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WHEN IDENTITIES ARE 'WRONGFULLY DISCLOSED': HOW THE *FLORIDA STAR V. B.J.F.* HAS CHANGED PRIVACY PROTECTION

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I. INTRODUCTION

The United States Supreme Court's decision in a Florida rape-victim privacy case, *The Florida Star v. B.J.F.*,[1] introduced a tough balancing test into the conflict between first amendment and privacy rights. The decision extended constitutional protection to the publication of information released by the government into the public domain, while it curtailed nondisclosure statutes and privacy tort law.[2] As a result, the press cannot be held automatically liable for publishing information normally withheld by state law.[3] Moreover, the burden of protecting rape victim's privacy shifted almost entirely to the government.[4]

The *Florida Star* Court held that a state statute violated the first amendment by imposing damages on a newspaper for publishing a rape victim's name obtained from a publicly released police report.[5] In reversing a civil damage award, the Court limited its decision to the facts in *Florida Star*.[6] Accordingly, the Court extended a "limited principle," to apply to the facts of each case, balancing first amendment rights against privacy rights.[7] The principle, first articulated in *Smith v. Daily Mail Publishing*,[8] permits a state to punish publication of lawfully obtained, truthful information about a matter of public significance only if the state can show that the punishment is narrowly tailored to further a state interest of the highest order.[9] Important

1. 109 S. Ct. 2603 (1989).
2. *Id.* at 2610-13.
3. *Id.* at 2612.
4. *Id.* at 2609 (discussing various government means of safeguarding information).
5. *Id.* at 2613.
6. *Id.*
7. *Id.* at 2609.
8. 443 U.S. 97 (1979).
9. 109 S. Ct. at 2609 (citing *Daily Mail*, 443 U.S. at 103).

to a later application of *Florida Star*,[10] the Court looked beyond the specific disclosure to the entire article to determine that publication concerned a matter of public significance.[11]

The *Florida Star* Court held negligence per se unconstitutional when imposed on the press.[12] In Florida, violation of a statute constitutes negligence per se where the statute sets a standard of care to protect a particular class of persons.[13] In *Florida Star*, the nondisclosure statute protected the identity of sexual assault victims.[14] Thus, the Court reasoned liability followed automatically from the publication.[15] Accordingly, the Court concluded that such "categorical prohibitions" prevent a case-by-case examination to determine whether the disclosure was highly offensive, a requirement of privacy tort law.[16] The Court also held that a statute that singles out the press for punishment fails to meet the state's statutory purpose.[17]

Constitutional scholars and media lawyers cite *Florida Star* as an indication that the Supreme Court interprets first amendment cases liberally while shifting to a more politically conservative position in other areas.[18] The *Florida Star* decision has immediately affected pri-

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10. Applied four months later by the Florida Supreme Court in Cape Publications Inc. v. Hitchner, 549 So. 2d 1374 (Fla. 1989).

11. 109 S. Ct. at 2611.

12. *Id.* at 2612.

13. *See* 38 FLA. JUR. 2d NEGLIGENCE §§ 51-52 (1981); Reliance Elec. Co. v. Humphrey, 427 So. 2d 214 (Fla. 4th D.C.A. 1983).

14. FLA. STAT. § 794.03 (1987). The statute provides in its entirety:

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

Id.

15. 109 S. Ct. at 2612.

16. *Id. See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

17. 109 S. Ct. at 2613. *See Daily Mail*, 443 U.S. at 104-05.

18. Burt Newborne, Professor of Constitutional Law at New York University, believes the Supreme Court is shifting to the right in equality cases, but "not yet" in first amendment cases. He said opinions such as *Florida Star* were "exceptionally careful" to maintain status quo legal norms. John P. McCrory, a Washington lawyer, said *Florida Star* followed a trend of privacy cases in other courts that were decided narrowly and limited to their own sets of facts. *PLI Seminar Considers Libel by Implication Cases*, News Notes, 16(42) MEDIA L. REP., reporting on Practicing Law Institute's Communication Law Seminar held Nov. 9-10, 1989, New York (Nov. 28, 1989).

vacy plaintiffs and media defendants.[19] In addition, *Florida Star* affected a criminal defendant appealing a conviction for divulging confidential information,[20] and courts in various kinds of civil action followed the style of the case in protecting the privacy of parties.[21]

This article examines *Florida Star's* impact on these cases as well as the impact it may have on future cases involving privacy torts and state laws protecting the identity of crime victims, and on access to public records. The analysis will attempt to determine what types of nondisclosure laws the Supreme Court will accept and what it may be willing to tolerate in statutes punishing the press.

II. *THE FLORIDA STAR V. B.J.F.*

The primary question appealed by *The Florida Star* was whether a state may impose civil and criminal sanctions on a newspaper for publishing lawfully obtained, truthful information found in government records.[22] *The Florida Star* challenged a Florida nondisclosure law, section 794.03.[23] Section 794.03 provides that to "print, publish, or broadcast . . . in any instrument of mass communication" the name or any identifying information of a victim of a sexual offense constitutes a second degree misdemeanor.[24] The Court held that *The Florida Star* could not be punished for publishing information publicly released in a police report.[25] Stressing the narrowness of its holding, the Court recognized the state interest in protecting victims' identities as "highly

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19. *See* Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374 (Fla. 1989) (quashing in part a summary judgment of liability against a newspaper under a private-facts tort and remanding the case); Easton Publishing v. Boettger, 110 S. Ct. 225 (1989) (vacating judgment and remanding to the Supreme Court of Pennsylvania, Eastern District, for further consideration in light of *Florida Star*); Ross v. Midwest Communications, Inc., 870 F.2d 271, 272-75 (5th Cir.) (affirming summary judgment for journalists in a state law invasion-of-privacy claim brought by a rape victim), *cert. denied*, 110 S. Ct. 326 (1989).

20. United States v. Wallington, 889 F.2d 573, 575-80 (5th Cir. 1989) (affirming the conviction of a public employee for divulging confidential law enforcement information in violation of a federal statute).

21. M.A.S. & D.P.S. v. United States, 1989 U.S. Dist. Lexis 9169 (W.D. Mo.) (No. 89-6045-CV-SJ-6), Aug. 7, 1989 (denying motion to seal file by plaintffs in an AIDS-related suit against a government hospital, but revising the name of the case to plaintiffs' initials to preserve their privacy interests). *See also* A.A. v. E.P., 559 So. 2d 622 (Fla. 3d D.C.A. 1990) (protecting children's privacy interests); M.L.B. & J.B. v. Department of Health & Rehabilitative Serv., 559 So. 2d 87 (Fla. 3d D.C.A. 1990) (protecting child's privacy interests).

22. Brief of Appellant at 1, The Florida Star v. B.J.F., 499 So. 2d 883 (Fla. 1st D.C.A. 1986) (No. 87-329).

23. FLA. STAT. § 794.03 (1987). *See* § 794.03 *supra* note 14.

24. *Id.*

25. 109 S. Ct. at 2613.

significant."[26] However, the Court ruled that the liability imposed under section 794.03 failed to adequately serve the state's interests.[27] Thus, the Court concluded that the state's application of section 794.03 under the facts in *Florida Star* failed to meet the strict burden the Court imposed on the state.[28]

A. *The Facts of* The Florida Star v. B.J.F.

1. Commencement of the Civil Suit

On October 20, 1983, B.J.F.[29] reported to the Duval County Sheriff's Department that an unknown assailant robbed and sexually assaulted her.[30] The Sheriff's Department placed the incident report, which identified B.J.F. by her full name, in its open press room.[31] *The Florida Star* is a small Jacksonville, Florida, weekly newspaper with a circulation of 18,000.[32] A reporter-trainee for *The Florida Star* copied the police report verbatim, including B.J.F.'s full name, on a blank duplicate of the department's forms.[33] A reporter from *The Florida Star* rewrote the report in a one-paragraph article.[34] Despite *The Florida Star's* internal policy of not publishing the names of sexual offense victims,[35] the newspaper published B.J.F.'s full name.[36] The article appeared under "Robberies" as one of fifty-four police-blotter stories in the "Police Reports" section.[37] In 1984, B.J.F. filed suit

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26. *Id.* at 2611.

27. *Id.* at 2613.

28. *Id.*

29. The appellee was referred to as B.J.F. by the appellate courts throughout the appeal process, although she and the trial court used her full name in the original action. *Id.* at 2605 n.2.

30. *Id.* at 2605.

31. *Id.* Florida's Public Records Law, with a few specific exemptions, requires most public agency records to be open to public inspection. FLA. STAT. § 119 (1983). The identity of rape victims is among the exemptions from this law, as well as being information protected by § 794.03. As the legal custodian of public records generated by its law enforcement activities, the sheriff's department is responsible for protecting the confidentiality of information exempted from the public records law. *Id.* § 119.07(2)(a) (1987).

32. 109 S. Ct. at 2605.

33. *Id.* The reporter testified during the trial that the department had posted a sign in the press room stating it was against the law to publish the name of a rape victim. Brief for the Appellee at 6-7, The Florida Star v. B.J.F. (No. 87-329).

34. 109 S. Ct. at 2606.

35. Both the reporter and the staff writer testified they were aware of the newspaper's internal policy against publishing the names of rape victims. The publisher testified that six employees in the supervisory chain missed the error. Brief for the Appellee at 7-8.

36. 109 S. Ct. at 2606.

37. *Id.* The article read:

> [BJF] reported on Thursday, October 20, she was crossing Brentwood Park, which is in the 500 block of Golfair Boulevard, enroute to her bus stop, when an unknown

against the sheriff's department and *The Florida Star*.[38] B.J.F. alleged the defendants negligently violated Florida's nondisclosure statute[39] and invaded her privacy.[40] Before trial, the sheriff's department settled with B.J.F. for $2500.[41] The trial judge rejected *The Florida Star's* motion to dismiss B.J.F.'s claim on the ground that the statute violated the first amendment.[42]

2. Trial Court Decision

At the trial, B.J.F. testified that a fellow worker brought the article to her while B.J.F. was in the hospital recovering from the assault.[43] B.J.F. testified that a man called her mother several times and threatened to rape B.J.F. again.[44] B.J.F.'s fear of the caller forced her to change her phone number and residence.[45] B.J.F. stated that she sought police protection and required mental health counseling because of the publicity and the calls.[46]

In defense, *The Florida Star* argued that the newspaper acquired the plaintiff's name lawfully from a "public record" and inadvertently departed from the newspaper's policy of not printing the names of rape victims.[47] *The Florida Star* also argued that the Florida Public Records Act[48] places responsibility on the sheriff to delete nondisclosure information exempted from the public record.[49]

In response, B.J.F. argued that *The Florida Star* obtained her name unlawfully because the public records law explicitly exempted rape victims' names from matters of public record.[50] B.J.F. argued that the statutory exemption equally bound the newspaper as legal

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> black man ran up behind the lady and placed a knife to her neck and told her not to yell. The suspect then undressed the lady and had sexual intercourse with her before fleeing the scene with her 60 cents, Timex watch and gold necklace. Patrol efforts have been suspended concerning this incident because of a lack of evidence.

Id.

38. *Id.*
39. *Id.*
40. Brief for the Appellee at 4.
41. 109 S. Ct. at 2606.
42. *Id.*
43. *Id.* (citing Brief for the Appellee at 5).
44. *Id.* (citing Brief for the Appellee at 6).
45. *Id.*
46. *Id.*
47. *Id.*
48. FLA. STAT. § 119 (1983). *See supra* note 31.
49. Brief of Appellant at 17.
50. Brief for the Appellee at 8 (citing FLA. STAT. § 119.07).

custodian of the public record.[51] Further, the sheriff's department's failure to withhold the exempted information did not make the newspaper's action lawful.[52] The trial judge agreed and granted B.J.F. a directed verdict on liability.[53] The trial judge also ruled that section 794.03 provided a constitutional balance between first amendment and privacy rights, and applied to a narrow class of sensitive criminal offenses.[54]

The trial judge further held the newspaper negligent per se because it violated the nondisclosure statute.[55] The trial judge's holding effectively left the jury to decide, not *whether*, but *how much* to award B.J.F. The jury found that the newspaper "acted with reckless indifference to the rights of others."[56] Accordingly, the jury awarded $25,000 in punitive damages in addition to $75,000 in compensatory damages.[57]

B. The Path to the United States Supreme Court

The Florida Star appealed to the Florida First District Court of Appeal. The appellate court affirmed the lower court's judgment in a three-paragraph *per curiam* opinion holding a rape victim's name should "not to be published as a matter of law."[58] Paul J. Levine, a Miami lawyer who recognized the first amendment implications of the case, filed an amicus curiae brief in the appeal for the Florida First Amendment Foundation.[59] Levine criticized the appellate court for refusing "to confront the constitutional issues" presented by the facts of *Florida Star*.[60] After the newspaper's defeat on appeal, the *St. Petersburg Times* and its legal counsel, George Rahdert, donated hundreds of hours to appeal the district court's decision. Rahdert described the appeal as a "tortured path" to the United States Supreme Court.[61]

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51. *Id.* at 12.
52. *Id.*
53. 109 S. Ct. at 2606.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* The trial judge reduced the compensatory award by $2500 to offset B.J.F.'s settlement with the Sheriff's Department. *Id.* The jury's award almost put *The Florida Star* out of business since the newspaper could not pay B.J.F. $97,500 and lacked insurance. A. Messerschmidt, Miami Herald, A1, col. 5 (Dec. 29, 1986).
58. 499 So. 2d 883, 884 (Fla. 1986).
59. Wendy H. Cohen participated in the amicus curiae brief for the Foundation.
60. Telephone interview with Paul Levine, Attorney at Law, in Miami, Florida (Oct. 6, 1989).
61. Telephone interview with George Rahdert, Legal Counsel for the *St. Petersburg Times*, in St. Petersburg, Florida (Oct. 5, 1989).

The Florida Supreme Court summarily denied review on May 28, 1987.[62] Seven months later, the United States Supreme Court certified to the Florida Supreme Court a question of whether the state high court had jurisdiction at the time it denied review.[63]

The Florida court answered affirmatively on September 1, 1988.[64] Thus, the appeal to the United States Supreme Court was timely. The United States Supreme Court heard arguments six months later and announced its decision on June 21, 1989.

C. *The Court's Analysis*

The United States Supreme Court reversed the state appellate court and concluded that imposing damages on *The Florida Star* for publishing B.J.F.'s name violated the first amendment.[65] Writing for the Court, Justice Thurgood Marshall noted a continuing tension between the first amendment rights of the press and the privacy protection established by statutes and common law doctrines.[66] The majority recognized that historically, the Court "without exception" upheld the right of the press to publish truthful information.[67] Yet, the Court resolved each conflict based on the facts of the particular case before it.[68] Accordingly, the Court concluded *Florida Star* must be examined on its particular facts.

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62. 509 So. 2d 1117 (Fla. 1987).

63. 484 U.S. 984, (1987).

64. *Florida Star*, 530 So. 2d at 286. B.J.F.'s attorney, Joel Eaton, had filed a motion to dismiss the appeal before the United States Supreme Court on the ground the appeal was untimely. He argued the Florida Supreme Court had lacked jurisdiction when it denied review, so *The Florida Star* should have filed an appeal to the United States Supreme Court within 90 days of the first district's opinion. *Id.* at 287. A ten-year-old amendment to the Florida Constitution grants the Florida Supreme Court jurisdiction over district court decisions with an opinion that could create a conflict with another court. FLA. CONST. Art. V, § 3(b)(3). Subsequently, the supreme court does not have subject-matter jurisdiction over a decision without an opinion or citation. 530 So. 2d at 288 n.3. *See also* Jenkins v. State, 385 So. 2d. 1356, 1357 (Fla. 1980). Eaton argued that the first district's three-paragraph opinion was the final decision of the highest state court with jurisdiction. 530 So. 2d at 287. The Florida Supreme Court said the district court opinion had met the requirements of the amendment for subject-matter jurisdiction. *Id.* at 288. Moreover, the court noted that as the final authority over the Florida Constitution, it had discretion to hear even those cases that the amendment excluded from its subject-matter jurisdiction. *Id.* at 288-89. The United States Supreme Court noted probable jurisdiction. *Florida Star*, 109 S. Ct. at 216.

65. 109 S. Ct. at 2608.

66. *Id.* at 2607.

67. *Id.*

68. *Id.*

A trilogy of United States Supreme Court cases, *Cox Broadcasting Corp. v. Cohn*,[69] *Oklahoma Publishing Co. v. District Court*,[70] and *Smith v. Daily Mail Publishing Co.*,[71] framed the argument before the Court. Each case involved the conflict between the first amendment interest in publishing truthful information and the state's interest in protecting individual privacy.[72] A fourth case, *Landmark Communications Inc. v. Virginia*,[73] formed the basis for the *Daily Mail* decision.

1. History

a. *Cox Broadcasting Corp. v. Cohn*

In the first case in the trilogy, *Cox Broadcasting*, the United States Supreme Court reversed a civil damage award against a television station for broadcasting the identity of a rape murder victim.[74] The state court based the award on a Georgia statute[75] which made publishing or broadcasting the identity of rape victims a misdemeanor.[76] The news reporter learned the victim's identity from copies of indictments made available in open court during the trial of one of the six defendants charged with the crime.[77] The trial court rejected the television station's constitutional claims and granted a summary judgment in favor of the victim's father.[78] The court held that the statute provided a civil remedy to those injured by its violation.[79] The Georgia Supreme Court ultimately upheld the statute as a "legitimate limitation on the right of freedom of expression" and found no public concern in publishing the identity of the victim.[80]

On appeal, the United States Supreme Court reversed and held that the press could not be liable for publishing truthful information released in public court records.[81] The Court declined to rule on the broader questions of whether the state may ever subject truthful publication to civil or criminal liability, or whether the state may ever

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69. 420 U.S. 469 (1975).
70. 430 U.S. 308 (1977).
71. 443 U.S. 97 (1979).
72. 109 S. Ct. at 2607.
73. 435 U.S. 829 (1978).
74. 420 U.S. at 471-76.
75. GA. CODE ANN. § 26-9901 (1972).
76. 420 U.S. at 471-74.
77. *Id.* at 472.
78. *Id.* at 474. Since the victim died, the father sued on her behalf. *Id.*
79. *Id.*
80. *Id.* at 475.
81. *Id.* at 496.

protect an area of privacy from unwanted publicity.[82] Significantly, the Court looked beyond the disclosure of the victim's identity and focused instead on the judicial proceedings arising from the prosecution of the crime.[83]

The Court found that judicial proceedings arising from violent crimes "are without question events of legitimate concern to the public . . . ."[84] The Court reasoned that since the scrutiny of the press helps guarantee fair trials,[85] the Court has long extended special protection to accurate reports of judicial proceedings.[86] Accordingly, the Court recognized that the press should scrutinize government operations and that official public records constitute the basic data of government operations.[87] Thus, the Court concluded that privacy interests fade when the information involved appears on the public record.[88] Accordingly, when the state places information on official court records the Court must presume the state intends to serve the public interest.[89] Therefore, under the *Cox Broadcasting* analysis, any state interest in protecting privacy in judicial proceedings may only be served by keeping the information off the public record.[90]

b. *Oklahoma Publishing Co. v. District Court*

In the second case, *Oklahoma Publishing*, the Court found a state court's order which prohibited the press from publishing the identity of a boy involved in a juvenile proceeding to be unconstitutional.[91] In an open court detention hearing, reporters learned the name of an 11-year-old boy charged with second-degree murder.[92] Several newspapers and radio and television stations reported the boy's name.[93] At the arraignment five days later, the trial judge issued a pretrial order enjoining publication of the boy's name and picture.[94] The Oklahoma

82. *Id.* at 491.
83. *Id.* at 490-93.
84. *Id.* at 492.
85. *Id.*
86. *Id.* at 492-93 (citing Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941)).
87. 420 U.S. at 491-92.
88. *Id.* at 494-95.
89. *Id.* at 495.
90. *Id.* at 495-96.
91. 430 U.S. at 308-12.
92. *Id.* at 309.
93. *Id.*
94. *Id.*

Supreme Court sustained the order, relying on Oklahoma statutes[95] requiring closed juvenile proceedings and records unless a judge specifically opened them to the public.[96]

The United States Supreme Court held that the state could not constitutionally prohibit publication of a juvenile's name previously revealed in an open court proceeding.[97] The Court reasoned that when a court made a hearing public, "what transpired there could not be subject to prior restraint."[98] The Court noted that the trial court failed to object to the presence of the press in the courtroom.[99] Further, the trial court presented no evidence that the reporters obtained the name unlawfully "or even without the State's implicit approval."[100]

c. *Smith v. Daily Mail Publishing Co.*

In the third case, *Daily Mail*, the Court upheld an order prohibiting an indictment against two newspapers for publishing the identity of a juvenile accused of a shooting death.[101] The newspaper obtained the identity of the boy from various sources, including witnesses, police, and a local prosecutor.[102] In addition to the newspapers' publication, three radio stations broadcast the juvenile's name.[103] Yet, nearly three weeks later, a grand jury indicted only the newspapers for violating a West Virginia statute.[104] The statute made it a misdemeanor "for a newspaper to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender."[105] The newspapers sought a writ of prohibition, arguing the statute violated the first and fourteenth amendments.[106] The West Virginia Supreme Court of Appeals agreed and issued the writ.[107] The court found that the statute operated as a prior restraint and that the state interest in protecting the identities of juvenile offenders failed to overcome a heavy presumption against prior restraints.[108]

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95. OKLA. STAT. ANN. Tit. 10 §§ 1111, 1125 (Supp. 1976).

96. 430 U.S. at 309-10.

97. *Id.* at 310-12. (per curium opinion).

98. *Id.* at 311 (relying on Nebraska Press Assn. v. Stuart, 427 U.S. 539, 568 (1976) (citing *Cox Broadcasting*, 420 U.S. at 469)).

99. 430 U.S. at 311.

100. *Id.*

101. 443 U.S. at 99-106.

102. *Id.* at 99.

103. *Id.*

104. W. VA. CODE § 49-7-3 (1976).

105. 443 U.S. at 98.

106. *Id.* at 100.

107. *Id.*

108. *Id.*

The United States Supreme Court affirmed the order against the indictments, but declined to decide whether the statute created a prior restraint.[109] The Court ruled that a state must show that any punitive action furthers a state interest, even when the punishment occurs after publication.[110] Further, the Court noted that "state action to punish the publication of truthful information seldom can satisfy constitutional standards."[111] Although the Court found no controlling precedent, three recent decisions[112] taken together suggested "that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[113]

The Court pointed out that in all of the related cases, the government provided access to the information or made access possible.[114] However, the Court placed more emphasis on the *Daily Mail* newspapers' use of routine reporting techniques to learn the identity of the juvenile.[115] The Court held that the first amendment rights of the press prevailed over the state's interest, which was to further the rehabilitation of juveniles by protecting their identities.[116] The Court reasoned that the state's interest could not justify criminal penalties and the West Virginia statute failed to serve that interest.[117] Moreover, the statute unconstitutionally singled out newspapers by not restricting the electronic media or other forms of publication.[118]

d. *Landmark Communications, Inc. v. Virginia*

In *Landmark Communications*, the Court held unconstitutional a state law[119] punishing media disclosure of confidential investigations into judicial misconduct.[120] An accurate report in a Landmark newspaper identified a judge under investigation by a state judicial review

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109. *Id.* at 102.

110. *Id.* (relying on *Landmark Communications*, 435 U.S. at 843).

111. 443 U.S. at 102.

112. *Landmark Communications*, 435 U.S. at 829; Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); *Cox Broadcasting*, 420 U.S. at 469.

113. 443 U.S. at 103.

114. *Id.*

115. *Id.*

116. *Id.* at 104.

117. *Id.* at 105.

118. *Id.* at 104-05.

119. VA. CODE § 2.1-37.13 (1973).

120. *Landmark Communications*, 435 U.S. at 837-45.

commission.[121] A month later, a grand jury indicted the newspaper for violating a statute that made divulging the identity of a judge under investigation by the commission a misdemeanor.[122] In a nonjury trial, the Court found Landmark guilty and fined Landmark $500 plus costs.[123] The Supreme Court of Virginia affirmed.[124]

The United States Supreme Court reversed.[125] While noting that the statute was not a prior restraint, the Court found that the interests advanced by the state were insufficient to justify the restraints on free speech and the press.[126] The Court recognized the state interests, which included maintaining the confidentiality of commission proceedings, protecting the reputation of judges, and maintaining the integrity of the courts, as legitimate state interests.[127] However, the Court held the interests failed to justify the encroachment on first amendment guarantees.[128]

2. The Arguments

The Florida Star argued that *Cox Broadcasting* controlled the issues in *Florida Star*.[129] In both cases, the reporter lawfully obtained the identifying information from the government; only the branches of government differed.[130] In *Cox Broadcasting*, the judicial branch of government supplied the protected information.[131] In *Florida Star*, the executive branch released the name.[132] Both cases involved statutes protecting the identities of victims of sexual assault.[133] Both cases involved news reports about matters of public interest.[134] Both news reports published truthful information contained in public records lawfully obtained by routine newsgathering techniques.[135] In addition, *The Florida Star* argued that the statute created a prior restraint, with

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121. *Id.* at 831.
122. *Id.*
123. *Id.* at 832.
124. *Id.*
125. *Id.* at 834.
126. *Id.* at 838. *See, e.g.* Buckley v. Valeo, 424 U.S. 1, 64-65 (1976).
127. *Id.* at 841.
128. *Id.* Also, the Court stated the state's justifications for the restraint amounted to "assertion and conjecture." *Id.*
129. 109 S. Ct. at 2608 (citing Brief of Appellant at 8).
130. *Id.* Brief of Appellant at 8-9.
131. *Id.*
132. *Id.* The Sheriff's Department acts as a law enforcer for the executive branch. *Id.*
133. *Id.* at 9-10.
134. *Id.* at 12.
135. *Id.*

no procedure for testing or balancing its application.[136] *The Florida Star* also attacked the state courts' use of the negligence per se theory against the press.[137] Finally, *The Florida Star* asked the Court for a "broader First Amendment principle that the press may never be punished, civilly or criminally, for publishing the truth."[138]

B.J.F. countered that *Cox Broadcasting* was not controlling on the issues in *Florida Star*.[139] B.J.F. noted that the defendant in *Cox Broadcasting* obtained the identity of a rape victim lawfully through open judicial proceedings.[140] Conversely, *The Florida Star* obtained B.J.F.'s name unlawfully because the Florida nondisclosure law made the identity of a rape victim confidential.[141] B.J.F. emphasized that the *Cox Broadcasting* Court declined to establish an absolute first amendment right to publish truthful information based on society's concern with both privacy and free press rights.[142] Thus, B.J.F. argued *Cox Broadcasting* left open the question of whether the first amendment protects the press from liability for publishing information in records which by law are not public records.[143] Finally, B.J.F. argued that a rule punishing publication of rape victim's names furthered three interests: the privacy of sexual offense victims; the physical safety of such victims, who may be targets of retaliation if their names become known to the assailants; and the state goal of encouraging victims to report sexual offenses without fear of exposure.[144]

3. The Court's Response

The Court agreed with B.J.F. that *Cox Broadcasting* should not control the issues in *Florida Star* since *Cox Broadcasting* concerned information obtained from court records that were open to public inspection.[145] Justice Marshall emphasized that the *Cox Broadcasting* Court specifically noted the "special protected nature of accurate reports of *judicial* proceedings."[146] Also, the *Cox Broadcasting* Court focused on the role of the press in opening the judicial system to public scrutiny and helping to guarantee fair trials.[147]

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136. *Id.* at 31.
137. *Id.* at 6.
138. *Id.* at 19.
139. *Id.* Brief for the Appellee at 21.
140. *Id.*
141. *Id.*
142. *Id.* at 21-22.
143. *Id.* at 22.
144. 109 S. Ct. at 2611.
145. *Id.* at 2608.
146. *Id.* (quoting *Cox Broadcasting*, 420 U.S. at 492 (emphasis in original)).
147. 109 S. Ct. at 2611.

In the *Florida Star* dissent, Justice Byron White,[148] agreed with the majority's distinction between the two cases.[149] Justice White emphasized, "[J]udicial records have always been considered public information in this country" and in *Cox Broadcasting* state law opened the records to the public.[150] Conversely, in *Florida Star*, state law withheld the information at issue from public release.[151]

Rather than relying on *Cox Broadcasting*, the Court relied on the "limited First Amendment principle" articulated in *Daily Mail*.[152] The *Daily Mail* Court concluded that a state may punish publication of lawfully obtained "truthful information about a matter of public significance" only if the state shows that the punishment is narrowly tailored to further a state interest of the highest order.[153] The Court focused on three important reasons to protect the press with the *Daily Mail* principle. First, since the standard only protects information lawfully obtained, the government could protect sensitive information in alternative ways other than by punishing the press.[154] Second, when the information has been publicly released, punishing the press fails to serve the government's interest in protecting the victims' privacy.[155] Third, self-censorship may result from punishing the media for publishing truthful information released by the government.[156]

The dissent criticized the majority's reliance on the *Daily Mail* principle.[157] Justice White considered the *Daily Mail* "rule" as only a hypothesis that should not be taken as constitutional dogma.[158] Justice White argued that *Daily Mail* concerned the disclosure of the name of an accused murderer.[159] In contrast, *Florida Star* concerned the rights of a crime victim.[160] Thus, Justice White concluded that "[T]he rights of crime victims to stay shielded from public view must be

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148. White's dissent was joined by Chief Justice William Rehnquist and Justice Sandra Day O'Connor. *Id.* at 2416. Justice White also wrote the majority opinion in *Cox Broadcasting* 420 U.S. at 469.

149. 109 S. Ct. at 2614.

150. *Id.*

151. *Id.*

152. *Id.* at 2609.

153. *Id.* (quoting *Daily Mail*, 443 U.S. at 103).

154. 109 S. Ct. at 2609.

155. *Id.* at 2615.

156. *Id.*

157. *Id.*

158. *Id.* White stated that prior cases only suggested the *Daily Mail* principle but none of the prior cases directly controlled *Daily Mail*. *Id.*

159. *Id.*

160. *Id.* at 2605.

infinitely more substantial" than the "minimal" rights of those accused of crime to remain anonymous.[161] Finally, Justice White wrote, "*Daily Mail* was careful to state that the 'holding in this case is narrow . . . *there is no issue here of privacy.*' "[162] Thus, Justice White concluded that privacy as the principal issue in *Florida Star* takes *Florida Star* outside the *Daily Mail* holding.[163]

4. The *Daily Mail* Principle

The Court ruled that applying the *Daily Mail* principle to the facts in *Florida Star* demanded reversal.[164] The Court found that in addition to being lawfully obtained and truthful, the information in the news article addressed "a matter of public significance."[165] The Court also found that the liability imposed on the publication in *Florida Star* failed to meet the *Daily Mail* standard requiring the punishment to "further a state interest of the highest order."[166] Finally, the Court expressed concern that liability would result in the media's self-censorship.[167]

a. Truthful Information Lawfully Obtained

The Court found that *The Florida Star* lawfully obtained B.J.F.'s name.[168] The Court noted B.J.F.'s argument that the identity of rape victims in police reports are not matters of public record.[169] However, the Court found that "the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to *receive* them when furnished by the government."[170] Further, the Court concluded that the government's failure to fulfill its statutory obligation to prevent the private information from being published could not make the receipt of confidential information unlawful.[171]

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161. *Id.* at 2615.
162. *Id.* (quoting *Daily Mail*, 443 U.S. at 105 (emphasis and omission in original)).
163. 109 S. Ct. at 2615.
164. *Id.* at 2610.
165. *Id.* at 2610-11.
166. *Id.* at 2611.
167. *Id.* at 2610.
168. *Id.* at 2611.
169. *Id.* at 2610. (citing Brief for the Appellee at 17-18 (citing FLA. STAT. § 119.07(3)(h) (1983))).
170. *Id.* (emphasis added).
171. *Id.* at 2610-11.

1. Alternative Means to Protect Privacy

The Court limited the means by which states may guard against the dissemination of private facts to nothing as drastic as punishing truthful publication.[172] The Court reasoned that despite the limitation, the state retained "ample means" of protecting private information, especially when the state possesses the sensitive information.[173] The Court suggested the following internal procedures to safeguard information: "The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination."[174]

Furthermore, the Court left some questions unanswered. First, the Court noted that neither the *Daily Mail* principle nor the *Florida Star* decision settled the issue of whether the press may be punished for *unlawful* acquisition of private information.[175] Second, the Court noted that Florida had not prohibited the *receipt* of confidential information.[176] Thus, the Court left open the questions of whether government restraints on unlawfully acquired information or on receipt of information would be constitutional.

2. A Matter of Public Significance

The Court also found that the news article concerned "a matter of public significance."[177] The Court looked beyond the specific identity revealed in the article and instead considered the article as a whole.[178] The Court concluded that the article's subject matter, the investigation of a violent crime, constituted a matter of "paramount" interest to the public.[179] Conversely, in the dissent, Justice White found no public interest in publishing the names of crime victims.[180]

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172. *Id.* at 2609.

173. *Id.*

174. *Id.*

175. *Id.* at 2610, n.8.

176. *Id.* at 2611.

177. *Id.* (quoting *Daily Mail*, 443 U.S. at 103 (1979)).

178. 109 S. Ct. 2611.

179. *Id.* In weighing the importance of the article, the Court followed its previous holdings in the trilogy of cases above, as well as *Landmark Communications. Id. See also supra* notes 69-71 and accompanying text.

180. 109 S. Ct. at 2619. (White, J. dissenting). The dissent also found no public interest in "immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy have failed." *Id.*

b. A State Interest of the Highest Order

The majority found that the liability imposed on *The Florida Star* failed to "further a state interest of the highest order."[181] Accordingly, the Court concluded that the Florida nondisclosure law, section 794.03, failed to meet the strict *Daily Mail* standard.[182] The Court recognized B.J.F.'s argument that punishing publication furthered three state interests: the privacy of the victims, protecting victims from retaliation by assailants, and encouraging victims to report sexual offenses.[183] Moreover, the Court agreed that these interests constituted "highly significant interests."[184] The Court also stated that someday a privacy case may meet the high standards of the *Daily Mail* principle.[185]

However, the Court considered imposing liability under the facts of *Florida Star* as too extreme a means to further the government interests.[186] Thus, the Court based its holding that the liability imposed in *Florida Star* did not serve the governmental interests advanced on three independent reasons. First, the information was already in the public domain.[187] Second, negligence per se unconstitutionally imposed categorical prohibitions on the media.[188] Third, singling out the press for punishment made the statute underinclusive.[189]

1. Information in the Public Domain

The Court emphasized that the government placed the information in the public domain, which implied that the government expected further dissemination of the information.[190] The Court held that the sheriff's department's failure to protect the information undercut Florida's policy against disclosing rape victims' identities.[191] Accordingly, the state failed to police itself by disseminating the informa-

181. *Id.* at 2611 (quoting *Daily Mail*, 443 U.S. at 103).

182. 109 S. Ct. at 2611-13.

183. *Id.* at 2611.

184. *Id.*

185. *Id.* The Court held: "We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance those interests as to satisfy the *Daily Mail* standard." *Id.* Unfortunately the Court did not provide any insight into what type of case would meet the *Daily Mail* standard.

186. *Id.* at 2613.

187. *Id.* at 2611-13.

188. *Id.* at 2612.

189. *Id.* at 2612-13.

190. *Id.* at 2611-12.

191. *Id.* at 2611.

tion.[192] Thus, the Court concluded that imposing damages against the press for publishing information released by the state was not a means sufficiently tailored to safeguard victims' anonymity.[193] The Court reasoned that where the government makes information publicly available, punishing anyone other than "the source of its release," would be highly irregular.[194]

In fact, the Court broadly stated that the constitution prohibited judicial restraint on the dissemination of truthful information already in the public domain.[195] The very fact that the government issued the information without qualification conveys the idea that the government considered subsequent publication of the information lawful.[196] Thus, the Court concluded that imposing civil damages for merely reproducing the news release "would surely violate the First Amendment."[197]

Additionally, the Court held that once the government released information to the public domain, any hope of restitution rested in the government.[198] The Court noted that the government's mishandling of confidential information given by the victims created the source of the release.[199] Accordingly, the government must be willing to compensate those victims for their loss of privacy and the other consequences of the disclosure.[200]

2. Negligence per se

Since the application of the negligence per se theory to section 794.03 would result in impermissible "categorical prohibitions upon media access . . .," the Court held the automatic imposition of liability failed to serve the state's asserted interests.[201] The Court reasoned that, unlike civil actions based on the common law tort of invasion of privacy, claims based on section 794.03 would eliminate case-by-case

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192. *Id.*

193. *Id.*

194. *Id.* at 2610.

195. *Id.*

196. *Id.* at 2612.

197. *Id.* Justice Marshall stated: "The fact that appellant converted the police report into a news story by adding linguistic connecting tissue necessary to transform the report's facts into full sentences cannot change this result." *Id.*

198. *Id.* at 2611-12.

199. *Id.*

200. *Id.* Perhaps B.J.F. should not have settled with the Sheriff's Department. The Court may have held the Sheriff's Department liable under the strict *Daily Mail* standard since the Sheriff's Department released the information into the public domain.

201. *Id.* at 2612.

findings that a reasonable person would find the disclosure highly offensive.[202] Under the negligence per se theory, liability follows automatically from publication "regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a subject of reasonable public concern . . . ."[203] Further, the Court held the application of the negligence per se theory to a nondisclosure statute would create a "perverse result" because the first amendment would provide less protection for truthful publications than for defamatory falsehoods.[204]

The dissent responded by arguing the majority's negligence per se concerns "miss the mark."[205] Justice White noted that the negligence per se theory does not hold defendants liable without a showing of negligence.[206] Instead, negligence per se means the legislature, not the courts, sets the standard of care for determining negligence.[207] Because the legislature reflects public opinion, Justice White upheld the legislative determination that a reasonable person would find categorically offensive the identification of a rape victim.[208] However, if the statute automatically imposed liability, evidence that the victim's identity was already known would enter into a jury's calculation of damages.[209]

3. Underinclusiveness

The Court found that imposing liability on *The Florida Star* failed to serve the state's interests based on the "underinclusiveness" of section 794.03.[210] The nondisclosure statute only prohibits an "instrument of mass communication" from identifying a sexual offense victim.[211] Section 794.03 does not prohibit the spread of private information by other means, including the neighborhood or workplace gossip.[212]

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202. *Id. See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 356-59 (5th ed. 1984) (discussing the common law public disclosure of private facts elements: (1) public disclosure, (2) private facts, and (3) matter would be highly offensive and objectionable to a reasonable person of ordinary sensibilities).

203. 109 S. Ct. at 2612.

205. *Id.* at 2617.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 2612.

211. *Id.*

212. *Id.*

Thus, because the statute lacked "more careful and inclusive precautions against alternative forms of dissemination," the Court doubted that section 794.03 actually served the significant interests advanced.[213] The Court ruled: "When a state attempts the extraordinary measure of punishing truthful publication in the name of privacy, [the state] must demonstrate its commitment to advancing the interest by applying its prohibition even-handedly, to the small-time disseminator as well as the media giant."[214]

In a concurring opinion, Justice Antonin Scalia concluded that the Court should overturn section 794.03 on the underinclusiveness ground alone.[215] Justice Scalia found that a law that "has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself" could not "protect an interest 'of the highest order.' "[216] Justice Scalia reasoned that the victim would experience just as much discomfort from the dissemination of the news among friends and acquaintances as the discomfort caused by the media publication.[217] B.J.F.'s argument that the state intended to protect rape victims from their assailants failed to persuade Justice Scalia. He reasoned that "there would be little reason to limit a statute with that objective to rape alone,"[218] and that the trial court gave no jury instructions to find that the rapist was still at large.[219]

The dissent argued that prior cases striking down laws due to underinclusiveness involved situations where a legislature singled out one segment of the news media for punishment, such as a newspaper but not television news.[220] Justice White wrote that section 794.03 "even-handely covers all 'instruments of mass communication' . . . and therefore [is] tailored almost as precisely as possible to achieving that end."[221] Justice White argued that the Court should have analyzed all of Florida's privacy tort law rather than just section 794.03, since the lawsuit was an action for "the negligent publication" of B.J.F.'s name rather than a prosecution for violating the statute.[222] He reasoned that in a negligence action, the Court should review the statute as a stand-

213. *Id.* at 2612-13.

214. *Id.* at 2613.

215. *Id.* (Scalia, J., concurring).

216. *Id.* at 2614. Such a law does not protect a state interest when the law leaves "appreciable damage" to the state interest unprohibited. *Id.* at 2613.

217. *Id.*

218. *Id.*

219. *Id.* at 2614.

220. *Id.* at 2617. (White, J., dissenting).

221. *Id.*

222. *Id.*

ard of care.[223] However, Florida's common law tort for publication of private facts would subject the neighborhood gossip to the same standard of care applied to the media.[224]

c. Self-censorship

Finally, the Court refused to contribute to the media's self-censorship by allowing punishment for publishing truthful information "released, *without qualification*, by the government."[225] *Cox Broadcasting* established the principle against self-censorship in relation to official court records, and the *Florida Star* Court extended this protection to other information released by the government.[226] By issuing a press release without qualification, the government, specifically the sheriff's department in *Florida Star*, implied the press could lawfully disseminate the information.[227] Thus, the application of the *Daily Mail* standard protects the press which relies on the government's implied representation.[228] Without such protection, the media would be forced into the "onerous obligation" of sifting through public documents to "prune out material arguably unlawful for publication."[229]

The dissent attacked this prong of the Court's analysis and claimed that the government had not released the information "without qualification."[230] Justice White reasoned that the sign posted in the sheriff's press room, warning against publishing the names of rape victims, qualified the release.[231] Further, the reporter's admitted knowledge of the law and the warning sign refuted the Court's holding that the government implied that the press could lawfully disseminate the information.[232] According to the dissent's analysis, Florida law sufficiently protected rape victims by exempting their names from disclosure and forbidding officials from releasing such information.[233] Justice

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223. *Id.*

224. *Id.* For this argument, White cited Cape Publications, Inc. v. Hitchner, 514 So. 2d 1136 (Fla. App. 1987), which the Florida Supreme Court overturned following *Florida Star*, four months later.

225. 109 S. Ct. at 2610 (emphasis added).

226. *Id.*

227. *Id.* at 2610, 2612.

228. *Id.* at 2610.

229. *Id.* This reasoning appears to recognize *Florida Star's* argument that "[t]he 310 exemptions to the disclosure provisions of the Public Records Act are scattered through the 960 chapters of the Florida Statutes." *Id.* Brief of Appellant at 18.

230. 109 S. Ct. at 2616.

231. *Id.*

232. *Id.*

233. *Id.*

White concluded that when a state takes such steps to prevent disclosure but mistakenly releases the protected information, the press should "respect simple standards of decency" and not publish identifying information about a rape victim.[234]

III. *FLORIDA STAR* APPLIED

A. *Easton Publishing v. Boettger*

Four months after deciding *Florida Star*, the United States Supreme Court granted certiorari in *Easton Publishing v. Boettger*,[235] a privacy case involving the media's disclosure of a state-intercepted communication. The Court vacated the judgment of the Supreme Court of Pennsylvania, Eastern District,[236] and remanded the case for that court to reconsider in light of *Florida Star*.[237] Justice White's dissent in *Florida Star* had predicted this result.[238]

In *Boettger*, the Pennsylvania Supreme Court held a newspaper liable in a civil action under a wiretapping and surveillance statute[239] for publishing excerpts of a transcript of an intercepted telephone conversation obtained from court files.[240] In *Boettger*, state police tapped Alfred Boettger's telephone.[241] Based on the intercepted information, the state charged Boettger with bookmaking, pool selling and conspiracy.[242] In response to a motion for discovery, the district attorney, in violation of the statute, inadvertently filed a copy of the transcript of the intercepted conversation with the clerk of courts.[243] Following a hearing on Boettger's motion to suppress the intercepted information, a newspaper reporter requested and received the file from the clerk's office.[244] The newspaper published a story based on the reporter's notes of the transcripts.[245] Boettger filed a lawsuit based

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234. *Id.*

235. 110 S. Ct. 225 (1989).

236. 555 A.2d 1234 (Pa. 1989).

237. 110 S. Ct. at 225.

238. 109 S. Ct. at 2618, n.4 (White, J., dissenting) (citing *Boettger*, 555 A.2d at 1239-40). Justice White found the ruling "that State cannot prevent publication of private facts about its citizens which the State inadvertently discloses . . . particularly troubling when one considers the extensive powers of the State to collect information." *Id.*

239. 18 PA. C.S. § 5725.

240. 555 A.2d at 1236.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

on a civil action created by the statute, and the trial judge directed a verdict in favor of Boettger on the issue of liability.[246] On appeal, the superior court agreed with the trial court that the reporter was not authorized under the statute to disclose the intercepted communication.[247] However, the superior court created "an implied exemption from liability" for media[248] disclosures which are "of legitimate public concern and lawfully obtained from court records accessible to the public."[249]

The Pennsylvania Supreme Court reversed, finding no ground for a media exemption.[250] The court reasoned that the information was not "readily obtainable through attendance in open court" and the information was not "*intentionally*" placed in records accessible to the public.[251] The court also found that Boettger's right to privacy outweighed the right of the press to publish the transcripts, because the first amendment privilege "directly related to government and the public's interest in scrutiny of its function."[252] Chief Justice Nix's dissenting opinion presaged the result reached by the United States Supreme Court.[253] Chief Justice Nix placed the burden on the judicial system to secure the documents.[254] Chief Justice Nix reasoned that "To place the onus on the newspaper to keep secret that which is public knowledge seriously conflicts with the First Amendment . . . ."[255]

B. *Cape Publications, Inc. v. Hitchner*

In 1987, when *Florida Star* came within the Florida Supreme Court's jurisdiction, the court declined review.[256] However, four months after the United States Supreme Court decided *Florida Star*, the Florida Supreme Court in *Cape Publications, Inc. v. Hitchner*,[257]

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246. The jury returned a verdict of $1,000 in actual damages and $17,409.43 in attorney's fees. *Id.*

247. *Id.* at 1237.

248. The superior court relied on *Daily Mail*, 443 U.S. at 97; *Cox Broadcasting*, 420 U.S. at 469; *Landmark Communications*, 435 U.S. at 829; and Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977). 555 A.2d at 1238.

249. *Id.* at 1235.

250. *Id.* at 1236.

251. *Id.* at 1239 (emphasis in original).

252. *Id.* at 1240.

253. *Id.* at 1240-41.

254. *Id.* at 1241.

255. *Id.* (citing *Landmark Communications*, 435 U.S. at 829).

256. 509 So. 2d 1117 (Fla. 1987). Accordingly, the United States Supreme Court obtained jurisdiction to hear *Florida Star*. 109 S. Ct. at 2607.

257. 549 So. 2d 1374 (Fla. 1989), reviewing 514 So. 2d 1136 (Fla. 5th D.C.A. 1987).

followed the United States Supreme Court's *Florida Star* decision. *Hitchner* concerned the privacy interests of parents who stood trial for aggravated child abuse.[258] The issue was whether a newspaper can be held liable for publishing lawfully obtained, confidential information in a story about a child abuse trial.[259] At the close of the state's evidence in the child abuse trial, the trial judge directed a verdict in favor of the parents, the Hitchners.[260] Section 827.07 of Florida's child abuse law makes child abuse information confidential.[261] However, a *Cape Publications* reporter covering the trial obtained the case file from the prosecutor's office.[262] The file contained some allegations not brought out at the trial.[263] The newspaper published the confidential information and reported that trial testimony brought out the allegations.[264] The Hitchners sued for two counts of invasion of privacy and two counts of libel.[265] The Hitchners based their invasion of privacy claims on the newspaper's violation of section 827.07 which makes the child abuse trial records and reports confidential.[266] The trial court granted partial summary judgment on liability against the newspaper.[267] The court determined that the statute was valid, that the statute created a private cause of action, and that publication of information protected by the statute was negligence as a matter of law.[268] The Fifth District Court of Appeal affirmed and recognized the Hitchners' claim as a proper common law action under a private-acts tort.[269] The elements of a private-acts tort include: (1) publication, (2) of private facts, (3) that are offensive, and (4) not of public concern.[270]

The Florida Supreme Court quashed the summary judgment and narrowly held that the facts of *Hitchner* could not impose liability on the newspaper.[271] Citing *Florida Star's* definition of matters of public

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258. 549 So. 2d at 1375.

259. *Id.* The Hitchners were tried on a charge of maliciously punishing their daughter, a violation of FLA. STAT. § 827.03(3) (1979).

260. 549 So. 2d at 1375.

261. FLA. STAT. § 827.07 (1981).

262. 549 So. 2d at 1375.

263. *Id.*

264. *Id.*

265. *Id.* at 1376.

266. *Id.*

267. *Id.* at 1377.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 1375.

concern, the court held that criminal matters reported in *Hitchner* constituted matters of public concern, and therefore failed to meet the fourth element of Florida's tort law.[272] The court emphasized that "the information published by Cape had been lawfully obtained, was freely given by government officials and thus was legitimately within the public domain."[273] Citing *Cox Broadcasting*, the court also held that the information constituted a matter of legitimate public concern because in writing the article, the newspaper intended to "scrutinize the judicial process" and "what it considered to be a questionable judicial determination."[274]

C. *United States v. Wallington*

In *United States v. Wallington*,[275] the United States Court of Appeals for the Fifth Circuit cited *Florida Star* in affirming the conviction of a public employee for divulging confidential information obtained within the scope of his official duties.[276] Wallace G. Wallington was an employee of the United States Customs Service.[277] The Customs Service assigned Wallington to the Regional Intelligence Branch, which maintained a computer database of federal and state law enforcement files.[278] Wallington ran a computer check on several people and gave the information to a friend who was not authorized to receive it.[279] Consequently, the government charged Wallington with disclosing information in violation of a federal law[280] prohibiting unauthorized disclosure by federal officers and employees of any employment-related confidential information.[281] In a jury trial, the district court convicted Wallington who appealed, arguing the statute constituted an overbroad restriction of free expression.[282]

The court of appeals upheld the statute.[283] The court of appeals reasoned that in conducting public affairs, the government's ability to preserve the confidentiality of its records is essential to the govern-

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272. *Id.* at 1379.
273. *Id.*
274. *Id.* at 1378.
275. 889 F.2d 573 (5th Cir. 1989).
276. *Id.* at 574.
277. *Id.*
278. *Id.*
279. *Id.*
280. 18 U.S.C. § 1905.
281. 889 F.2d at 575.
282. *Id.*
283. *Id.* at 579.

ment's ability to collect information from citizens.[284] The court of appeals noted the United States Supreme Court's suggestion in *Florida Star* "that the government has particularly extensive power to control the disclosure of sensitive information within its custody, and that the government may sanction its employees where 'the mishandling of sensitive information leads to its dissemination.' "[285] The court found that the prohibition imposed on government employees from knowingly disclosing confidential information struck a permissible balance between the first amendment and "the practical necessities of public service."[286]

D. *Ross v. Midwest Communications*

Recently a petition to the United State Supreme Court to review *Ross v. Midwest Communications* cited *Florida Star*.[287] However, the Court denied certiorari.[288] The *Ross* review petition sought review of an invasion-of-privacy action filed by a rape victim against a television station.[289] The station broadcast identifying information about the victim in a documentary questioning the guilt of a man convicted of a similar rape.[290] The United States Court of Appeals for the Fifth Circuit affirmed the trial court's grant of summary judgment for the television station.[291] The Fifth Circuit ruled that the details of the Ross rape were relevant to the issue the broadcast presented and that the issue constituted a legitimate matter of public concern.[292] Citing *Landmark Communications*, the court recognized the state's "power to protect rape victim's privacy by preserving the confidentiality of the state's records and punishing any who steal the information."[293] The court further stated "Liability for the wrongful taking of information could encompass damages resulting from the foreseeable publication of the information."[294]

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284. *Id.*

285. *Id.* (citing *Florida Star*, 109 S. Ct. at 2609).

286. *Id.*

287. 870 F.2d 271 (5th Cir.) (affirming summary judgment for journalists in a state law invasion-of-privacy claim brought by a rape victim), *cert. denied*, 110 S. Ct. 326 (1989).

288. 110 S. Ct. at 326.

289. *See* the Ross petition review in *Rape Victim Asserts Privacy Interest in Name*, 16(33) MEDIA L. REP. (Sept. 26, 1989).

290. 870 F.2d at 271.

291. *Id.*

292. *Id.* at 275.

293. *Id.*

294. *Id.*

Three months after *Ross*, the United States Supreme Court decided *Florida Star*. The *Ross* petition argued that the Supreme Court's decision in *Florida Star* sent a "devastating" message to rape victims, shattering "the fragile confidence [that] rape survivors possessed in law enforcement promises that their identities would not be disclosed."[295] The petition asked the Court to "make clear to survivors of rape that the law provides them some means of redress when their identities are wrongfully disclosed."[296]

IV. THE PRIVACY IMPLICATIONS OF *FLORIDA STAR*

Florida Star leaves unanswered the questions of which types of privacy actions will succeed and what kinds of nondisclosure laws will the courts tolerate? The *Florida Star* dissent redefined the issue in *Florida Star* with a dire prediction that the private facts tort would be obliterated.[297] Justice White narrowed the issue to "whether there is any information about people, which — though true — may not be published by the press."[298] Justice White further noted that the *Florida Star* Court's reliance on the *Daily Mail* standard

> obliterate[s] one of the most note-worthy legal inventions of the 20th-Century: the tort of the publication of private facts . . . . Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here . . . . I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers, or broadcast on television.[299]

Despite the dissent's criticism, the *Daily Mail* standard mirrors the language found in earlier Supreme Court opinions concerning prior restraint and the regulation of expression.

A. *Restraint on and Regulation of Expression*

Historically, the Court holds that the due process clause of the fourteenth amendment requires the courts' scrutiny of the government's attempts to restrain or regulate expression.[300] The judiciary's

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295. 16(33) MEDIA L. REP., *supra* note 289.

296. *Id.*

297. 109 S. Ct. at 2618.

298. *Id.*

299. *Id.*

300. Gitlow v. New York, 268 U.S. 652, 666 (1925); Buckley v. Valeo, 424 U.S. 1, 64-65 (1976).

usual deference to the legislature "cannot limit judicial inquiry when First Amendment rights are at stake."[301] Moreover, the government "carries a heavy burden of showing justification" for a restraint on expression.[302] The government must demonstrate "a sufficiently important interest" to justify the restraint.[303] Additionally, the government must demonstrate how effective the restraint would be in achieving the government's stated interest.[304] Specifically, the restraint which should be "narrowly drawn"[305] must be the "least drastic means" available to accomplish the government's stated interest.[306]

In earlier prior restraint cases, former United State Supreme Court Justice Potter Stewart suggested several ways the government may achieve its stated interests.[307] Justice Stewart reasoned: If the government's stated interest requires the nondisclosure of information in its custody, even if the interest advanced involves national security, the responsibility to protect the confidentiality of the information "must be where the power is."[308] Thus, the government may deny access to information and punish anyone who steals information in the government's custody.[309] The *Florida Star* Court endorsed Justice Potter's suggestion.

However, the *Florida Star* Court never addressed the newspaper's argument that the nondisclosure statute operated as a prior restraint. Likewise, the *Daily Mail* Court, which developed the standard applied in *Florida Star*, declined to decide whether the statute in question in that case operated as a prior restraint.[310] The *Daily Mail* Court, relying on *Landmark Communications*, ruled the government must demonstrate that any punitive action against the press further the state interest asserted, including punishment after publication.[311] Thus, the *Daily Mail* standard extends a balancing test to privacy actions for determining proper government restraints on government released information.

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301. *Landmark Communications*, 435 U.S. at 843.

302. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976).

303. 424 U.S. at 25. *See also* Schad v. Mount Ephraim, 452 U.S. 61, 68 (1981).

304. 427 U.S. at 562.

305. 452 U.S. at 68.

306. First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978). *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) for a discussion of the court's duty to examine alternative means to balance first amendment rights of the press with sixth amendment rights of defendants.

307. New York Times v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

308. *Id.*

309. *Landmark Communications*, 435 U.S. at 848 (Stewart, J., concurring).

310. 443 U.S. at 102.

311. *Id.* (citing 435 U.S. at 843).

B. *"A Proper Case"*

In the *Florida Star* dissent, Justice White's criticism of the majority extension of the *Daily Mail* standard misstated the majority's holding. Justice White interpreted the majority's findings as "protecting a rape victim's right to privacy is not among those state interests of the highest order."[312] However, the majority stated that undeniably the state's asserted interests, including protecting the victim's privacy, are "highly significant."[313] Justice Marshall's majority opinion never implied a hierarchy of state interests that placed "highly significant" below "highest order." Further, unlike the Court's ruling in *Landmark Communications*, the *Florida Star* majority never ruled that the interests asserted insufficiently justified the restraints on the press. Indeed, the *Florida Star* majority held that in "a proper case" the state may impose civil sanctions for publishing the name of a rape victim.[314] The majority defined a "proper case" as one in which advancement of the state interests would overwhelmingly necessitate imposing sanctions.[315] But the majority failed to provide any examples of what might constitute such a proper case.

Because the Court found the categorical prohibition of negligence per se unconstitutional when applied to the press, future civil cases must base any sanctions on common law torts or limited statutes that permit case-by-case analyses.[316] The *Florida Star* Court held that establishing tort elements, such as whether the published matter concerned a matter of public significance or whether a reasonable person would find the disclosure highly offensive, requires case-by-case analyses.[317] However, the Court also noted that historically, and "without exception," the Court upheld the press's right to publish in conflicts with privacy.[318] Without negligence per se, courts must rely on other negligence standards. For example, the Fifth Circuit in *Ross* suggested that liability for the wrongful taking of information could encompass damages resulting from the foreseeable publication of the information.[319]

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312. 109 S. Ct. at 2618.
313. *Id.* at 2611.
314. *Id.*
315. *Id.*
316. *Id.* at 2612.
317. *Id.*
318. *Id.* at 2607.
319. 870 F.2d at 275.

C. *"A Proper Statute"*

1. Truthful Information, Lawfully Obtained

Echoing the language of the Court in the seminal prior restraint case, *Near v. Minnesota*,[320] the *Florida Star* Court declined to rule whether the government may ever subject truthful publications to civil or criminal liability.[321] However, the Court in *Daily Mail* asserted that "state action to punish the publication of truthful information seldom can satisfy constitutional standards."[322] Overall, the Court clearly extends first amendment protection to lawfully obtained information that the government releases into the public domain.[323] The *Florida Star* Court ruled that absent a statute making the receipt of information unlawful, placing information in the public domain renders receipt lawful.[324]

2. Unlawfully Obtained Information

In *Florida Star*, the Court never settled the question of whether the press may be punished for the unlawful acquisition of private information.[325] However, the Court previously extended first amendment protection to the publication of confidential information where the lawfulness of the source was unclear,[326] and to the publication of classified documents that the newspaper illegitimately possessed.[327] Further, the Court will probably not tolerate a statute that makes the receipt of confidential information unlawful unless the statute includes a provision allowing the courts to determine on a case-by-case basis whether the statute's application passes constitutional scrutiny.[328] Finally, because of the unique duty of the press to scrutinize the operations of government, and the necessity of government records

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320. 283 U.S. 697 (1931) (hypothesizing instances when it might tolerate prior restraint, such as the "publication of the sailing dates of transports or the number and location of troops").

321. 109 S. Ct. at 2608-2609.

322. 443 U.S. at 102.

323. 109 S. Ct. at 2609-2610.

324. *Id.* at 2611.

325. *Id.* at 2610 n.8.

326. *Landmark Communications*, 435 U.S. at 829 (where the disclosure concerned confidential investigations into judicial misconduct).

327. New York Times v. United States, 403 U.S. 713 (1971) (where the press received copies of stolen classified documents known as the Pentagon Papers).

328. The *Florida Star* Court's language suggests that it may not find such a statute constitutional: "Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." *Id.* at 2611 (emphasis in original).

to provide the basic data of government operations, courts may need to determine whether any information constitutes a matter of public significance.

The *Ross* petition asked the Court to consider whether the constitution protected the disclosure of private facts obtained from a private source, or an unnamed confidential source.[329] Although the Court denied review of *Ross*, the *Florida Star* Court asserted as an alternative that the government may under some circumstances statutorily forbid nonconsensual acquisition of sensitive information resting in private hands.[330] The Court reasoned that such a statute would fall outside of the requirements imposed by the *Daily Mail* standard.[331]

3. Alternatives

Encouraging the government to use the "least drastic means" to accomplish the government's stated interest is an important feature of the *Daily Mail* standard. Accordingly, the *Florida Star* Court suggested several alternative means of protecting information in the state's custody. First, the government can deny access to certain information and punish the unlawful acquisition of information.[332] The Court also suggested that a damages remedy should apply to the government when the government mishandles information.[333] Thus, restitution may depend on the government's "willingness" to compensate victims and to protect victims from the consequences of the wrongful disclosure.[334]

The appellant's brief in *Florida Star* listed only three states with statutes that impose criminal penalties for publication of the names of sexual offense victims: Florida, Georgia[335] and South Carolina.[336] Nine states place the burden of protecting government-held private information on the government. The appellant's brief stated:

> For the most part, these [nine] statutes regulate the conduct of administrative officials and court employees . . . .

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329. 16(33) MEDIA L. REP., *supra* note 289.

330. 109 S. Ct. at 2609.

331. *Id.*

332. *Landmark Communications*, 435 U.S. at 849 (Stewart, J., concurring).

333. 109 S. Ct. at 2609.

334. *Id.* at 2611-12.

335. GA. CODE ANN. § 16-6-23 (1988), revised to reflect the Court's finding in *Cox Broadcasting*, 420 U.S. at 469.

336. S.C. CODE ANN. § 16-3-730 (1976).

> Although several of these statutes provide criminal penalties for violations by any person, they nonetheless focus on protecting information in the possession of the government . . . . Clearly, this procedure places the burden of confidentiality on law enforcement officials, and accomplishes the purpose of keeping the victim's identity withdrawn from public view without unconstitutional restraint on the press.[337]

Consequently, the *Florida Star* decision squarely places the onus of protecting information in government custody on government officials and employees. In *Wallington*, the fifth circuit cited the *Florida Star* Court's endorsement of internal safeguards to uphold a federal employee's conviction for divulging confidential information.[338] However, state-imposed penalties on government employees and officials for divulging information may create a chilling effect on the release of public information. Therefore, although the press escaped punishment for publishing private information lawfully obtained, in the future, the press may encounter more difficulty in acquiring public documents to which the public is legally entitled.

Ironically, just three months before *Florida Star*, the Court placed a new restriction on the press's access to public records. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,[339] the Court upheld a rejection of a request under the Freedom of Information Act[340] for the Federal Bureau of Investigation's (FBI) computerized compilation of public records.[341] The Court denied access despite the records' special public interest potential and despite the fact that before the FBI compiled information in one databank, individual public records contained the information.[342] In his *Florida Star* dissent, Justice White pointed out the irony of the Court's reasoning in *Reporters Committee*.[343] The *Reporters Committee* Court reasoned that when the government controlled information about a private citizen "as a compilation, rather than as a record of 'what the

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337. Brief of Appellant, at 10-11.

338. 109 S. Ct. at 2609. The *Florida Star* Court had suggested classifying information and enforcing procedures to ensure redacted release. Cited in United States v. Wallington, 889 F.2d 573, 579 (5th Cir. 1989).

339. 109 S. Ct. 1468 (1989).

340. 5 U.S.C.A. § 552 (1982 ed., Supp. IV).

341. 109 S. Ct. at 1485.

342. *Id.* at 1473.

343. 109 S. Ct. at 2619 (White, J., dissenting, citing United States Department of Justice v. Reporters Committee for Freedom of Press, 109 S. Ct. at 1468, 1485 (1989)).

government was up to', the privacy interest . . . is . . . at its apex while the . . . public interest in disclosure is at its nadir."[344] The Court ruled that disclosure of rap sheets, gathered from public records at courthouses across the nation, constitute categorically unwarranted invasions of privacy.[345]

4. Inclusiveness

Finally, for a statute to adequately serve the government's asserted interest, the statute must apply prohibitions evenly "to the small-time disseminator as well as the media giant."[346] The *Florida Star* Court specifically called for "more careful and inclusive precautions against alternative forms of dissemination," including dissemination by individuals.[347] As Justice Scalia suggested, society must be prepared to impose upon itself any prohibition that it is prepared to impose upon the press.[348] Justice Scalia also suggested that if the state intends to protect rape victims from their assailants, a statute should protect victims of other crimes as well, and juries should have to determine whether a perpetrator remains at large.[349]

V. CONCLUSION

The decision in *Florida Star* naturally evolved from *Cox Broadcasting*, which extended constitutional protection to the publication of information released in open court. The *Florida Star* Court further extended constitutional protection to the publication of other information released by the government. Using the *Daily Mail* standard, the Court gave limited protection to any lawfully obtained, truthful information about a matter of public significance. The Court reasoned that the state may punish publication only if the state can show that the punishment is narrowly tailored to further a state interest of the highest order. The Court also ruled that the establishment of the elements of privacy tort laws, including whether the published matter concerns a matter of public significance, requires case-by-case analyses. Finally, courts may look beyond the specific disclosure to the entire article to determine the matter's public significance.

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344. 109 S. Ct. at 1485.
345. *Id.*
346. *Florida Star*, 109 S. Ct. at 2613.
347. *Id.* at 2612-13.
348. *Id.* at 2614.
349. *Id.* at 2613.

Yet, *Florida Star* narrowly held: That the state failed to achieve admittedly significant interests by imposing liability on the press based on section 794.03. Additionally, as long as section 794.03 singles out the press, the statute fails to meet the *Daily Mail* standard. However, the Court warns the press that the *Daily Mail* standard is not an impossible test for the government. Civil sanctions, overwhelmingly necessary to advance the state's interests, establish a proper case for state-imposed sanctions on publishing the name of a rape victim.

Significantly, the *Florida Star* decision requires the government to take responsibility to protect information in its custody. Unfortunately, penalties imposed on government employees and officials for divulging information may have a chilling effect on the release of public information. Even in Florida, where official custodians of public records can face misdemeanor charges and civil penalties for intentionally withholding public records, increasing exposure to civil liability for inadvertently releasing exempted information may cause the public official to err on the side of denying or at least delaying access to public records. Further, delays to access often operate as denials to reporters on a deadline or to a press concerned with timely reports.

Finally, the Court in *Florida Star*, as in *Cox Broadcasting*, leaves open the question "'whether truthful publications may ever be subjected to civil or criminal liability' for invading 'an area of privacy' defined by the State."[350] However, requiring a state to narrowly tailor its remedies to serve an interest of the highest order should maintain the constitutional protection afforded to publishing the truth.[351]

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350. *Id.* at 2609 (quoting *Cox Broadcasting*, 420 U.S. at 491).

351. Radhert, *Star Ruling a 1st Amendment Smorgasbord*, 13 The Brechner Report 6 (July 1989).