 So.2d 764, 782 (Fla. 1979) (exclusion of the electronic media is left to the sound discretion of the judge).

122. Doe v. Sarasota-Bradenton Fla. Television, Co., 436 So. 2d 328, 331 (Fla. Dist. Ct. App. 1983) ("[w]e take this opportunity to encourage the use of compassionate discretion."). *See* State v. Williams, 7 Med. L. Rptr. 1849 (Ga. 1981). The *Williams* court stated that it was up to the trial court to determine whether a television station can televise all or part of a trial. *Id.* at 1851. Any determination must consider the adverse effect on victims of the accused or their relatives who view the testimony. *Id.* The *Williams* court denied the defendant's request to televise the hearing because of potential psychological harm to the murder victims' families. *Id.* at 1852.

The courtroom judge must consider 1) any adverse effect on trial participants, 2) the likelihood of attorney theatrics, 3) diverting concentration of jury members, 4) focus on the sensational rather than the significant, and 5) loss of dignity in the courtroom. *In re* Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 775 (Fla. 1979). Further consideration is given to 1) the public's right to know, 2) promoting the sixth amendment concept of a public trial, 3) educational value, 4) and the notion that the presence of television cameras serves the same purpose as reporters and sketch artists. *Id.* at 779-80.

A case arose in Arizona that involved a judge's order to restrain a television station's sketch artist's drawings of jurors' reactions and behavior. KPNX Broadcasting Co. v. Superior Ct., 139 Ariz. 246, 248, 678 P.2d 431, 433 (1984). The *KPNX* court held that the restraint order was an unconstitutional infringement on the media's first amendment right to attend and report on criminal trials. *Id.* at 259, 678 P.2d at 444. Under *Cox*, the sketches of jurors were as much in the public domain as the rape victim's name in *Cox*. *Id.* at 250-51, 678 P.2d at 437-38.

press' constitutional right of access to the public trial would not have been infringed by not permitting camera coverage.[123] Therefore, the *Doe* court admonished state prosecutors who failed to seek a protective order to restrict videotaping the victim's testimony.[124]

Restricting camera coverage alone is not sufficient to protect the rape victim's right of privacy.[125] Pseudonyms, although not affording absolute protection, greatly enhance the anonymity of the victim. Unless a pseudonym is used, a transcript of the rape trial will reveal the victim's identity, regardless of camera coverage. Consequently, the judiciary must take measures to use a pseudonym and restrict telecasting the victim's testimony in order to shield her identity.

RIGHT TO PRIVACY LIMITED TO MATTERS NOT OF PUBLIC RECORD

The United States Supreme Court has not addressed the issue whether an accurate publication of a rape victim's name is newsworthy where it is not of public record.[126] This issue was addressed by the New Jersey Supreme Court in *Griffith v. Rancocas Valley Hospital*.[127] The court assessed the newsworthiness of publishing a sexual assault victim's name derived from confidential medical records.[128] The hospital, without the victim's consent, released in-

123. *See In re* Application of KSTP Television, 504 F. Supp. 360, 364 (D. Minn. 1980) (court limited press access to transcript of videotapes that revealed the multiple rape of the victim while she lay blindfolded and bound on the floor).

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

125. *See* Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 178, 584 P.2d 1310, 1318 (Fla. 1978).

126. Courts and scholars define the newsworthy value given to a private fact with varying results. *See* Gilbert v. Medical Economics, Co., 665 F.2d 305, 308 (10th Cir. 1981) (facts that educate, enlighten or amuse are newsworthy); Taylor v. KTVB, Inc., 96 Idaho 202, 206, 525 P.2d 984, 988 (1974) (not newsworthy if used for purpose of embarrassment); Rawlins v. Hutchinson, 218 Kan. 295, 305, 543 P.2d 988, 996 (1975) (every person has episodes in their lives that should remain confidential); Hyde v. City of Columbia, 637 S.W.2d 251, 269 (Mo. App. 1982) (crime victim's name is a trivial public concern), *cert. denied sub nom.* Tribune Publishing Co. v. Hyde, 459 U.S. 1226 (1983); Barber v. Time, Inc., 345 Mo. 1199, 159 S.W.2d 291, 295 (1942) (story may be news, but identity of plaintiff adds little to the story); Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 178, 584 P.2d 1310, 1318 (1978) (name and address of child rape victim has no news value for public consumption); RESTATEMENT (SECOND) OF TORTS § 652D(g) (1977) (arrests, raids, suicides, marriages, divorces, accidents, fires, and catastrophes of nature are news). News is what is of interest, not what ought to be of interest. *See* Franklin, *supra* note 21, at 115.

127. 8 Med. L. Rptr. 1760 (N.J. Super. 1982).

128. *Id.* at 1762. *See* Jordan v. Pensacola News-Journal, Inc., 314 So. 2d 222 (Fla. Dist. Ct. App. 1975). In *Jordan*, plaintiffs as adoptive parents, sued the newspaper for publishing a story about their adoption, relying upon a statute that made adoption records confidential. *Id.* at 223. The plaintiffs contended that the statute created a right to privacy to conceal the adoptive parents' and

formation regarding the sexual assault.[129] A newspaper printed the story and identified the victim by name and address.[130] The *Griffith* court observed that, under New Jersey law, hospital records are classified as confidential and require written patient consent as a prerequisite to their release.[131] The *Griffith* court found that the hospital's disclosure was not protected by a source-based privilege.[132] The court concluded, however, that the newspaper's disclosure was protected under the first amendment because the victim's name was substantially relevant to the story.[133] This relevancy standard of newsworthiness was based on the logical nexus theory.[134]

The *Griffith* court decided that the *Cox* source-based privilege did not appropriately address the newsworthy value of the publicity given to the rape victim's name because her identity was first learned from a non-public source.[135] According to the court, the proper standard to be applied was the logical nexus test.[136] The court found that the victim's name was substantially relevant in

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child's anonymity. *Id.* Since there was no proof that the newspaper obtained the names from the confidential records, the privacy action was dismissed. *Id.* at 224.

129. Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760 (N.J. Super. 1982). Permission from the plaintiff to disclose the private fact can control a court's decision-making. Virgil v. Time, Inc., 527 F.2d 1122, 1127 (9th Cir. 1975) (a magazine has no right to publish unnewsworthy, embarrassing facts taken down during an interview where the person interviewed subsequently withdraws permission to print the facts), *cert. denied*, 425 U.S. 998 (1976).

130. Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760 (N.J. Super. 1982).

131. N.J. ADMIN. CODE tit. 8:43B, § 7.1(c)(3)(4) (1981). *See* Office of the Attorney General of Texas, Open Records Dec. No. 370, slip op. (April 15, 1983) (available July 1, 1985, on LEXIS, All A.G. file) (information contained in medical reports might raise a claim of privacy if it relates to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

132. Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1762 (N.J. Super. 1982). *Griffith* answers the issue not confronted by *Cox*, that liability may attach for releasing a victim's name not in the public domain. *Id.*

133. *Id.* For further discussion on the substantial relevancy test, also referred to as the local nexus theory, see *supra* notes 40 & 42 and accompanying text.

134. *Id.*

135. In the course of gathering news, the reporter is not restricted to official sources of information, but may base a story on any available source, if lawfully obtained. *Id.* at 1761. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99, 103 (1979) (newspaper reporter obtained juvenile offender's name by monitoring police radio and questioning witnesses; all in accordance with routine reporting practices); Taylor v. KTVB, Inc., 96 Idaho 202, 207, 525 P.2d 984, 989 (1974) (Shepard, C.J., dissenting) (media acted in accordance with routine reporting practices when arrest of nude man was filed).

136. Griffith v. Rancocas Valley Hosp., 8 Med. L. Rptr. 1760, 1762 (N.J. Super. 1982) (to properly balance freedom of the press against the right of privacy, the published fact must have some substantial relevance to a matter of public concern).

that it added credibility to the story recounting the sexual attack and, therefore, was newsworthy.[137] The logical nexus approach, even more than the *Cox* source-based privilege, places little significance on the rape victim's right of privacy and the hazardous consequences that result from publication of her identity. The *Griffith* court could have reached a different conclusion had a stricter standard of newsworthiness, the three-part test, been applied.

Although the three-part newsworthiness test has not been applied with respect to a rape victim's name, a clear example of its applicability to privacy cases involving identity can be found in *Diaz v. Oakland Tribune, Inc.*[138] In *Diaz*, the California Court of Appeals concluded that disclosing the true identity of the complainant was not newsworthy. A newspaper reporter had learned that the student body president of a college was a transsexual.[139] The newspaper revealed that the female president was formerly a man.[140] The newspaper contended that because there was a birth certificate on public record which carried the plaintiff's original name and gender, the publication was protected under *Cox*.[141] There was no proof, however, that the reporter relied on the birth certificate to learn the plaintiff's name and, thus, the *Diaz* court determined that the fact of the complainant's original gender was not a matter of public record.[142]

The newspaper additionally argued that the plaintiff's questionable gender identity was newsworthy because it was a contemporary social issue. The *Diaz* court examined the social utility of disclosing the claimant's original identity in the context of the three-part newsworthiness test.[143] The court found that the plaintiff made strong efforts to conceal her original identity,[144] and that

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137. *Contra* Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 178, 584 P.2d 1310, 1318 (1978) (rape victim's name is not news); Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471, 474 (Miss. 1976) (names relating to issues of an embarrassing or sensitive nature should not be published without consent).

138. 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983).

139. The reporter did not reveal his sources. *Id.* at 132, 188 Cal. Rptr. at 771.

140. The publication, in part, said that "[t]he students at the college . . . will be surprised to learn their student body president . . . is no lady, but is in fact a man . . . ." *Id.* at 124, 188 Cal. Rptr. at 766.

141. The police records upon which the reporter relied did not contain information concerning Diaz's new name or gender. *Id.* at 132, 188 Cal. Rptr. at 771. ("[w]e also do not consider Diaz's . . . birth certificate to be a public record in this instance.").

142. *Id.* Other courts presume a source-based privilege when a fact may have been derived from a public source. For further discussion see *supra* note 89.

143. For the required elements of the three-part newsworthiness test see *supra* notes 43-45 and accompanying text.

144. Even though the plaintiff was part of a small political arena at college, the *Diaz* court felt it was adequately contained and, thus, did not amount to a voluntary entry into the public eye. *Id.* at 134, 188 Cal. Rptr. at 772-73. *Cf.* Bi-

the publication unnecessarily intruded into her right of privacy under the pretense that the article was meant to benefit a legitimate social concern.[145] The court concluded that the plaintiff's right of privacy outweighed the public's right to know, and therefore the publication was not considered newsworthy.[146] The *Diaz* rationale is even more compelling where the identity of a rape victim is involved. First, as in *Diaz*, there is no social utility in revealing the claimant's identity, particularly where stigmatizing social attitudes against the rape victim may result. Second, as in *Diaz*, the nature of the intrusion into the victim's private life is clearly offensive where efforts to preserve anonymity are disregarded for the mere sake of sensational highlighting of the underlying story. Third, however, a negative answer as to the degree to which the complainant voluntarily entered the public eye is much more appropriate for a rape victim than a transsexual.

In comparison, had the logical nexus test been applied in *Diaz*, an invasion of privacy would not have been found because, as was argued, the disclosure that the plaintiff was born a man could add credibility to a story about the first female student body president of a college.[147] By contrast, in *Griffith*, it was not "logical" that a citizen should lose her right to privacy because she had the misfortune to become a victim of a sexual assault.[148] *Griffith* reflects the

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Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (public figures whose names are already in public domain have waived the right to privacy claim for publicity given to a private fact). One scholar maintains that the greater the area of dissemination given to a private fact, the less newsworthy the name and the less harmful the publication because fewer of the persons who read the story are likely to know the particular plaintiff and, thus, gossip and rumor are not significant concerns. *See also* Franklin, *supra* note 21, at 119. *Contra* Doe v. Sarasota-Bradenton Fla. Television, Co., 436 So. 2d 328, 331-32 (Fla. Dist. Ct. App. 1983) (as the size of the community in which the broadcast occurs increases, the deeper the intrusion into the plaintiff's private life).

145. The *Diaz* court found the reporter's conscious disregard for the plaintiff's right of privacy to be malicious and callous, and although malice is not an element of a privacy action, the finding of malice influenced the court's decision-making. *Diaz*, 139 Cal. App. 3d at 135-36, 188 Cal. Rptr. at 774.

146. Although the *Diaz* court strongly emphasized that the plaintiff prevailed on the merits of the case, the trial court was reversed on other grounds because of errors in the jury instructions. *Id.* at 122, 188 Cal. Rptr. at 765.

147. The newspaper raised a newsworthiness defense based on the theory that plaintiff's former gender negatived her title as first female student body president. *Id.* at 133, 188 Cal. Rptr. at 772.

148. One case involving disclosure of a rape victim's name treated the victim's presence at the rape trial as entering the public eye and, thus, a contributing factor to the media's newsworthiness defense. Hubbard v. Journal Publishing Co., 69 N.M. 473, 475, 368 P.2d 147, 148-49 (1962) (participants in trial proceedings, even if unwilling, lose part of their right of privacy). *Cf.* Campbell v. Seabury Press, 614 F.2d 395, 396 (5th Cir. 1980) (the freedom of press is a privilege that often outweighs the privacy rights of persons who do not voluntarily seek publicity).

harsh result that the logical nexus approach renders, whereas the three-part *Diaz* approach recognizes a privacy action for the insensitive publication of intimate information. In light of the consequences of the different approaches taken by the *Griffith* and *Diaz* courts for determining whether a published matter is newsworthy, the three-part test used in *Diaz* would clearly afford greater protection of the rape victim's right to anonymity.

The *Diaz* three-part test offers a proper balancing of freedom of the press and the right to privacy because it ultimately considers the social utility of the published fact.[149] Courts generally agree that there is no social value in revealing a rape victim's identity because it does not add to, and is not essential to, the rape story. Moreover, courts acknowledge that publication may cause the public to scrutinize and criticize the rape victim.[150] Under this rationale, the rape victim's name is not considered newsworthy, while the need to protect the victim from psychological harm is regarded as paramount.[151] Therefore, the three-part newsworthiness test can protect the rape victim's right to privacy. By contrast, the logical nexus standard cannot shield the identity of a rape victim whose name is derived from a confidential source because the standard merely requires that the name relate to the rape. If the *Cox* source-based privilege must stand, then a tougher standard must be applied when information is derived from a non-public source.

CONCLUSION

The most literal interpretation of *Cox* rests in its call to the states to keep the rape victim's name off the public records. If the legislature and judiciary hasten to meet this call, then *Cox* need not be an inadequate standard of protection of privacy rights. States must enact statutes that classify as confidential those portions of police records that contain the rape victim's name and address. Upon the plaintiff's request, courts should have a mandatory rule of procedure in which a pseudonym could be used in place of the rape victim's actual name. Moreover, courts should restrict electronic coverage of the rape victim's testimony.

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149. The *Diaz* court found little guidance in *Cox* because of its narrow holding. *Diaz*, 139 Cal. App. 3d at 131-32, 188 Cal. Rptr. at 771. *See also* Roshto v. Hebert, 439 So. 2d 428, 430-31 (La. 1983) (*Cox* failed to question whether truthful publications are always newsworthy and, therefore, privileged under the first amendment).

150. *In re* Matter of Pittsburgh Action Against Rape, 494 Pa. 15, 41, 428 A.2d 126, 139 (1981).

151. The rape victim in the recent telecast of the New Bedford Rape Case, *see supra* note 3, moved to a new state because she was humilated during her rape trial which turned into a public spectacle. *Rape: TV Replay (Broadcast of New Bedford Rape Trial)*, NATION, April 7, 1984, at 403.

Unlike victims of other crimes, there is a social stigma attached to a victim of a sexual assault.[152] There must be some point at which the constitutional right to publish must bow to the dignity of the rape victim, particularly when her name is not of public record. Disclosure of the victim's name exposes her to possible humiliation and degradation. Publication of the rape victim's identity serves no legitimate purpose but, rather, caters to a "morbid desire" to connect the details of a "detestable" crime with a victim's name.[153] Under the logical nexus theory of newsworthiness, the mere connection of the name to the crime justifies the publication. Therefore, courts must adopt the three-part newsworthiness test when a rape victim's right of privacy is implicated and *Cox* is not controlling.

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152. Broadcasting a rape victim's name in relation to a rape case perpetuates the myth that the woman "asked for it." *In re* Matter of Pittsburgh Action Against Rape, 494 Pa. 15, 40, 428 A.2d 126, 139 (1981). The rape victim's situation is unique. *Id.* at 41-42, 428 A.2d at 139. Unlike the victim of robbery or any other non-rape victim, there is the social stigma of being a victim. *Id.* at 40, 428 A.2d at 139. "Rare is the woman who can endure both the trauma of rape and the trauma of a highly publicized trial." Randolph, *Tavern Rape Case Prompts Hearing Into How To Make Trials*, Washington Post, April 25, 1984, at A3.

153. State v. Evjue, 253 Wis. 146, 161, 33 N.W.2d 305, 312 (1984).