

## NOTES

### **The Media's First Amendment Rights and the Rape Victim's Right to Privacy: Where Does One Right End and the Other Begin?**

*At the heart of the First Amendment is the ineluctable relationship between the free flow of information and a self-governing people, and courts have not hesitated to remove the occasional boulders that obstruct this flow. . . . Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decisionmaking if all ideas, discoveries, and points of view are before the citizenry for its consideration.<sup>1</sup>*

*The right to privacy does not prohibit any publication of matter which is of public or general interest. . . . The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.<sup>2</sup>*

#### I. INTRODUCTION

The media relies on the First Amendment when publishing truthful information that infringes on an individual's right to privacy or violates a statute.<sup>3</sup> The media's First Amendment right, however, is not absolute.<sup>4</sup> In

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1. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1047 (2d Cir. 1979) (stressing importance of First Amendment in democracy).

2. Samuel D. Warren & Louise D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-15 (1890) (promoting individual's right to privacy). "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society." *Id.* at 193.

3. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding unconstitutional statute imposing media fine for publishing lawfully-obtained sexual assault victim's name); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975) (holding press not liable for accurately broadcasting legally-obtained rape victim's name); see also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (restating holding permitting newspaper to publish juvenile arrestee's name despite restrictive statute). But see *Fla. Star*, 491 U.S. at 547 n.2 (White, J., dissenting) (stressing victim's privacy interest). "The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter." *Id.*

4. See *Fla. Star*, 491 U.S. at 541 (explaining truthful publication not automatically protected by First Amendment).

*Florida Star v. B.J.F.*,<sup>5</sup> the Florida Star newspaper appealed a statutorily-imposed fine for publishing a rape victim's name.<sup>6</sup> The U.S. Supreme Court rejected the newspaper's argument that the press is always immune from punishment when it publishes the truth.<sup>7</sup> Instead, the Court held that the fine was unconstitutional, concluding that the proper analysis focused on whether restricting the publication of legally-obtained truthful information was necessary "to further a state interest of the highest order."<sup>8</sup>

On July 18, 2003, the State of Colorado charged Kobe Bean Bryant, a world-renowned National Basketball Association (NBA) player, with rape.<sup>9</sup> Due to Bryant's international appeal, the District Court of Eagle County Colorado employed Internet technology to facilitate the media's demand for case-related information.<sup>10</sup> After Bryant's counsel sought approval to introduce evidence relating to the victim's past sexual acts, the court held *in camera* proceedings to determine the admissibility of the evidence in accordance with Colorado's rape shield laws.<sup>11</sup> The court clerk accidentally sent the rape shield hearing transcript, which contained explicit details of the victim's sexual conduct before and after the encounter, to the media due to an error in the electronic list.<sup>12</sup> After realizing its mistake, and while news organizations prepared stories based on the transcripts, the court issued an order enjoining the dissemination of any information contained in the rape shield transcripts.<sup>13</sup>

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5. 491 U.S. 524 (1989).

6. *Id.* at 527 (establishing factual scenario underlying Court's First Amendment analysis).

7. *Id.* at 532 (implying future scenarios determined on case-by-case basis).

8. *Id.* at 533 (quoting *Smith*, 443 U.S. at 103) (analyzing limited First Amendment principle).

9. *People v. Bryant*, 94 P.3d 624, 627 (Colo. 2004) (defining defendant's statutory criminal charges as forcible penetration of woman against her will). The State charged Bryant with violation of Colorado Sections 18-3-402(1)(a), 18-3-402(4)(a), and 18-3-402(6). *Id.* The court set a trial date for August 27, 2004. *Id.*

10. *Bryant*, 94 P.3d at 627 (describing court's distribution of public documents to media via Internet technology). The court made the documents available at <http://www.courts.state.co.us> under the heading "media information." *Id.*

11. *See Bryant*, 94 P.3d at 627, 629 (discussing Colorado's rape shield statute). Pursuant to Colorado Section 18-3-407(1), there is a presumption that specific instances of sexual conduct are irrelevant. *Id.* Exceptions to this rule include prior or subsequent sexual acts with the defendant; evidence to identify the origin of semen, pregnancy, disease; and similar evidence of sexual intercourse tending to show the defendant's lack of culpability. COLO. REV. STAT. § 18-3-407(1)(a)(b) (2004). On the defendant's motion, Colorado courts hold closed-door *in camera* proceedings eliciting the victim's testimony to determine whether a rape shield exception applies. COLO. REV. STAT. § 18-3-407(2) (2004).

12. *See Bryant*, 94 P.3d at 627 (explaining clerk's erroneous transmission). The words "IN CAMERA PROCEEDINGS" were marked on the top of each page of the transcript. *Id.*; *see also* Charlie Brennan, *Media Respond to Quest to Keep Testimony Secret*, ROCKY MTN. NEWS, July 8, 2004, at 24A (explaining transcripts emailed to seven news organizations).

13. *Bryant*, 94 P.3d at 626-28 (noting court's prior restraint restricting further release of transcripts). The June 24, 2004 order stated,

"[i]t has come to the Court's attention that the *in camera* portions of the hearings in this matter on [June] 21st and 22nd were erroneously distributed. These transcripts are not for public dissemination. Anyone who has received these transcripts is ordered to delete and destroy any copies and not reveal any contents thereof, or be subject to contempt of Court." *Id.*

Various media organizations appealed the court's order asserting that it violated their First Amendment rights.<sup>14</sup>

On June 29, 2004, the Colorado Supreme Court exercised jurisdiction over the media's appeal and determined that the district court's order was not unconstitutional because defending the privacy of the victim's prior and subsequent sexual history was a "state interest of the highest order."<sup>15</sup> In distinguishing *Bryant* from *Florida Star*, the Colorado Supreme Court explained that there was a greater state interest in *Bryant* because divulging a victim's sexual history reveals more privacy than merely a victim's identity.<sup>16</sup> The court relied on the language from *Florida Star*, which stated that, under certain circumstances, the scale may tip in favor of the state's interest in protecting the victim's privacy.<sup>17</sup> The Colorado Supreme Court, however, failed to distinguish *Cox Broadcasting Corp. v. Cohn*,<sup>18</sup> in which the Court cited Justice Douglas' opinion that trials are public property especially when the proceedings are published.<sup>19</sup>

When a court accidentally releases a rape victim's prior and subsequent sexual history, the decision to restrict media publication becomes more difficult because of the horrific nature of the crime and the strong public policy towards protecting victims and supporting the prosecution.<sup>20</sup> The court's reluctance to

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14. *People v. Bryant*, 94 P.3d 624, 626 (Colo. 2004) (requesting immediate relief from district court's order). The recipients filed an "Emergency Petition for Immediate Relief in the Nature of Prohibition or Mandamus and for Issuance of a Rule to Show Cause Pursuant to C.A.R. 21" to use this information in their stories. *Id.* at 626, 628.

15. *Bryant*, 94 P.3d at 628 (noting court's jurisdiction, explaining protection of victim's sexual history higher state interest than victim's identity). Several factors contributed to the Supreme Court of Colorado's holding, which focused on the "great and certain" harm that would result from publication. *Id.* at 633. The court focused on the severity of the information, the policy behind rape shield laws, and the extraordinary media attention to the accused. *Id.* at 635-36. *But see* *People v. Bryant*, 94 P.3d 624, 639 (Colo. 2004) (Bender, J., dissenting) (arguing that Supreme Court precedent mandated granting media's motion). The dissenting opinion would have granted the media's motion because the order was not narrowly tailored in that the information was already available and precedent mandated that the media has a right to publish information that it rightfully obtains. *Id.*

16. *Bryant*, 94 P.3d at 635 (distinguishing *Bryant* from *Florida Star*). The court, in *Bryant*, explained the heightened interest in light of the defendant being an internationally recognized basketball player and the media's extensive minute-by-minute coverage of the case. *Id.*; *see also* CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 41 (1992) (noting nothing more discriminatory than introduction of victim's sexual reputation in rape trials). *But see* *Fla. Star v. B.J.F.*, 491 U.S. 524, 528-29 (1989) (explaining release of sexual assault victim's name in highly covered rape trial).

17. *See Bryant*, 94 P.3d at 635 (explaining scope of Supreme Court's holding). The court emphasized that it was only resolving this specific factual scenario, and would not set a broader precedent. *Id.*

18. 420 U.S. 469 (1975).

19. *See id.* at 492 (noting Justice Douglas' views on availability of trial proceedings to public). "A trial is a public event. . . . If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. . . . Those who see and hear what transpired can report it with impunity." *Id.* (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

20. *See Bryant*, 94 P.3d at 629 (describing rape as most intimate and personally devastating personal invasion). The FBI acknowledged in a Uniform Crime Report that victims' fears of embarrassment in regards

permit restrictions on the media's publication of lawfully obtained truthful information stems from concerns of maintaining a free press.<sup>21</sup> In weighing its decision, a court must determine whether the victim's right to privacy and the state's interest in protecting its citizenry are compelling governmental interests strong enough to overcome the First Amendment, a cornerstone of free speech and democracy.<sup>22</sup>

Part II of this Note examines First Amendment jurisprudence in the context of prior restraints on free speech and press.<sup>23</sup> Part II also explores the evolution of the right to privacy.<sup>24</sup> Lastly, Part II reviews the crime of rape in the context of specialized body of laws tailored to the unique aspects of the crime.<sup>25</sup> Part III analyzes recent trends in First Amendment jurisprudence in connection with the right to privacy, specifically in regards to rape victims.<sup>26</sup> Part III illustrates that there must be a point where humanity and sensitivity overcome the media's First Amendment right.<sup>27</sup> Part III further explains why the Colorado Supreme Court's departure from precedent actually represented the exception the Supreme Court left open in *Florida Star*.<sup>28</sup> The final part of this Note supports and applauds the Colorado Supreme Court for recognizing that the media's First Amendment right does not always prevail over an individual's right to

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to her past sexual activities lead them to not report crimes. *Id.* at 630. These statistics led to the creation of rape shield laws in Colorado and other states, which protect victims from inquiry into their prior sexual conduct to avoid further embarrassment and humiliation. *Id.* Courts recognize that the rape victim is in a unique situation and makes evidentiary accommodations accordingly. Stephenie M. Bartels, Note, *Constitutional Law—Freedom of the Press—Imposing Liability on Newspaper for Publishing Name of Rape Victim Obtained from Publicly Released Police Report Violates First Amendment*. *Florida Star v. B.J.F.*, 109 S. Ct. 2603, 12 U. ARK. LITTLE ROCK L.J. 523, 540-41 (1990). Courts protect the victim from further embarrassment by omitting the victim's name. *Id.*; see also FED. R. EVID. 412 (stating federal rape shield evidentiary rule). The Federal Rules of Evidence also accommodate exceptions to rape shield rule with respect to the admissibility of past acts of the accused, which would otherwise be inadmissible. FED. R. EVID. 412.

21. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (illustrating truthful media reporting allows for intelligent informed voting body). A responsible press acts as the "handmaiden" of the court to administer justice. *Id.* Justice is more likely to prevail when the public is able to scrutinize the judicial process. *Id.*; see also *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (promoting trial fairness by bringing public scrutiny to administration of justice); *supra* note 1 and accompanying text (discussing *Thomas* and articulating First Amendment rationale).

22. See generally *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (balancing privacy interest with First Amendment rights); *Cox*, 420 U.S. 469 (weighing state's interest against freedom of speech and press); *People v. Bryant*, 94 P.3d 624 (Colo. 2004) (holding privacy interest compelling state interest greater than First Amendment rights).

23. See *infra* Part II.A (exploring First Amendment jurisprudence).

24. See *infra* Part II.B (demonstrating development of right to privacy).

25. See *infra* Part II.C (outlining rape and evidentiary rules accommodating severity of crime). This Note first looks at rape as a unique and reprehensible crime and then focuses on the evidentiary accommodations made to protect the rape victim, encourage reporting, and promote prosecutions.

26. See *infra* Part III (reviewing United States Supreme Court precedent in light of Colorado Supreme Court decision).

27. See *infra* Part III (striking balance between First Amendment and rape victim's privacy right).

28. See *supra* note 4 and accompanying text (discussing possible exceptions to general rule); *infra* Part II.D.2-3 (discussing narrow First Amendment exceptions); *infra* Part III.C (analyzing balancing test).

privacy.<sup>29</sup> Part IV also offers guidance on how courts should deal with future problems arising when sensitive, confidential information is inadvertently disclosed to the media or general public.<sup>30</sup>

## II. FIRST AMENDMENT

The First Amendment prohibits Congress from enacting any law that abridges free speech or the freedom of the press.<sup>31</sup> Arguably, the media receives double protection under the First Amendment, as its central functions, speech and press, were each addressed in the Amendment.<sup>32</sup> The media's demonstrative freedom is central to democracy and the heart of its ability to publish information that others may not want published.<sup>33</sup> First Amendment challenges occur in many topical forums, including the media's presence in the courtroom, matters of national security, and individual privacy.<sup>34</sup> Generally, courts find restrictions on media access to a courtroom unconstitutional.<sup>35</sup> The media's access to military operations and national security matters, however, is not given as much deference.<sup>36</sup> An individual's right to privacy also conflicts

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29. See *infra* Part IV (concluding Colorado Supreme Court approached and decided *Bryant* appropriately).

30. See *infra* Part IV (offering analytical framework for analyzing future issues).

31. U.S. CONST. amend. I (representing First Amendment as foundation of Bill of Rights and American democracy).

32. *Id.* (listing freedoms guaranteed by First Amendment). The press relies on free speech in exercising free press. CALVIN R. MASSEY, CONSTITUTIONAL LAW 504-510 (2d ed. 2001). The media was given significant protection because the drafters addressed its two functions explicitly in the First Amendment; free press and free speech. *Id.* at 504. The drafters of the Constitution were cognizant of the media's unique role to investigate and publicize matters, which are essential to democratic self-governance. *Id.*

33. See *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1047 (2d Cir. 1979) (stressing reluctance to limit First Amendment freedoms). On the other hand, the *Thomas* decision notes that some expression is not guaranteed if it involves words "capable of perpetrating grievous harm." *Id.* Courts have defined narrow categories of speech that states are permitted to punish. *Id.*

34. See generally Floyd Abrams, *Prior Restraints*, 727 PLI/PAT 391 (2002) (outlining restraints on First Amendment freedoms). This Note focuses on prior restraints on courtroom proceedings, national security, and privacy. Although other First Amendment challenges exist, they are outside the scope of this Note.

35. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (holding elevated prior restraint barrier not overcome in open court); see also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105-06 (1979) (declaring statute providing criminal sanctions for printing juvenile offender's name unconstitutional); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) (explaining negative effects when foreign countries interfere with media coverage of judicial and political matters).

36. See Steven S. Neff, Comment, *The United States Military Vs. The Media: Constitutional Friction*, 46 MERCER L. REV. 977, 985 (1995) (discussing historical deference given to secrecy of military operations). Some argue that the media's access to the military creates a fourth branch of government checking against governmental abuses. *Id.* at 980-81. The media insists that the First Amendment is an absolute right which should apply to all military actions. *Id.* at 1003. The military argues that the congressional power to wage war is tantamount to waging war successfully and allowing media unfettered access would lead to increased casualties and poses a danger to national security. *Id.* at 1004; see also *Schenck v. United States*, 249 U.S. 47, 52 (1919) (enforcing restrictions on media during war for national security interests). The Court noted in *Schenck* that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck*, 249 U.S. at 52; John E. Smith, *From the Front Lines to the*

with the media's First Amendment rights.<sup>37</sup> When the media's First Amendment rights present the potential for immediate irreparable harm to other interests, courts may place prior restraint restrictions on the media.<sup>38</sup>

### A. Prior Restraints

A prior restraint is a "governmental restriction on speech or publication before its actual expression."<sup>39</sup> Many courts are hesitant to place the prior restraint label on governmental actions because of the preclusive effect.<sup>40</sup> The Supreme Court only permits prior restraints in exceptional cases, such as matters of national security.<sup>41</sup>

#### 1. Prior Restraint and National Security

In *Near v. Minnesota*,<sup>42</sup> the Supreme Court left open the possibility that national security interests could be an exception to the general principle that prior restraints are unconstitutional.<sup>43</sup> Although the Supreme Court left this question unanswered, it has refused to allow prior restraints in cases where the government asserted a national security interest.<sup>44</sup> When national security interests are at stake, a prior restraint is permissible only if publishing the

*Front Page: Media Access to War in the Persian Gulf and Beyond*, 26 COLUM. J.L. & SOC. PROBS. 291, 291, 301-04 (1993) (discussing journalist access to various military operations from Vietnam to Persian Gulf).

37. See *supra* notes 1, 2 and accompanying text (comparing media's freedom of speech and individual right to privacy); *supra* note 3 (reviewing *Florida Star* in context of Supreme Court precedent).

38. See generally *Abrams*, *supra* note 20, (outlining admissibility of prior restraints on First Amendment freedoms balanced against other interests).

39. BLACK'S LAW DICTIONARY 1212 (7th ed. 2001).

40. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (stating prior restraints "most serious and the least tolerable infringement on First Amendment rights"); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (confirming government has "heavy burden of showing justification for" prior restraint); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (stating government has burden of justifying prior restraint); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (articulating presumption stating any prior restraint constitutionally invalid).

41. See *supra* note 36 and accompanying text (outlining media's access to military during time of war); *infra* Part II.A.1 (discussing national security potential exception to unconstitutionality of prior restraints).

42. 283 U.S. 697 (1931).

43. See *Near v. Minn.*, 283 U.S. 697, 716 (1931) (explaining potential exceptions to presumption of invalidity of prior restraint). "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Id.*; see also *supra* note 40 and accompanying text (hinting at some exceptions to general rule holding prior restraints unconstitutional).

44. See *New York Times Co.*, 403 U.S. at 714 (holding government failed to justify prior restraint). In *New York Times Co.*, the government attempted to enjoin newspapers from printing the contents of a classified Vietnam report. *Id.* Justice Black, writing a concurring opinion, emphatically refused to permit any intrusion on the right to freedom of speech, stating that it is a "bold and dangerously far-reaching contention that the courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security . . ." *Id.* at 718 (Black, J. Concurring). But see *United States v. Progressive, Inc.*, 467 F. Supp. 990, 1000 (W.D. Wisc. 1979) (holding prior restraint permissible on magazine article explaining how to build hydrogen bomb).

information will “result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>45</sup>

Likewise, the media’s access to military operations is not firmly established and remains unclear and ambiguous.<sup>46</sup> If the media has access to all aspects of military operations and publishes that information, it could cause great harm to American soldiers and national security as the element of surprise is a crucial aspect of a successful military action.<sup>47</sup> The Supreme Court, however, has recently refused to hear cases regarding this issue.<sup>48</sup>

Courts apply greater deference to the government on prior restraints enjoining free speech when national security interests are at stake than when non-national security interests.<sup>49</sup> The government, however, still bears the burden of justifying the imposition of such a restraint.<sup>50</sup> The government’s burden is even greater when justifying prior restraints on the media’s access to criminal trials.<sup>51</sup>

## 2. Prior Restraints in the Courtroom

The media’s extensive coverage of criminal trials forces courts to reconsider the media’s First Amendment rights in light of defendants’ rights to a fair trial.<sup>52</sup> Courts are generally reluctant to restrict media access to proceedings in open court.<sup>53</sup> The Supreme Court has developed a three-part test to determine

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45. See *New York Times Co.*, 403 U.S. at 730 (stating test used for prior restraints when national security interests involved).

46. See Neff, *supra* note 36, at 996-97 (discussing state of law concerning media access to military during time of war).

47. Neff, *supra* note 36, at 995 (discussing consequences of over-involved media in military actions); *id.* at 987 (elaborating on element of surprise). Chinese war strategists and United States military officers find that the element of surprise is an essential principle in war. *Id.*

48. See *Flynt v. Weinberger*, 762 F.2d 134, (D.C. Cir. 1985) (dismissing action because military lifted restriction two days after complaint making issue moot); *Nation Magazine v. Dep’t of Def.*, 762 F. Supp. 1558 (S.D.N.Y. 1991) (evaluating press action challenging military restrictions on coverage of armed forces during wartime hostilities). The *Nation Magazine* court decided the issue despite it being moot because it was likely to recur; the district court, however, would not decide whether to issue the injunction because the restriction was no longer in effect. *Id.* at 1574-75.

49. Neff, *supra* note 36, at 996-97 (weighing national security and soldier safety against principles of free press).

50. See *New York Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (reviewing government’s burden to overcome presumption of unconstitutionality). Justice Black, writing in a concurring opinion, stated “[t]o find that the President has ‘inherent power’ to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’” *Id.* at 719.

51. See *infra* Part II.A.2 (outlining permissibility of prior restraints on media access to criminal trials).

52. See Thomas B. Kelley, *Oh No! Here Comes A Celebrity Rape Trial!*, 22 COMM. LAW. 2, 2 (2004) (suggesting technology advances create new challenges for media asserting First Amendment rights); see also *People v. Bryant*, 94 P.3d 624, 627 (Colo. 2004) (describing court facilitated media demand by releasing information through internet).

53. See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 569 (1976) (holding failure to meet burden justifying prior restraint to enjoin media access to murder trial). In *Nebraska Press Ass’n*, the murder of an entire family drew massive media attention to a small town, and the trial judge issued an order restricting the media from

whether a prior restraint on pretrial publicity withstands First Amendment scrutiny.<sup>54</sup> Under this test, a prior restraint is permissible if the publicity impairs the defendant's right to a fair trial, there are no other mitigating alternatives, and the restraint would prevent the anticipated danger.<sup>55</sup> Courts impose restraints on courtroom publicity for four reasons, including: protecting a defendant's right to a fair trial, protecting the identity of all parties and witnesses, protecting confidential communications, and avoiding the public disclosure of discovery information.<sup>56</sup>

When deciding the Constitutionality of courtroom prior restraints, courts must weigh the freedom of speech and press against the criminal defendant's right to a trial by an impartial jury.<sup>57</sup> In *Capital Cities Media, Inc. v. Toole*,<sup>58</sup> the Supreme Court held that a prior restraint preventing the release of juror names in a criminal trial was unconstitutional.<sup>59</sup> Likewise, a criminal

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publishing or broadcasting the contents of the government's case. *Id.* at 542. The Supreme Court held the prior restraints unconstitutional after considering the extraordinary First Amendment protections. *Id.* at 569. The Supreme Court restated that

[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

*Id.* at 559-60 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

54. See *infra* note 55 and accompanying text (describing three part test applied to prior restraints on courtroom proceedings).

55. See *Nebraska Press Ass'n*, 427 U.S. at 562 (expressing three-part test).

[W]e must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger.

*Id.* Alternative measures to prior restraints on the media include: change of venue, postponement of trial, voir dire of witnesses, lucid instructions to the jury, and sequestration. See *Abrams*, *supra* note 34, at 414-15 (quoting *Nebraska Press Ass'n*, 427 U.S. at 545); see also, e.g., *Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971) (holding short continuances to reduce publicity not violation of right to speedy trial); *Sheppard*, 384 U.S. at 362 (permitting restraints on lawyers, court personnel, and law enforcement); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (striking down state statute preventing change of venue). Ultimately, the prior restraint must not be overbroad. *Nebraska Press Ass'n*, 427 U.S. at 561.

56. See generally *Abrams*, *supra* note 34 (outlining prior restraint courtroom application).

57. See Report of the Comm. on the Operation of the Jury Sys. on the Free Press—Fair Trial Issue, 45 F.R.D. 391, 394 (1969) (reviewing and applying Supreme Court's analysis from *Sheppard*). The committee recommended placing a duty on attorneys not to disclose the contents of pending criminal proceedings. *Id.* at 404-05. The committee also recommended that district courts issue local rules providing for disciplinary actions for violations of the rules. *Id.* at 401.

58. 463 U.S. 1303 (1983) (Brennan, J., Circuit Justice).

59. *Id.* at 1304 (Brennan, J., Circuit Justice) (staying order prohibiting juror name publication). Justice Brennan, as Circuit Justice, opined that assuming for argument only the state has a compelling interest to keep juror names confidential, but much more justification is needed to meet the narrowly tailored scrutiny. *Id.* at 1306 (Brennan, J., Circuit Justice).

defendant, who is negatively portrayed in the media, will lose an argument to restrain the media prior to jury selection.<sup>60</sup> Courts also generally deny requests for restrictions protecting the identity of trial participants.<sup>61</sup> While courts are hesitant to issue orders preventing communication of trial proceedings by a trial participant, they allow some narrowly tailored exceptions.<sup>62</sup>

Prior restraint analysis also applies in the context of discovery.<sup>63</sup> The Supreme Court permits orders protecting information obtained during the discovery process from the media.<sup>64</sup> While prior restraints are prevalent in courtroom settings and in matters of national security, the debate is far more controversial when balancing an individual's right of privacy against the media's First Amendment rights.<sup>65</sup>

### 3. Prior Restraints and Privacy

Individuals seeking restraints on the dissemination of personal information typically argue that the publication of their private affairs will lead to

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60. See *Hunt v. NBC*, 872 F.2d 289, 295 (9th Cir. 1989) (refusing to issue restraint on television docudrama portraying accused as murderer); *CBS v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 729 F.2d 1174, 1183 (9th Cir. 1983) (holding order restraining broadcast of videotapes unconstitutional); *Menendez v. Fox Broad. Co.*, No. 94 2339 R, 1994 WL 525520, \*1-2 (C.D. Cal. 1994) (denying order restricting documentary of children accused of murdering parents). *But see United States v. Noriega*, 917 F.2d 1543, 1551-52 (11th Cir. 1990) (allowing restraint on tapes containing privileged information, witnesses, defenses, evidence and trial strategy), *cert. denied*, 498 U.S. 976 (1990). The trial court in *Noriega* ordered CNN to hand over all copies of their tapes and not to air them anymore. *Id.* at 1545-46. Although the Court denied certiorari, Justice Marshall wrote a dissenting opinion, joined by Justice O'Connor because he believed the order did not survive the heavy presumption of invalidity. *Cable News Network, Inc. v. Noriega*, 498 U.S. 976, 976 (1990) (Marshall, J., dissenting).

61. See, e.g., *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105-06 (1979) (striking down statute prohibiting publication of juvenile offender's identity); *United States v. Brown*, 250 F.3d 907, 918 (5th Cir. 2001) (holding order mandating juror anonymity unconstitutional in trial of Louisiana governor); *Worrell Newspapers of Ind., Inc. v. Westhafer*, 739 F.2d 1219, 1225 (7th Cir. 1984) (holding statute threatening criminal sanctions for publication of identity of indicted individuals unconstitutional).

62. See *KPNX Broad. Co. v. Ariz. Super. Ct.*, 459 U.S. 1302, 1305-08 (1982) (upholding trial court order requiring court approval to publish juror sketches). *But see Butterworth v. Smith*, 494 U.S. 624, 626 (1990) (declaring law criminalizing revelation of grand jury testimony unconstitutional). Chief Justice Rehnquist noted the importance of grand jury secrecy, but ultimately determined it did not outweigh the First Amendment interest. *Id.* at 636.

63. See *Abrams*, *supra* note 34 at 514-28 (outlining prior restraint application to discovery disclosure).

64. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984) (determining information acquired during pretrial discovery does not trigger prior restraint First Amendment analysis). The Supreme Court drew a distinction between information obtained independently and information obtained through the discovery process. *Id.* at 34. The Court indicated that restricting disclosure of discovery information furthered a substantial governmental interest, protecting the privacy of parties, which outweighed First Amendment interests. *Id.*; see also *In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (affirming information obtained independently not subject to restrictive orders). The standard in this context is similar to, but less restrictive than, the standard applied to media access to criminal trials, and is limited to a showing of good cause. *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981).

65. See generally *Bartels*, *supra* note 20 (discussing context of *Florida Star* decision). *Bartels* states that the Supreme Court in *Florida Star* avoided the question of whether the Constitution protects the publication of truthful information, but applied a test attempting to "strike a balance between" the two interests. *Id.* at 541.

irreparable damage to their right of privacy.<sup>66</sup> Courts, however, have typically been unwilling to issue prior restraints on the sole basis of protecting individual privacy.<sup>67</sup> Indeed, the D.C. Circuit Court in *In re Lifetime Cable*,<sup>68</sup> refused to issue a prior restraint on a movie describing the alleged sexual abuse of a minor.<sup>69</sup> The court reasoned that the child's rights could be "redressed in legal actions that do not require a prior restraint in derogation of the First Amendment."<sup>70</sup> Despite courts' general reluctance to issue orders protecting individuals' privacy, privacy is, nonetheless, firmly rooted in legal precedent.<sup>71</sup>

### B. *The Individual's Right to Privacy*

In 1890, Samuel Warren and Louis Brandeis articulated the principles of the individual's right to privacy in a Harvard Law Review article entitled *The Right to Privacy*.<sup>72</sup> They argued that political, social, and economic changes lead to the recognition of certain new rights.<sup>73</sup> The article determined that the right to privacy evolved from other common law rights.<sup>74</sup> Warren and Brandeis also predicted that the right to privacy would soon be considered by the courts.<sup>75</sup> Seventy-five years later, the ideas they articulated, evolved into the foundation of modern constitutional jurisprudence in the form of landmark United States Supreme Court decisions.<sup>76</sup>

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66. See Abrams, *supra* note 34, at 541 (outlining prior restraint application to individual privacy).

67. See Abrams, *supra* note 34, at 541 (discussing refusal to enforce protective orders for individuals). Courts have held that such harm is too speculative or inadequate to justify the preclusive effect of a prior restraint. *Id.*

68. No. 90-7046, 1990 WL 71961 (D.C. Cir. 1990).

69. See *id.* at \*1 (revoking order protecting minor's privacy rights). The *In re Lifetime Cable* court held that the parties may redress their damages in legal action. *Id.*

70. *Id.* (stating appeals court opinion). The court concluded that any legal rights that the plaintiff's maintained should be addressed in legal action, which would not require the restrictiveness of a prior restraint. *Id.*

71. See Warren & Brandeis, *supra* note 2, at 193 (stating principles behind right of privacy).

72. See generally Warren & Brandeis, *supra* note 2 (delineating scope of right to privacy).

73. See Warren & Brandeis, *supra* note 2, at 195 (illustrating how common law grows to meet societal demands). Although Warren and Brandeis wrote this article to address the narrow issue that journalists were prying into individuals' privacy, over the next century, the right to privacy evolved into a constitutional right. See Benjamin E. Bratman, *Brandeis and Warren's "The Right to Privacy and the Birth of the Right to Privacy."* 69 TENN. L. REV. 623, 624-25 (2002); Ken Gormley, *One Hundred Years of Privacy*, 1992 WISC. L. REV. 1335, 1341-42 (1992).

74. See Warren & Brandeis, *supra* note 2, at 195 (discussing progression from one right to another). Warren and Brandeis suggest that the right to life leads to the right to liberty, which leads to the right to be left alone, ultimately resulting in the right to privacy. *Id.* Warren and Brandeis concluded that the law ought to recognize four causes of action for invasion of an individual's privacy. *Id.*

75. See Warren & Brandeis, *supra* note 2, at 197 (predicting evolution of common law).

76. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (defining "zone of privacy" in Constitution). There is support for the argument that although Warren and Brandeis articulated the framework for a tort, their theory developed into constitutional precedent. Bratman, *supra* note 73, at 624-25 (discussing tort law progression into constitutionally recognized right); Gromley, *supra* note 73, at 1341-42 (stating inexplicable correlation between privacy tort and right to privacy). Other commentators argue that the constitutional right to privacy is separate and distinct from the common-law right to privacy, but the proximity in time and public

In 1965, in *Griswold v. Connecticut*,<sup>77</sup> Justice Douglas found the fundamental right to privacy in the shadows of the Bill of Rights.<sup>78</sup> In *Griswold*, a jury convicted two physicians of assisting a married couple with the use of contraceptives.<sup>79</sup> Justice Douglas, writing for the majority, reversed the trial court's decision, finding penumbras within the Bill of Rights, and a zone of privacy embedded within those penumbras.<sup>80</sup> The Supreme Court invalidated the Connecticut statute on the grounds that people enjoy a right of privacy in their homes.<sup>81</sup> Although the Court warned that this right to privacy was limited to the marital home, it paved the way for other cases which further developed this right.<sup>82</sup>

In 1972, the Supreme Court expanded the scope of the right to privacy.<sup>83</sup> In *Eisenstadt v. Baird*,<sup>84</sup> the Supreme Court held that the right to privacy was not limited to married individuals.<sup>85</sup> *Griswold* and *Eisenstadt* built a foundation for a woman's right to privacy regarding her decision to terminate her pregnancy.<sup>86</sup> These cases led to *Roe v. Wade*,<sup>87</sup> where Justice Blackmun, writing for the majority, broadened the definition of an individual's right to privacy by striking down a statute that made abortions illegal.<sup>88</sup> In 2003, the Court continued to

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acceptance of the doctrine demonstrates the theoretical merger of the two concepts. See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 298-99 (1983).

77. 381 U.S. 479 (1965).

78. *Griswold*, 381 U.S. at 484 (describing penumbras emanating out of Bill of Rights).

79. See *id.* at 480 (stating defendants assisted married couple's use of contraceptives).

80. See *id.* at 484 (stretching literal interpretation of Bill of Rights). Justice Douglas stated, "The Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* Justice Douglas examined the First, Third, Fourth, Fifth, and Ninth Amendments and recognized that inherent in each was an area of individual privacy, upon which the government could not intrude. *Id.*

81. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (striking down statute). *But see id.* at 527-28 (Stewart, J., dissenting) (criticizing majority analysis). Justice Stewart and Justice Black agreed that the law was "silly," but stated that a right to privacy could not be found anywhere in the Constitution or precedent. *Id.* at 527-30 (Stewart, J., dissenting). Justice Black called the level of thinking "natural law due process philosophy" and warned that it was dangerous for the Court to engage in it. *Id.* at 515 (Black, J., dissenting).

82. See *Griswold*, 381 U.S. at 485 (limiting application to privacy rights); see also *infra* notes 83-91 and accompanying text (expanding right to privacy application).

83. See generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (expanding scope of individual's right to privacy).

84. 405 U.S. 438 (1972).

85. *Id.* at 454 (explaining right of privacy extends to non-married individuals). "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

86. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (relying on right of privacy in allowing women limited right to terminate pregnancy).

87. 410 U.S. 113 (1973).

88. *Id.* at 153 (broadening application of individual's right to privacy). In *Roe* a pregnant woman challenged a Texas statute prohibiting the assistance or performance of an abortion. *Id.* at 120. In ruling for the woman, the Supreme Court stated, "[t]he right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

expand its definition of the right of privacy in *Lawrence v. Texas*,<sup>89</sup> ruling that state anti-sodomy laws are an unconstitutional intrusion into individuals' right of privacy.<sup>90</sup>

### C. Rape: The Crime and Special Laws

Rape is a reprehensible crime and arguably the greatest violation of a person, second only to murder.<sup>91</sup> A rape victim suffers physical injuries, as well as long-lasting mental and psychological damage.<sup>92</sup> At least one state legislature, reacting to public outcry for more severe penalties for rapists due to the heinous nature of the crime, enacted statutes authorizing the death penalty for certain rape convictions.<sup>93</sup> Rape, nonetheless, has been treated differently than other crimes.<sup>94</sup>

Historically, rape victims suffered unnecessary embarrassment and harassment a second time when defense attorneys attacked their past sexual conduct in an attempt to prove consent at trial.<sup>95</sup> This attack effectively put the victim on trial.<sup>96</sup> As a remedy, state and federal legislatures enacted rape shield

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89. 539 U.S. 558 (2003).

90. See *id.* at 578 (stating right to privacy includes sexual behavior in home). This decision overruled the Court's past ruling in *Bowers v. Hardwick* that the right to engage in homosexuality was not a firmly rooted fundamental right like the right to privacy. *Id.*; see also *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) (upholding law criminalizing sexual acts enforced against homosexuals only) *overruled by Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

91. See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (emphasizing heinous nature of rape and its psychological affects on victim).

92. See DEANNA NASS, *THE RAPE VICTIM*, 119-32 (Gary Belkin & Melanie C. Belkin eds., 1977) (describing victim's multiple injuries). Along with the physical injuries sustained during the actual rape, a victim must deal with the subsequent "Rape Trauma Syndrome." *Id.* at 119. Rape Trauma Syndrome manifests itself in the form of increased motor activity, nightmares, and various phobias including darkness, outdoors, crowds, being alone, people being behind them, and sexual fears. *Id.* at 123-26.

93. See *Coker*, 433 U.S. at 586 (providing Georgia as example of state statute imposing death penalty for rape). The old Georgia statute, Georgia Section 26-2001, provided that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years." *Id.* But see *Coker*, 433 U.S. at 592 (holding death penalty for rape unconstitutional under Eighth Amendment). The Supreme Court held in *Coker* that the death penalty is "grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.*

94. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1090-91 (1986) (discussing treatment of rape in comparison to other crimes). Estrich notes that rape is the only crime where the victim has to show some restraint, as passivity and silence could infer consent. *Id.* at 1090. Furthermore, rape is within a narrow class of crimes that takes into account whether the victim had a prior relationship with the accused. *Id.* at 1091.

95. See David Haxton, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1220 (1985) (describing rationale for rape shield legislation).

96. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions On Campus Sexual Assault*, 84 B.U. L. REV. 945, 981 n.211 (2004) (citing JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE THE MISUNDERSTOOD CRIME* 174 (1993) (discussing traditional role of rape victim during trial). Allison and Wrightsman state that from the perspective of judges, jurors, and lawyers, it is not a stretch to say that the victim is on trial. *Id.*; see also LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* 100-06 (1989) (describing trial from victim's experience); Anne M. Coughlin, *Sex & Guilt*, 84 VA. L. REV. 1, 8 (1998)

statutes limiting access to the victim's past sexual experiences.<sup>97</sup>

### 1. Rape Shield Statutes

Legislatures enacted rape shield statutes to protect victim privacy, to promote victim reporting, and to encourage rape victims to testify against their assailants.<sup>98</sup> These statutes contained various levels of restrictiveness.<sup>99</sup> Generally, rape shield statutes preclude admission of evidence pertaining to the victim's past sexual conduct or predisposition for sexual conduct.<sup>100</sup> Jurisdictions disagree on the probative value of a woman's prior sexual behavior.<sup>101</sup> One author identified four general standards: "special scrutiny," "pure exceptions," "scrutinized exceptions," and "mixed by issue."<sup>102</sup>

The "special scrutiny" standard does not specifically bar evidence of a victim's past sexual conduct.<sup>103</sup> Instead, when a defendant intends to admit such evidence, the court weighs its prejudicial effect against its probative value.<sup>104</sup> This standard is significantly stricter than the federal prejudicial-probative standard, which requires that the prejudicial effect substantially outweighs the probative value, because the evidence is excluded if the prejudicial effect merely equals probative value.<sup>105</sup> Courts in these jurisdictions analyze the prejudicial effect by examining the invasion into the victim's privacy.<sup>106</sup>

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(outlining victim's hardship during prosecution).

97. See Haxton, *supra* note 95, at 1220 (explaining rationale for rape shield statutes).

98. See *H.R. CONF. REP. NO. 103-711*, at 383 (1994) (stating rationale for enacting rape shield statute); FED. R. EVID. 412 advisory committee's note (explaining need and function of special evidentiary rape rules).

99. See Haxton, *supra* note 95, at 1221-31 (discussing various Rape Shield statutes).

100. See FED. R. EVID. 412 (stating victim's past sexual history generally not admissible). "The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . . : (1) Evidence . . . that any alleged victim engaged in other sexual behavior. (2) Evidence . . . [of] any alleged victim's sexual predisposition." *Id.*

101. See Haxton, *supra* note 95, at 1221-28 (comparing restrictiveness of four general rape shield categories).

102. Haxton, *supra* note 95, at 1222-23 (labeling four basic rape shield statute forms); see also Shawn J. Wallach, Note, *Rape Shield Law: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 489 (1997) (discussing four different approaches to rape shield statutes). Wallace categorizes various rape shield statutes based upon their function and restrictiveness. *Id.*

103. See Haxton, *supra* note 95, at 1223 (explaining no evidence automatically excluded but must survive strict scrutiny for admissibility).

104. See Haxton, *supra* note 95, at 1223 (providing state statute examples); see also ALASKA STAT. § 12.45.045 (2004) (explaining prejudicial/probative test employed). Under Alaska Section 12.45.045, if the evidence of sexual conduct is relevant and its probative value is not outweighed by the risk of undue prejudice, the risk of issue confusion, or the risk of unwarranted invasion of privacy, then the evidence will be admitted. ALASKA STAT. § 12.45.045 (2004).

105. See Haxton, *supra* note 95, at 1223-25 (discussing hearing procedure prior to admissibility of rape shield content). Compare ALASKA STAT. § 12.45.045 (2004) (stating strict prejudicial against probative standard), with FED. R. EVID. 403 (expressing ordinary prejudicial versus probative standard). Federal Rule of Evidence 403 states that "[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." FED. R. EVID. 403.

106. See Haxton, *supra* note 95, at 1228-29 (discussing prejudicial effect on victim's privacy); see also

The “pure exception” standard differs from the “special scrutiny” standard in that a judge will not engage in a prejudicial versus probative analysis.<sup>107</sup> Instead, the legislature lists specific exceptions to the general rule that past act evidence is inadmissible.<sup>108</sup> If the evidence falls under one of the exceptions, then it is admissible.<sup>109</sup> For example, the Federal Rules of Evidence permit exceptions to general inadmissibility if the proffered evidence proves one or more of the following: source of semen, injury or other physical evidence, prior sexual history to prove consent, or evidence that if excluded violates the defendant’s constitutional rights.<sup>110</sup> Evidence of the victim’s motive is also an exception in a few jurisdictions.<sup>111</sup>

“Scrutinized exception” statutes represent a combination of the “pure exceptions” and “special scrutiny” standards.<sup>112</sup> In these jurisdictions, the admissibility of evidence listed under an exception must also survive a strict prejudicial versus probative analysis.<sup>113</sup> The “mixed by issue” standard uses one of the previously mentioned standards for each of the exceptions.<sup>114</sup>

Keeping with the goal of protecting the victim, many states require that certain formalities be met if the defendant intends to use evidence subject to rape shield statutes.<sup>115</sup> Colorado’s rape shield statute, for example, has specific procedural requirements.<sup>116</sup> First, the defendant must submit a written motion to the court at least thirty days prior to trial.<sup>117</sup> The motion must be accompanied with an affidavit of the proffered evidence.<sup>118</sup> If the court finds

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ALASKA STAT. § 12.45.045 (2004) (suggesting examination of invasion into victim’s privacy for prejudicial determination).

107. See Haxton, *supra* note 95, at 1225-26 (explaining pure exception takes question out of judiciary’s hands by blanket inadmissibility rule with few exceptions).

108. See Haxton, *supra* note 95, at 1225-27 (explaining application of “pure exception” statutes); see also ME. R. EVID. 412 (listing exceptions to victim’s sexual history evidence). These exceptions include: evidence of source of semen, past sexual history with accused, and evidence that the exclusion of which violates a defendant’s constitutional rights. *Id.*

109. See Haxton, *supra* note 95, at 1225-27 (describing effects of “pure exception” standard); see also ME. R. EVID. 412 (outlining permissible exceptions).

110. FED. R. EVID. 412(b)(1) (listing exceptions).

111. See Haxton, *supra* note 95, at 1226 (discussing exceptions used across jurisdictions).

112. See Haxton, *supra* note 95, at 1227 (discussing “scrutinized exception” standard).

113. See Haxton, *supra* note 95, at 1227 (discussing “special scrutiny” standard with enhanced prejudicial-versus-probative analysis).

114. See Haxton, *supra* note 95, at 1227 (discussing applications of “mixed by issue” standard). Haxton notes that California uses this standard in that it uses “pure exception” standard towards the issue of consent, “special scrutiny” on the question of credibility, and lacks a standard on other exceptions. *Id.*

115. See COLO. REV. STAT. § 18-3-407(2) (2004) (outlining procedure for admitting evidence excluded by rape shield statute). This Note focuses primarily on the Colorado statute because of its application in *Bryant*.

116. See COLO. REV. STAT. § 18-3-407(2) (2004) (outlining procedure for admitting evidence excluded by rape shield statute).

117. See COLO. REV. STAT. § 18-3-407(2) (2004) (describing notice requirement for admission of evidence excluded under rape shield statute); see also ARK. CODE ANN. § 16-42-101(c)(1) (Michie 1999) (permitting motion anytime before defense rests); ALASKA STAT. § 12.45.045(a) (Michie 2004) (permitting motion any time before or during trial or hearing).

118. COLO. REV. STAT. § 18-3-407(2)(b) (2004) (mandating affidavit requirement).

sufficient grounds for the motion, it then holds an *in camera* hearing to determine whether the evidence is admissible under the statute.<sup>119</sup> Other states and the federal government enacted similar unique evidentiary procedures to protect rape victims, encourage rape reporting, and promote victim testimony against the accused.<sup>120</sup>

## 2. The Defendant in Rape Cases

While the victim's past sexual history is generally inadmissible unless one of the aforementioned exceptions applies, the defendant is not afforded similar protections.<sup>121</sup> In most legal proceedings, prior bad acts are not admissible to show that a defendant acted in conformity therewith.<sup>122</sup> In sex crimes, however, evidence that a defendant committed a prior sexual crime is admissible, despite the prejudicial prospect of the jury using it to prove that the defendant acted in conformity therewith in the current case.<sup>123</sup> Congress justified the disparate rules on the ground that the victim's consent is difficult to prove and the defendant's past sexual crimes are indicative of a lack of consent in the present case.<sup>124</sup> Arguably, the combination of rape shield laws and the admissibility of the defendant's past sex crimes put defendants at a significant disadvantage from the outset of their trials.<sup>125</sup> The current state of

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119. COLO. REV. STAT. § 18-3-407(2) (2004) (discussing *in camera* review process designed to determine admissibility without public disclosure).

120. See *supra* note 95 and accompanying text (explaining motivation for rape shield laws).

121. See generally Robert F. Thompson, III, *Character Evidence and Sex Crimes in the Federal Courts: Recent Developments*, 21 U. ARK. LITTLE ROCK L. REV. 241 (1999) (discussing Federal Rules of Evidence treatment of character evidence in sex crimes).

122. FED. R. EVID. 404 (stating character evidence not admissible to prove action in conformity therewith). The Federal Rules of Evidence permit exceptions to the general exclusionary rule if the evidence is used to prove motive, habit, etc. *Id.*

123. FED. R. EVID. 413 (illustrating different treatment of past acts in sex crimes). "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense . . . of sexual assaults is admissible, and may be considered for its bearing on any matter to which it is relevant." *Id.* (emphasis added).

124. See 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

Alleged consent by the victim is rarely an issue in prosecutions for other violent crimes—the accused mugger does not claim that the victim freely handed over his wallet as a gift—but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him.

140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari). *But see* Thompson, *supra* note 121, at 243 (arguing rape shield statutes could lead to convictions for past crimes, not crime charged). Judges, scholars, professors, and attorneys opposed the new rules fearing that a defendant would be convicted for being a bad person and not based on a showing of the evidence beyond a reasonable doubt. *Id.* They believed it would be better addressed by amending Rules 404 and 405. *Id.*

125. See Joseph A. Aluisse, Note, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153, 187 (1998) (stressing defendants' disadvantage under Federal Rules of Evidence 413, 414, and 415); see also Martha Neil, *Bryant Case Leads to Calls for Change in Rape-Shield Laws*, A.B.A. J., Aug. 6,

the law reflects the public policies encouraging rape reporting, promoting victim testimony, and obtaining more convictions.<sup>126</sup>

#### D. *Cox, Florida Star, and Bryant*

A rape victim's right to privacy is guaranteed by the Bill of Rights and state and federal legislation.<sup>127</sup> The media's rights to free speech and free press are guaranteed by the First Amendment and promoted in democratic theory.<sup>128</sup> When these freedoms clash, it is often difficult to determine which right or rights should prevail.<sup>129</sup> Three cases deal specifically with this issue: *Cox Broadcasting, Florida Star*, and, most recently, *Bryant*.<sup>130</sup>

##### 1. *Cox Broadcasting Corporation v. Cohn*

In August, 1971, several young men raped and murdered a seventeen-year-old girl.<sup>131</sup> Despite extraordinary media coverage from investigation through trial, authorities did not reveal the identity of the victim.<sup>132</sup> During the trial, a Cox Broadcasting reporter authorized to review the court proceedings read the victim's name from the indictment.<sup>133</sup> The reporter's news station, Cox Broadcasting Corporation (Cox) televised the name of the victim in a breaking news story.<sup>134</sup>

In 1972, the victim's father sued Cox for violating his privacy pursuant to a Georgia statute.<sup>135</sup> Cox defended its actions by asserting that the television

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2004, at 4 (quoting Larry Pozner, former president of National Association of Criminal Defense Lawyers). "It's . . . a stacked deck already against defendants. If we change the law, what we're changing it to do is to say, 'Men accused of rape shall not be permitted to defend themselves. Just politically, we cannot have not-guilty pleas anymore in rape cases.'" *Id.*

126. See *supra* note 95 and accompanying text (discussing policy supporting today's rape legislation).

127. See *supra* Part II.B (discussing judicially and scholarly recognized right to privacy).

128. See *supra* Part II.A (identifying media's rights).

129. See Kimberly Kelley Blackburn, *Identity Protection for Sexual Assault Victims: Exploring Alternatives to the Publication of Private Facts Tort*, 55 S.C. L. REV. 619, 620-21 (2004) (tracing policies behind each right); Bartels, *supra* note 20, at 539-41 (balancing media's First Amendment rights with rape victim's privacy); see also Kevin O'Brien, *South Carolina: Last Haven for Rape Victim Privacy?*, 50 S.C. L. REV. 873, 873 (1999) (identifying South Carolina as one of few states with statutes protecting rape victim's privacy).

130. See generally *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (protecting media's First Amendment rights); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (defining scope of media's First Amendment rights in context of rape shield laws); *People v. Bryant*, 94 P.3d 624 (Colo. 2004) (expressing privacy limitation on First Amendment).

131. See *Cox Broad. Corp.*, 420 U.S. at 471, 474 n.5 (explaining six youths raped and murdered victim after high school party). Only one of the defendants made it to trial. *Id.* at 471-72. The other five defendants pleaded guilty of rape or attempted rape, and the murder charges were dropped. *Id.*

132. *Id.* at 471-72 (addressing Georgia law imposing penalty for revealing rape victim's identity).

133. See *Cox*, 420 U.S. at 472-74 (1975) (explaining reporter learned victim's name from indictments in public record).

134. *Id.* at 474 (describing how Cox broadcasted lawfully obtained victim's name in news report).

135. See *id.* at 474 (describing victim's father's legal recourse); see also GA. CODE ANN. § 26-9901 (1972) (repealed 1975) (making publication of rape victim's name misdemeanor). "It shall be unlawful for any news

reports were protected by the First and Fourteenth Amendments.<sup>136</sup> The trial court rejected Cox's constitutional claim and granted summary judgment for the plaintiff.<sup>137</sup> The Georgia Supreme Court upheld the trial court's ruling and articulated that Georgia's statute created a cause of action, allowing the case to continue under a common law tort theory.<sup>138</sup> The Georgia Supreme Court agreed with the trial court that the First and Fourteenth Amendments did not protect Cox, holding that "the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other."<sup>139</sup> The United States Supreme Court, however, disagreed with the Georgia Supreme Court.<sup>140</sup>

Instead of looking at the general question of where free press ends and where a zone of privacy begins, the Court questioned whether the media could be punished for truthfully publishing the name of a rape victim when the information was lawfully obtained from public records.<sup>141</sup> The Supreme Court stressed the media's crucial role in disseminating public information that individuals might not otherwise have the time to discover.<sup>142</sup> The Court

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media or any other person to print and publish, broadcast, televise . . . the name or identity of any female who may have been raped . . . . Any person or corporation violating the provisions of this section shall, upon conviction be punished as for a misdemeanor." *Id.* The victim's father brought the action on behalf of his deceased daughter. *Cox Broad. Corp.*, 420 U.S. at 474.

136. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 474 (1975) (stating Cox's constitutional argument against prohibiting legally obtained truthful information).

137. *Id.* (stating trial court found Georgia statute provided remedy for victims injured by media violations).

138. *Id.* at 474-75. The Georgia Supreme Court held that the criminal statute did not give rise to a civil cause of action for invasion of privacy, but determined that the common law invasion of privacy torts protected the victim and in turn her father standing as her representative. *Id.* The court did not analyze the constitutionality of the statute because it did not rely on the statute. *Cox Broad. Corp.*, 420 U.S. at 474.

139. *Cox Broad. Corp.*, 420 U.S. at 475 (quoting *Briscoe v. Reader's Digest*, 483 P.2d 34, 42 (1971)). The Court determined that the public's concern about the identity of a rape victim was insufficient to garner First Amendment protection. *Id.* at 475.

140. *Cox Broad. Corp.*, 420 U.S. at 476 (overruling Georgia Supreme Court on constitutional grounds).

141. *Id.* at 491-92 (presenting balance between First Amendment rights and right to privacy). The Court asked "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records-more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." *Id.* at 491. The Court held that the State could not do so. *Id.*

142. *See supra* Part II.A (articulating premise for media's First Amendment right to free speech and press); *see also Cox*, 420 U.S. at 492 (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). In *Craig*, Justice Douglas wrote:

A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

*Id.* at 492-93 (quoting *Craig*).

recognized a general right to privacy, but decided that right diminished when the information was already on public record.<sup>143</sup> The Court refused to permit a rule that made it difficult for the media to inform citizens about public business.<sup>144</sup> It held that the press could not be punished for accurately publishing truthful information released in public records.<sup>145</sup>

## 2. *Florida Star v. B.J.F.*

On October 20, 1983, a woman reported a sexual assault to the Duval County Sheriff Department in Jacksonville, Florida.<sup>146</sup> The Sheriff's Department prepared an incident report using the victim's real name and posted the report in an unrestricted press room.<sup>147</sup> A *Florida Star* reporter-in-training copied the report, and a reporter wrote an article incorporating the victim's name and details of the attack.<sup>148</sup> The newspaper published the article on October 29, 1983 in the "Police Reports" section of the *Florida Star*, using the victim's full name and describing the assault details.<sup>149</sup>

The victim sued the *Florida Star* pursuant to a Florida statute making it a second-degree misdemeanor to publish or broadcast a sexual offense victim's identity.<sup>150</sup> Prior to trial, the trial judge denied Florida Star's motion to dismiss on the grounds that the state statute did not violate the First Amendment.<sup>151</sup> At trial, the court similarly denied the defendant's motions for a directed verdict, and a jury awarded the victim \$100,000.00 in damages.<sup>152</sup> The First District Court of Appeals of Florida affirmed the trial court's decision, holding that a rape victim's name was "of a private nature and not to be published as a matter

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143. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975) (explaining privacy interest fades when information already in public record). As of 1971, the right to privacy was recognized in almost every state, and Georgia has recognized it since 1905. *Id.* at 488-89.

144. *Id.* at 496 (stressing importance of First Amendment in American democracy).

145. *Id.* (demonstrating reluctance to erode cornerstone of democracy).

146. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 527 (1989) (explaining Jacksonville Police Department's actions).

147. *Id.* at 527 (illustrating how restricted content made publication).

148. *Id.* (explaining publication of confidential information).

149. *Fla. Star*, 491 U.S. at 527-28 (depicting newspaper's violation of Florida statute in printing sexual assault victim's name). The reporter also violated the newspaper's internal policy preventing the publication of a sexual victim's name. *Id.*

150. *Fla. Star*, 491 U.S. at 526 (establishing statutory grounds for sexual assault victim's civil action against Florida Star newspaper); see also FLA. STAT. § 794.03 (1987). The victim also sued the police department, but that claim settled prior to trial. *Fla. Star*, 491 U.S. at 528. Florida Section 794.03 provided that it is a second degree misdemeanor to publish or broadcast identity of a sexual offense victim. FLA. STAT. § 794.03 (1987).

151. *Fla. Star v. B.J.F.*, 491 U.S. 524, 528 (1989) (denying Florida Star's motion to dismiss, which argued statute violated First Amendment).

152. *Id.* (denying Florida Star's motion because ruling affected narrow set of criminal offenses). The trial court stated that the Florida statute "reflected a proper balance between the First Amendment and privacy rights . . ." *Id.* The victim testified that the publication of her name initiated threatening phone calls to her mother, which forced her to change her phone number and residence, obtain police protection, and undergo mental health counseling. *Id.*

of law.”<sup>153</sup> After the Supreme Court of Florida denied review, the United States Supreme Court granted certiorari.<sup>154</sup> As it did in *Cox Broadcasting Corp.*, the Supreme Court, in *Florida Star* avoided the more general question of where the First Amendment ends and the right to privacy begins, and only analyzed whether a state may impose penalties when newspapers publish information obtained from public records.<sup>155</sup>

The victim argued that *Cox Broadcasting Corp.* should not apply because the *Florida Star* reporter did not obtain the information from a public judicial proceeding.<sup>156</sup> Justice Marshall, writing for the majority, disagreed with the victim, holding that the method of obtaining the information was synonymous with the information obtained in *Cox Broadcasting Corp.* because it was on public record.<sup>157</sup> While the Court was unwilling to announce that it would never enforce sanctions against the press for publishing accurate and truthful information obtained from public records, it held Florida's statute unconstitutional.<sup>158</sup> The Court backed away from the general notion in *Cox Broadcasting Corp.*, and instead focused on whether the statute was narrowly tailored enough to further “a state interest of the highest order.”<sup>159</sup> The Court listed three reasons why Florida Chapter 794.03 was not narrowly tailored: the information was obtained in a government news release available to the public, the negligence *per se* theory was too broad, and it was under-inclusive where it only limited mass distribution.<sup>160</sup> The Court, therefore, held that the statute was unconstitutional, but recognized Florida's interest in protecting rape victims.<sup>161</sup>

### 3. *People v. Bryant*

Colorado charged Kobe Bryant, a well-known NBA all-star, with sexual assault.<sup>162</sup> When Bryant sought to admit evidence of the victim's prior sexual

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153. *Fla. Star*, 491 U.S. at 529 (citing *Doe v. Sarasota-Bradenton Florida Television Co.* 436 So. 2d 328, 330 (Fla. Dist. Ct. App. 1983)).

154. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 529 (1989) (explaining procedural history including Florida Supreme Court denial of review).

155. *Id.* at 530 (framing precise constitutional question in context of specific factual scenario). The Court noted that, although it had found a right to publish in the past, that right only arose in a “discrete factual context.” *Id.*

156. See also *id.* at 531 (outlining defendant's argument based largely on *Cox*) *Cox* argued that the First Amendment prevented the press from ever being punished, criminally or civilly, for publishing the truth. *Id.*

157. See *Fla. Star*, 491 U.S. at 532-33 (explaining public record included police reports). The Court noted the important role the press assumed in subjecting criminal and civil trials to public scrutiny to ensure their fairness. *Id.*

158. *Id.* (holding Florida statute unconstitutional because invalid restriction on First Amendment).

159. *Id.* at 533 (describing First Amendment narrowly tailored analysis).

160. *Id.* at 536-41 (1989) (applying narrowly-tailored analysis).

161. See *Fla. Star*, 491 U.S. at 541 (concluding First Amendment supercedes victim's privacy rights under factual scenario). Importantly, however, the Court engaged in an analysis that recognized the state's interest in protecting rape victims. *Id.*

162. See *supra* note 9 and accompanying text (discussing allegations against Bryant).

conduct, the trial court held *in camera* hearings pursuant to Colorado's rape shield statute, to determine the "relevancy and materiality" of the victim's past sexual encounters.<sup>163</sup> On June 24, 2004, the court clerk accidentally emailed the transcripts of the *in camera* proceedings to seven media entities.<sup>164</sup> After realizing the mistake the same day, the court ordered the recipients to destroy or delete the transcripts and prohibited the release of any of its contents.<sup>165</sup> The recipients challenged the order, claiming the order was an unconstitutional prior restraint against publication inapposite to First Amendment jurisprudence.<sup>166</sup> The Supreme Court of Colorado heard the media's appeal.<sup>167</sup>

The Supreme Court of Colorado applied the narrowly tailored analysis from *Florida Star*, but came out on the other side of the issue.<sup>168</sup> Like *Florida Star*, the Colorado Supreme Court in *Bryant* recognized substantial state interests under the rape shield statute to protect rape victim privacy, encourage reporting of sexual assaults, and further prosecution and deterrence of sexual assault.<sup>169</sup> Unlike *Florida Star*, however, *Bryant* did not involve the name of an individual.<sup>170</sup> *Bryant* involved explicit details of the victim's past sexual conduct, which constituted the precise information the rape shield statute protected.<sup>171</sup> The court fashioned its decision around the dicta in *Florida Star* and other U.S. Supreme Court cases, reasoning that there may be a point where the right to privacy trumps the First Amendment.<sup>172</sup>

The court first identified that the state's interest was greater in *Bryant* than *Florida Star* because of the content of the information, the extraordinary media

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163. *People v. Bryant*, 94 P.3d 624, 626 (Colo. 2004) (explaining rape shield statute procedure). Colorado's rape shield statute, Colorado Section 18-3-407(2), provides an *in camera* hearing to determine the admissibility of evidence falling under the Rape Shield umbrella. COLO. REV. STAT. § 18-3-407(2) (2004).

164. *Bryant*, 94 P.3d at 626 (explaining reason for court reporter's mistake). The message "\*\*\*\* IN CAMERA PROCEEDINGS \*\*\*\*" appeared at the top of each page of the transcript. *Id.* at 627. The court reporter selected the wrong list of recipients to forward the materials to. *Id.*

165. *Id.* at 626 (illustrating court's reaction to discovering mistake); *see also supra* note 13 and accompanying text (discussing court order).

166. *See Bryant*, 94 P.3d at 626 (describing media assertion declaring district court order unconstitutional prior restraint).

167. *Id.* at 626 (exercising state supreme court's power of review over trial court's order).

168. *Id.* at 629 (describing Supreme Court analysis applied to prior restraint cases). Despite the pro-First Amendment holdings in *Cox* and *Smith*, the Supreme Court of Colorado recognized the rape victim's right to privacy, which was memorialized in *Florida Star*. *Id.*

169. *See People v. Bryant*, 94 P.3d 624, 631 (declaring state and privacy interests at their highest when rape shield statute applies); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (recognizing interest of highest order in protecting rape victim's identity).

170. *See Bryant*, 94 P.3d at 636-37 (explaining *Bryant* involves restraint on revealing victim's entire sexual history).

171. *Id.* at 633-34 (distinguishing *Bryant* factors from *Florida Star* factors).

172. *Id.* at 635 (illustrating state supreme court distinguishing Supreme Court precedent providing exception for rape victim in *Bryant*). The Supreme Court of Colorado used the exception left open by the U.S. Supreme Court in *Florida Star* that "in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests" to validate the majority of the Eagle County District Court prior restraint order. *Id.* (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989)).

attention, and the nature of the order.<sup>173</sup> The court also found that the potential harm to the victim was more significant because the victim's private sexual history and not merely her identity, was at issue.<sup>174</sup> If the *in camera* hearing determined that the testimony was not admissible, but the media had already provided it to the world, then the additional harm to the victim would be greater because it would be as if it was actually admitted into evidence.<sup>175</sup> The Colorado Supreme Court, however, was not entirely satisfied with the trial court's order, and modified it to solidify compliance with the narrowly tailored standard.<sup>176</sup> The court, therefore, removed the section of the order mandating destruction of the copies, explaining that restricting dissemination adequately protected the state's interests.<sup>177</sup> The court held that the modified order was a valid prior restraint.<sup>178</sup>

### III. ANALYSIS

The media's persistent and detailed coverage of high profile rape and sexual assault cases create unique problems for courts.<sup>179</sup> Sometimes confidential information is mistakenly released to the media.<sup>180</sup> The media wants to publish the information, but the rape victim insists that it remain private.<sup>181</sup> When the

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173. *Bryant*, 94 P.3d at 633-34 (describing increased level of foreseeable harm). The court, utilizing the exception left open by the U.S. Supreme Court, reasoned that the great and certain harm to the victim qualified usage of the prior restraint. *Id.*

174. *See id.* at 636 (explaining circumstances of *Bryant* create potential for irreparable harm to rape victim's reputation). The Supreme Court of Colorado also noted the negative potential effect on future rape reporting and prosecutions. *Id.*

175. *People v. Bryant*, 94 P.3d 624, 636-37 (Colo. 2004) (illustrating harmful permanent damage to victim and complications of future prosecutions).

176. *Id.* at 637-38 (narrowing order to ensure compliance with strict review standard). The court redacted the order to eliminate the destruction requirement to ensure that the restriction was reasonably related to the threatened harm as required by the Supreme Court's three-part test. *Id.*

177. *Id.* at 638 (holding revised order constitutional). The U.S. Supreme Court denied hearing the case and waited for the court to decide whether the evidence would be admissible. *Associated Press v. Dist. Ct. for the 5th Jud. Dist. of Colo.*, 542 U.S. 1301, 1304 (2004) (Breyer, J., Circuit Justice).

178. *See Bryant*, 94 P.3d at 638 (stating court's narrow holding). *But see id.* at 639 (Bender, J., dissenting) (disagreeing with majority and arguing standard misapplied). Justice Bender stressed the force of the First Amendment and was unwilling to consider that the State's interest was substantial enough to trump the First Amendment. *Id.* (Bender, J., dissenting).

179. *See supra* notes 10-12 and accompanying text (discussing court's need to fulfill extraordinary media demand through use of internet resources); *supra* note 60 and accompanying text (illustrating murder case with high media demand); *see also Kelley*, *supra* note 52, at 2 (stressing technology reshapes media's First Amendment rights in high profile trials).

180. *See supra* note 12 (stating clerk's error sending electronic version of rape shield hearing to seven media entities); *see also supra* note 133 and accompanying text (explaining victim's name obtained by reporter when read in open court); *supra* notes 146-154 and accompanying text (discussing police department posting rape victim's name on police bulletin board).

181. *See supra* notes 13-14 and accompanying text (demonstrating tension between media and court regarding publishing of information contained in transcript); *supra* notes 133-135 and accompanying text (illustrating conflict where media entity printed rape victim's name despite prohibitive statute); *supra* note 149 and accompanying text (stating newspaper published name despite statute imposing sanctions for violations).

government or court mistakenly releases this confidential information to the media, three firmly-rooted Constitutional interests clash.<sup>182</sup> The media's First Amendment rights clash with the victim's privacy interest and the state's interest in protecting rape victims.<sup>183</sup> Thus, a court must determine which right, or bundle of rights, prevails based upon the confidential information that the media attempts to publish.<sup>184</sup>

As the invasiveness of the confidential information changes so does the importance of each interest, and, in turn, the outcome of the balancing tests.<sup>185</sup> The confidential information ranges in invasiveness from a victim's name to her entire sexual history.<sup>186</sup> It is important, therefore, to identify and analyze the potential harmful effect of the publication of confidential information on the victim.<sup>187</sup> Historically, these interests clash when there is a statute or prior restraint penalizing or preventing the media from publishing the information.<sup>188</sup> In *Florida Star* and *Cox*, the victim's name was the confidential information mistakenly released.<sup>189</sup> The balancing test in those cases, therefore, should focus on the consequences of releasing the victim's name.<sup>190</sup>

#### A. *The Rape Victim's Name*

The media insists that the First Amendment guarantees their right to publish the rape victim's identity when it is mistakenly released to the public.<sup>191</sup> While it is unclear exactly what benefit, if any, society gains from knowing the

182. See *supra* Part II (discussing history of three competing constitutionally guaranteed interests).

183. See *supra* Part II.A (articulating First Amendment rights highlighting freedom of speech and prior restraints); *supra* Part II.B (discussing evolution of individual's right to privacy); *supra* Part II.C (explaining State's interest in protecting rape victims with specialized legislation).

184. See *supra* Part II.D.1 (explaining privacy interests in *Cox*); *supra* Part II.D.2 (discussing competing privacy and First Amendment interests in *Florida Star*); *supra* Part II.D.3 (explaining heightened privacy interest in *Bryant*).

185. See *supra* notes 160-161 and accompanying text (noting narrow holdings based on case by case factual scenarios). In *Florida Star*, the Court recognized that different results could be reached if the interests changed. Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

186. See *supra* notes 133-134 and accompanying text (explaining *Cox* victim's name accidentally released by government and published by media); *supra* notes 146-150 and accompanying text (explaining *Florida Star* victim's name released in police report); *supra* note 164 and accompanying text (explaining *Bryant* victim's entire sexual history released).

187. See *supra* Part II.D (explaining Court's analysis in light of specific interest at stake in each case); see also *supra* Parts II.A-C (analyzing each interest's history and applicable analysis).

188. See *supra* note 135 (discussing Georgia statute prohibiting publication of rape victim's name); *supra* note 150 and accompanying text (describing Florida statute providing tort liability for publication of rape victim's name); see also *supra* note 13 (discussing court order threatening contempt for publication of erroneously released Rape Shield hearing transcripts).

189. See *supra* Parts II.D.1-2 (articulating rape victim's privacy interest in her identity).

190. Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471 (1975); see also *supra* Parts II.D.1-2 (describing analysis based on factual circumstances).

191. See *supra* note 3 and accompanying text (describing cases supporting position declaring no press punishment for publishing truthful information). But see *supra* note 4 and accompanying text (limiting holding to facts of precedent cases and stating exceptions may exist in future cases).

victim's name, First Amendment jurisprudence clearly stresses that the cornerstone of democracy is the free flow of information to the public, especially in the context of criminal matters.<sup>192</sup> The free flow of information creates governmental accountability and ensures justice in the courts by discouraging secrets.<sup>193</sup> Divulging a rape victim's name, however, does little to hold the government accountable or ensure judicial fairness.<sup>194</sup> Despite the lack of a connection between a victim's name with the rationale behind the First Amendment, it is dangerous to erode constitutionally guaranteed rights.<sup>195</sup> Exceptions to the First Amendment should be granted sparingly because of the slippery slope effect where seemingly minor, less invasive, exceptions lead to larger exceptions, which could result in the erosion of a cornerstone of democracy.<sup>196</sup> Thus, in order to determine whether an exception is appropriate, the opposing interest must be analyzed and contrasted against First Amendment jurisprudence.<sup>197</sup>

The rape victim's privacy interest is one such opposing interest.<sup>198</sup> Like the freedom of press and freedom of speech, an individual's right to privacy is implicitly found in the Constitution and has its roots in American jurisprudence since 1890.<sup>199</sup> The Constitutional right to privacy is limited to concepts such as privacy in one's home and a woman's right to an abortion, but has not been applied to keeping an individual's name private.<sup>200</sup> Nonetheless, the rape victim scenario creates a stronger privacy argument because of the horrific nature of the crime, the victim's permanent physical and mental injuries, and defense attorneys' tactics to expose the promiscuity of the victim in an effort to show her consent.<sup>201</sup> If a victim's name is released to the public, she faces

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192. See *supra* note 1 and accompanying text (emphasizing First Amendment importance to democracy); see also *supra* note 34 (discussing First Amendment in context of open courtroom proceedings).

193. See *supra* note 1 and accompanying text (outlining rationale for free press and speech); *supra* note 32-33 and accompanying text (explaining rationale supporting free flow of information to public).

194. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 547 (1989) (White, J., dissenting) (discussing minimal legitimate state interest in rape victim's identity).

195. See *supra* note 21 and accompanying text (stressing importance of public judicial scrutiny). See generally *supra* note 36 and accompanying text (analyzing negative impact of foreign countries' invasion into independent media).

196. See *supra* note 40 (explaining importance of First Amendment and courts' reluctance to permit prior restrictions on free speech).

197. See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524, 530 (1989) (balancing First Amendment rights against rape victim's privacy rights in her name); *Cox. Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (comparing media's First Amendment rights against identity privacy rights); *People v. Bryant*, 94 P.3d 624, 631 (2004) (balancing victim's right to privacy in past sexual history versus media First Amendment rights).

198. See generally *supra* Part II.D (analyzing privacy interests against First Amendment backdrop).

199. See *supra* notes 71-75 and accompanying text (articulating Warren and Brandeis' position regarding right to privacy evolution in American common law); *supra* notes 76-90 and accompanying text (outlining development of right to privacy within Constitution).

200. See *supra* notes 76-90 (analyzing scope of constitutional right to privacy holdings).

201. See *supra* note 92 and accompanying text (explaining rape victim's persistent physical and emotional injuries); see also *supra* note 94 and accompanying text (emphasizing heinous nature of rape in comparison to other crimes).

embarrassment, anguish, and scrutiny by her peers.<sup>202</sup>

States also have an interest in protecting rape victims from embarrassment and scrutiny.<sup>203</sup> Every jurisdiction has taken steps to encourage rape victims to report and assist the state in prosecuting their attackers by masking their identity and enacting rape shield statutes that limit access to victims' sexual histories.<sup>204</sup> If the media is permitted to publish the rape victim's name merely because of a *Bryant*-like mistake, then the victim may be subject to the same irreparable harm that every jurisdiction set out to protect.<sup>205</sup> Ultimately, the question is whether the victim's privacy interest and the states' interest in protecting rape victims outweigh the media's First Amendment right to publish the rape victim's name.<sup>206</sup> The analysis changes when the intrusiveness of the confidential information is something more than simply the rape victim's name.<sup>207</sup>

### B. The Victim's Sexual History

In *Bryant*, the court accidentally released the transcript of an *in camera* Rape Shield hearing, revealing the victim's sexual history to the media; under these circumstances the weight of each interest changes.<sup>208</sup> While the name of a rape victim may be subject to the general principle that criminal matters should not be kept secret from the public, the victim's sexual history creates a more significant problem.<sup>209</sup> The First Amendment argument remains the same, but now has one major flaw.<sup>210</sup>

The First Amendment argument that justice is most likely to prevail when information is available to the public fails because the information sought to be

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202. See *supra* notes 94-96 and accompanying text (outlining policy behind rape shield laws to promote reporting and prosecution); see also Haxton, *supra* note 95, at 1220 (explaining policy rationale behind rape shield laws).

203. See *supra* note 97 and accompanying text (highlighting States' interests through various state and federal legislation to protect rape victims).

204. See *supra* Part II.C (listing and explaining various Rape Shield statutes); see also *supra* notes 115-119 and accompanying text (detailing Colorado's Rape Shield statute and procedure).

205. See *supra* note 96 and accompanying text (illustrating irreparable harm legislatures sought to avoid through Rape Shield legislation).

206. See *supra* notes 140-141 and accompanying text (focusing question presented in *Cox*); *supra* notes 154-155 and accompanying text (articulating question presented in *Florida Star*); *supra* note 163-178 (analyzing *Bryant* case under balancing test with highest state interest prevailing).

207. See *People v. Bryant*, 94 P.3d 624, 627 (2004) (explaining protected information included victim's sexual history mistakenly released after rape shield hearing).

208. See *supra* note 163-178 and accompanying text (describing court clerk's mistake in releasing *in camera* Rape Shield hearing transcripts); *supra* Part II.D.1-3 (outlining history of each interest in light of particular facts).

209. See *supra* note 1 and accompanying text (stressing importance of First Amendment to democracy); see also *supra* notes 31-35 and accompanying text (explaining scope of First Amendment analysis). *But see supra* note 155 and accompanying text (indicating First Amendment not absolute bar to restriction on publication of truthful information).

210. See *supra* notes 33-35 and accompanying text (articulating First Amendment analysis).

published is the kind of information that every state, as well as the federal government, has deemed inadmissible at trial.<sup>211</sup> If a victim's sexual history cannot be used at trial, it certainly cannot promote justice by being releasing the information to the public.<sup>212</sup> As a result, the weight of the First Amendment decreases when the information pertains to a sexual assault victim's sexual history.<sup>213</sup>

Accordingly, both the victim's privacy interest and the state's interest in protecting rape victims are heightened.<sup>214</sup> The result of releasing this information is to put a person who has lived through a horrifying and psychologically devastating rape through another bout of public humiliation.<sup>215</sup> Because rape is an intrusive invasion of one's body, it would be inhumane to force the victim to endure a further invasion into her privacy merely because of a court or governmental mistake.<sup>216</sup> Further, every state government and the federal government have taken steps to protect rape victims and encourage the prosecution of rapists by enacting special laws, which derogate from the traditional rules of evidence.<sup>217</sup> Legislative intent should not be circumvented merely because of a clerical error.<sup>218</sup>

### C. Distinguishing Precedent

The right to privacy, the First Amendment rights to free speech and free press, and the states' interest in protecting its citizenry are all present in the *Cox*, *Florida Star*, and *Bryant* decisions.<sup>219</sup> These three cases fall on various points of the privacy-First Amendment spectrum, and each case is readily distinguishable from its predecessor.<sup>220</sup> In *Cox*, the intrusion into the victim's privacy is far less than the intrusion in *Florida Star*, which is considerably less

211. See *supra* Part II.C.1 (explaining rape shield statute function preventing evidence of victim's sexual history unless exception applies).

212. See *supra* notes 94-96 (discussing problems inherent in admission of victim's past sexual history). But see *supra* Part II.A.2 (promoting First Amendment importance regarding matters disclosed in courtroom).

213. See *supra* notes 169-174 (explaining State, and victim's privacy interest elevated due to content of rape shield hearing transcript); see also *supra* Part II.C (discussing harmful effect on rape victim).

214. See *supra* note 173 and accompanying text (discussing state's interest elevated because of harmfulness of released information); *supra* note 175 and accompanying text (detailing increased harm rape victim suffers from publication of her entire sexual history).

215. See *supra* note 96 and accompanying text (stating historically victim raped second time when defense interrogates based on her sexual history).

216. See *supra* notes 92-96 and accompanying text (outlining heinous aspects of rape and effect on victim).

217. See *supra* note 116 and accompanying text (detailing Colorado statute protecting rape and sexual assault victims).

218. See *supra* note 98 and accompanying text (discussing legislature's intent to promote reporting, encourage victim testimony, and increase prosecutions).

219. See *supra* Part II.D (outlining interests at stake in *Cox*, *Florida Star*, and *Bryant*).

220. See *Fla. Star v. B.J.F.*, 491, U.S. 524, 530 (1989) (describing First Amendment prevailed over victim and state interests); *supra* notes 143-144 and accompanying text (explaining First Amendment rights superseded victim's privacy interests in *Cox*); *supra* note 173 and accompanying text (holding victim's privacy interest in sexual history eclipsed First Amendment protection in *Bryant*).

than the intrusion in *Bryant*.<sup>221</sup> Accordingly, the strength of the media's First Amendment right is greatest in *Cox* and *Florida Star*, but weaker in *Bryant*.<sup>222</sup> The specific facts of each case are critical to successfully weighing the competing interests.<sup>223</sup>

*Cox* is most notably distinguished from *Florida Star* and *Bryant* because the victim's name and details of the crime, which were published in the defendant's newspaper, were obtained in an open court proceeding.<sup>224</sup> When the media obtains information from a public court room proceeding, the media's First Amendment rights are elevated.<sup>225</sup> In writing the *Cox* decisions, Justice White relied on *Sheppard v. Maxwell*,<sup>226</sup> stating that with respect to judicial proceedings, the press serves to guarantee fairness of trial and adds public scrutiny to the administration of justice.<sup>227</sup> While the Supreme Court alluded to the victim's privacy interest, the Court noted that privacy interests faded when the information was made available to the public.<sup>228</sup> Lastly, *Cox* involved state-imposed sanctions, not a prior restraint.<sup>229</sup>

*Florida Star* is distinguishable from *Cox* because the victim's name was not released in public judicial proceedings; instead, the name was released in an official police report which was available to the general public.<sup>230</sup> Therefore, the policy behind keeping court proceedings public was diminished.<sup>231</sup> The Court, however, determined that there was no difference between information released to the public by open court proceedings and information released by a government entity such as the police.<sup>232</sup> The *Florida Star* Court approached

221. See *supra* notes 146-148 and accompanying text (stating rape victim's name mistakenly released in police report in *Florida Star*); *supra* notes 133-134 and accompanying text (explaining reporter obtained rape victim's name in open court in *Cox*); *supra* notes 164-165 and accompanying text (discussing clerk's mistake emailing rape shield hearing transcripts to media in *Bryant*).

222. See *supra* note 143 and accompanying text (stating *Cox* First Amendment interest higher because information already disclosed to general public); *supra* note 156 and accompanying text (explaining *Florida Star* First Amendment interest analogous to *Cox* where information distributed to public); *supra* note 174 and accompanying text (holding *Bryant* First Amendment interest lower due to Rape Shield legislation and minimal public disclosure).

223. See *supra* Part II.D (stressing importance of privacy interests being weighed against First Amendment rights).

224. See *supra* note 133 and accompanying text (explaining victim's name obtained by reporter when court read out loud).

225. See *supra* note 143 and accompanying text (holding press unable to become liable for publishing information obtained in public proceeding).

226. 384 U.S. 333 (1966).

227. See *id.* at 350 (articulating press "guards against the miscarriage of justice" by scrutinizing government actions).

228. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975) (explaining privacy interests fade when information already appears on public record).

229. See *id.* at 487 (explaining statutory and common law invasion of privacy actions).

230. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 527 (1989) (explaining police posted police report including victim's name on department bulletin board).

231. See *id.* (noting name not released in court proceeding like *Cox*).

232. See *id.* at 538 (likening police report to court proceeding because government provided information to

the question differently than the *Cox* Court when it explored the impact of rape, and its effect on the victim's privacy rights.<sup>233</sup> Despite the additional analysis, only three justices placed the victim's right to privacy above the media's First Amendment rights.<sup>234</sup> The Court left the door open, however, by not ruling out the possibility that in the appropriate case, imposing sanctions for publishing the name of a rape victim might be necessary in order to advance the victim's privacy interests over the media's First Amendment interest.<sup>235</sup>

Arguably, *Bryant* was the appropriate case that the Supreme Court alluded to in *Florida Star* because the victim's privacy interest was overwhelmingly necessary.<sup>236</sup> *Bryant*, however, did not involve a state sanction statute, but rather the trial court issued a prior restraint on the media.<sup>237</sup> Although not dealing directly with prior restraints, the Supreme Court analyzed *Cox* and *Florida Star* under prior restraint-like analysis.<sup>238</sup> Unlike *Cox*, the *Bryant* information was not released in an open court.<sup>239</sup> The *Bryant* information came from an *in camera* proceeding, which was specifically designed to keep information from the public, and therefore should receive greater deference than the information disclosed in *Cox*.<sup>240</sup> Similar to *Florida Star*, however, the information in *Bryant* was released due to a mistake.<sup>241</sup> The mistake in *Bryant* was more detrimental than the *Florida Star* mistake because the *Bryant* clerk emailed the rape shield hearing transcripts to the press.<sup>242</sup> While *Florida Star* involved information regarding the crime charged, *Bryant* dealt with intimate details of the victim's sexual history, which were deemed irrelevant to the ultimate factual determination.<sup>243</sup> A rape victim's sexual history, because it is exceptionally personal, requires specialized state and federal rules to promote the reporting and prosecution of rapes and sexual assaults.<sup>244</sup> Accordingly, the victim's privacy interest and the state's interest in protecting that interest outweigh the media's First Amendment rights.<sup>245</sup>

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media).

233. See *id.* at 527 (explaining State's significant interest in protecting rape victim's due to victim's fear).

234. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (containing dissenting opinions of Justice White, Chief Justice Rehnquist, and Justice O'Connor).

235. See *id.* at 541 (noting limitation on Supreme Court's holding).

236. See *id.* at 633 (noting exceptional imminent and certain harm unless prior restraint upheld).

237. See *supra* note 165 and accompanying text (explaining court's corrective actions to alleviate harm).

238. See *supra* Part II.D.1-2 (discussing analysis applied in *Cox* and *Florida Star*).

239. See *People v. Bryant*, 94 P.3d 624, 626 (2004) (determining court's order constituted prior restraint on media).

240. See *id.* at 629-31 (analyzing Colorado rape shield law designed to protect rape and sexual assault victim privacy).

241. See *supra* note 164 (describing clerk's mistake emailing transcript to media).

242. See *Bryant*, 94 P.3d at 627 (discussing content revealed as result of clerk's mistake).

243. See *id.* at 629-31 (articulating rationale for rape shield law and need for victim protection from embarrassment).

244. See *supra* Part II.C (emphasizing harmful nature of information).

245. See *supra* note 178 and accompanying text (distinguishing *Bryant* from *Cox* and *Florida Star* and upholding prior restraint as highest State interest).

## IV. CONCLUSION

When three competing Constitutional interests collide, courts are faced with extremely difficult decisions. The Colorado Supreme Court faced this dilemma in *Bryant* when it balanced the media's right to free speech, a rape victim's right to privacy, and the state's interest in protecting rape victims. Prior to *Bryant*, the media's right to free speech has consistently prevailed when balanced against an individual's right to privacy. In *Cox* and *Florida Star*, the Supreme Court held, on the specific facts of those cases, that the media's First Amendment rights prevailed over a sexual assault victim's right to keeping her identity private. The Court did, however, tailor its decision in *Cox* and *Florida Star* to leave open the possibility that at a certain point, the victim's privacy interest may supercede the media's free speech and press interests.

The Colorado Supreme Court, correctly tailored *Bryant* to Supreme Court precedent. The distinguishing factor in *Bryant* was the impact of the privacy interest being weighed. The privacy interest violated was not only the release of the victim's name, but her complete sexual history. In *Bryant*, the court opened the door to the analysis of a third interest; the state's interest in protecting rape victims. The Colorado Supreme Court weighed the victim's right to privacy in her personal sexual history plus the state's interest in protecting rape victims against the media's First Amendment rights. These two interests are firmly rooted in American jurisprudence. Although individually they may not outweigh the media's constitutionally guaranteed freedom of speech and press, together, under *Bryant*'s factual circumstances, they form a bundle of rights that supercede the First Amendment rights.

Courts must apply heightened scrutiny to protect the rape victim's right to privacy. The privacy rights articulated and predicted by Warren and Brandeis in 1890 have evolved to Constitutional rights that are applicable in these circumstances. All holdings in this area, however, must be limited to the most extreme cases, as the First Amendment remains a foundation for democracy. The Supreme Court of Colorado correctly recognized that there must be a point where compassion and humanity for victims of such a devastating crime surpasses a responsible media's First Amendment rights.

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