

REVEALING THE CONSTITUTIONAL INFIRMITIES OF
THE “CRIME VICTIMS PROTECTION ACT,”
FLORIDA’S NEW PRIVACY STATUTE FOR SEXUAL
ASSAULT VICTIMS

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I. INTRODUCTION: IDENTIFYING THE CONSTITUTIONAL DILEMMA

More than a century ago, American jurisprudence began recognizing the sociological concept of privacy as a legal right.¹ As privacy law developed, real-life scenarios revealed that many fundamental theories of privacy directly clashed with theories underlying the modern interpretation of the First Amendment, such as the freedom of the press.² The conflict between press freedoms and individuals’ privacy rights has not yet been settled satisfactorily. Both values are cherished and “plainly rooted in the traditions and significant concerns of our society.”³ Few people would deny that “[p]rivacy has always played a central role in the affairs of mankind and probably always will,”⁴ but neither would many

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1. A law review article was one of the most important incitements to the conversion of privacy as a social value into privacy as a legal right. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William L. Prosser, *Privacy [A Legal Analysis]*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 104, 104-05 (Ferdinand D. Schoeman ed., 1984) [hereinafter Prosser, *Privacy*].

Currently, the law recognizes two distinct forms of privacy. One form is considered constitutional privacy, even though the Constitution “does not explicitly mention any right of privacy.” *Roe v. Wade*, 410 U.S. 113, 152 (1973). This form of privacy protects an individual’s freedom to make choices regarding personal, intimate aspects of life such as education or pregnancy. See *id.* at 152-53. The second form of privacy stems from state law and protects individuals from unwanted, unreasonable publicity. See e.g., Deborah W. Denno, *Perspectives on Disclosing Rape Victims’ Names*, 61 FORDHAM L. REV. 1113, 1115-16 n.20 (1993) (explaining that “nearly every state recognizes, through common law or statute, some kind of right that individuals have to control the public use of personal information about them”); Prosser, *Privacy*, *supra*, at 106-07 (listing states whose courts recognized privacy as a legal right as of 1960).

At least one commentator has argued that the type of privacy that theoretically protects citizens against media disclosures can also be traced to the First Amendment itself. See James R. Beattie, Jr., *Note, Privacy in the First Amendment: Private Facts and the Zone of Deliberation*, 44 VAND. L. REV. 899, 901 (1991). Even if it cannot be traced to the First Amendment, this form of privacy is at least recognized by the Constitution of the State of Florida. See FLA. CONST. art I, § 23 (guaranteeing “[e]very natural person . . . the right to be let alone”).

2. See generally Prosser, *Privacy*, *supra* note 1, at 109-13; Denis McQuail, *The Mass Media and Privacy*, in PRIVACY 177, 180-82 (John B. Young ed., 1978).

3. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

4. Clemens P. Work, *Whose Privacy?*, 55 MONT. L. REV. 209, 234 (1994); *id.* at 210 (summarizing results of several polls that indicated the importance of privacy to Americans); McQuail, *supra* note 2, at 178-79 (noting survey results that indicated privacy was important to

deny that “the news media [cannot] survive if they are not vigorous advocates of openness and citizen participation.”⁵

Each of the competing values has a well-rooted legal pedigree. The Federal Constitution refers in plain language to press freedoms.⁶ Individuals’ rights to be free from unwanted, unreasonable publicity are protected by the tort of public disclosure of private facts, a tort which is “one of the most noteworthy legal inventions of the 20th century.”⁷ The different origins of these two rights may be partly responsible for the complex nature of the rivalry between them. The tension between privacy rights and press freedoms is unlikely ever to be solved with a broad principle; the United States Supreme Court adamantly, and perhaps wisely, declines to decide whether either doctrine is strong enough to prevail over the other.⁸ One of the most troublesome embodiments of this legal tension is the question of whether to disclose the names of rape victims. In this context more than any other, privacy claims “most directly confront” media claims.⁹

At the beginning of the twentieth century, the Florida Legislature answered the victim-identity question in favor of privacy by criminalizing the publication of rape victims’ names.¹⁰ That law¹¹ has remained in the Florida Statutes and was most recently codified at section 794.03.¹² However, the propriety of Florida’s resolution did not come under close judicial scrutiny until seventy-one years after its enactment. In 1989, the United States Supreme Court in *Florida Star v. B.J.F.*¹³ held unconstitu-

83% of the population). The United States Supreme Court acknowledged that “the century has experienced a strong tide running in favor of the so-called right of privacy.” *Cox Broadcasting*, 420 U.S. at 488.

5. Work, *supra* note 4, at 234. However, some surveys have indicated that a majority of the population would sooner protect privacy than protect the press. McQuail, *supra* note 2, at 178.

6. “Congress shall make no law . . . abridging the freedom of . . . the press.” U.S. CONST. amend. I. This prohibition also applies to the states pursuant to the Fourteenth Amendment. E.g., *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

7. *Florida Star v. B.J.F.*, 491 U.S. 524, 550 (1989) (White, J., dissenting); see also *Cox Broadcasting*, 420 U.S. at 488 (noting continued widespread state recognition of privacy as a legal right); Denno, *supra* note 1, at 1115-16 n.20.

8. See, e.g., *Cox Broadcasting*, 420 U.S. at 491 (refusing to decide “whether the State may ever define and protect an area of privacy free from unwanted publicity in the press”); *Florida Star*, 491 U.S. at 541 (limiting the holding to exclude an interpretation 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”). The Court explains its reluctance by stating: “the future may bring scenarios which prudence counsels our not resolving anticipatorily.” *Florida Star*, 491 U.S. at 532.

9. See *Cox Broadcasting*, 420 U.S. at 489 (adding that “[t]he face-off is apparent”).

10. See 1911, Fla. Laws ch. 6226, § 1, 195, 195-96 held unconstitutional by *State v. Globe Communications Corp.*, 648 So. 2d 110 (Fla. 1994); *infra* part III.

11. 1911, Fla. Laws ch. 6226, § 1, 195-96.

12. FLA. STAT. § 794.03 (1995). At the time of publication, the Florida Legislature had not yet officially removed section 794.03 from the statute books.

13. 491 U.S. 524 (1989).

tional the imposition of civil liability under section 794.03 for the publication of a rape victim's name discovered in a publicly released police report.¹⁴ However, the Florida Star Court did not go so far as to strike section 794.03 down as unconstitutional.¹⁵

Conversely, the Florida Supreme Court was recently willing to do so. In December, 1994, the court issued its opinion in *State v. Globe Communications Corp. (Globe III)*¹⁶. Therein, the court examined section 794.03 and held the statute facially invalid under the constitutions of both Florida and the United States.¹⁷ The Florida Supreme Court adopted much of its analysis from the Florida Star opinion.¹⁸ Although the Florida Supreme Court struck down section 794.03, it recognized a possibility that the Legislature could draft a constitutional law to achieve the same intended effect.¹⁹

The Florida Legislature responded to the *Globe Communications* decision. By the end of the subsequent session in May, 1995, the Legislature had passed a new law addressing the underlying objectives of section 794.03.²⁰ The Legislature designed the law, the Crime Victims Protection Act,²¹ to meet the stated concerns of all four of the courts that had previously addressed the constitutional infirmity of the Act's predecessor. Unfortunately, the Legislature acted hastily, and the new Act seems to parrot judicial musings rather than offer a solid, practical solution to the constitutional dilemma.

This Comment attempts to organize the relevant issues surrounding Florida's new privacy statute for sexual assault victims. Of course, the scope of sexual assault goes far beyond legal concerns and encompasses many important social and emotional issues. Shielding victims of rape and other sexual crimes from public exposure is a laudable goal. For several reasons, rape victims need, and probably even deserve, protection from the widespread publicity that the media can create, and from the subsequent trauma that such exposure can bring.²² However, the four courts that reviewed Florida's original victim privacy statute reached their respective decisions on the merits of each case without depending heavily

14. *Id.* at 526; see *infra* part IV.

15. See *Florida Star*, 491 U.S. at 541 (reiterating that the opinion was limited to an analysis of section 794.03 on the discrete facts of that case).

16. 648 So. 2d 110, 114 (Fla. 1994). Justice Kogan authored the court's opinion. Justices Shaw, Harding, Wells, and Chief Justice Grimes concurred separately without comment. Justice Overton concurred in result only, also without comment.

17. See *Globe III*, 648 So. 2d at 114; see also discussion *infra* part V.C.

18. See *Globe III*, 648 So. 2d at 112.

19. See *id.* at 114.

20. See Crime Victims Protection Act, 1995, Fla. Laws ch. 95-207; *infra* part VI. The author wishes to thank Mr. L. Martin Reeder of Steel Hector & Davis, West Palm Beach, for bringing the new statute to his attention.

21. See 1995, Fla. Laws ch. 95-207.

22. See discussion *infra* part II.

on rape-related policy arguments.²³ This Comment will also focus mainly on the legal aspects of privacy and press, but, in part II, it will preface that analysis with a cursory overview of some important sociological concerns related to victims and the press. The intent of part II is to recognize those arguments rather than to analyze, approve, or disapprove them.

Part III reviews Florida's original legislative answer to the identity-disclosure debate and identifies victim privacy statutes from other jurisdictions. Part IV outlines the United States Supreme Court's warnings about the constitutionality of Florida's original victim-privacy statute. It then focuses on the climate in Florida that caused section 794.03 to resurface and eventually to fail constitutional muster in the state supreme court. Part V summarizes the facts surrounding the publication of the name of William Kennedy Smith's alleged victim; these facts formed the basis for the Globe Communications decisions. Subsections of part V analyze the Florida court opinions in Globe Communications that unanimously held section 794.03 unconstitutional. Finally, part VI describes and critiques the replacement statute passed by the Florida Legislature six months after the Globe decision.

This Comment concludes that Florida's new Crime Victims Protection Act is no more constitutional than the original statute. However, the Comment does not purport to argue against all forms of privacy for sexual crime victims. Rather, it recognizes that the United States Constitution never allows a laudable "end" to justify unlawful "means."²⁴ Regardless of the noble purpose of Florida's new statutory scheme, the legislation is not the "highly accurate rifle"²⁵ that it must be in order to survive constitutional scrutiny.

II. A CURSORY OVERVIEW OF EXTRALEGAL PERSPECTIVES ADVOCATED BY VICTIMS AND THE PRESS

A. Policy Arguments in Favor of Privacy

"The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the pro-

23. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *State v. Globe Communications Corp.*, 622 So. 2d 1066 (Fla. 4th DCA 1993) [hereinafter *Globe II*] (quoting *State of Florida v. Globe Communications Corp.*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991) [hereinafter *Globe I*]), *aff'd*, 648 So. 2d 110 (Fla. 1994); *Globe II*, 622 So. 2d at 1066; *State v. Globe Communications Corp.*, 648 So. 2d 110 (Fla. 1994) [hereinafter *Globe III*].

24. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (explaining that regardless of a law's efficiency, convenience, or usefulness, the law may not be upheld "if it is contrary to the Constitution").

25. *Globe II*, 622 So. 2d at 1079.

tected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers.”²⁶

The primary and most persuasive social argument offered by those who seek anonymity for rape victims is that rape is inherently more traumatic and stigmatizing than other assaults.²⁷ The type of physical contact and intrusion involved in rape, and the unique emotions related to that form of contact, make rape an atypically atrocious crime. Rape is unusual also because of the blame—or at least suspicion—that is too often placed on the victims.²⁸ One rape counselor has stated:

Rape is different from other crimes and should be treated differently. Face it, [rape] isn't the same as having your wallet stolen. If you're the victim of a theft or mugging, no one will look at you cross-eyed and blame you, ask you what you were doing in that part of town, or why you were wearing tight clothes, or what you did to deserve it.²⁹

The United States Supreme Court has acknowledged that rape is “highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim Short of homicide, it is the ‘ultimate violation of self’.”³⁰ Our society continues to recognize these characteristics that differentiate rape, and therefore many areas of the law deal with rape as a special situation.³¹ The theory espoused by privacy advocates is that because rape is uniquely traumatic, First Amendment jurisprudence should yield to this extremely

26. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976).

27. See, e.g., *Denno*, supra note 1, at 1113 (speculating why most news organizations do not publish the names of rape victims).

28. See Linda Fairstein, Panel Discussion: The Privacy Rights of Rape Victims, 61 *FORDHAM L. REV.* 1137, 1138 (1993) (describing rape as “the only crime that is generally viewed as victim-precipitated, occurring because the victim in some way allowed the crime to occur”). “Rape victims have always been stigmatized for their behavior, and for their participation or victimization in this type of crime.” *Id.*

29. Shann Nix, Debate Over Naming Rape Victims, *S.F. CHRON.*, Apr. 18, 1991, at A1 (quoting K. Kaufman, a counselor with San Francisco Women Against Rape).

30. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (citation omitted). In related *Coker* dicta, the Court recognized that rape is “a violent crime,” which inflicts mental and psychological damage and “undermines the community’s sense of security.” *Id.* at 597-98.

31. See Fairstein, supra note 28, at 1138 (stating that “rape and other sexual assaults were treated differently from any other category of crime within the criminal justice system”). Linda Fairstein’s statement had a different meaning from the one implied here because she was criticizing the heavy burden of corroboration that rape victims once held. See *id.* But her statement is just as true regarding current laws that are now more protective of rape victims and tougher on rapists. See, e.g., CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* § 404.7 (1994) (pointing out that in sexual battery prosecutions “section 794.022 of the Florida Statutes protects a sexual battery victim’s privacy from unwarranted public intrusion by establishing guidelines restricting the admissibility of evidence relating to the character of the victim”); see also *FLA. STAT.* § 794.011(7) (1995) (excluding rapists from receiving “basic gain-time” that would shorten their prison terms); *FLA. STAT.* § 794.011(2)(a) (1995) (classifying sexual battery as a capital crime; i.e., punishable by death, when the rapist is an adult and the victim is a child).

narrow exception and deal with rape as a special situation, just as some other areas of law have done.³²

Even in today's relatively enlightened society, rape victims continue to be stigmatized and ridiculed.³³ If victims' names are publicized, the chances of such embarrassment are only enhanced. In conjunction, victims' anxiety worsens with the fear of further stigmatization.³⁴ Privacy advocates cite evidence which shows that public disclosure of a victim's identity often serves only to enhance the stigma and stereotyping that accompany rape.³⁵ Some commentators propose that the press should not be allowed to exacerbate irresponsibly the potential stigma and thereby cause "significant and very real harms" to victims who have already suffered greatly from the rape act itself.³⁶

Privacy supporters highlight the fact that there is apparently a wide base of popular public support for the concepts underlying legislation that prohibits disclosure of rape victims' names. Various studies have revealed that a large majority of people in the United States favor victim privacy.³⁷ Those interviewed affirmatively prioritize privacy interests more highly than press freedoms.³⁸

Similar studies indicate that rape victims allege they would be far more willing and likely to come forward, report the crime, and assist the authorities as necessary, if statutorily enforced anonymity were available or dependable.³⁹ Stated differently, "[n]aming rape victims would lead to a sharp decline in the reporting of rape crimes."⁴⁰ In 1992, the Federal Bureau of Investigation estimated that only one in ten victims reported

32. See Nix, *supra* note 29, at A1; cf. Letters to the Editor: The Ultimate Dehumanizing Crime, WALL ST. J., May 16, 1991, at A17 [hereinafter Letters to the Editor] (final letter, proclaiming "damn the . . . pseudojournalists in the media who use the banners of civil rights and First Amendment privileges to justify the continued humiliation of rape victims through the publication of their names").

33. See generally, e.g., SUSAN ESTRICH, REAL RAPE 3 (1987); Penelope J. Tomlinson, Privacy and Law Enforcement, in PRIVACY 137, 144 (John B. Young ed., 1978); Gail Fitzer, Debate Rages over Media Decision To Name Alleged Rape Victim, REUTER NEWSWIRE, Apr. 18, 1991 (quoting Rosemary Dempsey of the National Organization for Women as saying "the nature of the crime of rape is unfortunately such that society still tends to blame the victim"); Fitzer, *supra* (quoting Susan Estrich as saying "[t]o editors who say the stigma is gone, I have a list of women whose lives say you are wrong"); Joanne Kenen, Kennedy Case Renews Debate over Identifying Rape Victims, REUTER NEWSWIRE, Apr. 17, 1991 (citing theories of Harvard Law School Professor Alan Dershowitz that implicitly acknowledge social tendencies toward stigmatization).

34. See Denno, *supra* note 1, at 1124.

35. See Paul Marcus & Tara L. McMahon, Limiting Disclosure of Rape Victims' Identities, 64 S. CAL. L. REV. 1020, 1032-33 (1991).

36. Julia A. Loquai, Comment, Keeping Tabs on the Press: Individual Rights v. Freedom of the Press Under the First Amendment, 16 HAMLINE L. REV. 447, 460-61 (1992).

37. See, e.g., Denno, *supra* note 1, at 1130; Work, *supra* note 4, at 211; Nix, *supra* note 29, at A1.

38. See Denno, *supra* note 1, at 1130; Work, *supra* note 4, at 211.

39. See Work, *supra* note 4, at 1130-31.

40. Fitzer, *supra* note 33.

rape.⁴¹ Such a low ratio is rather persuasive when arguing that society should recognize rape as a narrow area in which First Amendment standards should be relaxed.

Theoretically, the relaxation need not be drastic. The type and amount of information protected under typical privacy statutes for sexual assault victims is specific and limited.⁴² Such a confined area of fact—name, address, telephone number—seems unlikely to self-expand and therefore lessens the slipperiness of the slope. Privacy advocates argue that the specific name of any given rape victim is not the core issue of public interest. In the opinion of Helen Benedict, a Columbia University Journalism Professor, “The victim’s identity adds nothing to public understanding of rape because this information has nothing to do with why the crime was committed.”⁴³ Even the United States Supreme Court implicitly agreed, defining the real “matter of paramount public import” in these situations as being “the commission, and investigation, of a violent crime which had been reported to authorities.”⁴⁴ For the above reasons, bending the rules of the First Amendment for rape victims is not highly vulnerable to the counterargument that this policy is a slippery slope leading to further censorship of the press.

For that matter, the slope need not be limited to only the spectrum that runs between free press and shackled press. Interestingly, the slippery slope argument in this area was recharacterized by Justice White’s dissenting opinion in *Florida Star v. B.J.F.*⁴⁵ Therein, Justice White envisioned a slope-spectrum running between individual privacy and public concern, arguing that overemphasizing the First Amendment may “hit the bottom” of that slippery slope and leave individual privacy unrecognized completely.⁴⁶ Justice White posited that if the fact that one has been violently, sexually assaulted is not recognizable as a private fact, then classifying private facts will be unbearably difficult.⁴⁷

B. Policy Arguments in Favor of Publishing Victims’ Names

“Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those meas-

41. Laura Myers, *Lifting Veil of Secrecy in Rape Cases Called an Effort To Regain Control of Crime*, L.A. TIMES, Apr. 5, 1992, at 5.

42. See *infra* notes 70-74 and accompanying text.

43. Helen Benedict, Panel Discussion: The Privacy Rights of Rape Victims, 61 *FORDHAM L. REV.* 1141, 1143 (1993); cf. Letters to the Editor, *supra* note 32, at A17 (final letter, asserting “[y]our author’s story would have been no more compelling with her byline”).

44. *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989).

45. *Id.* at 551-53 (White, J., dissenting).

46. See *id.*

47. See *id.* at 550-51 (reasoning that “[i]f the First Amendment prohibits wholly private persons . . . from recovering for the publication of the fact that [they were] raped, I doubt that there remain any ‘private facts’ which persons may assume will not be published in the newspapers or broadcast on television”).

ures that would allow government to insinuate itself into the editorial rooms of this Nation's press."⁴⁸

Members of the media and other supporters of press freedoms often directly attempt to refute the issues that privacy advocates raise, in addition to arguing their own extralegal points in favor of publicizing victims' names. For example, media defenders agree with privacy advocates about the continued existence of a social stigma attached to rape, but many media defenders feel strongly that the press can play an important role in changing or eliminating rape stereotypes.⁴⁹ This theory is shared by former NBC News President Michael Gartner⁵⁰ and Harvard Law School Professor Alan Dershowitz.⁵¹ In the words of Mr. Gartner, "[r]ape is a despicable crime of violence, and rapists are deplorable people. Rape victims, on the other hand, are blameless. One role of the press is to inform the public, and one way of informing the public is to destroy incorrect impressions and stereotypes."⁵² An alternative version of this theory is that even if publication cannot eliminate the stigma, publicity at least puts victims in a better position for dealing with the ridicule or embarrassment.⁵³ This is because the media can serve as a forum for the victim to comment on the crime.

Media supporters take this theory a step further, alleging that rape myths and the social stigma of rape are actually nourished by anonymity.⁵⁴ Professor Dershowitz argues that shielding the names of rape victims reinforces "old sexist stereotypes."⁵⁵ Apparently, anonymity may send an implicit message that rape is disgraceful.⁵⁶ One former president of the National Organization for Women proclaimed, "[K]eeping the

48. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring).

49. See, e.g., Michael Gartner, Panel Discussion: The Privacy Rights of Rape Victims, 61 *FORDHAM L. REV.* 1133, 1133-34 (1993); Nix, *supra* note 29, at A1 (quoting Stephen Isaacs, Associate Dean of Columbia University School of Journalism, as saying "[o]nce you routinely name [rape victims], the stigma . . . would be abolished fairly quickly"); Fitzner, *supra* note 33 (pointing out that "[s]ome legal experts and newspaper editors have supported publishing the names of rape victims, saying the stigma of rape could be removed if the media treated the crime like any other").

50. See Gartner, *supra* note 49, at 1133.

51. See Kenen, *supra* note 33 (summarizing Dershowitz's theories).

52. Gartner, *supra* note 49, at 1133. Mr. Gartner's comments also included, however, the contradictory theory that the "function of journalists is not to change the world, or to change the public's views. People who want to change the world should become teachers or politicians, not newsmen and newswomen." *Id.*

53. See Myers, *supra* note 41, at 5.

54. See Gartner, *supra* note 49, at 1133 (arguing the media "are participating in a conspiracy of silence which does a disservice to the public by reinforcing the idea that there is something shameful about being raped").

55. See Kenen, *supra* note 33, (quoting Professor Dershowitz).

56. See Denno, *supra* note 1, at 1124.

hunted under wraps merely establishes her as an outcast and implies that her chances for normal social relations are doomed."⁵⁷

By espousing such theories, those who support publicizing rape victims' names refute the privacy advocates' theory that the name itself has no public significance. Media defenders argue that a victim's name is important because including the name serves the dual purpose of better informing the public while lending a greater air of credibility to the news report.⁵⁸ On these and other points which are also argued by privacy advocates, supporters of press freedom have been quick to highlight that there are two sides to the story.

There is another element to the debate, though, for which privacy advocates have little or no response. Specifically, media defenders rely heavily on the "chilling effect" argument: that legislatively imposed prohibitions on the press, in any form, lead to exaggerated timidity and editorial self-censorship.⁵⁹ Making the press liable for what it publishes, especially when that liability can result from publishing true information such as an alleged victim's name, can cause the chilling effect that diminishes the quality and quantity of information available to society.⁶⁰ Courts tend to be diligent guardians against the chilling effect, which is usually referred to with distaste.⁶¹

The chilling effect is the underlying basis for Michael Gartner's proposition that "producers, editors, and news directors should make editorial decisions, rather than lawyers or legislatures."⁶² The implication is that editors can be trusted to exercise discretion and courtesy and might be likely to publish rape victims' names in extraordinary cases only. In fact, almost all media organizations currently claim to operate under some version of self-imposed censorship regarding the identity of sexual assault victims.⁶³ For this reason, media defenders argue, there is no need for the state to become involved. The risks involved with legislative over-reaching, such as by defining new areas in which the media cannot publish new information, support the argument that shielding rape victims is

57. Karen DeCrow, Stop Treating Rape Victims as Pariahs; Print Names, USA TODAY, April 4, 1990, at 8A.

58. See Gartner, *supra* note 49, at 1133.

59. See generally *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979) (discussing the chilling effect); *Simon & Schuster, Inc., v. New York State Crime Victims Bd.*, 724 F. Supp. 170 (S.D. N.Y. 1989), *aff'd*, 916 F.2d 777 (2nd Cir. 1990); *Lewis v. Time, Inc.*, 83 F.R.D. 455, 464-65 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983).

60. See, e.g., *Loquai*, *supra* note 36, at 455.

61. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (stating the Court's "reluctan[ce] to embark on a course" that would "invite timidity and self-censorship").

62. Gartner, *supra* note 49, at 1133.

63. *Denno*, *supra* note 1, at 1113; cf. *Fitzer*, *supra* note 33 (noting that journalism critics consider publication of victims' names to be "a breach of journalistic ethics").

a slippery slope leading to other means of censoring the press.⁶⁴ Despite these arguments, state legislatures have seen fit to enter the debate on the side of the victims.

III. EARLY LEGISLATIVE SOLUTIONS TO THE CONSTITUTIONAL DILEMMA, IN FLORIDA AND ELSEWHERE

Eighty-five years ago, on May 23, 1911, the Florida Legislature passed a statute designed to ensure privacy for victims of rape.⁶⁵ The law prohibited printing and publishing victims' names.⁶⁶ This statute remained in effect through late 1994—though in a slightly revised form—and offered rape victims a cloak of anonymity behind which to hide their emotional scars.⁶⁷ Codified at section 794.03, Florida Statutes, the modern version protected any victim of “any sexual offense” as defined in related statutes.⁶⁸ Section 794.03 also made illegal the “broadcast” of victims' identities, as opposed to mere publication, and referred to “any instrument of mass communication” to ensure that radio and television fell within the statute's sweep.⁶⁹

64. Legislators have shown little concern for avoiding giving the impression that censorship would be limited to victims' names. Cf., e.g., Tim Nickens, *The O.J. Effect? Juror Names May Be Sealed*, MIAMI HERALD, Apr. 27, 1995, at 10A (discussing proposed legislation to classify jurors' names).

65. The statute originally provided:

Section 1. It is hereby made unlawful for any person or persons to print and publish or cause to be printed and published in any newspaper, magazine, periodical or any other publication in the State of Florida the name or identity of any female raped or upon whom an assault with intent to commit rape has been committed or may be committed.

Section 2. Whoever is convicted of the violation of the provisions of this Act shall be punished by a fine of not more than one thousand dollars or by imprisonment in the County Jail for not more than twelve months, or by both such fine and imprisonment, in the discretion of the court. 1911, Fla. Laws ch. 6226, § 1, 195, 195-96.

66. *Id.*

67. The language of section 794.03 is:

Unlawful to publish or broadcast information identifying sexual offense victim.—No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. Such identifying information is confidential and exempt from the provisions of s. 119.07(1). This exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.14. An offense under this section shall constitute a misdemeanor of the second degree, punishable as provided in s. 775.082, or s. 775.083.

FLA. STAT. § 794.03 (1995).

The confidentiality exemption referred to a Florida public records statute requiring records custodians to permit “any person desiring to do so” to inspect and examine public records. FLA. STAT. § 119.07(1)(a) (1995). The punishments provided for in sections 775.082 and 775.083 include a 60-day maximum imprisonment and a \$500 maximum fine, respectively. FLA. STAT. §§ 775.082(4)(b), .83(1)(e) (1995).

68. See FLA. STAT. § 794.03 (1995). By referring to “any offense” under the surrounding chapter, the updated version theoretically recognized physical sexual assaults other than traditional rape. See FLA. STAT. Ch. 794 (1995).

69. FLA. STAT. § 794.03 (1995).

Florida was not the only state during the early 1900s to enact such legislation. In 1909, South Carolina adopted a similar statute, the modern version of which retains references only to “publication,” “newspaper,” and “magazine.”⁷⁰ At about the same time, Georgia enacted a rape victim privacy law that now prohibits all forms of “public dissemination” of “the name or identity of any female” rape victim.⁷¹ More recently, in 1987, Massachusetts joined those southern states. The Massachusetts State Legislature amended a statute that had previously only withheld rape records from public inspection.⁷² The amendment prohibited dissemination and disclosure of the contents of those records and subjected violators to a far heftier fine than in the three other states.⁷³ Notably, other states have also seen fit at one time or another to enact similar legislation that is no longer

70. South Carolina’s law reads:

Publishing name of victim of criminal sexual conduct unlawful. Whoever publishes or causes to be published the name of any person upon whom the crime of criminal sexual conduct has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years. The provisions of this section shall not apply to publications made by order of court.

S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1994).

71. Under the Georgia Code:

a) 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 the offense of rape may have been made.

b) This Code section does not apply to truthful information disclosed in public court documents open to public inspection.

GA. CODE ANN. § 16-6-23 (1994).

72. See MASS. GEN. L. ch. 265, § 24C (1994).

73. See 1987 Mass. Acts 177, § 2 (amending MASS. GEN. L. ch. 265, § 24C (1994) by adding the third paragraph quoted below). The Massachusetts law closed public records of rape and criminalized release of the victim’s identity, providing in relevant part:

Victim’s name; confidentiality. That portion of the records of a court or any police department of the commonwealth or any of its political subdivisions, which contains the name of the victim in an arrest, investigation or complaint for rape or assault with intent to rape . . . shall be withheld from public inspection, except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted. Said portion of such court record or police record shall not be deemed to be a public record....

Except as otherwise provided in this section, it shall be unlawful to publish, disseminate or otherwise disclose the name of any individual identified as an alleged victim of any of the offenses described in the first paragraph. A violation of this section shall be punishable by a fine of not less than two thousand five hundred dollars nor more than ten thousand dollars.

MASS. GEN. L. ch. 265, § 24C (1994).

in effect.⁷⁴ However, the Georgia, South Carolina, and Massachusetts statutes remain in effect.

From a policy perspective, the number of states that currently attempt to maintain statutory anonymity for victims is such a small minority that the need for government intervention in the matter is called into question.⁷⁵ Why so many states do not have similar laws is open to speculation. One reason may be that other states do not share Florida's public concern for the privacy interests of rape victims. However, this seems unlikely considering the large number of states that acknowledge the privacy interests of all citizens.⁷⁶ A better explanation may be that other states prefer to allow the media to police themselves in the hope that media indiscretions will be few so as not to damage state interests. Such an explanation is supported by the fact that mass media disclosures of rape victims' identities is such a relatively recent phenomenon that before the mid-1980s the media could be depended upon to operate under a self-imposed prohibition.⁷⁷ Massachusetts' 1987 statutory amendments might evidence that many states did not have problems in the past with media disclosure but now do.

A final speculation as to why so many states do not now have rape victim privacy laws is that other states have taken note of the resistance that Florida⁷⁸ and Georgia⁷⁹ encountered from the judiciary regarding their statutes. Those other states may be waiting until some state receives

74. E.g., WISC. STAT. § 942.02 (1974) (relating to communication of the identity of sex offense victims). That statute was enacted in 1925 but repealed, effective March 27, 1976. See WISC. STAT. § 942.02 (1982).

75. When the constitutionality of section 794.03 came under attack a few years ago, as will be explained in detail in part V of this Comment, the trial court concluded its opinion with the following dicta:

The need for a criminal statute with punitive sanctions for such disclosures is deemed necessary by the legislatures of only four states, Florida, Georgia, South Carolina and Wisconsin. The fact that forty-six states are able to conduct sexual assault investigations and trials without punishing the press criminally for a disclosure of the victim's identity is, in itself, a circumstance which leads this court to conclude that the state's expressed concerns . . . are somewhat exaggerated and overblown.

Globe II, 622 So. 2d 1066, 1075-76 (Fla. 4th DCA 1993) (quoting Globe I, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991), *aff'd*, 648 So. 2d 110 (Fla. 1994) (citations omitted)).

76. See Prosser, *Privacy*, *supra* note 1, at 106.

77. See Editorial, *Countering Rape's Stigma; The Best Course Is To Leave the Issue of Identification with the Alleged Victim*, L.A. TIMES, Dec. 20, 1991, at 6 (explaining that "[m]ost serious news organizations adhere to the policy of not revealing an alleged rape victim's name . . . [t]his is the longstanding policy of The Times also"); Howard Kurtz, *Smith's Accuser Lifts the Mask; ABC Interview Ends ID Debate*, WASH. POST, Dec. 19, 1991, at C1 (explaining how most national media had for months not printed the name of the alleged victim of Dr. William Kennedy Smith, even though the name had been publicized at the beginning of the controversy); see *supra* note 63 and accompanying text.

78. See *infra* parts IV & V.

79. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

express judicial approval of a statutory scheme. Then, that statute may serve as a model for the rest of the nation.⁸⁰

As stated, for decades section 794.03 operated unobtrusively, creating no major controversy and drawing very little attention to itself.⁸¹ Dissent arose twelve years ago when *The Florida Star* newspaper reported the full name of a rape victim as part of a low-key, routine column of "police blotter" stories.⁸² The litigation that stemmed from that newspaper report reached the United States Supreme Court.⁸³ The resulting 1989 opinion included a lengthy discussion of the questionable constitutionality of section 794.03, without actually ruling on the matter.⁸⁴

IV. THE UNITED STATES SUPREME COURT AND THE FLORIDA STAR V. B.J.F. OPINION

During the mid-1970s, the United States Supreme Court began a cautious, case-by-case commentary concerning the constitutionality of punishing the media for printing truthful information. The *Florida Star v. B.J.F.*⁸⁵ opinion is usually considered the last in a series of related opinions dealing with the complex questions arising from such state action.⁸⁶ In each opinion, the Supreme Court stressed that its decision was limited to the discrete factual context of the case under consideration and cautioned that the decision was not to be applied too broadly.⁸⁷ Yet, without exception, the Court held in favor of the media.

80. Of course, Florida's first rape-victim-privacy statute operated for a significant period of time without judicial resistance, and the majority of states did not use the law as a model then either.

81. Throughout the statute's existence, aside from the case opinions discussed within this Comment, only eight other state appellate court opinions ever cited the statute. See SHEPARD'S FLORIDA CITATIONS (through Jan., 1996 Supp.). None of those opinions questioned, limited, or criticized the law. See *id.*

When the constitutionality of section 794.03 came under attack a few years ago, as will be explained further in this Comment, the trial court was unable to discover any "appellate decision either reversing or sustaining a criminal conviction" under section 794.03. *Globe II*, 622 So. 2d 1066, 1071 (Fla. 4th DCA 1993) (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)), *aff'd*, 648 So. 2d 110 (Fla. 1994).

82. See *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989).

83. See *id.* at 524.

84. See *id.*

85. *Id.*

86. See, e.g., *Denno*, *supra* note 1, at 1117-19. The series is commonly recognized as including four or five important decisions. See generally *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Florida Star*, 491 U.S. at 524.

87. E.g., *Cox Broadcasting*, 420 U.S. at 491 (stating "it is appropriate to focus on the narrower interface between press and privacy that this case presents"); *Daily Mail*, 443 U.S. at 105 (warning that the "holding in this case is narrow").

First, in 1975, the Court issued its judgment in *Cox Broadcasting Corp. v. Cohn*.⁸⁸ In that case the Court found unconstitutional a civil damages award against a television station for broadcasting a rape-murder victim's name when that name was acquired from public judicial records.⁸⁹ Next, the Court decided *Oklahoma Publishing Co. v. District Court*⁹⁰ in 1977, finding unconstitutional a state court's order that enjoined the media from publishing the name and photograph of a juvenile defendant when the media received that information by attending an open hearing.⁹¹ Soon thereafter, in 1979, the Supreme Court held in *Smith v. Daily Mail Publishing Co.*⁹² that criminal sanctions against two newspapers for publishing a juvenile defendant's name without judicial approval were unconstitutional when the juvenile's name was obtained during interviews at the scene of the crime.⁹³ These three opinions served as guidance for the Supreme Court's 1989 decision regarding civil liability under section 794.03 of the Florida Statutes.

In *Florida Star v. B.J.F.*,⁹⁴ the Court specifically faced a situation in which a rape victim brought a civil suit under section 794.03 against a small newspaper⁹⁵ that had published a one-paragraph article which included the victim's full name in describing a robbery and rape.⁹⁶ The newspaper learned of the name when a reporter-trainee copied verbatim a police report that had been placed in the public pressroom at the police department.⁹⁷ After *The Florida Star* published the piece, B.J.F. alleged emotional distress, claimed that previously unknowing co-workers and acquaintances heard about the article, and alleged that her mother had received several intimidating telephone calls from a man threatening to rape B.J.F. again.⁹⁸

The trial judge who had presided over the case felt that section 794.03 "reflected a proper balance between the First Amendment and privacy rights, as it applied only to a narrow set of 'rather sensitive . . . criminal offenses'."⁹⁹ The jury awarded B.J.F. \$75,000 as compensatory damages and \$25,000 as punitive damages on the basis that *The Florida Star* had shown "reckless indifference."¹⁰⁰ The First District Court of Appeal

88. 420 U.S. at 469.

89. *Id.* at 496-97.

90. 430 U.S. at 308.

91. *Id.*

92. 443 U.S. 97 (1979).

93. *Id.* at 104.

94. 491 U.S. 524 (1989).

95. *The Florida Star* had an average circulation of 18,000 copies. 491 U.S. at 526.

96. *Id.* at 527.

97. *Id.*

98. *Id.* at 528.

99. *Id.* (citations omitted).

100. *Id.* at 529.

agreed with the outcome of the trial court, but the United States Supreme Court did not.¹⁰¹

It is critical to note that the Supreme Court opinion does not condemn legislative attempts at balancing First Amendment rights against privacy rights. Rather, open-minded scholars may fairly infer from the opinion that balancing is acceptable—even proper—as long as the state’s interests serve as the fulcrum upon which the competing rights are balanced. The default position of the scale tips in favor of the First Amendment, and only a “state interest of the highest order” will support a scale that tips in favor of privacy.¹⁰²

The framework of this analysis was articulated in *Smith v. Daily Mail Publishing Co.*¹⁰³ Specifically, the rule of law states 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.”¹⁰⁴ Even the Supreme Court admitted that this principle leaves open the possibility of legally shifting the scale away from the pro-press default position.¹⁰⁵ The Court simply concluded that the facts of the Florida Star case did not raise Florida’s interests to the level of the “highest order.”¹⁰⁶

For the sake of the Florida Star litigation, the State of Florida argued that there were three state interests underlying section 794.03: the privacy of sexual assault victims, physical safety of those victims, and encouragement that would motivate those victims to report sexual assaults and assist in prosecution of such offenses.¹⁰⁷ The Supreme Court conceded that in all circumstances those interests “are highly significant”¹⁰⁸ and that under certain unspecified circumstances those interests would be strong enough to support a scale leaning towards privacy.¹⁰⁹

Three factors led the Court to conclude that the particulars of B.J.F.’s situation did not satisfy the Daily Mail test. First, the source from which the newspaper had learned B.J.F.’s name was the government, which had erroneously, illegally, and inadvertently included B.J.F.’s name in the

101. See *Florida Star v. B.J.F.*, 499 So. 2d 883 (Fla. 1st DCA 1986), rev’d, 491 U.S. 524 (1989).

102. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

103. 443 U.S. at 97.

104. *Id.* at 103.

105. See *Florida Star*, 491 U.S. at 541 (“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.”). Justice White posited that if sexual assault victimization is not within the zone of personal privacy referred to in *Florida Star*, he would be hard-pressed to identify what was within the zone. See *id.* at 550-51 (White, J., dissenting).

106. *Id.* at 541 (concluding “that no such interest is satisfactorily served by imposing liability under § 794.03 to appellant under the facts of this case”).

107. *Id.* at 537.

108. *Id.*

109. See *id.*

copy of an incident report that the police had placed in the station's press-room.¹¹⁰ In light of the fact that the government "failed to police itself in disseminating information," the Court was loathe to countenance punishment of the media for the same infraction.¹¹¹ The Court suggested that the State should have compensated B.J.F.,¹¹² a statement presumably suggesting something more than or different from the \$2,500 pre-trial settlement reached between B.J.F. and the police department.¹¹³

The second factor that compelled the Court to rule as it did was that the trial judge found The Florida Star negligent per se without consideration of whether the particular revelation about B.J.F. was one that a reasonable person would have found highly offensive.¹¹⁴ The Court explained that such a cut-and-dried standard, with liability following automatically from publication, was unconstitutional in light of the numerous possible combinations of facts that might lessen the significance of the state's interests in any given case.¹¹⁵ Another downfall of the per se standard used under section 794.03 was the lack of any scienter element.¹¹⁶ Simply put, "individualized adjudication" would be constitutionally necessary to balance privacy rights against press freedoms.¹¹⁷

Third, the Court assumed that a "backyard gossip" could be equally as damaging to the interests of the victim as could an "instrument of mass communication."¹¹⁸ Such a possibility persuaded the Court that the high significance of Florida's interests could be undercut by "the facial underinclusiveness of section 794.03."¹¹⁹ In other words, Florida could not constitutionally balance privacy rights against press freedoms without

110. Id. at 538.

111. Id.

112. See id.

113. See id. at 528.

114. See id. at 539.

115. See id. (listing examples such as: 1) when the community already knows the victim's identity, 2) when the victim him/herself calls public attention to the assault, 3) when the victim's identity itself becomes a reasonable subject of public concern).

116. Id. "Scienter" is an intent standard.

117. Cf. id. at 540.

118. See id. (speculating that an "individual who maliciously spreads word . . . to persons who live near, or work with, the victim may [cause] consequences as devastating as the exposure of her name to large numbers of strangers").

This speculation logically may lead one to wonder whether Desiree Washington, whom former heavyweight boxing champion Mike Tyson was convicted of raping, would have suffered the same consequences if knowledge of her identity had been limited to only 30 or so people. See Tyson's Rape Victim Declares She's Been "Tried, Convicted," INDIANAPOLIS NEWS, Jan. 27, 1993, at E1 (describing Washington's feelings about being "trapped by the publicity surrounding her," not being able to enjoy her life, having no privacy, and quoting Washington as saying that she "can't heal and [she] can't get better and [she is] finding it hard to love and open up"); see also Tyson Victim "in Prison," NEWSDAY MAG., Jan. 27, 1993, at 133; Tyson's Rape Victim Says Publicity About Case Has Her in Prison, Too, INDIANAPOLIS STAR, Jan. 27, 1993, at E2. For further commentary on the distinctions between mass communication and small-scope communication, see *infra* notes 157-68 and accompanying text.

119. See Florida Star, 491 U.S. at 540.

doing so evenhandedly, which at least meant defining “press” broadly enough to include “the smalltime disseminator as well as the media giant.”¹²⁰

Although the United States Supreme Court identified constitutional problems with section 794.03, the Court did not force Florida to remove the law from the statute books. Rather, the Florida Star opinion simply concluded that Florida’s interests were not of the highest order within the context of B.J.F.’s situation. This conclusion did not necessarily mean that section 794.03 could never function constitutionally. However, within the context of another situation that arose only two years after the Florida Star litigation ended, Florida’s courts entirely dismantled section 794.03 pursuant to the conclusion implicit in the earlier analysis of the United States Supreme Court.

V. THE CIRCUMSTANCES THAT INVOKED JUDICIAL REVIEW OF SECTION 794.03 BY THE FLORIDA COURTS

In early 1991, a young Palm Beach County woman accused William Kennedy Smith, nephew of Massachusetts Senator Edward Kennedy, of rape.¹²¹ Various media sources eventually revealed that her name was Patricia Bowman, but initially Ms. Bowman remained anonymous to the public at large. Immediately after the police learned of the alleged rape, many reporters began investigating the story.¹²² One such reporter, Kenneth Harrell, worked for a Palm Beach County tabloid called The Globe.¹²³ During Mr. Harrell’s conventional investigation, he learned the name of Mr. Smith’s accuser from at least ten different people.¹²⁴ Notably, the initial revelation of Patricia Bowman’s identity did not involve any public records because no prosecution had begun yet.¹²⁵ That fact ought to have somewhat lessened the applicability of the Cox Broadcasting decision, which relied heavily on the reporter’s use of public records to determine the victim’s identity.¹²⁶ On the other hand, the nature of Mr. Harrell’s sources ought to have heightened the applicability of the Daily

120. *Id.* Assumedly, the 18,000-copy circulation of The Florida Star placed that newspaper in the category of “media giant” as opposed to “smalltime disseminator.”

121. Where Was Teddy? (Police Concerned About Sen. Edward Kennedy’s Behavior After His Nephew William Smith Was Accused of Rape), *TIME MAG.*, May 20, 1991, at 27.

122. *Globe II*, 622 So. 2d 1066, 1068-69 (Fla. 4th DCA 1993) (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)), *aff’d*, 648 So. 2d 110 (Fla. 1994).

123. *Id.* at 1068.

124. Those sources—some met by Mr. Harrell while he staked-out the accuser’s home— included various acquaintances of the accuser, other reporters, a Palm Beach County Victim Services coordinator, and former relatives of the accuser. *Id.* at 1068-69.

125. Ms. Bowman’s name did not enter the public records until May 9, 1991, when the State Attorney filed an information with the Clerk of the Circuit Court of Palm Beach County accusing Smith of sexual battery and simple battery. *Globe II*, 622 So. 2d at 1069 (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)).

126. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492-96 (1975).

Mail decision, which involved reporters who had learned a juvenile defendant's identity by interviewing witnesses at the scene of the crime.¹²⁷ However, in the final legal analysis of all the Florida courts that addressed the case, the source of Ms. Bowman's identity had relatively little importance.¹²⁸

Two Globe issues identified Ms. Bowman as the alleged victim and offered other identifying information about her.¹²⁹ However, before The Globe released those issues, four different British newspapers had already published Ms. Bowman's name, and one of those papers had included a photograph.¹³⁰ Newsstands in America's major cities and in South Florida distributed at least a small number of copies of each of those British tabloids.¹³¹ The fact that The Globe was merely repeating information that had already been publicized was significant in the subsequent legal analysis.¹³²

Within forty-eight hours of the arrival of the first Globe issue at newsstands, both NBC News and the New York Times informed their audiences that Patricia Bowman was the name of the alleged victim.¹³³ Many newspapers and other media followed suit during the succeeding days.¹³⁴ Some cited to other media outlets' earlier decisions about identifying Ms. Bowman; thus, they used either the "old news" theory or the "everybody's doing it" theory to excuse themselves from supposed breaches of their own codes of conduct.¹³⁵ On the other hand, NBC News had decided to print the name because of more broadly based beliefs about the proper role of the press and how the press should perform that role.¹³⁶ From the outset of the revelation of Ms. Bowman's identity, debate "raged" again about the propriety of identifying sexual assault victims in the media.¹³⁷

127. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99-100 (1979).

128. See *infra* parts V.A. through V.C.

129. The first issue was released on April 15, 1991, with a cover date of April 23, while the second issue was released April 22, 1991, with a cover date of April 30. *Globe II*, 622 So. 2d 1066, 1069 (Fla. 4th DCA 1993) (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)), *aff'd*, 648 So. 2d 110 (Fla. 1994).

130. Among the newspapers were THE SUNDAY MIRROR, TODAY, and PEOPLE. *Id.* One of those, THE SUNDAY MIRROR, had a circulation of nearly three million copies. *Id.*

131. *Id.*

132. See *infra* part V.

133. See *infra* part V. (referring to NBC Nightly News (NBC television broadcast, Apr. 16, 1991)).

134. *Id.*

135. E.g., Todd Rosenthal, *Alleged Victim at Kennedy Estate Is Millionaire's Stepdaughter*, REUTERS NEWSWIRE, Apr. 17, 1991 (justifying the revelation of Ms. Bowman's identity by stating that "Reuters, which normally does not identify rape victims, has decided to publish the woman's name because it is now public knowledge due to her identification by other news organizations like the New York Times and NBC television").

136. See Gartner, *supra* note 49, at 1133-34.

137. See, e.g., Fitzer, *supra* note 33; Kenen, *supra* note 33.

Acting almost as if *The Globe* had been the only news organization bold enough to publish the name of Smith's alleged victim, the State of Florida sought to enforce section 794.03 against *Globe Communications Corporation*.¹³⁸ The State's complaint, called an "information," charged the publisher with two counts of criminal violation of section 794.03: one count for the April 23rd issue of *The Globe*, and another count for the April 30th issue.¹³⁹ *Globe Communications* responded with a motion to dismiss the information.¹⁴⁰ The media corporation argued, primarily, that section 794.03 was facially violative of the constitutions of both Florida and the United States and, secondarily, that section 794.03 was also unconstitutional as applied to the facts of their case.¹⁴¹

A. The Trial Court Opinion

The Circuit Court for Palm Beach County addressed each of *Globe Communications'* arguments. First, the court focused on *The Globe's* argument that section 794.03 was overbroad due to its categorical prohibition against media dissemination of rape victims' names.¹⁴² The overbreadth problem arises from the possibility that an alleged victim's name is true information, lawfully obtained, and within the public interest itself or closely related to public interest material.¹⁴³ When all three of those potentialities are fulfilled, as they were here, the First Amendment protects the information unless the state supersedes with a compelling interest "of the highest order."¹⁴⁴ Accordingly, the basis of the newspaper's overbreadth argument was that section 794.03 could be read to criminalize the publication of a name even in a case in which all three factors were met and in which the state's interests did not overcome the protection offered by the First Amendment.¹⁴⁵

The *State v. Globe Communications Corp. (Globe I)* trial court implied that if the state's interests are not in every case unmistakably more compelling than the fundamental safeguard for free speech offered by the First Amendment,¹⁴⁶ then a "strict liability" statute such as section 794.03 is overbroad and must be stricken.¹⁴⁷

138. *Globe II*, 622 So. 2d 1066, 1068 (Fla. 4th DCA 1993) (citing *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)), *aff'd*, 648 So. 2d 110 (Fla. 1994).

139. *Id.*

140. *Id.*

141. *Id.* at 1069.

142. *Id.* at 1070.

143. *Id.*

144. See, e.g., *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

145. Such was almost the case in *Florida Star*, 491 U.S. 524 (1989), except that the possible liability there was civil rather than criminal.

146. Some First Amendment scholars might argue that no government interest could ever be more compelling than the First Amendment in any situation. This author submits that such situations can exist. For example, a statute criminalizing unauthorized dissemination of the United

In *Globe I* the State asserted virtually the same compelling interests as in *Florida Star*. The State of Florida wants to encourage victims to report sexual assaults and thereby enhance the state's ability to apprehend and prosecute the alleged perpetrators, and, at the same time, it wants to shield the victims from ridicule and embarrassment.¹⁴⁸ The trial court conceded that the State's asserted interests were supported by "considerable logic" and that shield laws may be "desirable."¹⁴⁹ However, the trial court concluded that, as a blanket proposition, the asserted state interests simply are not unerringly more compelling than First Amendment protection.¹⁵⁰

Finding no mechanism for distinguishing between individual situations—to determine whether in any particular case the state's interests overcome the First Amendment—the trial court deemed section 794.03 unconstitutionally overbroad.¹⁵¹ The statute's specific deficiency in this regard was its failure to provide for case-by-case hearings,¹⁵² which the United States Supreme Court referred to in the *Florida Star* opinion as indispensable "individualized adjudication."¹⁵³ Unfortunately, neither the trial court in *Globe I* nor the United States Supreme Court in *Florida Star* offered very specific advice about the procedural aspects of such individualized adjudication. The "when, how, and who" of the hearings are

States' active nuclear missile launch codes would house a greater government national security interest, more compelling than the First Amendment.

147. *Globe II*, 622 So. 2d 1066, 1071-73 (Fla. 4th DCA 1993) (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)), *aff'd*, 648 So. 2d 110 (Fla. 1994). This was in contrast to the *Florida Star* situation, which involved an unconstitutional application of the statute, but the United States Supreme Court did not take the opportunity to strike down section 794.03 entirely. In fact, the Court expressly conceived of the possibility that section 794.03 could function constitutionally. See 491 U.S. at 537 ("We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions . . . might be so overwhelmingly necessary to advance these interests as to satisfy the *Daily Mail* standard.")

148. *Globe II*, 622 So. 2d at 1070 (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)). The interests were virtually the same as those asserted in the *Florida Star* litigation. See *supra* text accompanying note 107.

149. *Globe II*, 622 So. 2d at 1070-71 (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)). This might qualify as an understatement in light of the United States Supreme Court's recognition that those interests are at the very least "highly significant" and could be of the highest order "in a proper case." See *Florida Star*, 491 U.S. at 537 (noting that "we are daily reminded of the tragic reality of rape"). See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (stating that the interests underlying claims of privacy "are plainly rooted in the traditions and significant concerns of our society"). Yet that "proper case" qualification goes to the core of the overbreadth issue.

150. *Globe II*, 622 So. 2d at 1071 (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)) (finding that "enforcement of such [shield] laws collides with First Amendment claims of the press to comment freely on a matter of public interest which is what the defendant is accused of doing in the case at bar").

151. *Id.* at 1073.

152. *Id.*

153. *Florida Star*, 491 U.S. at 540 (discussing one of many problems with section 794.03: "liability follows automatically from publication").

important details that may in fact erode the potential effectiveness of hearings as a cure for overbreadth.¹⁵⁴

Both courts, however, did provide good advice about the substantive aspects of the hearings. The trial court quoted a passage from the Florida Star opinion in which the Supreme Court suggested a few case-specific factual issues that would be relevant in determining whether the State's interests were of the highest order. Those issues included:

whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern—because, perhaps, questions have arisen whether the victim fabricated an assault by a particular person.¹⁵⁵

More factors would undoubtedly be necessary for properly determining the balance between privacy interests and press freedoms in any given case, but this provided a substantial start.¹⁵⁶ The point of the overbreadth issue is that additional factors were not available, thus preventing such balancing.

Having decided the overbreadth issue, the trial court analyzed Globe Communications' underinclusiveness argument. The court framed the question as whether section 794.03 was underinclusive "because it leaves unprohibited appreciable damage to a supposedly valid state interest."¹⁵⁷ The express language of the statute prohibited identification of rape victims only in "instrument[s] of mass communication."¹⁵⁸ When the United States Supreme Court examined the underinclusiveness aspect of section 794.03 pursuant to the Florida Star opinion, it concluded that the freedom of smaller disseminators and individuals to identify rape victims possibly eroded the significance of the state interests that section 794.03 was de-

154. This is demonstrated by some problems with Florida's new victim-privacy law; these problems stem from the legislative attempt to provide individualized adjudication. The possibilities of, and problems with, using case-by-case hearings selectively to enforce rape-victim-privacy are further explored and critiqued *infra* part VI.B.4.

155. Florida Star, 491 U.S. at 539 (quoted in Globe I, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)).

156. The Globe I trial court engaged in an "as applied" analysis, which for all intents and purposes is the same as the case-by-case analysis recommended to cure section 794.03's overbreadth problems, except that such analysis ought to be engaged in before prosecution rather than after. At that time, the trial court noted some relevant facts about Ms. Bowman's situation that went beyond the scope of the Florida Star list. Specifically among these were the facts that Ms. Bowman's "identity had been published by several British tabloid-type newspapers before the Globe published her name;" a possible "clear and present danger to [a] victim prior to the identification and apprehension of the alleged perpetrator" was absent; and no threat of a danger to the criminal justice system existed from publishing Ms. Bowman's name. Globe II, 622 So. 2d 1066, 1073 (Fla. 4th DCA 1993) (quoting Globe I, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)), *aff'd*, 648 So. 2d 110 (Fla. 1994).

157. *Id.*

158. FLA. STAT. § 794.03 (1995).

signed to protect.¹⁵⁹ The Court reasoned that any person who “maliciously spreads word of the identity . . . is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers.”¹⁶⁰

The *Globe I* trial court, perhaps feeling compelled to mimic the *Florida Star* opinion on the underinclusiveness issue, advised that the prohibition must be applied evenhandedly.¹⁶¹ The statute needs “inclusive precautions against dissemination by informants who are not representatives of large media”; i.e., the State may not distinguish between a backyard gossip’s conversations and *The Miami Herald*’s publicity, however different the two may be in reality.¹⁶² The court’s implication is that the First Amendment will not permit a distinction between two people having a discussion and 200,000 people reading publicity in a newspaper article. That somewhat unrealistic¹⁶³ analysis seems to focus on the speaker, as did the trial court in *Globe I* and the United States Supreme Court in *Florida Star*. This argument weakens if focus is placed on the audience, or on the realistic meaning of the word “publicity.”¹⁶⁴ Differentiating situations based on the speaker’s audience is surely possible within First Amendment jurisprudence, even if rarely done. This is exemplified by certain “hostile audience,”¹⁶⁵ obscenity,¹⁶⁶ and defamation cases.¹⁶⁷ On the

159. See *Florida Star*, 491 U.S. at 540 (ruling that “the facial underinclusiveness of § 794.03 raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests . . . asserted”).

160. *Id.*

161. *Globe II*, 622 So. 2d at 1073-74 (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)) (citing *Florida Star*, 491 U.S. at 540).

162. *Id.* at 1074.

163. In this regard, Patricia Bowman’s and Desiree Washington’s experiences demonstrate the reality of mass publicity compared to small-scope publicity. See *supra* note 118.

164. For example, the Ninth Circuit once explained:

There is an obvious and substantial difference between the disclosure of private facts to an individual—a disclosure that is selective and based on a judgment as to whether knowledge by that person would be felt to be objectionable—and the disclosure of the same facts to the public at large. The former, as the Restatement recognizes, does not constitute publicizing or public communication . . . and accordingly does not destroy the private character of the facts disclosed.

Virgil v. Time, Inc., 527 F.2d 1122, 1127 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976); see also WEBSTER’S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 1457 (2d ed. 1983) (defining publicity as “commonly known, or open to the knowledge of a community”).

165. See, e.g., *Feiner v. New York*, 340 U.S. 315 (1951) (affirming conviction of street-corner speaker who insulted politicians and minorities, on the basis that the audience was disorderly and unruly); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (explaining that breach of the peace includes “words likely to produce violence in others”). The Court in *Cantwell* suggested that “[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot[,] . . . disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order.” *Cantwell*, 310 U.S. at 308.

166. For example, even if sexual material might be suitable for adults, the state can regulate or ban that material when the intended audience consists of children. See *Ginsberg v. New York*, 390 U.S. 629, 636 (1968). Also, the standards used by juries to decide whether sexual material

other hand, these few distinctions based on audience could be attributed to the audience's psychological characteristics—such as maturity or attitude—rather than to sheer numbers.¹⁶⁸ Still, the idea that the First Amendment is blind to the difference between mass communication and small-scope communication seems to be based more on legal theory than on practicalities.

The trial court next tackled the issue of whether section 794.03 operated as a prior restraint. The United States Supreme Court had dodged that same question in 1989.¹⁶⁹ The answer offered in *Globe I* was that section 794.03 was most likely not a prior restraint.¹⁷⁰ However, the trial court's decision was based on confusing logic. First, the court noted that several types of prior restraints are identifiable.¹⁷¹ Second, the court explained that the legal standards are the same for prior restraints and subsequent punishments; I.E., legislative enactments proscribing punishment after publication are subject to the same scrutiny as pre-publication injunctions and licensure systems.¹⁷² But in the end the court simply referred to the careful review it had already applied to the overbreadth issue and relied on that analysis to find section 794.03 unconstitutional.¹⁷³ The trial court somehow reached the conclusion that section 794.03 "is probably not a 'prior restraint' as that term has been traditionally used" by relying on the conclusion that "no valid competing state interest is served by punishing defendant for publishing a truthful account of information it had lawfully acquired."¹⁷⁴ Even more confusing is the court's seemingly contradictory later statement that section 794.03 is in the nature of a prior restraint.¹⁷⁵ Evidently the trial court's holding did not rely on the prior restraint analysis.

is obscene may be altered when the material is "designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large." *Mishkin v. New York*, 383 U.S. 502, 508 (1966).

167. Many jurisdictions recognize defamation only when the defamatory meaning of a publication is acknowledged by a "right-thinking" community. E.g., *Kimmerle v. New York Evening Journal*, 186 N.E. 217, 218 (N.Y. 1933) (defining the New York standard as dependent on the minds of "right-thinking persons"). The practical effect of this rule is that criminals cannot recover for having had their criminal abilities insulted within a criminal peer group. See Note, *The Community Segment in Defamation Actions: A Dissenting Essay*, 58 *YALE L.J.* 1387 (1949).

168. But see *Virgil v. Time, Inc.*, 527 F.2d at 1125-27. However, in a non-First Amendment context, defamation is still defamation whether the audience consists of 200,000 people or only one person. See W. PAGE KEETON, *PROSSER & KEETON ON TORTS* § 111 (5th ed. 1984).

169. See *Florida Star v. B.J.F.*, 491 U.S. 524, 541 n.9. (1989).

170. *Globe II*, 622 So. 2d 1066, 1074 (Fla. 4th DCA 1993) (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)) (deciding the statute "is probably not a 'prior restraint'"), *aff'd*, 648 So. 2d 110 (Fla. 1994).

171. *Id.*

172. *Id.* at 1074-75.

173. *Id.* at 1075.

174. See *id.* at 1074-75.

175. *Id.* at 1076.

Finally, the trial court specifically examined section 794.03 under the microscope provided by the Florida Constitution.¹⁷⁶ The court concluded that the state constitution offers protection “at least as broad” as that of the First Amendment¹⁷⁷ and that further comment would therefore have been superfluous. Thus, the court simply pronounced section 794.03 to be equally violative of both the Florida Constitution and the United States Constitution.¹⁷⁸

B. The District Court of Appeal Opinion

After quoting in full the trial court’s opinion, the Fourth District Court of Appeal in *State v. Globe Communications Corp. (Globe II)* added its own thoughtful analysis.¹⁷⁹ Whereas the lower tribunal had done a thorough job of identifying the theoretical legal deficiencies of section 794.03, Judge Harry Lee Anstead, writing for the majority,¹⁸⁰ went beyond that to offer suggestions on how the state’s “rights could be served by measures less drastic.”¹⁸¹ The opinion therefore can accompany the United States Supreme Court’s *Florida Star* opinion as a guide for curing the unconstitutional effects of applying a statute such as section 794.03 in every situation—what the appellate court called “using a shotgun when a highly accurate rifle is required.”¹⁸²

First, the appellate court more fully developed the *Florida Star* dicta that had chided the government for having been the entity directly responsible for informing *The Florida Star* about B.J.F.’s identity.¹⁸³ The appellate court suggested that the State of Florida more plainly classify rape victims’ names as confidential and then create a cause of action for

176. *Id.* at 1075. The relevant portion of the Florida Constitution is article 1, section 4, stating that “[e]very person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.” FLA. CONST. art. I, § 4.

177. The court based the conclusion primarily on the lack of contrary controlling precedent in Florida. See *Globe II*, 622 So. 2d 1066, 1081 (Fla. 4th DCA 1993) (quoting *Globe I*, No. 91-11008MM A02 (Palm Beach County Ct. Oct. 21, 1991)), *aff’d*, 648 So. 2d 110 (Fla. 1994). However, the conclusion that press protection in Florida is at least as broad as federal constitutional protection is curious. The federal Constitution simply states that no law may be passed “abridging the freedom of . . . the press,” while the Florida Constitution provides the caveat that speakers “shall be responsible for abuse” of their rights. Compare U.S. CONST. amend. I with FLA. CONST. art. I, § 4. The differences in language raise many interesting arguments that are unfortunately beyond the scope of this comment.

178. *Globe II*, 622 So. 2d at 1075.

179. See *Globe II*, 622 So. 2d at 1076-81.

180. Judge Anstead is now an Associate Justice of the Florida Supreme Court.

181. *Globe II*, 622 So. 2d at 1078.

182. *Id.* at 1079.

183. See *Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) (theorizing that section 794.03 could “hardly be said to be narrowly tailored” in those situations wherein the “the government has failed to police itself in disseminating information”).

breach of confidentiality.¹⁸⁴ From a theoretical, legal standpoint, shifting the burden of compensatory liability from the press to the government sidesteps the scope of the First Amendment altogether. A law that forces the government to compensate rape victims if those victims' names are published certainly is not a law "abridging the freedom of . . . the press."¹⁸⁵ The practical result of such burden-shifting is to eliminate the dangerous "chilling effect" of self-censorship.

Next, the appellate court suggested that a more narrowly tailored statute would have expressly recognized the risk to the victims' safety in those situations where the rapist had not yet been apprehended.¹⁸⁶ Also, the court implicitly recommended that the Legislature officially take notice of any evidence that might indicate that victim safety was an unusually high concern in the case of rape as compared to other crimes.¹⁸⁷ The court requested similar empirical evidence for support of the proposition that anonymity is an integral motivation for rape victims to report their victimization.¹⁸⁸ The appellate court recognized, however, that rewriting section 794.03 is a legislative task and that the courts would not accept the burden of engaging in analysis as done in *Florida Star* each time a media outlet is prosecuted.¹⁸⁹

Judge Anstead, writing for the court, offered to the Legislature one other piece of advice, similar to what the United States Supreme Court had noted in *Florida Star*.¹⁹⁰ The phrase "instrument of mass communication" is too ambiguous for use in a statute such as section 794.03. The *Globe II* court reiterated the need for a better definition of "the press" to serve the dual purpose of evading void-for-vagueness claims and averting underinclusiveness challenges.¹⁹¹ In sum, after agreeing with the trial court as to almost all details of analysis, the appellate court affirmed the order striking section 794.03 as unconstitutional facially and as-applied.¹⁹²

C. The Florida Supreme Court Opinion

After such thorough analysis by both lower state courts, not much was left for the Florida Supreme Court to say since it found itself in agreement with the preceding decisions. Writing for the majority, Justice Kogan referred often to the opinions below and quoted at length from the

184. See *Globe II*, 622 So. 2d at 1079 (proposing "a determination by the state to maintain confidentiality within its own ranks and records, and a provision for sanctions upon breach").

185. U.S. CONST. amend. I.

186. *Globe II*, 622 So. 2d at 1079.

187. *Id.*

188. See *id.*

189. *Id.* at 1080.

190. See *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (pointing out that the statute does not define the phrase "instrument of mass communication").

191. *Globe II*, 622 So. 2d at 1081.

192. *Id.*

persuasive opinion “above” (*Florida Star v. B.J.F.*¹⁹³) to show that the Florida Supreme Court approved of and agreed with those decisions.¹⁹⁴

In affirming the facial unconstitutionality of section 794.03, the court did not feel compelled to extend the already long list of flaws with the statute. The opinion simply reviewed the overbreadth and underinclusiveness of the express language of the statute.¹⁹⁵ Additionally, as the appellate court had done, the Florida Supreme Court declined the State’s invitation to “interpret” away any infirmities of section 794.03 by inferring affirmative defenses and adopting carefully phrased jury instructions.¹⁹⁶

In doing so, the court took the same opportunity that the Fourth District had taken and gently, yet clearly, encouraged the Florida Legislature to rewrite section 794.03.¹⁹⁷ Together, the three courts’ opinions suggest that allowing a narrow exception to the First Amendment for some rape victims is not per se invalid in the eyes of the law. Even the United States Supreme Court’s opinion in *Florida Star v. B.J.F.* is in accord with this implication. Understandably, the Florida Legislature went back to the drawing board to create a new statutory scheme.¹⁹⁸ The Legislature did not merely amend section 794.03. Rather, the Legislature passed a new package of interrelated statutes.

VI. LEGISLATIVE RESPONSE TO THE FLORIDA JUDICIARY: THE NEW “CRIME VICTIMS PROTECTION ACT”

Only six months after *State v. Globe Communications Corp.*,¹⁹⁹ the Florida Legislature enacted a new strategy for shielding rape victims’ identities.²⁰⁰ The Florida Legislature considered, amended, and unanimously²⁰¹ passed the Crime Victims Protection Act²⁰² during the eight-week period between March 8, 1995 and May 5, 1995.²⁰³ The Act took

193. 491 U.S. 524 (1989).

194. *Globe* III, 648 So. 2d 110, 112-13 (Fla. 1994).

195. *Id.*

196. *Id.* at 113.

197. *Id.* at 113-14 (concluding first that “[r]ewriting would be necessary” and then further encouraging the Legislature by stating “we do not rule out the possibility that the legislature could fashion a statute that would pass constitutional muster”).

198. *Id.*

199. *Id.* at 110.

200. 1995, Fla. Laws ch. 95-207, § 8, 1832, 1835 (“Became a law without the Governor’s approval June 9, 1995.”).

201. See FLA. S. JOUR. 385 (Reg. Sess. April 21, 1995) (memorializing a vote of 38 in favor and 0 opposed); FLA. H.R. JOUR. 876 (Reg. Sess. April 27, 1995) (memorializing a vote of 115 in favor and 0 opposed); FLA. S. JOUR. 1107-09 (Reg. Sess. May 5, 1995) (memorializing a vote of 36 in favor and 0 opposed).

202. FLA. S. JOUR. 1107-09 (Reg. Sess. May 5, 1995).

203. FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 65, SB 496.

effect on October 1, 1995.²⁰⁴ It included three new statutes designed to function cooperatively to achieve the effect that the Legislature sought in a manner that would survive judicial scrutiny. Although the Legislature's desired effect is of high social value, this Comment predicts that the judiciary still will not be satisfied.

A. Content of the New Act

1. Legislative Findings and Purpose

In the preamble to the Crime Victims Protection Act, the Legislature expressly stated its motivations and reasoning, as well as the State of Florida's interests.²⁰⁵ Not surprisingly, the interests asserted in 1995 were the same as the interests asserted in 1993 and 1994 for the State of Florida v. Globe Communications Corp. litigation²⁰⁶ and in 1989 for the Florida Star v. B.J.F. case.²⁰⁷

In response to the Fourth District Court of Appeal's request,²⁰⁸ the Legislature provided some statistical evidence to substantiate its belief in the compelling nature of the State's interests.²⁰⁹ At least one draft of the Act cited data implying that fear of identification is fundamental to victims' decisions to "refrain from reporting and prosecuting sexual crimes."²¹⁰ Specifically, according to the Legislature, sixty percent of sexual crime victims share "fear of disclosure of their identity" as a primary concern; sixty-six percent of victims would be more likely to report crimes if given statutorily enforced anonymity; and eighty-four percent of sexual crimes go unreported.²¹¹

The second and third set of statistics appear to contradict the State's argument that statutorily enforced anonymity will meet the State's interests. Apparently, as many as eighty-four percent of sex crimes went unreported even though Florida has had a rape victim privacy statute since

204. 1995, Fla. Laws ch. 95-207, § 8, 1832, 1835 (enacting the Crime Victims Protection Act).

205. Fla. SB 496, § 2(1) (1995).

206. See *supra* text accompanying note 148.

207. See *supra* text accompanying note 107.

208. See *supra* text accompanying notes 187-88.

209. The Florida Legislature has maintained its assertion that these interests are always compelling. See Fla. SB 496, § 2(1) (1995). The reviewing courts were not quite in agreement with the Legislature on that point, but they have openly acknowledged that protecting rape victims from ridicule and danger and encouraging those victims to report the crimes are highly significant interests that can often be compelling enough to suspend First Amendment privileges narrowly. See *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (admitting that "in a proper case, imposing . . . sanctions . . . might . . . advance these interests as to satisfy the Daily Mail standard"); *Globe III*, 648 So. 2d 110, 114 (Fla. 1994) (admitting that "the legislature could fashion a statute that would pass constitutional muster").

210. 1995, Fla. Laws ch. 95-207, § 2, 1832, 1832.

211. Fla. SB 496 (draft of April 21, 1995).

1911. Furthermore, broadly based percentages should be irrelevant considering that privacy concerns may constitutionally outweigh free press concerns only through individualized adjudication.²¹² The real issue is whether any specific individual victim will, without anonymity, be amenable to reporting a crime and assisting or participating in a rape prosecution.²¹³ The Legislature attempted in the new Act to address this issue, which goes to the practical functioning of the individualized adjudication requirement.²¹⁴ The provision for individualized adjudication is but one of many differences between the Crime Victims Protection Act and the formerly effective section 794.03. In the next sections, this Comment will briefly survey the new Act in its entirety and then scrutinize several of its portions.

2. Brief Overview of the Three New Statutes Created by the "Crime Victims Protection Act"

The Crime Victims Protection Act²¹⁵ is designed to function only when case-by-case examination demonstrates that the scenario in question raises the state's interests to the point of being "compelling."²¹⁶ The Act recognizes five independent characteristics, which originated in dicta of the United States Supreme Court and the Florida Fourth District Court of Appeal. These characteristics must be shown before the rape victim may receive protective anonymity;²¹⁷ they are listed within a new statute, codified by the Act at section 92.56, Florida Statutes.²¹⁸ When either the victim or the state demonstrates the existence of all five characteristics,²¹⁹ section 92.56 takes effect and shields the alleged victim from public exposure. All court records that reveal the victim's name, address, or photograph immediately become confidential and exempt from Florida's constitutional public disclosure provisions.²²⁰ To facilitate anonymity,

212. See Florida Star, 491 U.S. at 540.

213. The narrower question of whether any given victim who would not receive anonymity would be more or less willing to report a sexual crime is probably impossible to answer within the confines of feasible constitutional balancing. The state cannot adjudicate the question until after the crime has been reported, which means in all practicality that the state cannot adjudicate the question at all. Theoretically, the best practical (though not necessarily legal) way to adjudicate the issue would be to have rape victims talk to judges before talking to the police. However, the trial court system is unlikely to have the means by which to cope fairly and efficiently with such a procedure.

214. See FLA. STAT. § 92.56 (1995).

215. A simple outline of the Act's provisions may be found also in FIRST AMENDMENT FOUNDATION, SECTION-BY-SECTION ANALYSIS OF SB 496 (June 15, 1995).

216. See id.

217. See FLA. STAT. § 92.56(1)(a)-(e) (1995).

218. See id. The specifics of the characteristics will be put aside temporarily to retain a focus here on the broad functions of section 92.56 and the rest of the Act. See *infra* part VI.B.4. (addressing the details of the characteristics).

219. FLA. STAT. § 92.56(1) (1995).

220. See id; see also *infra* note 249; FLA. STAT. § 119.07(3)(h) (1995).

section 92.56 allows the state to substitute a false name for the true name in any court records.²²¹ Once section 92.56 takes effect in a particular case, the identity-revealing court records may not be made public without incurring the courts' contempt powers.²²²

The confidential nature of the victim's identity extends to any in-court testimony from the victim. To achieve this confidentiality, section 92.56 provides that no publication or broadcast may include "an identifying photograph, an identifiable voice, or the name or address of the victim."²²³ These restrictions are waivable if the victim personally files with the court a written consent to cancel the Act's protective anonymity.²²⁴ However, the substance of the victim's testimony always remains susceptible to publicity.²²⁵

As an assurance against any type of misinterpretation that could violate the Sixth Amendment,²²⁶ section 92.56 plainly states that it "may not be construed to prevent the disclosure of the victim's identity to the defendant."²²⁷ The defendant may apply to the trial court for an "order of disclosure."²²⁸ This will provide the defendant (and anyone else who is directly involved in the preparation of the defense) with all identifying information concerning the victim.²²⁹ The defendant and his defense team are equally vulnerable to contempt sanctions for any "willful and knowing disclosure" of the identity to any other person.²³⁰

The Act offers protective anonymity to a far larger group of victims than formerly effective section 794.03. Where former section 794.03 limited its scope to victims of sexual assault,²³¹ the new Act expands the list of crimes for which victims can seek privacy. Specifically, victims of offenses described in Florida Statutes chapters 794 and 800 and some offenses described in chapter 827 may ask the trial court to close the records.²³² Those chapters define and prohibit rape and similar sexual assaults, lewdness and indecent exposure, child abuse and aggravated child abuse, as well as sexual performance by a child.²³³

221. FLA. STAT. § 92.56(3) (1995).

222. See id. § 92.56(2), (6) (1995).

223. Id. § 92.56(5) (1995).

224. Id. § 92.56(4) (1995).

225. Id.

226. To put the theory as simply and broadly as possible, the Sixth Amendment ensures that criminal defendants may "confront" the witnesses who testify against them. See U.S. CONST. amend. VI.

227. FLA. STAT. § 92.56(2) (1995).

228. Id.

229. Id.

230. Id.

231. See FLA. STAT. § 794.03 (Supp. 1994), held unconstitutional by *Globe III*, 648 So. 2d 110 (Fla. 1994).

232. FLA. STAT. § 92.56(1) (1995).

233. See FLA. STAT. chs. 794, 800, 827 (1995).

The Crime Victims Protection Act also creates two other new statutes. One of the statutes is section 794.024,²³⁴ which singles out public employees and officers who might disclose a victim's identity.²³⁵ When public employees reveal a victim's confidential identity to parties other than those directly involved with the prosecution, the public employees are subject to second degree misdemeanor sanctions.²³⁶ This statute ostensibly satisfies judicial demands for government accountability rather than media accountability alone.²³⁷

The third new statute is section 794.026, which provides an expressly civil cause of action for the victim personally; this cause of action is invocable when any "entity or individual" communicates the victim's confidential identity "prior to open judicial proceedings."²³⁸ The victim must show that the communication was intentional and in "reckless disregard" for the highly offensive nature of that type of revelation.²³⁹ Then the communicator becomes liable to the victim for all damages necessary to compensate the victim for any resultant injuries.²⁴⁰

Many of the provisions described above contain one or more flaws that ought to render the new Crime Victims Protection Act unconstitutional. Though there are many social and emotional merits to offering some privacy to victims of sexual assaults, the Florida Legislature acted too quickly in the wake of the *State v. Globe Communications Corp.* series of opinions. In the next sections, this Comment reveals some weaknesses of the new Act.

B. Constitutional Infirmities of the New Act

1. Problems Regarding the Wide Scope of the Act

The very title of the Act reveals an inherent difference between the new statutes and the formerly effective section 794.03. The Florida Legislature is no longer limiting the privacy shield to rape victims but now offers the shield to victims of any sort of sexual crime and some non-sexual child abuse.²⁴¹

The extension of the list of crimes for which victims may seek court-imposed anonymity renders the Act hopelessly overbroad by suppressing more speech than necessary—speech that the state does not have a com-

234. FLA. STAT. § 794.024 (1995).

235. *Id.*

236. *See id.*

237. *See supra* notes 183-85 and accompanying text.

238. *See* FLA. STAT. § 794.026 (1995).

239. *Id.*

240. *Id.*

241. *See supra* notes 232-33 and accompanying text.

elling interest to suppress.²⁴² The state's interests in protecting rape victims are based on policy arguments that are unique to rape.²⁴³ Furthermore, the United States Supreme Court decision in *Florida Star v. B.J.F.*,²⁴⁴ which implied that a rape victim's name could be suppressed if the state's interests in doing so were compelling, was expressly limited to facts that dealt with rape.²⁴⁵ The Florida Legislature has not shown that the social stigma and ridicule that are found in tandem with rape or the reluctance to report rape or assist with its prosecution are at all problematic in situations involving crimes other than rape. Though it would be hard to deny that similar problems may exist with aggravated child abuse or sexual performance by a child, the Legislature has not produced any findings in this regard. Lewdness and indecent exposure seem to be another matter entirely. The Act possibly implies a non sequitur by assuming that victims of "flashing" are just as much in need of privacy as victims of rape or sex-related child abuse. "Flashing" may be somewhat traumatic, but rape is unquestionably more so.

In summary, the state's interests are not equally significant for all of the crimes covered by the Crime Victims Protection Act, and this renders the Act overbroad. Admittedly, the Act's extended scope does not render it facially unconstitutional;²⁴⁶ rather, the Act could become unconstitutional as-applied if judges suppress the identities of victims of crimes such as lewdness or similar crimes that are not so heinous as rape.²⁴⁷ By extending the list of crimes for which the press may be prohibited from publicizing the victims' names, the Florida Legislature has provided powerful ammunition to those media supporters who argue that such laws are a slippery slope leading to further censorship.²⁴⁸

2. Problems Regarding the Nature of the Confidentiality Offered by the Act

When a victim's case proves to be one of those rare situations in which privacy rights should outweigh press freedoms, the confidentiality protection arising from the new Act is based on a closure of public records. Upon the trial court's declaration, "[a]ll court records, including

242. Overbroad statutes violate the First Amendment by punishing or affecting speech that should otherwise be protected by the First Amendment. See *Broadrick v. Oklahoma*, 413 U.S. 601, 611-15 (1973).

243. See discussion supra part II.A.

244. 491 U.S. 524 (1989).

245. See id. at 541.

246. See 413 U.S. at 615 (explaining that a statute may be held invalid on its face only when the overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

247. Because the statutes within the Act depend on case-by-case decisions, the overbreadth related to the Act's scope is curable through judicial interpretation and non-application in appropriate circumstances. See id. at 615-16.

248. See supra part II.B.

testimony from witnesses, that reveal the photograph, name, or address of the victim . . . are confidential and exempt from the provisions of s. 24(a), Art. I of the State Constitution²⁴⁹ and may not be made public.”²⁵⁰ Any willful and knowing violation of that rule will be considered contempt of court.²⁵¹

These clauses should be effective in solving two of the constitutional infirmities of the Act’s predecessor, but they simultaneously raise other distinct and problematic concerns. The formerly effective section 794.03 suffers from underinclusiveness and vagueness because of the undefined phrase “instrument of mass communication.”²⁵² The new section 92.56 theoretically mends those weaknesses by facially disregarding the nature of the speaker and focusing instead on the speech-act itself: making information public. Thus, the statute avoids the risk of defining “the press” in a way that violates the First Amendment. However, although the Act was intended to include both the “smalltime disseminator” as well as the “media giant,” as recommended by the United States Supreme Court,²⁵³ the scope of section 92.56’s phrase “may not be made public” is difficult to delimit precisely.

a. Problematic Statutory Language Regarding the Prohibited Speech-Act and the Susceptible Speakers

The Act’s ostensible focus on the speech-act itself is equally as vague as is the formerly effective section 794.03’s focus on the speaker. What it means to make something public defies exact articulation. Although no federal court has specifically ruled that the phrase is unconstitutionally vague,²⁵⁴ federal judges have been known to disagree about what type of

249. This portion of the Florida Constitution states in part:

SECTION 24. Access to public records and meetings.— (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.

FLA. CONST. art. I, § 24(a).

250. FLA. STAT. § 92.56(1) (1995).

251. *Id.* ¶ 6.

252. See *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989); *Globe III*, 648 So. 2d 110, 113 (Fla. 1994); *Globe II*, 622 So. 2d 1066, 1081 (Fla. 4th DCA 1993).

253. See *Florida Star*, 491 U.S. at 540. But see *Virgil v. Time, Inc.*, 527 F.2d 1122, 1125-27 (9th Cir. 1975) (explaining how privacy law distinguishes between individual speakers and mass media speakers and stating that “[t]alking freely to someone is not in itself . . . making public the substance of the talk”), cert. denied, 425 U.S. 998 (1976).

254. Search on WESTLAW, Allfeds database, (January 22, 1996) (using the “terms and connectors” search: “make public” “made public” /p vague vagueness; and using the “natural language” search: “whether the statutory language ‘make public’ or ‘made public’ is unconstitutionally vague”).

activity the phrase encompasses.²⁵⁵ Under Florida law, the standard for testing vagueness is whether a person “of ordinary intelligence should know what was intended.”²⁵⁶ The problem inherent in the Legislature’s use of the words “made public” is that, although courts through the First Amendment may force the law to ignore the difference between backyard gossips and media giants, the general populace does see that distinction in the word “public.” The common understanding of the word necessarily excludes de minimus conversations.²⁵⁷ Ordinary citizens will not realize that, under this new law, personal conversations are as sanctionable as nationwide television broadcasts.

Furthermore, although the language seems facially unconcerned with who the speaker is, it must implicitly account for the identity of the speaker; otherwise the phrase loses all meaning. There can be no speech-act without some type of speaker. Thus, the ambiguity of section 92.56’s language “may not be made public”²⁵⁸ is twofold. The phrase is unclear about to whom it applies and what precisely it prohibits.

The two issues are inextricable. For example, section 92.56 might reasonably be interpreted to apply to court officers and similar government personnel who have access to previously public, newly confidential, records. The first subsection of section 92.56 warns that “court records . . . may not be made public,”²⁵⁹ a prohibition that seems to imply—but does not expressly include—the additional phrase “by those persons who have access to such records.” Working under the “government personnel” definition to which speakers are subject under section 92.56, the prohibited speech-act should include at least distributing copies of court records to members of the general public or press, such as was done by the court clerk involved in the Cox Broadcasting scenario.²⁶⁰ However, if section 92.56 applies to court officers and government personnel and makes

255. See, e.g., *McKnight v. Southeastern Pennsylvania Transp. Auth.*, 438 F. Supp 813, 824 (E.D. Pa. 1977) (complaining that the pleadings that averred that false accusations “were made public” were “much too vague in [so] stating”). On appeal, the Third Circuit vacated on other grounds but accepted the averment that false accusations had been “made public,” on the basis that one party had conceded that there had been “communication to others.” 583 F.2d 1229, 1239 (3d Cir. 1978). In contrast, the Ninth Circuit has distinguished communication to others from public communication. See *Virgil*, 527 F.2d at 1125-27.

256. E.g., *Brown v. State*, 629 So. 2d 841, 842 (Fla. 1994); *State v. Bussey*, 463 So. 2d 1141, 1144 (Fla. 1985) (stating that the vagueness question depends upon “whether the language of the statute is sufficiently clear to provide a definite warning of what conduct will be deemed a violation; that is, whether ordinary people will understand what the statute requires or forbids, measured by common understanding and practice”).

257. WEBSTER’S NEW TWENTIETH CENTURY UNABRIDGED DICTIONARY 1456 (2d ed. 1983) (defining “public” as “known by, or open to the knowledge of, all or most people; as, he will make this information public”) (emphasis added).

258. FLA. STAT. § 92.56(1) (1995).

259. *Id.*

260. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 472-73 n.3 (1975).

those persons subject to contempt,²⁶¹ then section 92.56 renders superfluous the new section 794.024, which subjects public employees to criminal misdemeanor sanctions for disclosing public records.²⁶² Conversely, the plain language of section 794.024 raises doubts as to whether section 92.56 is meant to apply to public employees at all. If section 92.56 does not apply to public employees, then the section's language "may not be made public"²⁶³ might not include a speech-act such as showing court records to a reporter.

Also, in certain circumstances, persons other than public employees are capable of making court records public. For example, a reporter may examine court records without permission during a courtroom recess and then base a newspaper article on those records. Alternatively, jurors who examine the records during deliberation are capable of revealing the records' contents. A judge's family members or acquaintances might accidentally see confidential records in chambers²⁶⁴ and would then have knowledge of the confidential records. All of these examples indicate that the phrase "may not be made public" could encompass many different types of speakers.

However having a broad scope does not necessarily prevent vagueness. For example, because of section 92.56's catchall language, the law is unclear on whether "repeaters" fall within its purview. An example of a repeater is a newspaper that publishes information after that information has already been released, such as by an earlier statewide or nationwide television broadcast. The *Globe* was a repeater because several foreign newspapers had published Patricia Bowman's name before The *Globe*.²⁶⁵ In defamation law, "repeaters" generally are not immune from liability;²⁶⁶ by analogy, "repeaters" might be susceptible to section 92.56.

Because of two crucial distinctions, however, the rules of defamation law on the issue of repeaters may not be appropriate in situations involving victim privacy. First, defamation law focuses primarily on the reputation interests of the defamed plaintiff and leaves the state's interests to play only a supporting role.²⁶⁷ Second, defamation law is based on the principle that false and defamatory material is not protected by the First Amendment;²⁶⁸ this principle explains, to a certain extent, the de-

261. FLA. STAT. § 92.56(6) (1995).

262. *Id.* § 794.024 (1995).

263. *Id.* § 92.56(1) (1995).

264. The question of whether a judge can be in contempt of his or her own order is troublesome in its own right.

265. See *supra* note 130.

266. See KEETON, *supra* note 168, § 113.

267. See generally *id.* § 115.

268. This concept is illustrated in *Garrison v. Louisiana*, in which the Court states:

Calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in

emphasis on the state's interests. In contrast, a crime victim's identity is true information, which receives full First Amendment protection except when the state's interests in suppressing that information are compelling.²⁶⁹ Thus, the legal theory of victim privacy may be said to rely primarily on the interests of the state²⁷⁰ and to leave the privacy interest of the victim as a secondary factor—one which may heighten the state's interests depending upon the circumstances.²⁷¹ For these reasons, no court should sanction a repeater for identifying a victim because, once the victim's identity has been made public for the first time, the state no longer has a compelling interest in suppressing the information.²⁷² If a repeater is punished under section 92.56, the statute will be functioning in an unconstitutionally overbroad fashion.²⁷³ That potential for overbreadth is present in other portions of the new Act as well; the aggregate makes the entire Act substantially overbroad.²⁷⁴

Just as section 92.56's vagueness may lead to overbreadth, as explained above, its ambiguity also seriously infringes on the concept of "fair warning" through due process. A basic proposition of the law is that the people who are subject to it must be forewarned of that fact.²⁷⁵ Certainly newspapers, television stations, and other media giants are forewarned that they are subject to the restrictions of section 92.56. However, the phrase "made public" still does not properly or clearly define which entities are the small-time disseminators that may have been swept within the new Act's scope.

From a policy perspective regarding small-time disseminators, legislative reliance on a catchall phrase, such as "may not be made public," is unwise. The earlier example of the nosy reporter serves as a good model for this analysis. The reporter crosses the bar during recess and inappro-

order and morality. . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

379 U.S. 64, 75 (1964) (citations omitted).

269. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

270. See *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (inquiring whether former section 794.03 serves a need to further state interests of the highest order).

271. Cf. *infra* part VI.B.4.

272. See *Florida Star*, 491 U.S. at 539 (implying that the state's interests are undercut when "the identity of the victim is already known throughout the community").

273. Publishing true information is protected by the First Amendment unless the state has interests that are compelling in the specific instance at hand. Therefore, even if repeaters are clearly within the statute's meaning, the statute is overbroad for punishing them. See *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (stating that "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct").

274. See discussion *infra* part VI.B.3-4.

275. E.g., *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."). The Court in *Maynard* went on to explain that "specific case" or "as-applied" analysis for problems of due process vagueness is appropriate only for "statutes not threatening First Amendment interests." *Id.* For statutes that do, vagueness could be grounds to strike.

priately reads the papers that sit on the temporarily vacant clerk's bench. In that set of circumstances, the clerk did not willfully and knowingly give information to the reporter and is not therefore guilty of contempt.²⁷⁶ Yet, somebody who was once ignorant of the alleged victim's identity—the reporter—now has knowledge that was previously confidential. Whether or not this means that the information has been made public is unclear. If the reporter does not tell anyone or use the information in a broadcast, then an assumption that the information has not been made public is reasonable. The assumption may no longer be reasonable, however, if the reporter shares the information during his family dinner conversation, perhaps becoming a small-time disseminator.

Granted, the reviewing courts sought a statute that would deter “the backyard gossip” as well as the “media giant.”²⁷⁷ However, the challenge for legislators is to strive toward plainer distinctions regarding what speech-activity or which speakers are included, rather than to draft catchall language such as that in section 92.56. Even if a judge could decisively rule that a situation such as the reporter's dinner conversations falls squarely within the meaning of the statute, that type of situation is one in which the state probably should not become involved. Even though the First Amendment may preclude distinguishing between media giants and media midgets, this preclusion should not discourage legislators from distinguishing between media midgets and everyday living room conversationalists. Otherwise, the state could invoke a statute designed to protect privacy for the ironic purpose of invading what is normally and traditionally considered to be a very private sphere.²⁷⁸

The statutory language in section 92.56 about making information public is ambiguous as to who and what might be classified as sanctionable. This is a serious problem that ought to render section 92.56 void for vagueness,²⁷⁹ overbreadness, and a violation of due process.

b. Problematic Statutory Language Regarding What Will Become Confidential

Additional vagueness concerns are raised by the clause within section 92.56 that defines which judicial materials will become confidential. By stating that “all court records” that reveal the photograph, name, or ad-

276. Cf. FLA. STAT. § 92.56(6) (1995).

277. E.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989).

278. For support of the proposition that the state may not punish speech within the privacy of one's home, even when the speech is recognized to be unprotected by the First Amendment, see *Stanley v. Georgia*, 394 U.S. 557 (1969).

279. Cf. *Globe II*, 622 So. 2d 1066, 1081 (Fla. 4th DCA 1993) (noting that section 794.03's phrase “instrument of mass communication [is] so ambiguous that it may also render the statute void-for-vagueness”), *aff'd*, 648 So. 2d 110 (Fla. 1994); see generally *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (explaining the legal principle of void-for-vagueness).

dress of a sexual crime victim “may not be made public,”²⁸⁰ the statute is susceptible to several potentially conflicting meanings. The statute might mean only that the image of the victim or the few words identifying the victim’s name or address may not be made public. The name or photograph could be blacked out before distributing copies of court records to the public or press. Also, this meaning would at least ensure that only the narrowest, most unexpandable range of facts would be excluded from being published. Thus, the slippery slope becomes less slippery.

On the other hand, section 92.56 might reasonably be interpreted to mean that the entirety of any record becomes confidential if some subsection within that record mentions the victim’s real name. This interpretation should be deemed unconstitutional because far too much non-private information about the judicial proceedings would then be shrouded from the press. The press has “[g]reat responsibility . . . to report fully and accurately the proceedings of government.”²⁸¹ When the press engages in this special responsibility as the “Fourth Estate,”²⁸² it is performing “precisely the function it was intended to perform by those who wrote the First Amendment.”²⁸³ Accordingly, accurate reports of judicial proceedings receive extra protection.²⁸⁴

It is true that the United States Supreme Court has pointedly avoided an express or implied ruling upon “any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records.”²⁸⁵ But the Court’s philosophy on that issue indicates that the state must distinguish between what information is truly private and what is not.²⁸⁶ Despite strong feelings about the private nature of a rape victim’s specific identity, it can be conceded that the surrounding judicial proceedings are of a public, publishable nature because those proceedings involve government prosecution of a violent, antisocial crime.²⁸⁷

Withholding reams of trial transcript or motions on the basis that a few of the pages include a person’s name would thwart a core function of the

280. FLA. STAT. § 92.56(1) (1995).

281. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975).

282. Potter Stewart, “Or of the Press,” 26 *HASTINGS L.J.* 631, 634 (1975) (adopting a metaphor coined by Thomas Carlyle).

283. *Id.* at 631; see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RES. J.* 521, 528.

284. *Cox Broadcasting*, 420 U.S. at 492-93.

285. *Id.* at 496 n.26.

286. See *id.* In *Cox Broadcasting* the Court advised:

If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.

Id. at 496 (emphasis added).

287. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989) (stating that the commission and investigation of violent crimes is a matter of “paramount public import”).

media in violation of the First Amendment's Press Clause. Furthermore, withholding extra information about the prosecution would not serve the state's asserted interests. This is because the victim's safety, reputation, and self-confidence are less threatened by those portions of judicial proceedings that do not reveal the victim's identity.²⁸⁸ Even if the trial court grants anonymity to a victim, little or no good is accomplished for the victim or the state by closing the courthouse doors on nonvictim testimony, evidentiary hearings, or jury instructions.

There is another manner in which the phrase "all court records"²⁸⁹ can be interpreted too broadly, placing the Act in substantial jeopardy of being held void for vagueness.²⁹⁰ It involves the distinction between recognizing information as court records and recognizing information qua information and is best exemplified by a comparison of similar hypotheticals. If the nosy reporter, referred to earlier, reads the court records on the clerk's desk and then writes a newspaper article based on them, then his information seems to be within the meaning of court records. However, if the reporter is the only nonjudicial observer in the courtroom during a hearing and the reporter learns the victim's name because a witness accidentally mentions it on the stand, the information may no longer be fairly within the meaning of court records—this, despite the fact that the witness's testimony is part of the record. The comparison illustrates the possibility of varying, or even conflicting, judicial interpretations of what information comes from court records and what information does not.

On-the-spot determinations of whether to enjoin reporters under section 92.56 are unconstitutional under an interpretation of the holding in *Oklahoma Publishing Company v. District Court*:²⁹¹ a state court is not permitted to prohibit the publication of information obtained during open judicial proceedings.²⁹² The inexplicit nature of the phrase "all court records" may lead to violations of this rule of law. Moreover, other portions of section 92.56 also violate the *Oklahoma Publishing* rule, specifically, the clauses regarding reproduction of victim testimony.

288. The express legislative purpose section of the Crime Victims Protection Act hinges the integrity of the victim's safety, reputation, and self-confidence only on the risk of "public disclosure of the victim's identity." Problems are not attributed to participating in judicial proceedings, or to the proceedings themselves. See 1995, Fla. Laws ch. 95-207, § 2, 1832, 1832-33.

289. FLA. STAT. § 92.56(1) (1995).

290. See *supra* note 279.

291. 430 U.S. 308 (1977).

292. *Id.* at 310.

c. Problematic Statutory Language Limiting the Reproduction of Testimony

The effects of limiting the reproduction of witness testimony illustrate another weakness in the Crime Victims Protection Act. Under section 92.56, no publication or broadcast may include "an identifying photograph, an identifiable voice, or the name or address of the victim."²⁹³ The "substance" of the victim's testimony remains susceptible to publicity, however.²⁹⁴ The constitutional question raised by these provisions is based on the general difference between closing public access only to judicial records, as opposed to closing public access to live judicial proceedings.

The plain language of the Act refers to making "all court records" confidential; no provision exists for keeping the public or press out of the courtroom at any time.²⁹⁵ Of course, there is no constitutional problem with not keeping the press out of the courtroom; in fact, the press belongs there for the sake of the public.²⁹⁶ Both the press and the general public have a constitutionally protected, although conditional, right of access to criminal trials.²⁹⁷ There are some exceptions to the general rule, however, for which the courtroom doors may be closed.²⁹⁸

Although section 92.56 does not expressly close the courtroom doors, it nevertheless attempts to prohibit making public "an identifying photograph" or "an identifiable voice" of a rape victim when that victim takes the stand to testify publicly.²⁹⁹ This prohibition is arguably unconstitutional for two reasons. The first is somewhat intuitive. A plain language interpretation of the phrase "identifying photograph," employing the principle *inclusio unius est exclusio alterius*³⁰⁰ would theoretically allow the publication of highly accurate portraits drawn by courtroom sketch artists or intricately detailed written explanations of the physical appearance of the victim. This underinclusiveness leaves a loophole that seriously undermines the state's attempts at meeting its interests.

293. FLA. STAT. § 92.56(5) (1995).

294. See *id.*

295. See *id.*, § 92.56.

296. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (stating that "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations"); Gerald Dworkin, *Privacy and the Law*, in *PRIVACY* 113, 124 (John B. Young ed., 1978) ("It is a basic principle of the legal system that justice must not only be done but must manifestly be seen to be done."), "Prima facie, judicial proceedings are in public and the interest in open justice overrides the individual interest in privacy." *Id.*; see Stewart, *supra* note 282, at 634.

297. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558-81 (1980) (plurality opinion).

298. See, e.g., Dworkin, *supra* note 296, at 124.

299. See FLA. STAT. § 92.56(5) (1995).

300. Literally, the "inclusion of one is the exclusion of another." *BLACK'S LAW DICTIONARY* 763 (6th ed. 1990).

The second reason involves the manner in which the statute restricts the press's ability to make editorial decisions about portraying a public event. By implication, section 92.56 allows the press to attend the proceedings and view the victim during live, public testimony.³⁰¹ Similarly, section 92.56 does not prohibit the press from bringing cameras or tape recorders into the courtroom, nor does the section authorize judges to order the press to remove such equipment.³⁰² Nevertheless, the statute prohibits media representatives from broadcasting what they film or record in the open courtroom.

The United States Supreme Court has condoned some restrictions on the press that involved prohibiting all use of cameras or recording devices in certain situations. For example, the plurality in *Houchins v. KQED, Inc.*³⁰³ refused to condemn a sheriff's policy of allowing the media to tour a jail under the condition that no camera equipment be used.³⁰⁴ Section 92.56 is distinct, though, because it places no restrictions on whether the media may bring recording equipment into the courtroom. Strong arguments have been made in support of the principle that once the press is allowed to film or record an event, the press should be allowed to publish or broadcast the material.³⁰⁵ In the words of Justice Stewart, "[I]f a television reporter is to convey the sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment."³⁰⁶ This philosophy played out in *Oklahoma Publishing Co. v. District Court*,³⁰⁷ where reporters photographed an alleged juvenile delinquent as the juvenile was escorted from the courthouse to a vehicle.³⁰⁸ Because the juvenile's image had been "publicly revealed," the United States Supreme Court refused to uphold an injunction against publication of the image.³⁰⁹

At least one Florida appellate court expressly ruled that the media may not be prevented from disseminating films or recordings of public proceedings if the media had been allowed to utilize its recording equipment during the proceeding.³¹⁰ The court identified such a prohibition as a prior restraint.³¹¹

301. See FLA. STAT. § 92.56(5) (1995) (containing no language about closing court or excluding the media).

302. See *id.* (containing no language about cameras or recording devices).

303. 438 U.S. 1 (1978).

304. See *id.* at 9 (recognizing "no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes" (emphasis added)).

305. See *id.* at 17-18 (Stewart, J., concurring).

306. *Id.* at 17.

307. 430 U.S. 308 (1977).

308. *Id.* at 309.

309. See *id.* at 310.

310. *Times Publishing Co. v. State*, 632 So. 2d 1072, 1075 (Fla. 4th DCA 1994) (holding that "[i]f the media are allowed to take cameras into the courtroom, they are allowed to disseminate what they film").

311. *Id.*

Another Florida appellate court implied the same rule by identifying a narrow exception to it. In *Mayer v. State*,³¹² a judge had required, as a condition of a reporter's attendance at a juvenile court proceeding that could have been closed under statutory authorization, that the reporter expressly agree not to disseminate any of the information she gathered there. When the reporter broke her promise to the judge and published the details of the proceeding, the judge imposed contempt sanctions that were subsequently upheld.³¹³

The new Act does not prohibit ordinary, nonmedia citizens from entering the courtroom to witness a rape trial, nor does it prevent the media from doing so. If the Legislature has not drafted the statute in such a manner as to prevent a citizen from going to court to see or listen to a witness's testimony, then the same statute should not be permitted to prevent a different citizen at home from watching television to see or listen to the same witness. As a general rule, "one who testifies at a trial testifies before the public."³¹⁴ With the passage of the Crime Victims Protection Act, which expressly forces the media to censor itself by altering a film's image or soundtrack, the timing is ripe for revisiting the question of whether the state may force such editing techniques. The answer is likely to be "no," because the United States Supreme Court strongly disfavors legislation that allows the government to perform key editorial decision-making for the American media.³¹⁵

3. Problems Regarding Who May Argue for Anonymity Under the Act

Under the express terms of section 92.56, either the victim or the state may ask the trial court to close the records of the case and grant protective anonymity.³¹⁶ This option inherently diminishes the significance of the state's interests in toto. Under a statutory framework that depends on ad hoc decisionmaking, the judge's conclusion as to whether the state's interests are fully compelling in any specific case can be soundly based only on an assertion of such interests by the state itself. Certainly, the state's interests may be recognized and weighed by the courts for the sake of broad legal conclusions. However, individualized adjudication is crucial to the success of the Crime Victims Protection Act.³¹⁷ This means that

312. 523 So. 2d 1171 (Fla. 2d DCA 1988).

313. See id. at 1176.

314. *United States v. Salerno*, 828 F.2d 958, 960 (2d Cir. 1987).

315. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) ("[W]e . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.").

316. FLA. STAT. § 92.56(5) (1995).

317. *Globe II*, 622 So. 2d 1066, 1079 (Fla. 4th DCA 1993), aff'd, 648 So. 2d 110 (Fla. 1994).

the state's interests must prove compelling in each and every case in which a victim receives protective anonymity.

The victim alone should not be allowed to argue for anonymity in a case where the state itself is unwilling to come forward to assert that its interests in protecting that specific victim are of the highest order. As a matter of course, nearly all victims of sexual crimes probably will desire confidentiality and feel convinced that their own interests are compelling. Nevertheless, the proper legal standard is clinical and is not based on whether the particular victim has compelling interests in privacy. The intensity of the state's interests is the true measurement that must be made under the Constitution.³¹⁸ In order for that measurement to be made, the victim should have the state in court as well.

4. Problems Regarding Individualized Adjudication Under the Act

The provision for individualized adjudication within section 92.56 is in deference to the unanimous advice of the appellate courts that ruled on section 794.03.³¹⁹ Unlike the effects of the formerly effective section 794.03, section 92.56 does not allow victims to receive protective anonymity unless a judge rules that the specific case involves the state's interests to a compelling degree. Specifically, under the Act there must be a showing that five independent characteristics exist.³²⁰ The first three are modeled after the examples listed by the United States Supreme Court as possible factors that would undercut the privacy rights of the victim.³²¹ These characteristics were drafted into the new statute in converse order to the Court's list. First is that the "identity of the victim is not already known in the community";³²² second is that the "victim has not voluntarily called public attention to the offense"; and third is that the "identity of the victim has not otherwise become a reasonable subject of public concern."³²³

The fourth characteristic that must be shown under the new Act before a victim's identity can be kept confidential is that disclosure "would be offensive to a reasonable person."³²⁴ This characteristic can also be traced to the *Florida Star v. B.J.F.* opinion³²⁵ and brings the Act more in accord

318. See *supra* discussion in part III.

319. See, e.g., *Globe II*, 622 So. 2d at 1079.

320. See FLA. STAT. § 92.56(1) (1995) (listing the five characteristics).

321. See *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989).

322. Though this factor might appear to address the ambiguity of whether "repeaters" will be subject to the statute, the question is not answered so easily. For example, in the *Globe Communications* scenario, *The Globe* was a repeater because other newspapers had previously revealed Patricia Bowman's identity. Yet, because these newspapers were located in Europe, a judge might find under section 92.56 that the identity of the victim was not already known in the local community and could be shielded.

323. FLA. STAT. § 92.56(1)(a)-(c) (1995) (emphasis added).

324. *Id.* § 92.56(1)(d) (1995).

325. See *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989).

with traditional privacy law standards.³²⁶ Adoption of the time-honored “reasonable person” standard lends legitimacy to the new statutory provisions.

The fifth and final characteristic forces the court to consider whether disclosure of the victim’s identity would endanger the victim, prevent the victim from testifying, or cause the victim mental harm.³²⁷

Also included is a catchall option allowing the judge to recognize any other good cause why the victim may deserve or need anonymity.³²⁸ However, no catchall option exists on the other side of the equation. The court is not given any authority to recognize that in a certain case, even if all five characteristics are present, there may be other unpredicted reasons that undercut the intensity of the state’s interests in the victim’s privacy. For example, the court may believe that a particular victim has less need for privacy because the victim is a celebrity or public figure. Or, perhaps the accused is a celebrity or public figure, such as William Kennedy Smith, and the court believes that this fact reduces the state’s interests in protecting the victim. If the accused is a popular and powerful politician, the court may feel that the public’s right to know the identity of the accuser outweighs the existence of the other five characteristics. As another example, the state’s interests in protecting a particular victim are lessened if the victim is no longer living. Also, consider a rape that has only local significance because the victim is a foreigner who is about to return to his or her home overseas. Finally, some victims may show a fear or unwillingness to assist in a prosecution regardless of an opportunity to remain anonymous. The state’s interests in all of these examples are probably not compelling.

Courts must have the flexibility to account for unpredictable situations in which the state’s interests in the victim’s privacy should not outweigh the First Amendment. In truth, much flexibility is available from the broad nature of the third characteristic, which requires that the identity of the victim “has not otherwise become a reasonable subject of public concern.”³²⁹ That provision, though, relies on the nature of the victim qua victim.³³⁰ The provision would be less able to account for some of the possibilities listed in the preceding paragraph, including the situations involving the foreign victim and the deceased victim. Without more express flexibility to give weight to such circumstances, section 92.56 should be held unconstitutionally overbroad.

326. See WILLIAM L. PROSSER, *LAW OF TORTS* § 97 (2d ed. 1955).

327. See FLA. STAT. § 92.56(1)(e) (1995).

328. *Id.*

329. *Id.* § 92.56(1)(c) (1995).

330. For example, as the United States Supreme Court speculated in dicta, the victim’s identity may become a reasonable subject of public concern because “the victim fabricated an assault by a particular person.” *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989).

VII. CONCLUSION: FLORIDA MUST PERSIST IN ATTEMPTING TO SOLVE
THE CONSTITUTIONAL DILEMMA

This Comment's analysis may only scratch the surface of the Crime Victims Protection Act and reach the most blatant constitutional problems with the legislation. Additional scrutiny will likely find other troublesome aspects of the Act or expand upon the material herein. A possible reason the Act is so problematic is that the Florida Legislature gave great credence to judicial reasoning which was intimately related to section 794.03. Instead of following the advice in the Florida Star and Globe Communications opinions and simply amending section 794.03, the Legislature used judicial dicta to guide the construction of an entirely new statutory scheme. Now, these new statutes are themselves in need of amendment.

Victims of rape and similar sexual crimes may need privacy for social and emotional reasons. The State of Florida may need to give them that privacy in order to meet its own sociological or legal needs. However, under the United States Constitution, a state may not give victims privacy without an extremely careful analysis and assurances that the First Amendment will not be ignored. The Crime Victims Protection Act does not display such careful analysis or assurances.

Much of the language in the new statutes must be clarified. Those people or entities subject to the Act must be forewarned of that fact, and they must know more specifically what behavior is prohibited. Courts must be afforded more flexibility in determining whether any given case passes constitutional muster. Also, section 92.56 should be revised to eliminate forced censorship. If the Florida Legislature made each of those changes thoughtfully and effectively, the Crime Victims Protection Act would then be much closer to meeting constitutional standards, and victims could take comfort in a more dependable form of anonymity. The State of Florida should continue in its efforts to solve this constitutional dilemma and balance the tension between privacy rights and press freedoms.