THE RIGHT TO PRIVACY VERSUS THE FREEDOM OF THE PRESS: PRIVACY'S STRUGGLE FOR EQUALITY

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I. INTRODUCTION

> *To preserve his sense of identity and the integrity of his personality, . . . each human being needs to limit the area of his intercourse with others. . . . [W]e need to be able to keep to ourselves, if we want to, those thoughts and feelings, beliefs and doubts, hopes, plans, fears and fantasies, which we call "private" precisely because we wish to be able to choose freely with whom, and to what extent, we are willing to share them.*[1]

A democratic society thrives on the dissemination of truthful information to its citizens so that the people may become more educated

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[1] Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 52-53 n.44 (1974) (quoting COMMITTEE ON PRIVACY, JUSTICE, PRIVACY AND THE LAW (M. Littman & P. Carter-Ruck, joint chairmen, 1970)).

and aware of their government.[2] Newspapers, as one of the means employed to inform the public, are able to publicize an event that may involve the lives of only a few, yet will touch and affect the lives of millions. The nature of reporting often involves newsworthy occurrences which may transcend the distinction between matters the public considers important or interesting and those classified as personal in nature. One such situation involves the publication of the names of rape victims.

The tension between an individual's desire to control the publication of personal facts and the public's thirst for information emanates from two competing constitutional rights—the right to privacy and the right to free speech and free press.[3] While, for example, a rape victim has a privacy interest in being physically secure and controlling the publication of personal information about her,[4] arguably the press has a right to

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[2] Bloustein, *Privacy Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 624 (1968). Bloustein adopts the belief that "[f]reedom of speech is derived, not from a supposed 'Natural Right,' but from the necessities of self-government by universal suffrage. . . . Speech is protected because the people, 'the rulers' in a democratic state, must, so far as possible, understand the issues which bear upon our common life." *Id.* (quoting A. MEIKELJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965)). Meikeljohn's principle on freedom of speech was utilized elsewhere in drawing the conclusion that "[a]n informed public is essential to a thriving democracy." Comment, *Identifying the Rape Victim: A Constitutional Clash Between the First Amendment and the Right to Privacy*, 18 J. MARSHALL L. REV. 987, 992 n.31 (1985).

[3] For a discussion on how the right to privacy has evolved into a constitutional right, see *infra* text accompanying notes 9-51. The right to free speech and free press is securely rooted in the first amendment. For a discussion on the scope of protection guaranteed under freedom of the press, see *infra* text accompanying notes 62-84.

[4] In Doe v. Sarasota-Bradento Fla. Television Co., 436 So. 2d 328, 330-31 (Fla. Dist. Ct. App. 1983), the court dedicated a portion of its opinion to addressing the trauma suffered by a rape victim whose identity had been exposed to the public. *Id.* While emphasizing that withholding the victim's name would not have restricted the accurate publication of the "news," the court sympathetically expounded upon the damaging consequences of disclosing a rape victim's identity. *Id.* "The publication added little or nothing to the sordid and unhappy story; yet that brief little-or-nothing addition may well affect appellant's well-being for years to come." *Id.* at 331. Other courts have further acknowledged that victims have an interest in keeping their identities private. *See* Comment, *supra* note 2, at 987 nn.4-5 (citing Poteet v. Roswell Daily Record, Inc., 92 N.M. 170, 177, 584 P.2d 1310, 1317 (1978) (Concealing the identity of a child rape victim may be a more important concern than freedom of the press.)); Cape Publications, Inc. v. Bridges, 423 So. 2d 426, 427 (Fla. Dist. Ct. App. 1980), *cert. denied*, 464 U.S. 893 (1983) (considered "bad taste for a newspaper to print a photograph showing a naked woman fleeing from her estranged husband"); Roshto v. Herbert, 439 So. 2d 428, 432 (La. 1983) ("careless and insensitive" for the press to publish "information about a man's past misdeed").

report on matters of public concern with impunity.[5] Setting aside any alternative resolutions which a minority of scholars espouse,[6] the United States Supreme Court has most effectively confronted and resolved the conflict between these rights through the adoption of "a balancing approach in determining whether the right of free press supersedes the demands of conflicting rights, such as the constitutional right[] . . . to privacy."[7]

This comment will analyze the conflict between the right to keep personal information private and the right to publish, focusing on the Supreme Court's interpretation of the right to privacy and the extent to which the Constitution guarantees freedom of the press. In addition, against the background of these sometimes conflicting interests, this comment will discuss the Supreme Court's current position regarding when an individual's right to privacy will supersede, if ever, the press's right to publish truthful information, paying special attention to the right

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[5] One theorist, Professor M. Nimmer, has suggested that the role of free speech and free press serves three functions in society: "(1) the 'enlightenment' function; (2) the 'self-fulfillment' function; and (3) the 'safety valve' function." Note, Florida Star v. B.J.F.: *Can the State Regulate the Privacy of Rape Victims?*, 41 MERCER L. REV. 1061, 1065 n.37 (1990) (citing M. NIMMER, NIMMER ON FREEDOM OF SPEECH §§ 1.02-.04 (1984)). The enlightenment function offers the general public a passageway to ideas, thus providing them with the information needed to make decisions. *Id.* The self-fulfillment function allows for a means of self-expression, whereas the safety valve function provides people with an alternative to violent measures when a means for releasing hostility is needed. *Id.* at 1066. This theory attempts to capture the essence of the first amendment by setting forth the importance of free press and free speech as it affects each individual in society.

[6] For example, scholars who support the absolutist theory believe that the guarantees of the first amendment are absolute and that no law may infringe upon the protection it affords. Note, *The Imposition of Strict Civil Liability on a Media Defendant for Publication of Truthful, Lawfully Obtained Information*, 18 STETSON L. REV. 119, 123-24 (1988). Similar to this absolutist theory is the belief that one's interpretation of constitutional intent begins and ends with those rights explicitly named in the Constitution. Johnson, *Abortion, Personhood, and Privacy in Texas*, 68 TEX. L. REV. 1521, 1532 n.92 (1990). Therefore, because a right to privacy is not explicitly mentioned in the Constitution, certain scholars would require that "the judge must stick close to the text and the history, and their fair implications, and not construct new rights." *Id.* (citing Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 8 (1971)). Thus, these scholars would always resolve the conflict between the right to publish and the right to privacy in favor of the freedom of the press guarantee explicitly preserved in the first amendment.

[7] Note, *supra* note 6, at 124 (citing Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring) ("[T]he demands of free speech in a democratic society . . . are better served by candid and informed weighing of competing interests.")).

of a rape victim to keep her identity private.[8]

II. THE EVOLUTION OF THE RIGHT TO PRIVACY

> *The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.*[9]

At first blush, the concept that a person possesses a legal right to his privacy appears to be a rudimentary guarantee,[10] particularly in comparison to those explicit rights which are arguably not as essential to human existence in a free society.[11] The Constitution does not, however, explicitly furnish a person with a right to privacy, but rather leaves this matter to the courts' imprimatur.[12] Although legal scholars

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[8] The most recent United States Supreme Court decision addressing a right to privacy claim involved the publication of a rape victim's name. The Florida Star v. B.J.F., 491 U.S. 524 (1989). *See infra* notes 139-61 and accompanying text.

[9] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *quoted in* Eisenstadt v. Baird, 405 U.S. 438, 453 n.10 (1972); Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (Goldberg, J., concurring).

[10] Affording man the right to control the most private aspects of his personal life is a concept originated by legal scholars who realized that a right to privacy is essential to the development of civilized man. Although this right would appear to be a rudimentary guarantee in a society which provides its citizens with so many freedoms, the development of an actual constitutional right to privacy has been continuing for over a century. For a discussion on how the right to privacy has evolved in the courts, see *infra* text accompanying notes 11-25.

[11] *See, e.g.*, U.S. CONST. amend. II ("the right of the people to keep and bear Arms"); U.S. CONST. amend. IV ("[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures"); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

[12] Solomon, *Personal Privacy and the "1984" Syndrome*, 7 W.N.E. L. REV. 753, 771 (1985). Through a line of decisions, the Supreme Court recognized that:

> "[A] right of personal privacy, or a guarantee of certain areas or zones of privacy" does exist under the Constitution. The Court has found the roots of

are unable to agree upon a definition of privacy or the scope of its protection,[13] there is no disputing the necessity of acknowledging that an individual possesses a certain "right to be let alone."[14] This belief was skillfully articulated a century ago when Samuel Warren and Justice Louis Brandeis observed that:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[15]

Hence, this century old concept of privacy established an awareness that, in certain situations, there exists a right to privacy for the individual, a right to which courts have given structure and meaning.[16]

Although the concept of privacy as a legal right did not exist at

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> that right in the First Amendment, Third Amendment, Fourth Amendment, Fifth Amendment, Ninth Amendment, the due process clause of the Fourteenth Amendment, and in the penumbras of the Bill of Rights."

Id. (quoting Roe v. Wade, 410 U.S. 113, 152 (1972)).

[13] One scholar defined privacy as "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him, is limited." Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 36 (1967). Another author viewed privacy as "a form of power, 'the control we have over information about ourselves' or 'the condition under which there is *control* over acquaintance with one's personal affairs by the one enjoying it,' or 'the individual's ability to control the circulation of information relating to him.'" Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 276 (1974) (citing FRIED, AN ANATOMY OF VALUES 140 (1970); PRIVACY, Nomos XIII 94 (Pencock & Chapman, eds. 1971); MILLER, THE ASSAULT ON PRIVACY 25 (1971)) (emphasis in original). Furthermore, one scholar believed that "invasions of privacy take place whenever we are deprived of our bodies and minds as to offend what are ultimately shared standards of autonomy." Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 268 (1977).

[14] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). As a result of this article's influence, Warren and Justice Brandeis have been frequently credited with originating a generalized right to privacy. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1420 (1974).

[15] Warren & Brandeis, *supra* note 14, at 196.

[16] *See infra* notes 22-51 and accompanying text.

common law, Warren and Justice Brandeis incorporated into their theory the common law notion that an individual should be protected in person and in property.[17] They also integrated into their theory society's concern for social changes affording individuals the right to be let alone.[18] The notion that a changing society creates the need for new rights was explained by the authors to mean that "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."[19] Thus, according to Warren and Justice Brandeis, the right to privacy reached beyond preventing the publication of false facts about a person.[20] More appropriately, they reasoned that a right to privacy was "not merely the right to prevent inaccurate portrayal of private life, but to prevent its being depicted at all."[21]

The first case to test the foundation of the Warren and Justice Brandeis thesis was *Roberson v. Rochester Folding Box Co.*[22] The *Roberson* case involved a plaintiff whose likeness was involuntarily placed in an advertisement for Franklin Mills Co. flour.[23] The advertisements, in the form of flyers, were then displayed in various public places where they were seen by many people who personally knew the plaintiff.[24]

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[17] Warren & Brandeis, *supra* note 14, at 193. The common law principles utilized by Warren and Justice Brandeis depict how society has consistently demanded that legal rights be broadened to match society's needs and expectations. *Id.* Early on, the common law provided a remedy "for physical interference with life and property, for trespass *vi et armis*." *Id.* Later, there came the right to life which merely protected a person from battery, the concept of liberty which encompassed freedom from actual restraint, and the right to property which protected a person's land and cattle. *Id.* From these common law rights, Warren and Justice Brandeis decided that the time had come for "the right to life to . . . mean the right to enjoy life; . . . [for] the right to liberty [to] secure the exercise of extensive civil privileges; and [for] the term property . . . to comprise every form of possession—intangible, as well as tangible." *Id.*

[18] Note, *Privacy, Computers, and the Commercial Dissemination of Information*, 65 TEX. L. REV. 1395, 1405 (1987).

[19] *Id.* (citing Warren & Brandeis, *supra* note 14, at 193).

[20] Warren & Brandeis, *supra* note 14, at 218. The scholars noted that redressing or preventing injury caused by the publication of falsehoods would be more appropriately covered under the laws of slander and libel. *Id.*

[21] *Id. See also* Note, Hall v. Post: *North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts*, 67 N.C.L. REV. 1474, 1478 (1989).

[22] 171 N.Y. 538, 64 N.E. 442 (1902).

[23] *Id.* at 542.

[24] *Id.* As a result of having her picture on the advertisement, the plaintiff claimed to have suffered great humiliation due to the "scoffs and jeers" of those who recognized her face. *Id.* at 542-43.

The New York Court of Appeals denied the plaintiff's claim for relief founded in humiliation, dismissing the observations of Warren and Justice Brandeis as being too remote.[25]

It was not until 1905, in *Pavesich v. New England Life Insurance Co.*,[26] that a court acknowledged privacy as an independent right.[27] Hence, not until fifteen years after Warren and Justice Brandeis introduced their views on privacy to the legal field, had their beliefs finally found their way into the decisions of the courts, thus rendering privacy rights protectable.

Since the recognition of privacy as an independent right, courts have delineated the types of privacy interests which are constitutionally protected. In *NAACP v. Alabama*,[28] the Supreme Court addressed whether Alabama could compel the National Association for the Advancement of Colored People (NAACP) to reveal to the state's Attorney General the identities of all Alabama agents and members of the NAACP without violating the due process clause of the fourteenth amendment.[29] By upholding the petitioner's claim that compelling the production of membership lists would violate the first amendment as incorporated through the due process clause of the fourteenth amendment, the Court protected the group members' freedom to associate and, in effect, preserved a right to privacy in one's association with others.[30]

Although not explicitly mentioned in the Constitution, freedom of association was one of the protected interests discussed by the Court in

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[25] In denying the plaintiff's claim, the court articulated the following belief:

> An examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.

Id. at 556.

[26] 122 Ga. 190, 50 S.E. 68 (1905).

[27] *Id.* at 214. In *Pavesich*, the court held that the unauthorized use of the plaintiff's name and picture in an advertisement constituted an invasion of privacy. *Id.*

[28] 357 U.S. 449 (1958).

[29] *Id.* at 451. A judgment of civil contempt had been previously entered against the NAACP when it refused to comply with a court order requiring it to produce a list of its members. *Id.*

[30] *Id.* at 466.

Griswold v. Connecticut.[31] In *Griswold*, the Court articulated the theory that a right to privacy exists under the collective penumbra of the first, third, fourth, fifth, ninth and fourteenth amendments.[32] Having found

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[31] 381 U.S. 479 (1965). Justice Douglas, writing for the Court, reasoned that:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of a parent's choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

Id. at 482.

[32] *See id.* at 484. Justice Douglas supported his penumbra theory by articulating the guarantees which constitute a zone of privacy as follows:

> The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.

Id.

Since its inception, the penumbra theory has been applied to an array of legal settings by scholars who believe that a right to privacy is hidden within the Bill of Rights. For example, some of the questions surrounding one's "right" to decline medical treatment have been addressed in light of the penumbra theory of privacy. Note, *Withholding and Withdrawing Life-Sustaining Medical Treatment: Procedures for Subjective and Objective Surrogate Decision Making* In Re Jobes, In Re Peter *and* In Re Farrell, 19 RUT.-CAM. L.J. 1029, 1032-33 (1988). As one scholar observed, the right to withhold medical treatment "hinges upon the well-founded common-law right to bodily self-determination" and "the constitutionally based right to privacy which the United States Supreme Court has recognized in the penumbra of the Bill of Rights." *Id.*

Additionally, the unreasonableness of electronically recording private conversations has been discussed with respect to the fourth amendment and the penumbra theory of a right to privacy. Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 662-65 (1988). In his article, Gutterman relied on the holding of Katz v. United States, 389 U.S. 347 (1967), which set forth the principle that the fourth amendment protects people, not places. Gutterman, *supra* at 663. Based on this principle drawn from *Katz*, Gutterman discussed the existence of "a penumbra of constitutional rights of privacy" in his determination that "the fourth amendment was intended to escape the stricture of a formalistic property analysis and to affirm the concept that the amendment protects certain privacy rights." *Id. See also* Note, *A*

that the roots to a right to privacy emanated from these amendments, the Court concluded that the right of married persons to use contraceptives fell within this penumbra, or "zone of privacy."[33]

It must be noted, however, that the view that a general right to privacy dwells within the shadows of the Bill of Rights has been met with criticism.[34] Those who have chosen to interpret the Constitution through the eyes of the framers posit that "when the Constitution sought to protect private rights it specified them[,] . . . [and because] it explicitly protects some elements of privacy, but not others, . . . it did not mean to protect those not mentioned."[35] Even in the face of such formidable criticism, *Griswold* and its progeny established and expanded the right to privacy, particularly with respect to procreation and child-rearing.[36]

The Court dramatically extended the right to privacy established in *Griswold* in the landmark case of *Roe v. Wade*.[37] Relying on this broadened right to privacy, the Supreme Court found Texas' nearly

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Reconsideration of the Katz Expectation of Privacy Test, 76 MICH. L. REV. 154 (1977).

Thus, the penumbra theory has been adopted by various scholars as a means to support alleged privacy interests in different factual contexts.

[33] *Griswold*, 381 U.S. at 481-86.

[34] *Id.* at 507-27 (Black, J., dissenting). A formidable criticism against the penumbra theory of privacy was rendered by Justice Black who dissented in *Griswold*. *Id.* In his dissent, Justice Black strongly stated that there is no mention of a right to privacy within the specific boundaries of the Constitution. *Id.* at 508. (Black, J., dissenting). In the words of Justice Black, "[t]he Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not." *Id.*

Justice Stewart, in a separate dissenting opinion, emphasized Justice Black's belief that nothing in the language of the Constitution invalidates Connecticut's law against the use of contraceptives. *Id.* at 527-31 (Stewart, J., dissenting).

[35] Henkin, *supra* note 14, at 1422.

[36] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (The Court invalidated a statute which permitted contraceptives to be distributed by pharmacists and physicians only to married persons, and held that such a statute discriminated against the unmarried.); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (The Court struck down a statute which prohibited the sale of contraceptives to persons under the age of sixteen without a prescription.).

Furthermore, in Stanley v. Georgia, 394 U.S. 557 (1969), the Court went beyond merely addressing issues involving procreation and child rearing when it discussed a person's constitutional right to possess pornographic materials in the privacy of his home. The resolutions presented in *Stanley* touched upon both the protection of an individual's free access to ideas and the vital privacy interest of allowing a person to be free from government scrutiny in his own home. *Id.* at 565, 568.

[37] 410 U.S. 113 (1973).

complete ban on abortions unconstitutional.[38] The aftermath of this decision, however, reached far beyond the rights pertaining to abortion. As a result of the *Roe* decision, legal scholars surmised that *Roe* undeniably formulated an independent "Constitutional Right to Privacy,"[39] and that the Court has essentially categorized the right to privacy as an inherent part of the fourteenth amendment's concept of personal liberty.[40]

Although the Supreme Court in *Roe* took an enormous step toward establishing the foundation of privacy guarantees in the Constitution, questions remained concerning the extent of protection and the standards utilized to define the scope of this protection. After *Roe*, for example, the Court further recognized the right of family members to live together[41] and determined that the right to marry is fundamental.[42] But, even though the Court generously extended the protection under the right to privacy in these areas, its benevolence was not unlimited, as was demonstrated in the 1986 case of *Bowers v.*

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[38] *Id.* at 166. The Court in *Roe* noted, however, that the right to privacy "is not absolute and is subject to some limitations; and that at some point, the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Id.* at 155.

[39] Henkin, *supra* note 14, at 1423.

[40] *Roe*, 410 U.S. at 153. Interestingly, the immeasurable impact that the *Roe* decision had on establishing a constitutional right to privacy remains intact despite the recent Supreme Court decision in Webster v. Reproductive Health Service, 109 S. Ct. 3040 (1989), which some scholars believe may have overruled *Roe*. Bopp & Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157, 157 (1989). *See also* Bopp, Coleson & Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule* Roe v. Wade?, 1 SETON HALL CONST. L.J. 55 (1990). A more reasoned interpretation of *Webster*, however, is that it did not actually overrule *Roe* but "demoted the former fundamental right [to abortion] to a liberty interest under the fourteenth amendment, and therefore states now need only show that their regulatory scheme is rationally related to a legitimate state purpose." Bopp & Coleson, *supra*, at 161-62. For a brief discussion on the importance of whether a right is classified as "fundamental," see *infra* note 49.

[41] Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977). The Court determined that the government may not pass zoning regulations which hinder family members from living together. *Id.* This protection applied evenly to both traditional "nuclear" families as well as to extended families. *Id.* at 504.

[42] Zablocki v. Redhail, 434 U.S. 374, 384 (1978). The Court found a Wisconsin law unconstitutional which required a parent under a court order to support a minor child not in his custody, to meet specific requirements before he may marry. *Id.* at 375. Much of the Court's decision was based upon the determination that the right to marry is fundamental, and interference with that right shall be subject to strict scrutiny. *Id.* at 384.

Hardwick.[43]

In *Hardwick*, the Court addressed whether there is a fundamental right to engage in homosexual sodomy.[44] The *Hardwick* Court, borrowing from *Palko v. Connecticut*[45] and *Moore v. City of East Cleveland*,[46] decided to afford protection under the right to privacy to

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[43] 478 U.S. 186 (1986).

[44] *Id.* at 191-92. The plaintiff in *Hardwick* challenged a Georgia statute which made it a crime to perform or submit to acts of sodomy. *Id.* at 188. There was nothing on the face of the statute distinguishing between heterosexual and homosexual behavior. *Id.* at 188 n.1.

[45] 302 U.S. 319 (1937). The facts of *Palko* involved the appellant's challenge to a Connecticut statute which allowed appeals in criminal cases "to be taken by the state." *Id.* at 320. Pursuant to this statute, the State of Connecticut appealed the lower court's decision which found appellant guilty of murder and sentenced him to life imprisonment. *Id.* at 320-21. In declining to hold that the statute was in violation of the fourteenth amendment, the United States Supreme Court theorized that this was not a situation where "immunities that are valid against the federal government by force of the specific pledges of particular amendments have been found to be *implicit in the concept of ordered liberty* and thus, through the fourteenth amendment, become valid as against the states." *Id.* at 324-25 (emphasis added). The *Palko* Court supported its decision not to classify the Connecticut statute as being "implicit in the concept of ordered liberty" by setting forth situations where the "liberties" at hand could not be abridged by a state statute without violating the fourteenth amendment. *Id.* at 324. For examples of liberties which should not be abridged by a state statute, see De Jonge v. Oregon, 299 U.S. 353, 364 (1936), Herdon v. Lowry, 301 U.S. 242, 259 (1936) (freedom of speech and the right of peaceable assembly); Grosjean v. American Press Co., 297 U.S. 233 (1935), Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1930) (freedom of the press); Hamilton v. Regents, 293 U.S. 245, 262 (1934), Pierce v. Society of Sisters, 268 U.S. 510 (1924) (free exercise of religion); Powell v. Alabama, 287 U.S. 45 (1932) (right of one accused of a crime to the benefit of counsel).

[46] 431 U.S. 494 (1977). In *Moore*, the Supreme Court reversed the lower court's decision which upheld the appellant's conviction for violating a housing ordinance. *Id.* at 496-97. The ordinance placed limits on the number of occupants of a "dwelling unit" by specifically defining what constitutes a "single family." *Id.* at 496 n.2. In reversing the conviction, the Supreme Court noted that "the appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history and solid recognition of the basic values that underlie our society.'" *Id.* at 503 (citing Griswold v. Connecticut, 381 U.S. 479, 501 (1965)). Consequently, the Court deduced that the sanctity of the family is protected by the Constitution "because the institution of the family is *deeply rooted in this nation's history and tradition*." *Id.* (emphasis added). *See also* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (Parents have a constitutional right, reflecting "strong history," tradition and culture, to have the primary decision-making role in rearing their children.); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (Goldberg, J., concurring) (labelling a parents' right to raise their children as a "basic structure of our society"); *Griswold*, 381 U.S. at 496 (accentuating the "traditional nature of family as a relation as old and as fundamental as our entire

those liberties "implicit in the concept of ordered liberty [because] neither liberty nor justice would exist if they were sacrificed,"[47] or those which "respect the teachings of history [and have a] solid recognition of the basic values that underlie our society."[48]

With this theory as its guide, the Court refused to extend the privacy protection traditionally afforded in matters of family, marriage, and procreation to the practice of homosexual sodomy.[49] By so holding, the Court was unwilling to recognize "new" fundamental rights not encompassed in those liberties so "deeply rooted in this nation's history and tradition."[50] Hence, through a line of decisions involving disparate factual scenarios, the Court has provided protection for those privacy rights which it deemed traditionally fundamental pursuant to the due

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civilization").

[47] Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

[48] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (citing Griswold v. Connecticut, 381 U.S. 479, 501 (1965)).

[49] Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986). One scholar noted that the *Hardwick* Court refused to acknowledge *Griswold* and its progeny as precedent stating that "*Griswold* recognized a fundamental right to privacy in the conduct of one's intimate relationships, but the *Hardwick* Court reasoned that the established privacy rights did not bear 'any resemblance to the claimed constitutional right of homosexuals to engage in sodomy.'" Note, *Characterization and Disease: Homosexuals and the Threat of AIDS*, 66 N.C.L. REV. 226, 235 (1987). Similarly, another scholar addressed the Court's refusal to extend the right to privacy to encompass homosexual sodomy by stating that "Justice White[, writing for the Court in *Hardwick*,] read *Griswold v. Connecticut* and its progeny as encompassing only those privacy rights integral to procreative choice and family autonomy." *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1522 (1989) (citing Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973)).

[50] *Hardwick*, 478 U.S. at 192 (citing *Moore*, 431 U.S. at 503). The *Hardwick* decision has been met with criticism questioning how and why the Court decided to draw the line here and not extend the right to privacy any further. Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 747 (1989). Accordingly, one scholar surmised that "unless and until the Court repudiates the privacy doctrine altogether, which it did not do in *Hardwick*, a decision to draw the line *here* is nothing more than a judgment that *this* particular activity is either less fundamental or more unsavory than the activities protected in prior cases." *Id.* (emphasis in original).

Moreover, one authority has argued that the holding in *Hardwick* ignores the possibility that homosexuality could be classified along with "other intimate activities as part of the sphere of autonomy necessary for the flourishing of human personality." Waldron, *Particular Values and Critical Morality*, 77 CALIF. L. REV. 561, 561 (1989).

process clause of the fourteenth amendment.[51]

Since the emergence of a constitutional right to privacy, the Supreme Court has not explicitly attached "fundamental value" to all recognized areas of privacy.[52] "Instead, the Court has found privacy values in some areas to be worthy of constitutional protection as 'fundamental values,' but has not provided such protection to privacy values in other areas."[53] Given the elusive nature of the scope of a right to privacy, it is not surprising that some scholars have adopted varying interpretations of the Court's inroads. Determining whether the constitutional right to privacy may ever protect an individual from having personal, intimate facts publicized, a most interesting distinction has been drawn by scholars who subscribe to two divergent schools of thought.

Specifically, one approach limits the application of a constitutional right to privacy to cases where a plaintiff has attacked a state statute on the grounds that it unconstitutionally deprived him of his privilege to make personal decisions.[54] As one scholar observed, "the constitutional right of privacy described by the Supreme Court in *Roe v. Wade* . . . has little to do with the common law right to privacy described by Warren and Brandeis in their famous treatise . . . ," and while "Warren and Brandeis were trying to create common-law controls over private behavior, . . . *Roe v. Wade* involved the application of constitutional law to control state behavior."[55] Under this approach, right to privacy actions involving an individual's desire to safeguard his personal life from public exposure would not implicate a privacy right of constitutional magnitude since the individual is not being deprived of his autonomy to

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[51] The importance of accurately classifying a right as "fundamental" should not be dismissed as arbitrary given that "[a] statute that interferes with a nonfundamental right need bear only a rational relationship to legitimate state interest; however, when a statute infringes on a fundamental right, the state's objective must be compelling and the statute a necessary and least restrictive means to the achievement of that end." Note, *supra* note 49, at 234-35. Therefore, the Court's ultimate determination of whether a right to privacy will prevail is often dispositive of whether the right involved is determined to be fundamental.

[52] Note, The Florida Star v. B.J.F.: *Balancing Freedom of the Press and the Right to Privacy Upon Publication of a Rape Victims Identity,* 35 S.D.L. REV. 94, 101 (1990). *See supra* text accompanying notes 10-51.

[53] Note, *supra* note 52, at 101.

[54] Rich & Brilliant, *Defamation in Fiction: The Limited Viability of Alternative Causes of Action,* 52 BROOKLYN L. REV. 1, 20 n.94 (1986). For a discussion of cases involving state statutes which were challenged for being an unconstitutional infringement on one's right to privacy, see *supra* text accompanying notes 10-51.

[55] Rich & Brilliant, *supra* note 54, at 20 n.94.

make personal decisions.[56] Thus, first amendment concerns would dominate in these actions.

Admittedly, this approach logically draws a distinction between a plaintiff who challenges a state statute by alleging a deprivation of his right to make personal decisions and a plaintiff who "uses a state statute or state common law as a weapon to attack the constitutional right to free speech."[57] Nevertheless, the basic premise that an individual has a right to be let alone permeates both scenarios. To hold that an individual has a "limited" constitutional right of privacy, only to be invoked when a state statute deprives him of his autonomy, stifles the development of the right to privacy at a time when courts and scholars have come to recognize its existence. Accordingly, the second school of thought believes that even when an individual uses a state statute as a "sword" to defend his right to privacy, it is as much a right of constitutional magnitude as when an individual challenges a statute for allegedly depriving him of his right to privacy.[58]

It is interesting to note that as the right to privacy has developed, individual states have adopted their own state constitutional provisions which guarantee citizens an independent right to privacy. For example, the Florida Constitution explicitly provides that "every natural person has the right to be let alone and free from governmental intrusion into [the person's] private life . . . ."[59] Moreover, at least three other states, Alaska, California, and Montana, also provide a constitutional guarantee to the right to privacy.[60] The adoption of a right to privacy into state constitutions further supports the belief that privacy rights should not be limited, but instead should receive the same protection afforded other rights explicitly mentioned in the Constitution.

Before analyzing whether an individual has a right to prevent the publication of highly personal information, and more importantly, how

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[56] *Id. See also* Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1584 n.42 (1979). Felcher and Rubin also subscribe to the school of thought that the constitutional right to privacy protects persons from governmental intrusions on individual autonomy. *Id.* They support their belief by concluding that "a crucial distinction between the two types of rights is that the common law right operates as a control on private behavior, while the constitutional right operates as a control on the government." *Id.*

[57] Rich & Brilliant, *supra* note 54, at 20 n.94.

[58] *See* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978).

[59] Johnson, *supra* note 6, at 1540.

[60] *Id.* at 1540 n.170.

the Supreme Court has confronted this issue, a discussion of the media's constitutional right to free speech and press must be addressed.

III. THE SCOPE OF PROTECTION UNDER FREEDOM OF THE PRESS

From the founding days of this nation, the rights to freedom of speech and of the press have held an honored place in our constitutional scheme. . . . However, First Amendment rights are not absolute. They are not boundless.[61]

A. WHY THE RIGHT TO PUBLISH TRUTHFUL, LEGALLY OBTAINED INFORMATION OUTWEIGHS OTHER COMPETING INTERESTS

Challenges brought against the press for publishing truthful information have consistently failed because the first amendment guarantees freedom of the press.[62] Setting aside for the time being cases involving claims against the press for violation of an individual's privacy interest,[63] it is important first to note various other interests which have been trumped by the broad protection afforded to the press and its right to publish.

In *New York Times Co. v. United States*,[64] the Court established that the press has virtually absolute immunity from pre-publication restraints.[65] In *New York Times Co.*, the government sought an

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[61] United States v. Progressive, Inc., 467 F. Supp. 990, 992 (W.D. Wis. 1979).

[62] *See infra* notes 64-84 and accompanying text. One scholar's explanation as to why an aggrieved party's legitimate competing interest will often be sacrificed to preserve the right to publish truthful information reads as follows: "Over the ensuing decades, even courts that recognized the right to sue displayed first amendment concerns—implicitly and sometimes explicitly—by denying recovery when they found that the information disclosed was 'newsworthy' or a 'legitimate matter of public concern.'" Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1195-96 (1990).

[63] For a discussion of claims against the press for violation of an individual's privacy interest, see *infra* notes 93-100 and accompanying text.

[64] 403 U.S. 713 (1971).

[65] *Id.* at 714. In a per curiam opinion, the Supreme Court established that "any system of prior restraints of expression comes to this Court bearing the heavy presumption against its constitutional validity." *Id.* (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). *See also* Near v. Minnesota, 283 U.S. 697 (1931). With this presumption in mind, the Supreme Court, in *New York Times*, held that the government had not met the "heavy burden of showing justification for the imposition of such a restraint." *New York Times Co.*, 403 U.S. at 714 (quoting Organization for a

injunction against two newspapers to prevent them from further publication of secret studies of the United States' policy in Vietnam.[66] Although an opposing national security interest was apparent, the heavy presumption against the constitutionality of prior restraints persuaded the Court to conclude that the right of the press to publish truthful information was the paramount of the two interests.[67]

Five years later, the Court addressed the constitutionality of a state court order prohibiting the publication or broadcast of a confession made by a suspect. In *Nebraska Press Ass'n v. Stuart*,[68] the interest sought to be protected by prohibiting the press from publishing information concerning an ongoing trial was clear—to protect the accused's sixth amendment right to a fair trial by preserving an impartial jury.[69] Nevertheless, the *Nebraska Press* Court, applying a balancing

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Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

[66] *New York Times Co.*, 403 U.S. at 714. Specifically, the government sought to enjoin the New York Times and the Washington Post from publishing a classified study entitled "History of U.S. Decision—Making Process on Viet Nam Policy." *Id.*

[67] *Id.* at 722-23 (Douglas, J., concurring). In a concurring opinion, Justice Douglas, relying in part on Near v. Minnesota, 283 U.S. 697 (1931), opined that although "[t]hese disclosures may have a serious impact . . . that is no basis for sanctioning a previous restraint on the press." *New York Times Co.*, 403 U.S. at 722-23 (Douglas, J., concurring). Furthermore, Justice Douglas refuted the government's contention that "it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security," because *Near* "repudiated that expansive doctrine in no uncertain terms." *Id.* at 723 (Douglas, J., concurring) (citing *Near*, 283 U.S. 697 (1931)).

Courts, however, have interpreted this holding to permit the statutory authorization of an injunction against publication of information where its danger is sufficiently compelling. *See* United States v. Progressive, Inc., 467 F. Supp. 990, 992 (W.D. Wis. 1979). In *Progressive*, the district court enjoined a newspaper from publishing information about confidential, technical facts concerning the hydrogen bomb. *Id.* at 997. The defendant magazine, relying in part on the holding in *New York Times*, contended that an injunction would be in violation of first amendment freedoms. *Id.* at 991-92. The district court rejected this argument on the grounds that this case was different in several respects from *New York Times*. *Id.* at 994. First, the published study in *New York Times* contained data detailing events which happened as far back as twenty years earlier. *Id.* Second, the government did not advance any cogent reasons as to how the New York Times article could affect national security. *Id.* Lastly, "[a] final most vital difference between these two cases is that a specific statute is involved here . . . [namely,] Section 2274 of The Atomic Energy Act." *Progressive*, 467 F. Supp. at 992.

[68] 427 U.S. 539 (1976).

[69] *Id.* at 551-56. With respect to the sixth amendment's guarantee of "trial by an impartial jury," the Court, in Duncan v. Louisiana, 391 U.S. 145, 149 (1968), stated that:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial

test,[70] held that the benefits of a gag order did not outweigh the dangers of infringing upon the first amendment.[71] This approach of balancing the effectiveness of the restraint against freedom of the press was established by Judge Hand, who contended that "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[72] After reviewing the facts *sub judice,* in light of Judge Hand's balancing test, the *Nebraska Press* Court was not convinced that a gag order would effectively preserve the accused's sixth amendment right to a fair trial without unconstitutionally infringing upon the right of the press to publish accurate information.[73] Therefore, the order was denied.[74]

First amendment guarantees also extend to commercial publications

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> by a panel of impartial, "indifferent" jurors. . . . "A fair trial in a fair tribunal is a basic requirement of due process." In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn." His verdict must be based upon the evidence developed at the trial.

Id. (citation omitted) (quoting *In re* Murchison, 349 U.S. 133, 136 (1954) and Irvin v. Dowd, 366 U.S. 717, 722 (1961)). The situation presented in *Nebraska Press* was particularly susceptible to the dangers of widespread news coverage stripping the defendant of an unprejudiced jury because the crime was committed in Southland, Nebraska, a town with a population of approximately 850 people. *Nebraska Press*, 427 U.S. at 542.

[70] Applying a balancing test to determine whether a gag order was the appropriate means by which to preserve one's sixth amendment right to a fair trial, the *Nebraska Press* Court made determinations concerning: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Nebraska Press*, 427 U.S. at 562. In addition, the Court considered the exact terms of the restraining order, and whether the record itself supported the issuance of a prior restraint on the publication. *Id.*

[71] *Id.* at 570. In so holding, the Court authoritatively emphasized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559.

[72] *Id.* at 562 (citing United States v. Dennis, 341 U.S. 494 (1951)). Judge Hand's "balancing approach" basically permits the Court to "scrutin[ize] the justifications for the gag order" as a factor in determining whether an infringement of free speech is necessary to prevent a harm from occurring. G. GUNTHER, CONSTITUTIONAL LAW 1428 (11th ed. 1985).

[73] *Nebraska Press*, 427 U.S. at 570.

[74] *Id.*

and advertisements.[75] In *Bates v. State Bar of Arizona*,[76] the Court upheld the right of a legal services clinic to advertise in newspapers that it performed certain routine services at reasonable rates.[77] The State Bar of Arizona advanced several potent justifications for prohibiting lawyers from advertising, including the inherently misleading nature of the advertisement and the preservation of professionalism.[78] Despite such seemingly significant interests, the Court held that the first amendment protects commercial speech, and therefore, this freedom of publication could not be compromised to satisfy the competing interests espoused by the Arizona bar.[79]

Similarly, in *Landmark Communications, Inc. v. Virginia*,[80] the State of Virginia was interested in protecting the reputation of its judges and preserving the institutional integrity of its courts.[81] *Landmark* involved a Virginia newspaper which accurately reported that a judge was under investigation by a state judicial review commission.[82] As a result of the

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[75] NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW § 16.31 (3d ed. 1986). "Before the mid-1970's, the Court assumed that most types of commercial speech—commercial advertising or speech that merely proposes a commercial transaction—fell wholly outside the First Amendment." GUNTHER, *supra* note 72, at 1128. This statement accentuates the strength of the protection afforded first amendment rights despite the irony that courts have only recently considered commercial speech to be protected speech; yet, the courts have held that the first amendment outweighs other justifiable interests.

[76] 433 U.S. 350 (1977).

[77] *Id.* at 384.

[78] *Id.* at 368-79. Additionally, the Arizona Bar considered the advertisement's "[a]dverse [e]ffect on the [a]dministration of [j]ustice," *id.* at 375, "[t]he [u]ndesirable [e]conomic [e]ffects of [a]dvertising," *id.* at 377, "[t]he [a]dverse [e]ffect of [a]dvertising on the [q]uality of [s]ervice," *id.* at 378, and "the difficulties of enforcement." *Id.* at 379. Not withstanding the numerous justifications set forth by the State Bar of Arizona, the Supreme Court concluded that restraining such information from being freely disseminated would amount to a violation of the first amendment. *Id.* at 384.

[79] *Id.*

[80] 435 U.S. 829 (1978).

[81] *Id.* at 841. The State of Virginia was concerned with protecting the reputation of a judge from the adverse publicity which may follow from frivolous complaints, maintaining confidence in the judicial system, prohibiting disclosure of the complaint prior to the Virginia Inquiry and Review Commission's determination that the charge is well founded, and protecting complainants and witnesses from counter-accusations by prohibiting disclosure until the validity of the complaint is established. *Id.* at 833.

[82] Specifically, the Virginia Pilot, a Landmark Communications newspaper, published an article which reported that "[n]o formal complaint has been filed by the commission against [the judge], indicating either that the five-man panel found insufficient cause for

report, the newspaper was convicted under a state law that made it a crime to divulge information pertaining to the commission's proceedings.[83] Reversing the conviction, the Supreme Court opined that the first amendment guarantees of freedom of speech and of the press outweighed the legitimate interests advanced by the state.[84]

Since 1971, the Supreme Court has consistently cleaved to the policy that state interests, which are furthered by restricting the free flow of information, must outweigh the freedom of the press so as to justify the encroachment of this first amendment guarantee. In light of this policy, which often results in a verdict in favor of the press, one may seriously question how an individual could ever succeed in a claim against the press for violating his right to privacy.

B. THE FREEDOM OF THE PRESS IS NOT ABSOLUTE, PARTICULARLY WITH RESPECT TO INVASION OF PRIVACY CLAIMS

Although the first amendment explicitly states that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"[85] the scope of this guarantee is uncertain. Legal scholars who support the absolute guarantee theory of the first amendment have proffered that the amendment's actual language expresses the precise intent of the ratifiers regarding the scope of the amendment's protection.[86] One proponent of this absolutist theory, Supreme Court Justice Black, stated that "[the Founding Fathers] wanted to ordain in this country that Congress, elected by the people, should not tell the people . . . what they should believe or say or publish, and that is about it. It says 'no law,' and that is what I believe it means."[87] According to this absolutist

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action or that the case is still under review." *Id.* at 831.

[83] *Id.* Landmark was indicted and convicted for violating a Virginia statute which makes it a misdemeanor to divulge the identity of a judge who is the subject of an investigation and hearing conducted by the Commission. *Id.* at 831-32 (citing VA. CODE § 2.1-37.13 (1973)). Almost every state has a statute similar to Virginia's law. *Id.* at 833.

[84] *Id.* at 838.

[85] U.S. CONST. amend. I.

[86] Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549, 549 (1962). *See supra* note 6 and accompanying text.

[87] Cahn, *supra* note 86, at 554. *See also* Meikeljohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245. According to Meikeljohn, Justice Black, as an absolutist, believed that "the provisions of the Bill of Rights are 'universal' statements . . . [a]nd such statements are 'not open to exceptions.'" *Id.* at 248. In furthering an understanding of the absolutist thesis, Justice Black summed up his own perceptions stating that "the history and language of the Constitution and the Bill of Rights . . . make

theory, the literal meaning of the language of the amendment is the gauge by which to measure the scope of the amendment's protection.

The absolutist theory for defining the extent of the first amendment guarantees collapsed, however, under the weight of case law which recognized instances where regulation of speech was permissible.[88] As Justice Brandeis astutely articulated, "while the rights enumerated in the first amendment are fundamental, they are not absolute."[89] As a result, courts have upheld regulation of certain types of speech so long as the first amendment is not unduly abrogated.[90] Therefore, speech classified as obscene, defamatory, misleading commercial speech, and fighting words are not protected by the first amendment.[91] These categories of speech which have historically been found unprotected by the first amendment are indicative of the Supreme Court's reluctance to interpret the first amendment guarantee of freedom of speech as absolute.

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it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government *all* power to act in certain areas—*whatever the scope of those areas may be.*" *Id.* (emphasis in original). Hence, "no law abridging" means precisely what the drafters of the Constitution intended it to mean—"*no law abridging.*" *Id.* at 246 (emphasis in original).

[88] *See infra* notes 90-98 and accompanying text.

[89] Note, *supra* note 6, at 124 (citing Whitney v. California, 274 U.S. 357, 373 (1927)). The Court in *Whitney* held that the California Criminal Syndicalism Act, which basically states that one is guilty of a felony if he organizes to advocate criminal syndicalism, did not violate the due process clause or equal protection clause of the fourteenth amendment. Whitney v. California, 274 U.S. 357, 372 (1927). In a concurring opinion, Justice Brandeis articulated that "although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral." *Id.* at 373 (Brandeis, J., joined by Holmes, J., concurring).

[90] *Whitney,* 274 U.S. at 373 (Brandeis, J., joined by Holmes, J., concurring). *See also* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). In *Cantwell,* the Court succinctly stated that "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Id.*

[91] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). The *Chaplinsky* Court expressly provided that:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. (footnote omitted).

Likewise, the first amendment protection affording freedom of the press does not assure that no actions will be brought against the press based on the content of the published expression.[92]

Claims against the press traditionally have been brought under one of three principal tort theories: defamation, negligence, or invasion of privacy.[93] By definition, defamation generally involves the publication of information which is false, and thereby falls outside the scope of this analysis which focuses on the publication of private, albeit true, information.[94] Unlike defamation, invasion of privacy and negligence claims often arise when one has allegedly been injured by a publication of accurate, truthful information.[95] As one scholar noted, "there are significant differences between negligence and privacy actions. . . . One distinguishing feature . . . relates to the nature of the injury. . . . [I]n other negligence cases, the harm the plaintiff has suffered is undeniably real. Many plaintiffs in such cases have suffered grievous bodily harm or death."[96] Unfortunately for the plaintiffs, the harm associated with

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[92] *See infra* notes 90-98 and accompanying text.

[93] Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from the Publication of Accurate Information*, 52 UMKC L. REV. 421, 424 (1984). *See, e.g.*, M. FRANKLIN, MASS MEDIA LAW: CASES AND MATERIALS 300-45 (3d ed. 1986).

[94] *See* Edelman, *supra* note 62, at 1196-97. Defamation is false speech which tends to harm the reputation of the plaintiff. *Id.* at 1196. Cases addressing the issue of defamation have attempted to limit recovery by distinguishing whether the plaintiff is a public or private figure. *Id. See also* New York Times Co. v. Sullivan, 376 U.S. 254, 283, n.23 (1964) (holding that absent a showing of "actual malice," a public official may not be awarded damages for the publication of a defamatory falsehood regarding his official conduct); Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974) (holding that a private figure may recover for defamation based on a "less demanding showing" than a public figure). Since this comment addresses truthful speech invading an individual's privacy, a further discussion regarding defamation is unnecessary.

[95] Linder, *supra* note 93, at 424. *See also* Note, *supra* note 6, at 131.

[96] Linder, *supra* note 93, at 424 (citation omitted). Additionally, courts which have addressed claims asserting media liability for the negligent publication of information have generally refused to adopt the analysis frequently used in privacy actions. *Id.* at 425. *See* Note, *supra* note 5, at 131 (stating that "in negligence actions against the media for negligent publication of accurate and truthful information, courts have required two principal elements: clear-and-present-danger and incitement"). Furthermore, negligence suits can be distinguished from those for invasion of privacy because an invasion of privacy suit may or may not assert negligence with respect to liability. *Id.*

a privacy tort claim is not as easily detectable.[97]

The elements required to establish a tortious invasion of privacy based on the publication of private facts are: (1) the dissemination of information to the public at large, (2) of facts that a reasonable person would consider private and highly offensive, and (3) these facts are not of legitimate or public concern.[98] These guideposts for determining whether an invasion of privacy tort exists are inherently subjective and highly dependant upon a judicial determination of which facts are considered to be "personal, offensive or newsworthy."

Such ambiguities pave an uncertain road as to whether an aggrieved party possesses a legitimate cause of action. Interestingly, the *Restatement (Second) of Torts*, the very source of the elements of a tortious invasion of privacy, offers the following caveat to those proceeding with a privacy tort claim: "It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment."[99] Perhaps the Restatement's warning should be considered as the rule given that

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[97] Edelman, *supra* note 62, at 1208-10. In his discussion of the difficulties involved in determining the damage in "private-fact disclosure privacy torts," Edelman concluded that:

> The difficulty is due, in part, to the complexity of determining the extent of injury. When the disclosed facts are true, the difficulty is compounded because of the clash between the interests of privacy and free speech. The combination of subjective injury and constitutional clash explains the reluctance of courts to recognize a tort in this branch of privacy law.

Id. at 1209-10 (footnote omitted).

[98] RESTATEMENT (SECOND) OF TORTS § 652D (1976). Section 652D of the Restatement, entitled "Publicity Given to Private Life," states that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
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> (a) would be highly offensive to a reasonable person, and
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> (b) is not of legitimate concern to the public.

Id. The tort of invasion of privacy can be said to consist of four branches: "misappropriation of someone's name or likeness, intrusion into a person's private life, placing a person in a false light, and public disclosure of private facts." Comment, *supra* note 2, at 990 n.20. The "branch" which covers a tortious invasion of privacy based on public disclosure of private facts is tantamount to this analysis.

[99] RESTATEMENT (SECOND) OF TORTS § 652D special note (1976).

in all four Supreme Court cases involving speech as an alleged invasion of privacy, the plaintiff was denied recovery.[100] In these cases, the right to privacy collided with the strength of the first amendment and the Court was faced with a choice between the lesser of two evils: abridging an individual's right to privacy in truthful but personal aspects of his life, or depriving the press of its freedom to publish verified, newsworthy information.

The concerns discussed above are perhaps best illustrated in cases involving the publication of the names of rape victims, where interestingly, two out of the four privacy cases which the Supreme Court chose to address involved the publication or broadcast of a rape victim's name. Moreover, the most recent privacy decision, which reflects the current position of the Court, involved a privacy claim by a rape victim whose identity was published.

IV. PUBLISHING A RAPE VICTIM'S NAME: THE RIGHT TO PRIVACY VERSUS THE RIGHT TO PUBLISH

> *Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments . . . it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records . . . .*[101]

The Supreme Court has come closest to resolving the ongoing conflict between the right to privacy and the right to publish in a number of narrowly decided cases, specifically, *Cox Broadcasting Corp. v. Cohn,*[102] *Oklahoma Publishing Co. v. District Court,*[103] *Smith v. Daily Mail Publishing Co.,*[104] and, most recently, *The Florida Star v. B.J.F.*[105]

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[100] The Florida Star v. B.J.F., 491 U.S. 524 (1989); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). *See infra* notes 102-61 and accompanying text.

[101] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

[102] 420 U.S. 469 (1975).

[103] 430 U.S. 308 (1977).

[104] 443 U.S. 97 (1979).

[105] 491 U.S. 524 (1989).

All four cases involved speech as an alleged invasion of privacy[106] and the constitutionality of state actions attempting to punish the reporting of truthful, accurate information.[107] The lesson gleaned from these cases can best be summarized by recanting Chief Justice Burger's observation that "state action to punish the publication of truthful information seldom can satisfy constitutional standards."[108] "Seldom," however, does not mean never; therefore, the question lingers as to when a state may constitutionally prohibit the media from reporting the truth.

In *Cox Broadcasting Corp. v. Cohn*, Mr. Cohn, the father of a deceased rape victim, sued a broadcasting company which had televised the name of his daughter.[109] Relying on a Georgia statute[110] that made it a misdemeanor for anyone to publish the name of a rape victim, Mr. Cohn claimed that his right to privacy had been invaded by the

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[106] Edelman, *supra* note 62, at 1197. "Four cases involving speech that the plaintiff claimed to be invasive of privacy have now reached the Supreme Court, which denied recovery in all four cases." *Id.*

[107] Note, *supra* note 5, at 1068. In each of the four Supreme Court cases "that demonstrated 'the conflict between truthful reporting and state-protected privacy interests . . . the Court declared government actions prohibiting the publication of true facts unconstitutional.'" *Id.*

[108] Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102 (1979).

[109] *Cox*, 420 U.S. at 474. The reporter obtained the name of the victim from a copy of the indictments which were made available to him by the clerk of the court upon request. *Id.* at 472-73 n.3. Later that same day, the reporter broadcasted a report on the court proceedings which included the victim's name, Cynthia Cohn. *Id.* at 473-74. Mr. Cohn brought an action for money damages against Cox Broadcasting Corp., the owner of the television station which broadcasted the news report about his daughter. *Id.*

[110] The statute at issue stated that:

> 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.

Id. at 471 n.1 (citing GA. CODE ANN. § 26-9901 (1972)).

broadcast.[111] Reversing the Georgia Supreme Court decision in favor of Mr. Cohn, the United States Supreme Court held that the broadcast of a rape victim's name, obtained from public court records, did not constitute an invasion of privacy.[112] Moreover, the Court stressed the impropriety of imposing sanctions for the publication of truthful information gathered from court records open to public inspection.[113]

The *Cox* decision involved a very narrow holding which revealed some subtle, yet consequential, details on how the Supreme Court approaches a right to privacy claim. Most significantly, the Court "limited its holding to bar state sanctions for the publication of truthful information contained in official court records open to public inspection" and "declined to address the 'broader question whether truthful publication . . . may ever be subjected to civil or criminal liability consistently with the first and fourteenth amendments.'"[114] Since special protection consistently has been afforded to the press to accurately report accounts of judicial proceedings, the Court in *Cox* obviously designed its narrow holding to derive the benefits of this "special protection."[115]

The notion of allowing the publication of information obtained from judicial records lends itself to another subtlety of *Cox;* namely, that considerable deference is afforded to the free flow of information which

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[111] *Id.* at 474-75. "Although the privacy invaded was not that of the deceased victim, the father was held [by the Georgia Supreme Court] to have stated a claim for invasion of his own privacy by reason of the publication of his daughter's name." *Id.*

[112] *Id.* at 494-96.

[113] *Id.* "The interests in privacy fade when the information involved already appears on the public record." Id. at 494-95. Likewise, the television reporter based his report on the notes he took during the court proceedings and acquired the rape victim's name from the official court documents which were open to the public for inspection. *Id.* at 472-73, 494-95.

[114] Note, *supra* note 21, at 1482 (quoting *Cox*, 420 U.S. at 491).

[115] *Cox*, 420 U.S. at 492-93. In recognizing the broad protection afforded to the press to publish judicial proceedings, the *Cox* Court relied on the holding in Craig v. Harney, 331 U.S. 367, 374 (1947), which discussed the public nature of a trial and the press's ability to report what transpired with impunity. *Cox*, 420 U.S. at 492-93. Because what occurs in a courtroom is considered "public property," accurate information concerning a trial may be published without fear of liability. *Id. See also* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966); Estes v. Texas, 381 U.S. 532, 541-42 (1965); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

addresses matters of public concern.[116] Since "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public,"[117] there is a strong presumption in favor of allowing the press to report the events of a trial without apprehension.[118] Therefore, the *Cox* Court's narrow holding was the product of a "source-based privilege analysis," an analysis which took into account the source of the reporter's information—a public court record—along with the press's responsibility to publish matters of public concern.[119]

Although not specifically dealing with a rape victim's name, the next two cases which alleged an invasion of privacy claim, *Oklahoma Publishing Co. v. District Court*[120] and *Smith v. Daily Mail*,[121] are an integral part of the Court's current philosophy on the scope of protection afforded the right to privacy.[122] In *Oklahoma Publishing*, the Supreme Court relied on the rationale presented in *Cox* when it unanimously held that a pretrial order enjoining the press from publishing information regarding a juvenile proceeding violated the first and fourteenth amendments.[123] The reporters in *Oklahoma Publishing* were present

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[116] *Cox*, 420 U.S. at 492-93. Based on the notion that matters of public concern should be freely reported by the press, "[the *Cox*] Court's decision reflects a deference to the role that the press must play in a democratic society, particularly when citizens rely on the press to report 'at first hand the operations of [their] government.'" Note, *supra* note 5, at 1071 (citing *Cox*, 420 U.S. at 491).

[117] *Cox*, 420 U.S. at 492.

[118] *Id.* at 492-93. Although there undoubtedly exists a privacy interest in preventing the publication of a name involved with a judicial proceeding, the interests of the public to know and of the press to publish outweighed any conflicting privacy concerns. *Id.*

[119] Linder, *supra* note 93, at 432; Note, *supra* note 6, at 129. Justice White, writing for the majority, further explained that the "privilege" which allows the press to report on judicial proceedings is included in the tort action for invasion of privacy. *Cox*, 420 U.S. at 493-95. In support of this proposition, Justice White quoted directly from the Restatement, which provides that "there is no liability for the examination of a public record concerning the plaintiff, or of documents which the plaintiff is required to keep and make available for public inspection." *Id.* at 494 (quoting RESTATEMENT (SECOND) OF TORTS § 652B comment c (1967)).

[120] 430 U.S. 308 (1977).

[121] 443 U.S. 97 (1979).

[122] The Florida Star v. B.J.F., 491 U.S. 524, 530-31 (1989). The Court in *Florida Star*, which is the most recent Supreme Court case involving the publication of a rape victim's name, described the *Cox*, *Oklahoma Publishing* and *Daily Mail* trilogy as illustrating the "conflict between truthful reporting and state-protected interests." *Id.* at 530.

[123] Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).

in the courtroom during a juvenile hearing,[124] and "the name and picture of the juvenile . . . were 'publicly revealed in connection with the prosecution of the crime,' . . . much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain."[125] Nonetheless, the court below did not believe that the *Cox* rational was applicable in *Oklahoma Publishing* because the Oklahoma statutes[126] mandated that juvenile proceedings be held privately unless the judge specifically orders otherwise.[127]

Despite state statutes which expressly provide for a closed juvenile hearing unless open to the public by a court order, the Supreme Court again refused to enjoin the press from publishing information obtained from a public hearing.[128] Much like the holding in *Cox*, the decision in *Oklahoma Publishing* emphasized that the press can not be enjoined or punished for accurately reporting information obtained from judicial proceedings.[129] Thus, both of these cases involved the narrow factual scenario of reporting what transpired in open court and were subject to the "special privilege" given the press when judicial proceedings are the source of a reporter's information.

A departure from the "source-based privilege analysis" relied on in *Cox* and in *Oklahoma Publishing* was apparent in the 1978 case of *Smith*

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[124] An eleven year old boy was at a detention hearing in Oklahoma County Juvenile Court because of "charges filed by state juvenile authorities alleging delinquency by second-degree murder" in the fatal shooting of a railroad switchman. *Id.* at 309.

[125] *Id.* at 311 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 471 (1975)).

[126] The statutes at issue provided, in pertinent part, that: "[t]he hearings shall be private unless specifically ordered by the judge to be conducted in public. . . . Stenographic notes or other transcripts of the hearings shall be kept as in other cases, but they shall not be open to public inspection except by order of the court," OKLA. STAT. ANN. tit. 10, § 1111 (West Supp. 1976), and "[t]his court shall make and keep records of all cases brought before it. Such records shall be open to public inspection only by order of the court to persons having a legitimate interest therein . . . ." OKLA. STAT. ANN. tit. 10, § 1125 (West Supp. 1976).

[127] *Oklahoma Publishing Co.*, 430 U.S. at 311.

[128] *Id.* at 311-12. The Court dismissed the lower court's argument by simply stating that "[w]hether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel." *Id.* at 311.

[129] *Id.* at 310-11. Additionally, the court relied on its decision in Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976), which held that an order prohibiting the press from publishing information that tended to reveal the guilt of a defendant while the trial was still pending was unconstitutional. *Oklahoma Publishing*, 430 U.S. at 310. *Nebraska Press* further exemplifies that "once a public hearing had been held, what transpired there could not be subject to prior restraint." *Nebraska Press*, 427 U.S. at 568.

v. Daily Mail Publishing Co.[130] Instead of focusing on the source of the information, the *Daily Mail* Court focused on the state's justifications for the statute and whether the regulation was the least restrictive means available.[131]

In *Daily Mail*, a West Virginia statute[132] sought to ban the publication of the names of juvenile court defendants.[133] In finding the statute unconstitutional, the Court was not convinced that the state's interest was of the "highest form" or that the statute was the least restrictive on free expression available.[134] Although *Daily Mail* did not address the privacy claim presented in *Cox*, the Court's discussion concerning the applicable constitutional standard by which to judge a state's authority to regulate what the press may publish is significant.[135]

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[130] 443 U.S. 97 (1979). *See also* Note, *supra* note 5, at 1077 ("According to the [*Smith*] majority, the verity of the information published was not a determinative issue, as it was in the decisions of *Cox Broadcasting* and *Oklahoma Publishing*.").

[131] Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104-05 (1979).

[132] The statutes challenged stated, in pertinent part: "nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court . . . ." W. VA. CODE § 49-7-3 (1976), and:

> [a] person who violates . . . a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment.

Id. at § 49-7-20.

[133] *Daily Mail*, 443 U.S. at 98-99. The reporters learned the names of the juveniles by monitoring the police band radio frequency. *Id.* at 99. Hearing reports transmitted over the radio regarding the fatal shooting of a student at his junior high school, the reporters went to the school and simply asked witnesses and the police for the name of the alleged assailant. *Id.*

[134] *Id.* at 104-05. The Court held that the state's purported interest in furthering the rehabilitation of juveniles—by keeping their identities confidential—was substantial. *Id.* Therefore, "[t]he important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment. . . . Therefore, . . . the constitutional right must prevail over the state's interest in protecting juveniles." *Id.* at 104 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Davis v. Alaska, 415 U.S. 308 (1974)). Furthermore, since the statute restricted only newspapers and not electronic media or other forms of publication, the Court held that the purpose of the statute was not furthered by a means sufficiently tailored to the ends. *Id.* at 105.

[135] *Id.* at 105-06. The Court specifically stated that there was no issue before it concerning privacy, prejudicial pretrial publicity, or unlawful press access to private judicial proceedings. *Id.* at 105. The Court was simply concerned with resolving the issue of whether a state has the power to punish the press for publishing lawfully

First, the Court in *Daily Mail* articulated the principle 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."[136] The significance of the state's interest, therefore, became the basis for appraising the constitutionality of a restraint on publication.[137] Additionally, the decision in *Daily Mail*, like the one in *Cox*, exemplifies how the Court traditionally fashions the holdings of such cases in an extremely narrow and fact specific manner.[138]

By handing down tightly constructed decisions in cases involving the regulation of the media in reporting truthful information, the Court has artfully avoided the issue of whether any statute regulating the publication of lawfully obtained, accurate information could ever pass constitutional muster. In 1989, the Court was once again faced with the opportunity to deliberate on whether the press can ever be found criminally or civilly liable for harm caused by the publication of truthful, yet offensive information. In *The Florida Star v. B.J.F.*,[139] a rape victim filed suit against a newspaper which allegedly had negligently published her name in violation of a Florida statute[140] which made the publication or broadcast of the identity of a sexual offense victim a second-degree misdemeanor.[141] The rape victim, B.J.F., also made a

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obtained, truthful information which revealed the identity of an accused juvenile delinquent. *Id.* at 105-06. To resolve this narrow issue, the Court set forth an analysis based upon whether the statute justifies the purported state interest. *Id.* at 106.

[136] *Id.* at 103.

[137] *Id.* at 104-05. "The magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents. Moreover, the statute's approach does not satisfy constitutional requirements." *Id.*

[138] *Id.* at 105.

[139] 491 U.S. 524 (1989).

[140] The Florida statute entitled Unlawful to Publish or Broadcast Information Identifying Sexual Offense Victim, provided, in pertinent part, that:

> [N]o person shall print, publish, 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 will constitute a misdemeanor of the second degree, punishable as provided in § 775.02, § 775.083, or § 775.084.

FLA. STAT. § 794.03 (1987).

[141] *Florida Star*, 491 U.S. at 526.

claim that her right to privacy had been violated.[142] Once again, however, the Court held that the right of the press to publish truthful information outweighed the state's interest[143] in preserving the confidentiality of a rape victim's identity.[144]

The *Florida Star* Court founded its decision on the principle "that where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order."[145] In arriving at this determination, the Court discussed the previous holdings of *Cox*, *Oklahoma Publishing* and *Daily Mail* but emphasized the narrowness of those decisions and the need to "sweep no more broadly than the appropriate [factual] context of the instant case."[146] Hence, the *Florida Star* Court determined that the *Cox* case was not controlling because the facts of *Cox* dealt specifically with the special protection afforded the

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[142] *Id.* at 528-29. B.J.F. sought compensatory damages for the harassment following the publication of her full name and punitive damages on the grounds that the newspaper published her name intentionally and with reckless indifference. *Id.*

[143] *Id.* at 541. The state of Florida enunciated three main interests purportedly furthered by the statute: preserving the privacy of sexual offense victims, protecting the physical safety of the victims who may be targets of retaliation, and encouraging victims of similar crimes to come forward and report these offenses without the concern of being exposed. *Id.* at 537. Regardless of these important state interests, the *Florida Star* Court decided "that no such interest is satisfactorily served by imposing liability under § 794.3 to appellant under the facts of this case." *Id.* at 541.

[144] *Id.* By deciding in favor of the press, the Court reversed the lower court's decision which determined that the statute was unconstitutional and that the publication of B.J.F.'s name was per se negligent. *Constitutional Law—Leading Cases*, 103 HARV. L. REV. 137, 261 (1989). A jury had awarded B.J.F. $75,000 in compensatory damages and an additional $25,000 in punitive damages. *Id.*

[145] *Florida Star*, 491 U.S. at 541.

[146] *Id.* at 533. The Court in *Florida Star* left no doubt that it deliberately intended to narrowly construct the holdings of all four cases involving the conflict between accurate reporting and an alleged privacy interest. *Id.* at 530. As the *Florida Star* Court blatantly noted:

> Our decisions in cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy, have not, however, exhaustively considered this conflict. On the contrary, although our decisions have without exception upheld the press's right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context.

Id.

press to report on judicial proceedings.[147]

The *Florida Star* Court did, however, rely on the *Daily Mail* standard that only statutes narrowly tailored to a state's interest of the "highest order" would pass judicial scrutiny.[148] Justice Marshall, writing for the majority, interpreted the *Daily Mail* standard as providing for three factors to be considered in cases involving attempts to punish the accurate publication of information: (1) whether the information was lawfully obtained;[149] (2) whether the information was already publicly available at the time of publication;[150] and (3) "the 'timidity of self-censorship' that may result from punishing the media for the publication of truthful information."[151] Applying this standard to the specific factual setting of *Florida Star*, the Court determined that because the newspaper had obtained the victim's name from a police report kept in a non-restricted room at the Sheriff's Department,[152] the press could not be held liable, and the rape victim's identity could be published.[153]

Scholars who believe that the *Florida Star* court erroneously denied B.J.F. recovery and incorrectly declined to impose liability against the newspaper should look no further than the dissent in *Florida Star* to support their point of view. Justice White, who previously refused to extend the right to privacy in *Hardwick*,[154] authored the dissent and set forth a cogent argument as to why the majority wrongfully denied B.J.F.

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[147] *Id.* at 532. "One of the reasons we gave in *Cox Broadcasting* for invalidating the challenged damages award was the important role the press plays in subjecting trials to public scrutiny and thereby helping guarantee their fairness." *Id.*

[148] *Id.* at 533-41.

[149] *Id.* at 533-34

[150] *Id.* at 535.

[151] *Id.* (quoting *Cox*, 420 U.S. at 496). *See also* Note, *supra* note 5, at 1083-84.

[152] *Florida Star*, 491 U.S. at 527. A Star reporter trainee went to the press room of the Duval County Sheriff's Department and copied the police report verbatim. *Id.* Despite the notices in the press room which stated that rape victims' names were not to be considered matters of public record and thus should not be published, the trainee included the victim's full name in the transcription of the police report. *Constitutional Law-Leading Cases*, *supra* note 144, at 260. Furthermore, the staff writer who authored the newspaper article failed to delete B.J.F.'s name from the article, which was a violation against the newspaper's own policy against identifying sexual offense victims by name. *Id.*

[153] *Florida Star*, 491 U.S. at 524-25.

[154] As previously discussed, Justice White, writing for the majority in *Hardwick*, declined to afford the same protection granted in familial matters to homosexual sodomy. *See supra* text accompanying notes 43-50.

protection of her privacy.[155]

Primarily, Justice White attacked the Court's reliance on *Smith v. Daily Mail Publishing Co.* as the bedrock on which to rest its decision.[156] The most important distinction that Justice White made between *Florida Star* and *Daily Mail* was that, in *Daily Mail*, the identity of an accused murderer was disclosed, whereas, in *Florida Star*, it was the identity of a rape victim that was published.[157] Moreover, *Daily Mail* specifically stated that "the holding in this case is narrow . . . *there is no issue here of privacy*," while in *Florida Star*, the principle issue was privacy.[158] Given these significant distinctions, Justice White concluded that the principles set forth in *Daily Mail* did not control the facts presented in *Florida Star*.[159]

The concluding paragraph of Justice White's dissent emphasized that there is no public interest in publishing the identities of victims and likewise, no public interest exists in absolving the press from liability.[160] Additionally, as the *Florida Star* majority acknowledged, there was a compelling state interest in protecting the privacy of sexual assault victims which was supported by numerous justifications. For example, the state had an interest in: "(1) protecting the privacy rights of sexual offense victims from the 'embarrassment, humiliation, and shame' caused by mass disclosure; (2) encouraging victims of sexual attacks to report offenses without fear of exposure; and (3) protecting the physical safety of victims who may be targeted for retaliation . . . ."[161] In light of such significant justifications, it is difficult to comprehend how these concerns could fall short of constituting a state interest of the highest order.

These errors presumptively made by the *Florida Star* majority will have an enormous impact on future privacy claims brought by rape victims seeking recovery for the publication of their names, an undeniably private and personal fact. In the words of Justice White:

> By holding that only a "state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right

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[155] *Florida Star*, 491 U.S. at 542-53 (White, J., dissenting).

[156] *Id.* at 544-46 (White, J., dissenting).

[157] *Id.* at 545 (White, J., dissenting).

[158] *Id.* (quoting *Daily Mail*, 443 U.S. at 105) (emphasis in original).

[159] *Id.* at 546 (White, J., dissenting).

[160] *Id.* at 553 (White, J., dissenting).

[161] Note, *supra* note 52, at 113-14 (citing *Florida Star*, 491 U.S. at 537).

> to privacy is not among those state interests of the highest order, the Court accepts the appellant's invitation . . . to obliterate one of the most note-worthy legal inventions of the 20th-Century: the tort of the publication of private facts.[162]

Although *Florida Star* seemed to possess all the right elements of a protectable privacy right, the press still triumphed, leading some "to imagine what, if any, publication involving truthful information the Court will deem to be punishable."[163]

There is no disputing that the Court has consistently tailored its holdings in these privacy cases as narrowly as possible so that any departure from their facts would render their holdings uncontrolling. In *Florida Star*, the Court explicitly declared that:

> Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a state may never punish publication of the name of the victim of a sexual offense.[164]

By refusing to adopt a broader standard for determining exactly when a victim can be assured that her name shall remain private, the Court has left unresolved the inquiry of whether the right to privacy will ever prevail.

The Court's hesitation to specifically address just when the press has gone too far reflects a strong policy supporting the uninhibited dissemination of truthful information to the public. A conflicting point of concern, however, exists with respect to the supposedly guaranteed privacy rights of the individual. While the Court has decisively insured an individual's right to marry, to use contraceptives, and to read pornographic materials in his home,[165] it has yet to afford the victim of a sexual assault the right to avoid having her humiliation made public and to be physically secure without fear of retaliation. Moreover, the significant state and societal interest of encouraging victims to report these crimes without the fear of exposure should be preserved. These various interests are too valuable for the Court to dismiss in opinions

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[162] *Florida Star*, 491 U.S. at 550 (White, J., dissenting).

[163] Note, *supra* note 52, at 117.

[164] *Florida Star*, 491 U.S. at 541.

[165] *See supra* text accompanying notes 31-51.

which are applicable only to the very narrow settings in which they were determined.

V. CONCLUSION

The guarantees afforded the press under the first amendment obviously protect the truthful, accurate publication of information considered to be of interest to the public at large. As one court concluded, however, "the rights guaranteed by the first amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other."[166] In light of such a statement, it is difficult to understand how the press's right is offended by only nominal intrusions, such as publishing a story in its entirety but omitting the name of a victim.

There is no disputing that the press plays a significant role in society by furnishing citizens with information necessary to maintain a well-educated, democratic populace. Hence, the press should not be inhibited from reporting truthful, accurate information which is of newsworthy magnitude and was obtained through legal means. The press's droit to report the "news" with impunity, however, would not be unduly infringed by a regulation which merely requires that a rape victim's identity remain anonymous. Such a compromise is not only unintrusive on the press's first amendment right to publish, but it acknowledges that there does exist a right to privacy deserving the protection of the Constitution.

If there truly exists a right to privacy rooted in the fourteenth amendment's concept of personal liberty, it should not be subordinated to the guarantees afforded in other amendments. Although "[e]stablishing the point at which free speech values must give way to the right of individuals to be physically secure or to control what is known or said about them will not be easy . . . ,"[167] it is a task which should no longer be ignored by the Court. Thus, if the Supreme Court is to continue to define the scope of protection afforded by the right to privacy, it must discontinue rendering decisions that are too limited to establish any sound precedent, and it must clarify, with specificity, how a privacy claim may survive, if ever, the fatal blow of a conflicting fundamental right.

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[166] Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 537, 483 P.2d 34, 42, 93 Cal. Rptr. 866, 874 (1971).

[167] Linder, *supra* note 93, at 442.