South Carolina Law Review

Volume 50
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*
Article 3

Summer 1999

Constitutional Law

Kevin O'Brien

SOUTH CAROLINA: LAST HAVEN FOR RAPE VICTIM PRIVACY?

1. INTRODUCTION

South Carolina is one of only three states that criminalizes publishing the identity of sexual assault victims.[1] The United States Supreme Court struck down the statutes of the other two states, Georgia and Florida, as violative of the First Amendment[2] rights of the press.[3] However, as recently as 1990, the South Carolina Supreme Court upheld the constitutionality of South Carolina's version of this type of statute.[4]

Recently, in *Doe v. Berkeley Publishers*,[5] the South Carolina Supreme Court once again heard arguments in a suit brought for a violation of the state's rape shield statute.[6] *Berkeley Publishers* is factually distinctive from previous cases because the sexual assault victim who brought the suit was a man. The plaintiff, while in a county jail, was sexually assaulted by another inmate.[7] A report of this assault in a local newspaper, *The Berkeley Independent*, included the victim's name.[8] The victim sued the newspaper for invasion of privacy and

---

1. *See* S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976). For the other two states, see *infra* note 3 and accompanying text. *See generally* Carol Schultz Vento, Annotation, *Propriety of Publishing Identity of Sexual Assault Victim*, 40 A.L.R. 5th 787 (1996) (analyzing criminal and civil cases resulting from publication of sexual assault victims' identities).

2. First Amendment protections of speech and press are applicable to the individual states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV. This Comment will refer to these rights only as First Amendment rights.

3. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496-97 (1975) (invalidating Georgia's statute, GA. CODE ANN. § 16-6-23 (1992)); *see infra* Part II.A. The Georgia state legislature has since amended the statute to conform to the holding in *Cox Broadcasting*.

Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (ruling Florida's statute, FLA. STAT. ANN. § 794.03 (West 1987) (current version at FLA. STAT. ANN. § 794.03 (West Supp. 1999), unconstitutional)); *see infra* Part II.A. After amendment by the legislature, the Florida Supreme Court struck down the statute in *Florida v. Globe Communications, Corp.*, 648 So. 2d 110, 114 (Fla. 1994). *See infra* Part II.B.

A fourth state, Wisconsin, repealed a similar statute following the United States Supreme Court's decision in *Cox Broadcasting*. *See* WIS. STAT. ANN. § 942.02 (West 1973) (repealed 1976).

4. *See* Dorman v. Aiken Communications, Inc., 303 S.C. 63, 66, 398 S.E.2d 687, 689 (1990) (per curiam) (declining "to hold the statute unconstitutional on its face").

5. 329 S.C. 412, 496 S.E.2d 636, *cert. denied*, 119 S. Ct. 406 (1998).

6. S.C. CODE ANN. § 16-3-730.

7. *Berkeley Publishers*, 329 S.C. at 413, 496 S.E.2d at 636.

8. Doe v. Berkeley Publishers, 322 S.C. 307, 309-10, 471 S.E.2d 731, 732 (Ct. App. 1996), *rev'd*, 329 S.C. 412, 496 S.E.2d 636, *cert. denied*, 119 S. Ct. 406 (1998).

intentional infliction of emotional distress. The newspaper's publisher, Berkeley Publishers, asserted First Amendment privilege in its answer.[9]

The trial court granted a directed verdict to the newspaper.[10] On appeal, the South Carolina Court of Appeals successfully avoided addressing any constitutional issues surrounding the statute by ruling that the rape shield statute was not applicable to the facts of the case.[11] Rather, the court held that the South Carolina Freedom of Information Act[12] governed the case because the victim's name was included on a sheriff's department's incident report.[13] Under the Freedom of Information Act, any information on an incident report, including a victim's name, is public information and available for publication.[14] Nonetheless, the court of appeals remanded the case for a factual determination on the plaintiff's cause of action for invasion of privacy.[15] The supreme court reversed, holding as a matter of law that no invasion of privacy occurred.[16]

Although rape shield statutes have existed for many decades,[17] courts

---

9. In an effort to retain some privacy, the victim filed the summons and complaint as John Doe. The trial judge ordered the victim to use his real name. On appeal, the South Carolina Supreme Court granted his motion to use the fictitious name "John Doe." *Id.* at 310, 471 S.E.2d at 732.

10. *Id.* at 309, 471 S.E.2d at 732.

11. *Id.* at 311, 471 S.E.2d at 733.

12. S.C. CODE ANN. §§ 30-4-10 to -110 (Law. Co-op. 1991 & Supp. 1998).

13. *Berkeley Publishers*, 322 S.C. at 311, 471 S.E.2d at 733.

14. *See* S.C. CODE ANN. § 30-4-50(A)(8) (Law. Co-op. Supp. 1998) (declaring "incident reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed" to be public information).

15. *See Berkeley Publishers*, 322 S.C. at 314, 471 S.E.2d at 735 (remanding for a jury determination of whether publishing the victim's name in the particular circumstance was a "matter of public significance").

16. Doe v. Berkeley Publishers, 329 S.C. 412, 414, 496 S.E.2d 636, 637, *cert. denied*, 119 S. Ct. 406 (1998).

17. South Carolina's rape shield statute existed before 1912. The 1912 version of the statute reads:

> Whoever publishes, or causes to be published, the name of any *woman, maid or woman-child*, upon whom the crime of rape or an assault with intent to ravish has been committed or alleged to have been committed, in this State, in any newspaper, magazine, or other publication, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or imprisonment of not more than three years: *Provided*, the provisions of this Section shall not apply to publications made by order of Court.

2 S.C. CODE § 317 (1912) (emphasis added). Note that this version recognized only female victims. Gender was not an issue in *Berkeley Publishers* because the current version contains no reference to the victim's gender:

> Whoever publishes or causes to be published the name of *any person* upon whom the crime of criminal sexual conduct has been committed or alleged to have been committed in this State in any newspaper,

only recently have entertained constitutional challenges. With few exceptions, courts have consistently failed to rule directly on the constitutionality of these statutes, opting instead to limit their holdings narrowly or to avoid the question entirely. However, *Berkeley Publishers* once again brings focus to "the conflict between truthful reporting and state-protected privacy interests" inherent in rape shield statutes.[18]

This Comment examines the constitutional issues surrounding statutes that prohibit publishing the identity of sexual assault victims. Part II examines case law involving the constitutionality of rape shield statutes. Part III presents policy arguments for and against such statutes. Finally, Part IV examines South Carolina's rape shield statute under the constitutional standard established by case law and recommends revisions that would allow it to survive constitutional challenge.

II. CASE LAW

A. United States Supreme Court

The Supreme Court first addressed the constitutionality of rape shield statutes in *Cox Broadcasting Corp. v. Cohn*.[19] In *Cox Broadcasting* the father of a rape and murder victim brought a civil suit for invasion of privacy against a television station that revealed the identity of his daughter in violation of Georgia's rape shield statute.[20] The defendant, a local broadcasting company, obtained the identity of the victim from public judicial records.[21] The trial court held that violation of the statute entitled injured parties to a civil remedy and therefore found the television station liable.[22] On appeal the Georgia Supreme Court found the statute constitutionally valid.[23] The United States Supreme Court reversed this decision in an explicitly narrow and extremely cautious opinion. The Court limited its decision with the following statement: "Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth

---

> magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years. The provisions of this section shall not apply to publications made by order of court.

S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976) (emphasis added).

18. Florida Star v. B.J.F., 491 U.S. 524, 530 (1989).

19. 420 U.S. 469 (1975).

20. *Id.* at 474; *see supra* note 3.

21. *Cox Broad.*, 420 U.S. at 472-73.

22. *Id.* at 474.

23. Cox Broad. Corp. v. Cohn, 200 S.E.2d 127, 134 (Ga. 1973) (stating that Georgia's rape shield statute is "a legitimate limitation on the right of freedom of expression contained in the First Amendment"), *rev'd*, 420 U.S. 469 (1975).

Amendments, . . . it is appropriate to focus on the narrower interface between press and privacy that this case presents . . . ."[24] The Court held that a state may not impose sanctions against the press for truthfully reporting information obtained from the court records of a public prosecution.[25]

Shortly after *Cox Broadcasting*, the Supreme Court in *Smith v. Daily Mail Publishing Co.*[26] again ruled against privacy rights and struck down a West Virginia statute that prohibited publishing the names of juvenile criminal suspects.[27] In *Daily Mail* a local newspaper obtained the name of a fourteen-year-old murder suspect from eye-witness interviews and, after three local radio stations broadcasted it, published the suspect's name.[28] On appeal, the Supreme Court struck down the statute as unconstitutional because it prohibited only newspaper publication while imposing no similar restrictions on other forms of the press such as electronic media.[29] In its opinion, the Court extended its holding in *Cox Broadcasting* by precluding punishing the press for publishing *any* truthful information lawfully obtained: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[30] As with *Cox Broadcasting*, the Court emphasized the narrow scope of its holding.[31]

The Supreme Court most recently ruled on the constitutionality of rape shield statutes specifically in *Florida Star v. B.J.F.*[32] The Court, by a narrow majority, reversed a Florida court's affirmance of $100,000 in compensatory and punitive damages to a rape victim whose name a newspaper inadvertently published.[33] The newspaper published the victim's name after an inexperienced reporter copied a police crime report which included the victim's name.[34] This publication violated the newspaper's internal policy.[35] The victim sued the newspaper, under a per se negligence theory, for invasion of privacy.[36] In a very instructive opinion finding Florida's statute violative of the First Amendment, the Court first noted that the reporter obtained the victim's name from the police department, an integral part of the same government which sought to punish the subsequent publication. The Court stated: "Where, as

24. *Cox Broad.*, 420 U.S. at 491.
25. *Id.*
26. 443 U.S. 97 (1979).
27. *Id.* at 104.
28. *Id.* at 99-100.
29. *Id.* at 104-05.
30. *Id.* at 103. The interest advanced by the State was the alleged improved rehabilitation of juvenile offenders as a result of maintaining their anonymity. The Court found this interest was "not sufficient to justify application of a criminal penalty." *Id.* at 104.
31. *Id.* at 105 ("Our holding in this case is narrow.").
32. 491 U.S. 524 (1989).
33. *Id.* at 529.
34. *Id.* at 527.
35. *Id.* at 528.
36. *Id.*

here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting* . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity."[37] Punishing the press for publishing a government news release, the Court reasoned, would likely result in self-censorship of the press.[38]

Second, and perhaps most importantly, the Court noted that imposition of a negligence per se standard allows no case-by-case analysis of the facts, but simply imposes "liability . . . automatically from publication."[39] Publication of any kind violates the statute,

> regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern—because, perhaps, questions have arisen whether the victim fabricated an assault by a particular person.[40]

The Court believed that limiting truthful publication requires a case-by-case analysis so that any decision would not reach too broadly. The Court's opinion reflected this belief by limiting its holding explicitly to the facts of the case.[41]

Finally, the Court stated that the statute was facially underinclusive by prohibiting publication only by an "'instrument of mass communication.'"[42] Disclosures by individuals to the victim's co-workers or friends are not penalized although such disclosures "may have consequences as devastating as the exposure of [the victim's] name to large numbers of strangers."[43]

Despite the Court's ruling, it did not preclude the possibility of a constitutional rape shield statute: "We do not hold . . . that a State may never punish publication of the name of a victim of a sexual offense."[44] In addition, the Court did "not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might

---

37. *Id.* at 538.
38. *Id.*
39. *Id.* at 539.
40. *Id.*
41. *Id.* at 541.
42. *Id.* at 540 (quoting FLA. STAT. ANN. § 794.03 (West 1987) (current version at FLA. STAT. ANN. § 794.03 (West Supp. 1999)).
43. *Id.*
44. *Id.* at 541.

be . . . overwhelmingly necessary to advance" the interests of the state.[45] The Court instead very narrowly held that punishing the truthful publication of lawfully obtained, publicly significant information must support a significant state interest.[46] It determined that the state interests advanced, namely encouraging victims of sexual assault to report the crime as well as ensuring the privacy and safety of those victims, were "highly significant" but, "under the circumstances of this case," did not warrant the imposition of liability.[47]

B. Other Cases

Rape privacy statutes first faced constitutional challenge over fifty years ago in *State v. Evjue*.[48] In *Evjue* Wisconsin brought criminal charges against a newspaper for violating a Wisconsin statute that prohibited publishing the identity of female rape victims.[49] The Wisconsin Supreme Court reversed a lower court ruling and upheld the constitutionality of the statute.[50] After balancing the state interests advanced by the statute, namely protecting the privacy of sexual assault victims and improving prosecution of offenders, with the "minimum of social value in the publication," the court concluded that the "slight restriction of the freedom of the press" was justified.[51]

The first civil action brought under South Carolina's rape shield statute occurred over thirty-five years ago in *Nappier v. Jefferson Standard Life Insurance Co.*[52] In *Nappier* the identities of two sexual assault victims and their vehicle were well known throughout the state.[53] In reporting on the sexual assault of the two women, a television station broadcasted a picture of their vehicle, effectively identifying the victims.[54] The victims sued the television station for invasion of privacy, basing their claim on both common law

---

45. *Id.* at 537.
46. *Id.* at 541.
47. *Id.* at 537.
48. 33 N.W.2d 305 (Wis. 1948).
49. *Id.* at 306.
50. *Id.* at 312.
51. *Id.*
52. 322 F.2d 502 (4th Cir. 1963).
53. The court stated:

> These young women were employed by the Dental Division of the South Carolina Department of Health to teach dental hygiene in the public schools. In this work they adopted a puppet play, the puppet commonly known as "Little Jack." Throughout the State they were therefore spoken of as "The Little Jack Girls." A station wagon was furnished them by the State on each side of which was prominently lettered "Little Jack, Dental Division, South Carolina State Department of Health."

Id. at 503.
54. *Id.* at 503-04.

invasion of privacy and the state's rape shield statute.[55] The defendant argued that the public significance exemption precluded finding a common law invasion of privacy.[56] The Fourth Circuit Court of Appeals reversed the trial court's dismissal, holding that the public interest exemption did not apply: "South Carolina has unequivocally declared the identity of the injured person shall not be made known in press or broadcast."[57] However, as the court noted in its opinion, the defendant did not challenge the statute's constitutionality.[58]

Twenty-five years later, South Carolina's rape shield statute faced its first constitutional challenge in *Dorman v. Aiken Communications, Inc.*[59] In *Dorman* a reporter for the *Aiken Standard* obtained a police report covering the assault of a real estate agent by her client.[60] The report did not state the victim's name or that she had been sexually assaulted.[61] The reporter obtained the victim's name from other sources and published an article reporting the facts surrounding the assault, including the victim's name.[62] The victim brought suit for violation of South Carolina's rape shield statute,[63] invasion of privacy, and intentional infliction of emotional distress.[64] The supreme court, in considering an appeal from a denied summary judgment motion, declined "to hold the statute unconstitutional on its face."[65] The court affirmed the denial of summary judgment in light of the United States Supreme Court's finding in *Florida Star* that the First Amendment issue concerning rape shield statutes should be addressed "'only as it arose in a discrete factual context.'"[66]

III. POLICY ARGUMENTS SURROUNDING RAPE SHIELD STATUTES

Critics of rape shield statutes assert that publishing victims' names

---

55. *See* S.C. CODE ANN. § 16-81 (Michie 1962) (amended 1976); *see also supra* note 17 (setting forth 1912 version of the statute).

56. *See Nappier*, 322 F.2d at 505. The district court based its dismissal on the fact that no "name," as stated in the statute, was actually revealed. *See* Nappier v. Jefferson Standard Life Ins. Co., 213 F. Supp. 174, 176 (E.D.S.C. 1963). The Fourth Circuit rejected this reasoning. *Nappier*, 322 F.2d at 504-05.

57. *Nappier*, 322 F.2d at 505.

58. *Id.*

59. 303 S.C. 63, 398 S.E.2d 687 (1990).

60. *Id.* at 64-65, 398 S.E.2d at 688.

61. *Id.* at 65, 398 S.E.2d at 688.

62. *Id.*

63. S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976).

64. *Dorman*, 303 S.C. at 65, 398 S.E.2d at 688.

65. *Id.* at 66, 398 S.E.2d at 689.

66. *Id.* at 66, 398 S.E.2d at 688 (quoting Florida Star v. B.J.F., 491 U.S. 524, 530 (1989)). Although the court did not reach a decision on the First Amendment issue, it did hold that the legislative history revealed no intent for civil liability to result from violation of the statute. *Id.* at 67, 398 S.E.2d at 689. Therefore, the plaintiffs in both *Dorman* and *Berkeley Publishers* had no right to a private cause of action as a result of the violation of the rape shield statute. However, South Carolina does recognize the common law tort of invasion of privacy. *See* Meetze v. Associated Press, 230 S.C. 330, 336, 95 S.E.2d 606, 609 (1956).

would eliminate the stigma associated with rape.[67] These critics contend that the anonymity required by such statutes implies that being raped is disgraceful.[68] In arguing for the publication of rape victim identity, a former president of the National Organization for Women stated that prohibiting publication "merely establishes [the victim] as an outcast.... Pull off the veil of shame. Print the name."[69] Some victims understand this argument. For example, after reading an editorial arguing that the stigma of rape could be eliminated by victims revealing their identities, a rape victim, Nancy Ziegenmeyer, allowed a newspaper to describe her ordeal.[70]

Proponents of rape shield statutes counter these arguments first by noting that victims should have the option of going public, as did Ziegenmeyer. After publication of the article, Ziegenmeyer stated: "No one should dictate to rape victims that they should speak out. It must be their choice."[71] This view enjoys wide public support.[72] Furthermore, Ziegenmeyer stated: "We're not going to lessen the stigma by just publishing victims' names."[73] She also admitted she would not have reported her rape if she had known her name would be published by the press.[74]

Disclosure opponents also argue that victim identification would reinforce, not reduce, the stigma associated with rape.[75] This reinforcement, they argue, stems from the fact that "the great majority of rapes are committed by an acquaintance or relative and, therefore, the consent of the victim is often presumed."[76] As a result, the majority of raped women who voluntarily disclose their identities are in steady relationships and raped by strangers.[77]

Advocates of disclosure assert that non-disclosure laws do not encourage the reporting of rape. At least one commentator, noting trends in both reported and unreported rapes (especially in those states that punish media disclosure), has "concluded that protecting the identity of victims has not

---

67. *See, e.g.*, James Warren, *Naming Rape Victims a Debate for Media*, CHI. TRIB., Apr. 18, 1991, § 1, at 5.

68. *See* Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019, 1031 (1991).

69. Karen DeCrow, *Stop Treating Victims as Pariahs; Print Names*, USA TODAY, Apr. 4, 1990, at 8A.

70. Marcus & McMahon, *supra* note 68, at 1032 n.61.

71. *Feedback: Other Views on the Crime of Rape*, USA TODAY, July 20, 1990, at 13A.

72. *See* Sandra Sanchez, *Rape Poll: No Names, Say 91%*, USA TODAY, Apr. 18, 1991, at A1 (indicating 91% of adults surveyed felt either that victims, not news organizations, should decide whether to disclose their identities or that names should never be published).

73. *Feedback: Other Views on the Crime of Rape*, *supra* note 71, at 13A.

74. *See* Rogers Worthington, *Rape Victims Caught in Open-Records Clash*, CHI. TRIB., July 29, 1990, § 1, at 15.

75. *See* Marcus & McMahon, *supra* note 68, at 1032-33.

76. Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1125 (1993).

77. Marcus & McMahon, *supra* note 68, at 1033.

affected . . . the reporting of crimes."[78] However, as Nancy Ziegenmeyer's comments suggest, rape victims do not necessarily agree with this conclusion.[79] Furthermore, proponents of disclosure assert that publication of rape victim identity is an editorial decision not a legislative decision. Members of the press, such as Michael Gartner, argue that the decision to publish should be made by editors and news directors, not the legislature or judiciary.[80] However, the public apparently does not support this view.[81]

Both camps vociferously argue the foregoing policies as well as others. This author finds protecting the privacy of victims more compelling, especially in light of the comments from former victims. The First Amendment impact of prohibiting publication of this one detail surrounding the crime of rape is minimal, and any adverse impact upon the accused can generally be eliminated while still maintaining the anonymity of the victim to the general public.

IV. SOUTH CAROLINA'S RAPE SHIELD STATUTE AND THE CONSTITUTIONAL STANDARD

The *Daily Mail* Court established, and the *Florida Star* Court reaffirmed, the constitutional standard by which rape shield statutes are measured: "[I]f [the media] lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[82] A discussion of the individual components of this standard follows.

A. Lawfully Obtains

In *Cox Broadcasting* the Court held that a newspaper could not be held liable for publishing a rape victim's name taken from a publicly available judicial record.[83] The *Daily Mail* Court, by using the language "lawfully obtains," expanded the scope of acceptable acquisition by the media to include "routine newspaper reporting techniques."[84] Although the *Daily Mail* Court expressly limited its holding, the "lawfully obtains" language is clearly broad—any investigative technique, no matter how intrusive or annoying, falls within it, as long as no statute is broken in the process.

---

78. Carey Haughwout, *Prohibiting Rape Victim Identification in the Media: Is It Constitutional?*, 23 U. TOL. L. REV. 735, 749 (1992).

79. *See supra* notes 71, 73-74 and accompanying text.

80. *See* Michael Gartner, *Naming Rape Victims: Usually, There Are Good Reasons to Do It*, USA TODAY, Apr. 22, 1991, at 6A.

81. *See supra* note 72 and accompanying text.

82. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979); *accord* Florida Star v. B.J.F., 491 U.S. 524, 541 (1989).

83. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496-97 (1975).

84. *Daily Mail*, 443 U.S. at 103.

B. Public Significance

The commission of a crime and the judicial proceedings surrounding the crime are matters of public significance.[85] The media therefore have a right, and a duty, to report the information they legally obtain.[86] In *Florida Star* the Court affirmed this principle, specifically regarding a rape victim's name, by stating that "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime . . . ."[87] The applicability of this portion of the *Daily Mail* standard to information surrounding a rape, including the victim's identity, is generally not questioned.

C. State Interest

In the "state interest" portion of the *Daily Mail* standard, legislative drafting has an impact. A constitutionally defensible rape shield statute must be narrowly tailored to meet a compelling state interest. To date, the United States Supreme Court has not found a rape shield statute to meet this rigorous standard. However, one can gain some insight from the state interests that have been asserted unsuccessfully.

In *Cox Broadcasting* Georgia defended its statute as protecting the "zone of privacy surrounding every individual."[88] The Court ruled this interest is inadequate to prohibit publication when the identity of the victim appears in public records.[89] In *Globe Newspaper Co. v. Superior Court*[90] the Court struck down a Massachusetts law mandating closure of trials involving sexual assaults on minors.[91] The Court held that the state interests asserted, protecting the identity of victims and encouraging victims to testify, were insufficient.[92] In *Florida Star* the state asserted victim privacy, victim safety, and encouraging the reporting of sexual assaults as compelling state interests.[93] Although recognizing these interests as "highly significant," the Court nonetheless concluded they were inadequate because the statute was not narrowly tailored to accomplish them.[94] The Court outlined three considerations leading to its conclusion: the source of the prohibited information, the overbreadth of the

85. *See Cox Broad.*, 420 U.S. at 492.
86. *See id.*
87. *Florida Star*, 491 U.S. at 536-37.
88. *Cox Broad.*, 420 U.S. at 487.
89. *See id.* at 494-95 ("[I]nterests in privacy fade when the information involved already appears on the public record.").
90. 457 U.S. 596 (1982).
91. *See id.* at 610-11.
92. *Id.* at 607-10.
93. Florida Star v. B.J.F., 491 U.S. 524, 537 (1989).
94. *Id.* at 541.

statute, and the underinclusiveness of the statute.[95] Application of these three factors to South Carolina's rape shield statute reveals obvious constitutional defects. Nonetheless, the South Carolina General Assembly has neglected to amend the state's statute.

1. Public Information

The *Florida Star* Court first considered the newspaper's source of the victim's name, specifically the state's own police report—a document available to the general public.[96] The Court said that as custodian of sensitive information, the government should find "less drastic means than punishing truthful publication" to prevent the information's release.[97] The Court recommended other means to prevent the release, such as classifying information, redacting releases, and providing damage remedies against the government for the release.[98] Information obtained through non-public sources could be untangled, in some cases, from the stringent *Daily Mail* criteria by prohibiting its "nonconsensual acquisition."[99]

The United States Supreme Court stated in *Florida Star* and *Cox Broadcasting* that a state cannot punish the media for publishing truthful information already in the public domain. As currently drafted, South Carolina's rape shield statute does not incorporate this directive. A constitutional rape shield statute would except information already in the public domain. To ensure the confidentiality of rape victims, the legislature should develop and vigorously apply additional state procedures. These procedures should ultimately (1) prevent sensitive identity information held by the government from falling into the public domain and (2) prohibit the nonconsensual release of such information in the hands of private individuals. This latter goal introduces additional complications the legislature should address.

2. Overbroad

As written, South Carolina's rape privacy statute makes unlawful *any* publication of the name of a sexual assault victim, regardless of the circumstances. Under this broad standard, publishing a consensual interview with a sexual assault victim, as happened in both the Mike Tyson and William Kennedy Smith cases, could result in prosecution.[100] The *Florida Star* Court

95. *Id.* at 537-40.
96. *Id.* at 536.
97. *Id.* at 534.
98. *Id.*
99. *Id.*
100. *People* published an interview with the victim in the Mike Tyson case, and *Vanity Fair* published an interview with the alleged victim in the William Kennedy Smith trial. *See* Carey Haughwout, *supra* note 81, at 743 & nn.67-68.

also addressed this point and emphasized that the flexibility of a case-by-case analysis is necessary when restricting rights as fundamental as freedom of speech or of the press.[101] The South Carolina legislature should amend the rape shield statute to remove this broad standard and replace it with one that allows for a case-by-case determination of the appropriateness of publishing a sexual assault victim's identity.

3. *Underinclusive*

Statutes that place restrictions only on the media are constitutionally suspect.[102] South Carolina's rape shield statute penalizes publication "in any newspaper, magazine or other publication."[103] In *Florida Star* the Court ruled that a similar prohibition restricting publication by an instrument of mass communication was unconstitutionally underinclusive because it did not prohibit less widespread disclosures:

> When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant. Where important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury. A ban on disclosures effected by "instrument[s] of mass communication" simply cannot be defended on the ground that partial prohibitions may effect partial relief. Without more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication

101. *See Florida Star*, 491 U.S. at 530 ("[W]e have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context."); *see also* WXYZ, Inc. v. Hand, 463 F. Supp. 1070, 1072 (E.D. Mich. 1979) (striking down a Michigan statute requiring the granting of a protective order in sexual assault trials upon the request of either party because the statute allowed no discretion on the part of the court).

102. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) ("[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.").

103. S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976). In *Dorman v. Aiken Communications, Inc.*, 303 S.C. 63, 66, 398 S.E.2d 687, 688 (1990), the South Carolina Supreme Court ruled that this language is broad enough to cover publication by electronic media as well.

> by the mass media satisfactorily accomplishes its stated purpose.[104]

However, ample precedent exists for upholding the constitutionality of statutes that apply to all generally and that do not single out the press, even though these statutes affect the press's ability to report the news.[105] South Carolina's rape shield statute should be amended to restrict publication by *anyone* to avoid underinclusiveness.

V. CONCLUSION

In *Florida Star* the United States Supreme Court explicitly left open the possibility of a constitutional rape shield statute.[106] Although the Court was not thorough in its explanation, it did provide some guidance on how to draft such a statute. The legislature, and presumably the citizens, of South Carolina clearly find this statute worthwhile. With revision, its ability to survive constitutional attack could be greatly improved.

Kevin O'Brien

---

104. *Florida Star*, 491 U.S. at 540-41 (alteration in original) (citations omitted).

105. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669-71 (1991) (rejecting the newspaper's argument that application of a general state promissory estoppel statute infringed the newspaper's First Amendment rights); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977) (explaining that the press must obey general copyright laws).

106. *See supra* notes 44-45 and accompanying text.