University of Dayton Law Review

Volume 1 | Number 1 Article 5

January 1976

Privacy: Does Freedom of the Press Allow for Protection of a Rape Victim's Identity

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COMMENT

PRIVACY: DOES FREEDOM OF THE PRESS ALLOW FOR PROTECTION OF A RAPE VICTIM'S IDENTITY? *A Comment on Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. 1029 (1975)

Rape is a crime in which a greater social stigma is often attached to the victim than to the perpetrator. A robbery victim is rarely made to feel that he "asked for it," but a rape victim frequently is. In implicit recognition of the "chilling effect" this situation has on reports and prosecutions of rape offenses, the legislatures of Georgia[1] and of several other states[2] have enacted statutes prohibiting media disclosure of a rape victim's name or identity. That the identity of a rape victim is in our society a conventionally designated area of privacy is witnessed by the fact that many newspapers, if not most, voluntarily refrain from divulging this information.

In *Cox Broadcasting Corp. v. Cohn*[3] the constitutionality of the Georgia statute which made it a misdemeanor to disclose a rape victim's name was successfully challenged by Cox Broadcasting Corporation. In an 8-1 decision, the Supreme Court of the United States held that for a state to impose criminal or civil sanctions upon the media for the dissemination of truthful information obtained from public records violated the first amendment guarantees of freedom of speech and of press. The Court declined to decide the broader question "whether truthful publications may ever be subjected to civil or criminal liability consistently with the first and fourteenth amendments, or . . . whether the States may ever define and protect an area of privacy free from unwanted publicity."[4] Thus, the decision apparently leaves intact the common law tort of invasion of privacy, but fails to articulate when, if ever, criminal or

1. GA. CODE ANN. § 26-9901 (1972):
It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

2. FLA. STAT. ANN. § 194.03 (Supp. 1975-76); S.C. CODE ANN. § 16-81 (Supp. 1974); WIS. STAT. ANN. 942.02 (Supp. 1975-76).

3. 95 S. Ct. 1029 (1975).

4. *Id.* at 1044.

civil liability may attach for the publication of accurate information which intrudes upon an individual's privacy.

This Comment proposes to consider whether it may ever be constitutionally permissible for a state to prohibit the revelation of damaging personal information obtained from public records and whether the holding in *Cox* necessarily blocks all avenues of judicial relief to a rape victim who has suffered measurable harm as a result of media publicity.

I. Facts of the Case

Appellee's 17-year-old daughter died after being raped by six fellow high school students. Eight months later, appellant broadcasting corporation identified Cohn's deceased daughter by name during a televised newscast describing a courtroom appearance of the six defendants. Cohn brought an action for invasion of privacy against the reporter who had made the disclosure and against the company which owned the station over which it had been aired. He based his action on a Georgia statute which made it a misdemeanor to print or broadcast or otherwise disseminate to the public a female rape victim's name.[5] It was not disputed that the reporter learned the victim's identity by examining the indictments, which were public records open for general inspection. The trial court disagreed with appellants' contention that their broadcasts of true and accurate information, gleaned from public records, fell under the protection of the first and fourteenth amendments and granted summary judgment to appellee on the ground that the statute gave him a civil remedy. Since no factual dispute existed, liability followed as a matter of law with the amount of damages to be determined at trial by a jury.

On appeal, the Georgia Supreme Court held that the trial court had erred in construing the statute to extend a civil remedy.[6] Nevertheless, appellee's complaint did set out the elements of a cause of action for the common law tort of invasion of privacy. Accordingly, the trial judge's grant of summary judgment had been improper, for unresolved issues of fact were still to be determined at trial: principally, whether or not appellee's privacy had in fact been wilfully or negligently violated and, if so, to what extent. The court rejected appellants' argument that such a limitation on the media's right to disseminate information was necessarily barred by the first and fourteenth amendment guarantees of free speech and free press. It

5. *See* note 1 *supra*.

6. Cox v. Cohn, 231 Ga. 60, 200 S.E.2d 127 (1973).

stressed that a weighing of societal values dictated that appellee's right of privacy be protected at the expense of appellants' right to disclose the information.

Upon motion for rehearing, the Georgia Supreme Court dealt specifically with the constitutionality of §26-9901 and deemed it a valid restriction on first amendment rights, since the identity of a rape victim was not within the province of legitimate public concern and therefore did not "rise to the level of First Amendment protection."[7]

II. Opinion of the Court

The issue before the Supreme Court of the United States was whether a state could, without violating first and fourteenth amendment rights, afford appellee a cause of action for invasion of privacy on the basis of the accurate publication of a rape victim's name, information which was on public record and open to public inspection.[8]

Speaking for the Court, Justice White acknowledged the "impressive credentials"[9] of the right of privacy, but nonetheless held that the states have no power to suppress information obtained from a public record under the guise of protecting an individual's right to privacy. The first and fourteenth amendment guarantees of freedom of speech and of press bar imposition of civil liability for pure expression of information obtained under these circumstances.[10] By reporting fairly and accurately on the commission of criminal acts, their prosecutions, and related judicial proceedings, the press is performing the indispensable function of informing the citizenry about an area of legitimate public concern. Acceptance of the rule urged by appellee would invite self-censorship by the press, so that information which might otherwise be published would instead be suppressed. The societal interest in a vigorous free press overrides

7. *Id.* at 68, 200 S.E.2d at 134.

8. The Court first decided that jurisdiction over the appeal was proper under 28 U.S.C. § 1257(2) (1970) by virtue of the fact that the Georgia Supreme Court drew the constitutionality of Ga. Code Ann. § 26-9901 (1972) into question in a manner bearing directly on the merits of the case and that the Georgia Court's decision was a "final judgment" within the meaning of § 1257. All of the justices agreed that the Court's jurisdiction had been properly invoked, with the exception of Justice Rehnquist, who based his rather lengthy dissent on his belief that the judgment was not "final" in the sense intended by § 1257 and should therefore have been dismissed for lack of jurisdiction.

9. 95 S. Ct. at 1043.

10. "Pure expression" is here contrasted with other forms of "speech." *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning); Street v. New York, 394 U.S. 576 (1969) (flag mutilation); Spence v. Washington, 418 U.S. 405 (1974) (flag desecration).

a state's interest in protecting privacy where the means of protection entails suppression of information on public record.

Although he concurred in the result, Justice Douglas emphasized that he would have rested the decision upon a much broader proposition, namely, that the first and fourteenth amendments flatly prohibit imposition of civil liability for discussion of public affairs, a term which is to be broadly construed to encompass any item which generates sufficient public interest to be covered by the media.

In his concurring opinion, Justice Powell voiced his disagreement with the majority's interpretation of prior decisions. Justice White had claimed that "[t]he Court has . . . left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person." However, Justice Powell argued that "the constitutional necessity of recognizing"[12] truth as a defense was implicit in a standard of recovery based on knowledge or reckless disregard of the truth.[13] In *Gertz v. Welch*[14] that standard had been relaxed to allow a defamed private individual to recover compensatory damages if he could prove at least negligence on the part of the defamer. Thus, Justice Powell noted:

> [I]f the statements are true, the standard contemplated by *Gertz* cannot be satisfied . . . [and] I view that opinion as requiring that the truth be recognized as a complete defense.[15]

III. BACKGROUND

Although it is of relatively recent origin,[16] the tort of invasion of privacy has been recognized by the large majority of states[17] and remains expressly rejected by only three.[18] In spite of the widespread

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11. 95 S. Ct. at 1044.

12. *Id.* at 1048.

13. This was the standard established in a series of cases beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964), as the basis of recovery in defamation and "false light" privacy cases. For discussion see *infra* at 22.

14. 418 U.S. 323 (1974).

15. 95 S. Ct. at 1048-49.

16. Its birth can be traced back to 1890, when Samuel D. Warren and Louis D. Brandeis published their essay, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis argued that individuals who are injured by the press' publication of private information should be granted a legal remedy.

17. W. PROSSER, TORTS, § 117 at 804 (4th ed. 1971). Texas became the most recent state to recognize the right of privacy in Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).

18. *Nebraska*, Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); *Rhode Island*, Henry v. Cherry & Webb, 30 R.I. 13, 73 A. 97 (1909); and *Wisconsin*, Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936).

acceptance this tort has achieved, there is no general consensus about its precise definition. The most famous definition is probably that of Professor Cooley, who called it "the right to be let alone."[19] Other commentators have defined it variously as "control over knowledge about oneself,"[20] as a right protecting an individual's "inviolate personality,"[21] and as "the right of an individual . . . to live a life of seclusion, or to be free from unwarranted publicity."[22]

According to Dean Prosser's analysis, there are really four torts, not just one, within the law of privacy:[23]

1. Intrusion upon an individual's physical solitude.[24]
2. Public disclosure of private information about an individual.[25]
3. Exposure of plaintiff to publicity which places him in a false light in the public eye.[26]
4. Appropriation of the plaintiff's name or likeness for the defendant's advantage.[27]

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19. T. COOLEY, THE LAW OF TORTS § 29 (2d ed. 1888).

20. Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968). Here the emphasis is not on the absence of information about ourselves in the minds of others, but rather on our capacity to control the dissemination of that information. A similar approach is employed in Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973). Warren and Brandeis never defined the term precisely but were concerned primarily with that aspect of privacy which spares one from idle gossip and scandal.

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

22. 77 C.J.S. *Right of Privacy* § 1 (1952).

23. PROSSER, *supra* note 17, at 804-15.

24. This has been construed to cover various behavior. *See, e.g.*, Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964) (electronic eavesdropping); Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E. 2d 765, 307 N.Y.S. 2d 647 (1970) (unauthorized wiretapping); Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (unreasonable obtrusive surveillance); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959)(an illegal search of a customer's shopping bag in a store).

25. To be actionable, the disclosure must be of a highly objectionable nature and the facts revealed must be truly private. Disclosures which have given rise to liability are seen in: Feeney v. Young, 191 App. Div. 501, 181 N.Y.S. 481 (1st Dep't 1920) (the filming of a caesarean delivery); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931)(a motion picture revival of the past history of a reformed prostitute and former murder defendant); Brent v. Morgan, 221 Ky. 765, 299 S.W. 967, Annot., 55 A.L.R. 964 (1927)(the public posting of an individual's indebtedness).

26. D'Altomonte v. New York Herald Co., 154 App. Div. 453, 139 N.Y.S. 200 (1st Dep't 1913)(attributing spurious books or articles to the plaintiff); Stern, Walter, & Simmons, Inc. v. Seaboard Sur. Co., 308 F. Supp. 252 (N.D. Ill. 1970)(using plaintiff's photograph in a suggestive advertisement).

27. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938)(unauthorized use of an individual's name or likeness for advertising or for some other commercial purpose); Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S.E. 452 (1936) (impersonating another in order to obtain confidential price quotations); Burns v. Stevens, 236 Mich. 443, 210 N.W. 482 (1926) (posing as someone else's spouse). "It is the plaintiff's name as a symbol of his identity that is involved here." PROSSER, *supra* note 17 at 805.

Although the *Restatement of Torts*[28] is in accord with Prosser's categorization, his analysis has not gone unchallenged.[29]

It was not until 1967 that the first privacy case finally reached the Supreme Court. By its holding in *Time, Inc. v. Hill*,[30] a "false light" invasion of privacy case, that any publication of legitimate public interest is privileged unless it can be shown that the defendant published with knowledge of falsity or offensiveness or in reckless disregard thereof, the Supreme Court raised the common law newsworthiness privilege, previously recognized as absolute in some states but only qualified in others, to a rule of constitutional law.[31] The decision was in many ways a natural sequel to *New York Times Co. v. Sullivan*,[32] which had revolutionized libel law by holding that the first and fourteenth amendment protections of freedom of speech and of press require that there be clear and convincing proof that a defamatory falsehood regarding the official conduct of a public official was uttered with knowledge of falsity or in reckless disregard for the truth before recovery could be had.[33]

By its holding in *Hill*, the Supreme Court extended to privacy law the constitutional standards which had been developed in defamation cases, even though the interests sought to be protected by the two torts are quite different.[34] Apparently, the common element of falsity in defamation and false light privacy cases blinded the Court to the true nature of the interest sought to be protected in false light privacy cases and resulted in an unsatisfactory merging

28. RESTATEMENT (SECOND) OF TORTS § 652 A (Tent. Draft No. 13, 1967).

29. *See, e.g.*, Bloustein, *supra* note 21; Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 331 (1966).

30. 385 U.S. 374 (1967).

31. For a further discussion of the newsworthy privilege see PROSSER, *supra* note 17 at 823-33.

32. 376 U.S. 254 (1964).

33. Subsequent cases followed and extended the *New York Times* doctrine, applying it to criminal libel prosecutions. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64 (1964)(to all levels of government officials); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967)(county clerks); Time, Inc. v. Pape, 401 U.S. 279 (1974) (police officials); St. Amant v. Thompson, 390 U.S. 727 (1968) (deputy sheriff, political candidates); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)(candidate for a primary election for the U.S. Senate and to those defined as public figures); Associated Press v. Walker, 388 U.S. 130 (1967)(retired Army general and political commentator); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (former athletic director at a state university); Greenbelt Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)(real estate developer).

34. "The gravamen of a defamation action is engendering a false opinion about a person, whether in the mind of one other person or many people. The gravamen in the public disclosure cases is degrading a person by laying his life open to public view." Bloustein, *supra* note 21 at 981.

of defamation and privacy concepts.[35] The Court apparently failed to appreciate that one's privacy can be invaded as effectively by the publication of false facts as by the publication of true ones. The interest sought to be protected is the same in both false light and public disclosure cases. To base recovery on the publisher's recklessness or willfulness in publishing false or offensive material is to stress the reputational interest and ignore the privacy concern. The plaintiff in *Hill* was not concerned about the falsity of the information which *Life* magazine had published but about the fact that it had been published at all. He was not contending that his reputation had been damaged, but rather that his and his family's privacy had been destroyed. Accordingly, it would seem more consistent with the nature of the tort for the Court to base recovery upon the publisher's fault in *invading* the plaintiff's privacy, rather than upon his fault in publishing inaccurate or misleading information.

In 1974, the Court had another opportunity to construe a "false light" invasion of privacy action, *Cantrell v. Forest City Publishing Co.*[36] However, since the defendant was found to have engaged in knowing falsehood or reckless disregard of the truth, the Court had no occasion to reconsider the "actual malice" standard announced in *Hill*. A few months earlier, in *Gertz v. Robert Welch, Inc.*,[37] the Court had relaxed that standard in defamation cases involving those it judged to be private individuals by holding that such plaintiffs could recover compensatory damages for actual injury if at least negligent defamatory falsehood were proved. In order to recover presumed or punitive damages, the *New York Times* standard would have to be met, that is, knowledge of falsity or reckless disregard thereof.[38]

Although *Cox*, like *Gertz*, involved a private plaintiff, the invasion complained of in *Cox* was public disclosure of true facts, whereas in *Gertz* it was defamation. Nevertheless, *Gertz* is important to privacy law since it marks the Supreme Court's first retreat from the *New York Times* line of cases with their unmistakable

35. Nimmer, *The Right to Speak from Time to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

36. 419 U.S. 245 (1974).

37. *See* note 14 *supra*.

38. The *Gertz* holding rejected the rule established in an earlier case, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 31 (1971), according to which the fact that a matter was of "public or general interest" was sufficient to invoke the *New York Times* standard regardless of whether the plaintiff was a private or public figure. Although *Rosenbloom* was discussed at length in *Gertz*, it was not necessary to overrule it explicitly since it had been a plurality decision in which two justices joined Justice Brennan in the plurality opinion, two concurred separately and three dissented.

preference for press freedoms vis-à-vis individual personality rights. However, *Cox* leaves unresolved the issue of whether the more lenient *Gertz* standard established for defamation cases brought by nonpublic persons will be applied to privacy law as well.[39] In his concurring opinion, Justice Powell noted that the Court had not had the opportunity to reconsider the *Hill* rule and expressed doubts about the continued viability of the *Hill* "public interest" test:

> The Court's abandonment of the 'matter of general or public interest' standard as the determinative factor for deciding whether to apply the *New York Times* malice standard to defamation litigation brought by private individuals . . . calls into question the conceptual basis of *Time, Inc. v. Hill*.[40]

Thus, there is reason to think that *Cox* is not the setback for privacy litigation that it may appear to be.

IV. Analysis

The right of privacy, although not expressed in the Constitution has been found to be a peripheral right within the "penumbra" of rights explicitly guaranteed by the Constitution.[41] However, only personal rights which are deemed "fundamental" or "implicit in the concept of ordered liberty"[42] are protected by this guarantee of personal privacy.[43] It is important to realize that the privacy interests thus protected all involve governmental interference with an individual's right to determine his personal conduct or governmental intrusion into places where one's personal life is conducted.

> [The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion'. . . . Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.[44]

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39. *See* Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y. Law Forum 453 (1975) arguing that *Gertz* may signal a revision of the Court's attitude toward privacy law.

40. 95 S. Ct. at 1048.

41. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

42. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

43. Thus far, cases which have granted this protection include: Griswold v. Connecticut, 381 U.S. 479 (1965) (marriage); Roe v. Wade, 410 U.S. 113 (1973) (abortion); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association); Katz v. United States, 389 U.S. 347 (1967) (search and seizure); Stanley v. Georgia, 394 U.S. 557 (1969) (privacy of the home).

44. Katz v. United States, 389 U.S. 347, 350-51 (1967) (footnotes omitted).

Thus, the tort of invasion of privacy has not been found to be of federal constitutional dimensions any more than murder and robbery have been.[45] On the other hand, as Justice Stewart had pointed out, a federal constitutional basis for protecting privacy and reputational interests does exist by virtue of the ninth amendment, which reserves unenumerated rights to the states' protection.

> The protection of private personality . . . is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis for our constitutional system.[46]

Whenever two potentially inconsistent values collide, a balanced assessment of each is required before a choice or compromise can be made between the two. In the case of press-privacy conflicts, where both constitutional and tort principles come into play, careful consideration must be given to the underlying justifications for each interest and to the extent to which each would be hindered or promoted by adoption of the rules urged by the parties. Although the late Justice Black and Justice Douglas repeatedly criticized any balancing or accommodation of first amendment freedoms not explicitly imposed by the framers themselves,[47] a majority of the Court has consistently rejected this absolutist approach and has engaged in the weighing of first amendment guarantees against other legitimate interests. The Court used the "weighing and balancing" approach in *New York Times* and its progeny[48] as well as in the press-privacy cases from *Hill* to *Cox*.

As the majority opinion in *Cox* recognizes, "In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the tradition and significant concerns of our society."[49] The Court concedes that "powerful arguments"[50] can be made for appellant's proposition that "there *is* a zone of privacy surrounding every individual . . . within which the State may protect him from intrusion by the press."[51] However,

45. At least one commentator has argued that perhaps the right of privacy should be accorded constitutional status. Note, *Privacy in the First Amendment*, 82 Yale L.J. 1462 (1973).

46. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

47. *See, e.g.*, Gertz v. Welch, 418 U.S. 223, 355-57 (1974) (Douglas, J., dissenting); Time, Inc. v. Hill, 385 U.S. 374, 398-401 (1967) (Black, J., concurring), at 401-02 (Douglas, J., concurring); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 250 (1974) (Douglas, J., dissenting).

48. *See, e.g.*, note 33 *supra*.

49. 95 S. Ct. at 1044.

50. *Id.* at 1042.

51. *Id.*

it is in the public disclosure privacy tort "that claims of privacy most directly confront the constitutional freedoms of speech and press . . . ."[52] Justice White then goes on to discuss the vital role of the press in informing the citizenry about government and judicial proceedings, thereby enabling the citizenry "to vote intelligently or to register opinions on the administration of government . . . ."[53] In so doing, the press also guarantees fair trials and focuses "public scrutiny upon the administration of justice."[54] Having evaluated the respective interests at stake, the Court concludes that "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection."[55]

While, as Justice White aptly points out, a rule which would make public records available to the media but forbid their publication if offensive to the reasonable person would have a "chilling effect" on the press and invite self-censorship, that would not be the result of the holding urged by the appellee. "One steers clear of a barbed wire fence, but he stays even farther away if he is not sure exactly where the fence is,"[56] but here there is no uncertainty which need prompt such caution. The publisher has been put on notice by the state legislature, *prior to publication*, that the disclosure of identity will be regarded as offensive. Thus, the press would not, as Justice White maintains, find it difficult to inform its readers about public matters, nor would it lead to the suppression of news items which would otherwise be printed. A vigorous press requires clear standards of liability and a broad scope of protection. Predictability is required so that the press can fully exercise its right and duty to inform. None of these objectives would be compromised by allowing a state to proscribe the media publication of a rape victim's name.

It strains credulity to suggest that publication of a rape victim's name in any way provides the public with information it needs to make self-governing choices. It may pander to public curiosity, but it cannot be said that society's interest is served by identification of the victim. There is no question that the public has a legitimate need and right to be informed of criminal acts and of the subsequent prosecution of apprehended criminals; however, in a case such as

52. *Id.* at 1043.
53. *Id.* at 1044.
54. *Id.* at 1045.
55. *Id.* at 1046.
56. Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEXAS L. REV. 630, 634 (1968).

this the press does not abrogate its responsibility to inform if it merely recounts the event without identifying the innocent victim. Every disclosure case can be broken down into two components: the identity of the person involved and the remaining relevant facts. Constitutional guarantees can be met without giving the press license to disclose identities when the facts alone would suffice. Information on public record, protected by the "fair comment" privilege at common law[57] raises problems which should be dealt with selectively and not in a doctrinaire manner.

In *Hill*, the majority acknowledged that damages for invasion of privacy might be justified where " 'revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency.' "[58] This is clearly applicable to identification of a rape victim where the legislature, speaking for the electorate it represents, has unambiguously articulated "the community's notions of decency." The objective of such legislation is to save the rape victim from intense embarrassment and offensive publicity and to aid law enforcement by encouraging reports and prosecutions of rapes. It is well-known that many rapes go unpunished because the victim fears the glare of publicity which would accompany prosecution.[59] Enforcement of the right of privacy in this carefully circumscribed context accomplishes the dual purpose of shielding the victim and facilitating enforcement of justice.

The court's all-or-nothing approach to privacy, namely, that once information is placed in public records all rights to control the extent of publication cease, fails to distinguish between the degrees of publicity and amount of damage which results depending on the method of disclosure. Although a rape victim's name may be on an indictment and the trial open to anyone who may wish to attend, the exposure gained from this alone would be miniscule compared to that resulting from a televised news broadcast aimed at the entire community. Recognizing this distinction, Professor Franklin has noted that:

> It is fiction to say that a newspaper drawing on public records is only making accessible what was constructively known by all before . . . .

57. For a discussion of the "fair comment" privilege at common law, *see* PROSSER, *supra* note 17, at 819-23; 1 HARPER & JAMES, THE LAW OF TORTS, § 5.24-.28 (1956); Note, *Fair Comment*, 62 HARV. L. REV. 1207 (1949).

58. 385 U.S. 374, 383, n. 7 (1967) *quoting* Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir. 1940); Annot., 138 A.L.R. 15 (1940).

59. State v. Evjue, 253 Wis. 146, 153, 33 N.W.2d 305, 312, Annot., 13 A.L.R.2d 1201 (1948) holding that a statute prohibiting identification of a rape victim was not an unconstitutional restraint on the press.

> The nature of the individual item and its intrinsic importance, rather than its classification as a public record, should perhaps be controlling.[60]

Dean Prosser also sounded a cautionary note regarding the significance attached to public records:

> [T]he existence of a public record is a factor of a good deal of importance, which will normally prevent the matter from being private, but . . . under some special circumstances it is *not necessarily conclusive*.[61] (Emphasis supplied)

The Court suggests that a state policy which denies the public and press access to certain kinds of official records and judicial proceedings (such as juvenile court hearings, divorce proceedings, and grand jury testimony) is not constitutionally invalid, but "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information."[62] Here, the Court seems to be offering states a constitutionally acceptable way of protecting such privacy interests, that is, by restricting access to the pertinent documents. Apparently, this could be done without impairing the constitutionally granted right to a public trial in criminal cases. But if, as the Court suggests, states can constitutionally restrict the right of general access to documents relating to certain judicial proceedings, and in so doing notify the press that it prints such information at the risk of civil or criminal liability, why then can a state not simply make an unequivocal declaration of its policy that certain information will be kept private by enacting legislation prohibiting its publication? In either case the press is left with the required "breathing space" and the effect on news dissemination should be the same. In fact, more information about criminal occurrences and judicial proceedings would reach the public if only a single item of information, the rape victim's name, were denied media publicity than if, as the Court suggests, public documentation were avoided altogether.

Admittedly, Cohn's case was a weak one. First, his interest was apparently only a relational one, since it was not his name, but his

60. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 120-21 (1963).

61. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 396 (1960). In his discussion of *Cox*, Professor Beytagh expressed concern " . . . about the almost casual manner in which the Court accepted the 'public records' exception to privacy protection and gave it constitutional status . . . ." *See* Beytagh, *supra* note 39, at 487.

62. 95 S. Ct. at 1047.

daughter's, which was reported in the newscast. This has been a traditional ground for denial of relief.[63] Second, his daughter had died. The general rule is that a decedent's survivors have no legally protected interest in the privacy of the dead person, no matter how close the relationship was. In effect, Cohn was claiming that the invasion of his daughter's privacy, who was already deceased when the alleged invasion occurred, constituted an invasion of his own privacy as well—not a very convincing contention by any standard. Third, although the issue of damages did not go to trial, it would be difficult to imagine what they might have been. Perhaps the Court was influenced by these factors and was understandably reluctant to expand the constitutional scope of privacy law on the basis of such unconvincing facts.

It could be argued that *Cox* is limited to its facts, and that the result would not necessarily be so harsh if a privacy action were brought by a rape victim who could demonstrate that she had sustained real, verifiable injuries. It is easily imaginable that a woman who was the victim of a particularly sensationalized rape would suffer tangible harm as a result of widespread publicity. If there were falsehoods in the news accounts, she might well be able to prevail in a defamation action. As a private individual, the *Gertz* standard would apply and she would be able to recover actual damages so long as she proved that the media were at least negligent in ascertaining the truth. However, if the reports were accurate to the letter, a narrow reading of *Cox* would bar all recovery, even though her injury might be as great. In a case such as this the resultant harm would not be produced by the accuracy or falsity of the information, but by disclosure of her identity. Accordingly, it seems anomalous to base recovery on proof of falsity, when privacy is invaded just as substantially by true as by false statements.

It is probably easier to concede that such a plaintiff should be granted relief than it is to formulate a workable test on which her recovery should be based. Where constitutional guarantees are at stake, it is not advisable to proceed in an ad hoc fashion. A narrow rule could be that whenever a state has unequivocally articulated its policy that certain information not be publicized and a compelling state interest in the restriction can be shown, tort liability may be imposed for its violation. This would save the Georgia statute but leave rape victims in states which do not have such a law without a remedy. A broader rule could be predicated on unwarranted identi-

63. PROSSER, *supra* note 17, at 814-15; for a collection of cases, *see* Annot., 18 A.L.R.3d 873 (1968).

fication of a participant in a newsworthy event. Thus, the newsworthiness of the event would be judged separately from that of the person involved. Liability could be keyed to the relevance of the disclosure to the report of the event so that identification of an individual when not within the sphere of legitimate public interest could be the basis of an invasion of privacy suit. Since this rule would be more likely to infringe on first amendment freedoms than the narrower one, the *New York Times* standard of "actual malice" could be retained as the fault standard. The existence of a public record would be, as Prosser suggested,[64] a significant, but not a decisive factor.

V. CONCLUSION

In *Cox*, the Supreme Court pits the individual's right to privacy against the public's right to know and decides that the latter interest must prevail. However, as has been stressed in this Comment, there is compelling societal interest in preserving individual privacy, for privacy "embodies values which are essential to a free society."[65] A government which purports to cherish individual rights can not afford to disregard the individual's right to privacy. It must recognize that the right to privacy is more than a "sociological notion"[66] or the "residual" left after other interests have been served.[67] It is, like the explicitly guaranteed freedoms of speech and press, a touchstone of democracy. What is at stake is not the individual's right to privacy versus society's right to be informed. Society and the individual have a stake in the preservation of both rights, and where, as in *Cox*, the scales tip in favor of individual privacy, that interest should be protected.

Dalma C. Grandjean

64. *See* note 61 *supra*.
65. Storey, *Infringement of Privacy and its Remedies*, 47 AUSTL. L.J. 498, 508 (1973).
66. Davis, *What Do We Mean By 'Right to Privacy'?* 4 S.D.L. REV. 1, 19 (1959).
67. Kalven, *supra* note 29, at 327.