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Identity Protection for Sexual Assault Victims: Exploring Alternatives to the Publication of Private Facts Tort

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IDENTITY PROTECTION FOR SEXUAL ASSAULT VICTIMS: EXPLORING ALTERNATIVES TO THE PUBLICATION OF PRIVATE FACTS TORT

I. INTRODUCTION

In *Doe 2 v. Associated Press*,[1] the United States Court of Appeals for the Fourth Circuit gave terse treatment to a sexual assault victim's publication of private facts tort claim.[2] The plaintiff, who remained anonymous to the public throughout the criminal trial and conviction of his molester, chose to give a victim's impact statement in open court. He revealed his identity after the judge allegedly ordered reporters not to reveal the individual's name.[3] All reporters acquiesced except one.[4] The victim's name was published.[5] Upon review of the district court's dismissal of the victim's civil action against the Associated Press, the court of appeals failed to explore the constitutional concerns associated with "wrongful publicizing of private affairs" claims.[6] Instead, the *Doe 2* court applied South Carolina law.[7] The court rejected the "wrongful publicizing of private affairs" claim, as well as intrusion, infliction of emotional distress, and fraudulent misrepresentation claims.[8] South Carolina's privacy law appears to be well established. If the law is so well established, what alternatives exist for victims of sexual abuse who wish not to be exposed in such a fashion?

Based on the large volume of works discussing the right to privacy, legal academia has repeatedly bid welcome and adieu to the invasion of privacy tort[9]

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1. 331 F.3d 417 (4th Cir. 2003).

2. *Id.* at 421–22.

3. *Id.* at 419. The existence of this order was disputed. For purposes of evaluating the legal questions, the court assumed the plaintiff's allegations were true. *Id.*

4. *Id.* at 420.

5. *Id.*

6. Doe 2 v. Associated Press, 331 F.3d 417, 421–22 (4th Cir. 2003).

7. *Id.* at 421–22.

8. *Id.* at 420–22.

9. *See generally* John A. Jurata, Jr., Comment, *The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 510–24 (1999) (surveying recent cases in which public disclosure of private facts tort successfully protected individuals' privacy and suggesting that the tort is reemerging); Jane E. Prine, Case Note, Lake v. Wal-Mart Stores, Inc., *582 N.W.2d 231 (Minn. 1998)*, 25 WM. MITCHELL L. REV. 999, 999–1000 (1999) (highlighting a recent Minnesota case in which the Minnesota Supreme Court recognized a private individual's right to privacy); Kim Ruckdaschel-Haley, Note, The Florida Star v. B.J.F.: *Balancing Freedom of the Press and the Right to Privacy upon Publication of a Rape Victim's Identity*, 35 S.D. L. REV. 94, 117 (1990) (arguing that as a result of recent United States Supreme Court decisions, effective protection of private but truthful information is hard to conceptualize); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV.

since its inception in the often cited Warren and Brandeis article, *The Right to Privacy*.[10] The subject is controversial and likely has no "one size fits all" solution. Legal options for protection from public disclosure of sexual assault victims' identities are less accessible, despite what appeared to be a surge in recognition of the right to privacy.[11]

Part II of this Comment explores the constitutional concerns involved in public disclosure of private facts claims, including the interests of sexual assault victims, the bases upon which states grant legal protection, and relevant United States Supreme Court decisions. Part III uses the *Doe 2 v. Associated Press* decision to examine the development and current state of privacy protection in South Carolina. Part IV highlights and summarizes alternative approaches in privacy protection throughout the country. Based on this analysis, Part V advances an alternative to protect the privacy of sexual assault victims that is consistent with relevant Supreme Court decisions, and merges the most acceptable devices in such protection.

II. CONSTITUTIONAL CONCERNS

A. Interests of Sexual Assault Victims

Any analysis of the constitutionality of publishing sexual assault victims' names must begin with a brief discussion of the interests involved. The policies underlying the privacy rights of sexual assault victims are in direct conflict with other policies, including freedom of the press, that stand in favor of publishing the names with impunity.

1. Policies Against Protection

One frequently offered argument for limiting protection of sexual assault victims' identities stems from the Freedom of the Press Clause expressed in the First Amendment of the United States Constitution.[12] The major policy underlying this clause, as well as the Free Speech Clause generally, is that there is a "large[] public interest, secured by the Constitution, in the dissemination of truth"[13] and the workings of the government.[14] It is an established notion that freedom of press and speech are critical in a democratic society to ensure that the government is

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291, 362 (1983) (arguing that the "private-facts tort has failed to become a usable and effective means of redress for plaintiffs").

10. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890) (indicating generally that the press crosses a line when it publishes private information, and the law should offer a remedy for abuses).

11. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 488 (1975) (White, J.) (noting that "the century has experienced a strong tide running in favor of the so-called right of privacy").

12. *See* Ruckdaschel-Haley, *supra* note 9, at 98.

13. Garrison v. Louisiana, 379 U.S. 64, 73 (1964), *quoted in Cox Broad. Corp.*, 420 U.S. at 491.

14. *See* Ruckdaschel-Haley, *supra* note 9, at 98.

functioning at the "will of the public."[15]

Other reasons to allow publication of sexual assault victims' names are compelling. Many have said that "protecting" the names of sexual assault victims adds to the stigma associated with the crime.[16] Writer James Warren describes the protection of victims' anonymity as a "demeaning form of self-censorship."[17] Another policy against maintaining anonymity is society's emphasis on preventing crime through education.[18] The idea is that if society's views of sexual assault are ever to change, people must learn about the crime and the victims through identification of the victims.[19]

Additionally, a journalist's job is to publish the facts in an objective manner.[20] Proponents of publication argue that journalists should not be forced to exclude any facts of a story.[21] Accurately reporting the facts, including the victims' names, "add[s] credibility to the story."[22] Proponents also argue that courts should not make editorial decisions.[23] Harry Kalven, author and former Professor of Law at the University of Chicago, "suggest[s] 'that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness,'" and also questions "whether the claim of privilege is not so overpowering as virtually to swallow the tort."[24]

2. *Policies in Favor of Protection*

Of course, one of the major policies supporting protection of sexual assault victims' identities is the desire to protect victims from any further humiliation.[25] Sexual assault is a highly personal crime. Frequently, victims are viewed as sharing responsibility for their attacks.[26] Exposure to the public's scrutiny is often likened to being assaulted a second time. Opponents of publication argue that it is not the

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15. *Id.*

16. Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1124 (1993) (citing Geneva Overholser, *American Shame: The Stigma of Rape*, DES MOINES REGISTER, July 11, 1989, at 6A).

17. James Warren, *Naming Rape Victims a Debate for Media*, CHI. TRIB., Apr. 18, 1991, § 1, at 5, *quoted in id.* at 1124.

18. *See* Denno, *supra* note 16, at 1125–26.

19. *See id.*

20. *See id.* at 1126.

21. *See id.*

22. Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1126 (1993).

23. *See id.* at 1127.

24. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966), *quoted in* Sheldon W. Halpern, *Rethinking the Right of Privacy: Dignity, Decency and the Law's Limitations*, 43, RUTGERS L. REV. 539, 550 (1991).

25. Denno, *supra* note 16, at 1113, 1124.

26. *See* Benjamin J. Marrison, Editorial, *Bryant's Alleged Victim Should Stay Nameless*, COLUMBUS DISPATCH, Aug. 3, 2003, at 1C (stating that some still believe that the victims "somehow brought it upon themselves").

victims' responsibility to educate the public about sexual assault, and "change must come from the individuals in society who hold stereotypical views about rape, not from the victims themselves."[27] Additional policies supporting the protection of victims' identities include physical protection of the victim from retribution or harm by the accused,[28] increasing both the reporting of crimes and the number of arrests, and encouraging participation in court proceedings.[29]

A more abstract reason to protect the identity of sexual assault victims from publication by the press is to protect the individual's sense of self.[30] "What is really at issue . . . [is] the debasement of his sense of himself as a person that results because [an individual's] life has become a public spectacle against his will."[31] Dr. Edward Bloustein, author and former President of Rutgers University, described invasion of privacy as "a blow to human dignity."[32] It is for this final reason—the affront to one's inner sanctity that results from sexual assault—that rape victims are entitled to protection and anonymity.

B. Typical Bases on Which States Grant Legal Protection

"[V]irtually all jurisdictions now recognize, either by common law or statute, some form of the individual's right to exercise some degree of control over the public use of his or her persona."[33] Of course, due to the competing interests involved and privacy's intangible nature, "[t]his recognition . . . [has been] accompanied by confusion and controversy over the nature and [breadth of the tort]."[34] The "publicity given to private life tort" is one of Prosser's four torts that constitute invasion of privacy as reflected by the *Restatement (Second) of Torts*.[35] This tort provides a legal cause of action if an individual publicizes a matter involving another's private life that is "highly offensive to a reasonable person and is not of legitimate concern to the public."[36] Decisions in cases involving a media defendant frequently weigh in favor of the media defendant "if the information was lawfully obtained, was newsworthy, and was of legitimate public concern."[37]

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27. Denno, *supra* note 16, at 1126 (citing Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1020, 1034 (1991)).

28. *See* Lance Pugmire, *Affidavits in Bryant Case to Stay Sealed*, L.A. TIMES, Aug. 22, 2003, at D1 (reporting that the accuser was the target of threats).

29. *See* Denno, *supra* note 16, at 1130.

30. *See* Halpern, *supra* note 24, at 540.

31. Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 619 (1968)).

32. *Id.* at 619.

33. *Id.* at 540 (citing Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 82 (W. Va. 1984)).

34. *Id.* at 540.

35. *Id.* at 541 (citing William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960)); Carol Schultz Vento, Annotation, *Propriety of Publishing Identity of Sexual Assault Victim*, 40 A.L.R.5th 787, 794 (1996) (citing RESTATEMENT (SECOND) OF TORTS § 652D (1976)).

36. Vento, *supra* note 35, at 794 (citing RESTATEMENT (SECOND) OF TORTS § 652D (1976)).

37. *Id.* at 795.

Another basis on which states have granted legal protection is by statutes which impose civil sanctions, criminal sanctions, or both, for publishing rape victims' names.[38] Only a few jurisdictions have these statutes.[39] South Carolina, Florida, and Georgia are the only states that have statutes that criminalize publication of such information.[40] The Supreme Court of South Carolina upheld the constitutionality of its statute providing criminal sanctions.[41] In Florida and Georgia, statutes were held unconstitutional in *Florida Star v. B.J.F.*[42] and *Cox Broadcasting Corp. v. Cohn*,[43] respectively. Georgia has amended its statute to satisfy the demands of the Georgia Supreme Court's opinion in *Cox*.[44] Florida's attempt to revise its statute was unsuccessful; the Florida Supreme Court struck down the amended statute as unconstitutional.[45] The collective effect of these decisions was to make the imposition of criminal and civil liability by states on media defendants difficult at best, and left to be decided on a case-by-case basis.[46]

Additionally, some states recognize *civil* liability with the availability of an action for damages. State legislatures that have provided civil remedies for sexual assault victims whose names are published include New York, Massachusetts, Nebraska, Rhode Island, Virginia, and Wisconsin.[47] New York, in particular, enacted the statutory right of privacy in lieu of the common law tort to protect "settled principles of law" in its jurisprudence.[48]

C. *Relevant Supreme Court Decisions Reveal a Grim Outlook*

1. *Cox Broadcasting Corp. v. Cohn*

In *Cox Broadcasting Corp. v. Cohn*,[49] Justice White considered the issue of whether "consistent[] with the First and Fourteenth Amendments, a State may

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38. *Id.* at 794.

39. *Id.*

40. Kevin O'Brien, Comment, *South Carolina: Last Haven for Rape Victim Privacy?*, 50 S.C. L. REV. 873, 873 (1999).

41. *See generally* Dorman v. Aiken Communications, Inc., 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990) (finding that South Carolina's rape shield statute, S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976), does not allow a civil remedy).

42. 491 U.S. 524 (1989).

43. 420 U.S. 469 (1975).

44. O'Brien, *supra* note 40, at 873 n.3.

45. Florida v. Globe Communications, Corp., 648 So. 2d 110, 114 (Fla. 1994).

46. *See* O'Brien, *supra* note 40, at 877.

47. Prine, *supra* note 9, at 1008 n.77–78 (citing MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989)); NEB. REV. STAT. ANN. § 20-201 (West 1997); N.Y. CIV. RIGHTS LAW § 50-b,c (McKinney 1992); R.I. GEN. LAWS § 9-1-28.1 (1997); VA. CODE ANN. § 8.01-40 (Michie 1992); WIS. STAT. ANN. § 895.50 (West 1997)).

48. Prine, *supra* note 9, at 1008 (quoting Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447 (N.Y. Ct. App. 1902)).

49. 420 U.S. 469 (1975).

extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime."[50] In this particular case, appellee's teen-aged daughter was raped and killed.[51] Appellant reporter learned the name of the victim from court records made available to him by the clerk of court and broadcast the name of the deceased rape victim.[52] Relying on Georgia's rape shield statute, the girl's father sought money damages, claiming the broadcaster violated his right to privacy by publicizing his daughter's name.[53] The publisher claimed privilege based on the First and Fourteenth Amendments.[54] The trial court held that the statute granted a civil remedy to victims injured in such a way, and the court granted summary judgment for the plaintiff.[55]

The Georgia Supreme Court used the rape shield statute's existence as evidence of public policy that a rape victim's name is not of legitimate public concern.[56] The court found the statute was a "legitimate limitation on the right of freedom of expression contained in the First Amendment" because the interest in the identity of the victim did not "rise to the level of First Amendment protection."[57]

Justice White, in an opinion reversing the Georgia Supreme Court's ruling, noted that the tort of public disclosure of private facts "most directly confront[s] the constitutional freedoms of speech and press" because it involves an injury resulting from publication of information "whether true or not."[58] The Court avoided answering the question as to whether it is constitutional for a state to "define and protect an area of privacy free from unwanted publicity in the press."[59] Instead, the Court decided a very narrow issue based on the facts of this case: Can a state protect the identity of a rape victim by imposing sanctions on truthful publication of information garnered from records which are publicly accessible?[60]

There could be no doubt the crime and the judicial proceedings were of "legitimate concern to the public" and therefore, "[fell] within the responsibility of the press to report the operations of government."[61] The Court reasoned that "[a] trial is a public event [and w]hat transpires in the court room is public property."[62] This left few options for sexual assault victims who want to participate in the prosecution of their attackers. Courts have no "perquisite . . . to suppress, edit, or

50. *Id.* at 471.
51. *Id.*
52. *Id.* at 472–74.
53. *Id.* at 474.
54. *Id.*
55. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 474 (1975).
56. *Id.* at 475.
57. *Id.* (quoting Cox Broad. Corp. v. Cohn, 200 S.E.2d 127, 134 (Ga. 1973)).
58. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 489 (1975).
59. *Id.* at 491.
60. *Id.*
61. *Id.* at 492.
62. *Id.* at 492 (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

censor events which transpire in proceedings before it."[63]

The Court's failure to commit to the broader issue indicated a recognition that a private individual may require heightened protection from invasions of privacy, but only under very particular facts. The Court failed to indicate what would constitute a protection-invoking fact pattern. The result is that sexual assault victims do not know what particular facts would protect them, and cannot make decisions in reliance on a remedy.

The Court recognized that there are categories of expression which are of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[64] The fact that the state put the name in the records, however, meant the state found the name to be of social value.[65] The Court proposed that states protect the identities of the victims by not having them in public documentation or exposing them in other ways,[66] and suggested that the media must decide what to publish as opposed to the judiciary.[67] The Court delivered the issue back to interested parties to figure out how to handle this delicate balance.

For plaintiffs like those in *Doe 2*, this does not bode well because it reveals that the Fourth Circuit was correct in its application of the law. *Cox* implies that even with the judge's order for the press to remain silent about the name of the victim, courts do not have any particular power to control what the press prints.[68] Additionally, the proceeding itself could be viewed as being a public record because it is public property.[69]

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

Another critical decision in the area of public disclosure is *Florida Star v. B.J.F.*[70] *Florida Star* involved an appeal brought by a newspaper publisher found civilly liable, pursuant to a Florida statute, for publishing a sexual assault victim's name.[71] A newspaper employee obtained the information from a police report publicly accessible in a pressroom.[72] The lower court found that the statute balanced "First Amendment and privacy rights" in a "narrow set" of circumstances.[73] Additionally, the judge found the newspaper per se negligent, and

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63. *Cox Broad. Corp.*, 420 U.S. at 492–93 (quoting *Craig*, 331 U.S. at 374).
64. *Cox Broad. Corp.*, 420 U.S. at 495 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
65. *Id.* at 495.
66. *Id.* at 496.
67. *Id.*
68. *Id.* at 492–93 (citing Craig v. Harney, 331 U.S. 367, 374 (1947)).
69. *Id.* at 492 (citing *Craig*, 331 U.S. at 374).
70. 491 U.S. 524 (1989).
71. *Id.* at 526.
72. *Id.* at 527.
73. *Id.* at 528.

a jury awarded $75,000 in compensatory damages and $25,000 in punitive damages.[74]

On appeal, the United States Supreme Court extended *Cox*, thus making a tort or statutory remedy for publication of sexual assault victims' names even less accessible.[75] The Court limited the tort further by reaffirming the press' rights to publish not only information obtained during court proceedings, but also information prior to court proceedings.[76]

The Court applied the standard from *Smith v. Daily Mail Publishing Co.*[77] to limit the decision to the facts of the case.[78] The *Daily Mail* standard requires that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, *absent a need to further a state interest of the highest order.*"[79] In applying the *Daily Mail* standard to *Florida Star's* facts, the Court found that the fact that the state agency exercised its discretion in making information confidential did not make obtaining the information about the rape unlawful when furnished by the government.[80] Furthermore, the Court found the article on the violent crime, rather than the identity reported in it, to be "a matter of public significance."[81]

The Court found that the interests of the victims of sexual assault are "highly significant,"[82] and once again, the Court declined the opportunity to completely rule out that there may be some circumstances under which a state may need to impose civil sanctions to advance the interests of the victim within the bounds of the *Daily Mail* standard.[83] The facts in *Florida Star*, however, did not warrant such state action according to the Court.[84] An important reason was that the newspaper gained access to the information because of the government's mistake.[85] The government could have prevented the press' access to the victim's full name simply by not including it in the report.[86]

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74. *Id.* at 528–29.

75. *Id.* at 541.

76. Florida Star v. B.J.F., 491 U.S. 524, 541 (1989).

77. 443 U.S. 97 (1979).

78. *Florida Star*, 491 U.S. at 533 (citing Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

79. *Id.* at 533 (citing *Smith*, 443 U.S. at 103) (emphasis added)).

80. *Id.*, 491 U.S. at 536.

81. *Id.* at 536–37.

82. *Id.* at 537. *But see* Linda Perry, *When Identities are 'Wrongfully Disclosed': How* The Florida Star v. B.J.F. *has Changed Privacy Protection*, 3 U. FLA. J.L. & PUB. POL'Y 101, 130 (1990) (reasoning that Justice White's dissenting opinion misinterprets the majority opinion when he said the Court found the interests of rape victims were not of the highest order; implying that the majority never recognized "highly significant" as being less significant than "highest order").

83. *Florida Star* v. B.J.F., 491 U.S. at 537.

84. *Id.*

85. *Id.* at 538.

86. *Id.*

The Court also held that the Florida standard of per se liability was too broad.[87] The Court distinguished the civil liability imposed by the statute from the civil liability created by the invasion of privacy tort by noting that the per se standard did not allow the case-by-case examination of whether or not the information disclosed was "highly offensive."[88] Instead, the liability was automatic regardless of mitigating facts or scienter.[89] Also, the statute likely was too underinclusive to accomplish its goal.[90] A rape shield statute must be applied "evenhandedly."[91]

Suggestions for protection of information in the hands of the government included "classify[ing] certain information, establish[ing] and enforc[ing] procedures ensuring its redacted release, and extend[ing] a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination."[92] In cases where the government holds the information, there is always "a less drastic means than punishing truthful publication"[93] because the press would not be the "source of the release"; rather, the government would be.[94] Punishing publication of information that is available to the public probably would not advance a state interest, and laying responsibility in the hands of the government would be more narrowly tailored to fit the interests involved.[95]

In sum, *Cox* and *Florida Star* together whittle away at the potential for use of the public facts tort or confidentiality statutes to protect the names of sexual assault victims. These cases effectively tell us what the standard is not, but do not tell us what it is. The lower courts and state legislatures are left to continue testing the waters. It is important to note that the United States Supreme Court has examined very few private facts cases, with only two brought by or on behalf of sexual assault victims; all were decided in favor of the media defendant.[96] The Court has chosen its cases carefully and appears to suggest to leave the press alone and focus on procedures which have led to the publication of such information. Once it gets to the press, a sexual assault victim's name becomes public property. Even though this is not necessarily the result intended by the *Cox* Court, as is indicated by Justice

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87. *Id.* at 539.
88. *Id.*
89. Florida Star v. B.J.F., 491 U.S. 524, 539 (1989).
90. *Id.* at 540.
91. *Id.*
92. *Id.* at 534.
93. *Id.*
94. *Id.* at 535.
95. *See* Florida Star v. B.J.F., 491 U.S. 524, 535 (1989); *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) ("By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.").
96. *See Cox Broad. Corp.*, 420 U.S. at 496–97 (holding "the First and Fourteenth Amendments bar[]" Georgia from making the media defendant civilly liable for publication of a sexual assault victim's name); *see also Florida Star*, 491 U.S. at 541 (holding that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed . . . only when narrowly tailored to a state interest of the highest order").

White's dissent in *Florida Star*, the opinions are consistent because the only solution offered is to give the issue back to the government to decide how to implement these decisions.

III. *DOE 2 V. ASSOCIATED PRESS* AND THE STATE OF THE LAW IN SOUTH CAROLINA

South Carolina addresses the publication of sexual assault victims' names through the invasion of privacy tort and through legislation.[97] In recent years, these two routes to a remedy for public disclosure of a sexual assault victim's name have grown contradictory. While the statute provides criminal sanctions for publishing the name of a rape victim, the tort has become ineffective in protecting the anonymity of sexual assault victims.

A. Background

One of the earliest South Carolina cases to recognize a public disclosure right to privacy tort was *Meetze v. Associated Press*.[98] While this case was not brought on behalf of a sexual assault victim, it is cited in many of South Carolina's cases addressing the issue, and set the standard for privacy cases in South Carolina jurisprudence.

In *Meetze*, the identities of a married twelve-year-old girl, who had given birth to a child, and her husband were published in several papers despite their repeated requests to maintain their anonymity.[99] The Supreme Court of South Carolina found that anything of "legitimate public or general interest" is publishable as long as it is not "mere curiosity."[100] The *Meetze* court further defined the boundaries of the tort by noting that "[r]evelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency."[101] A person may lose his right to privacy, however, by becoming an unwilling participant in an "occurrence of public or general interest."[102] The *Meetze* court declined to grant relief, based on the principles above, because a twelve-year-old giving birth was of public interest as an unusual "biological occurrence," and because the birth of the child was a matter of public record.[103]

The most important South Carolina case in the area of privacy rights is *Doe v.*

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97. *See* S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976) (providing criminal sanctions for publication of sexual assault victims' names); Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502, 504–05 (4th Cir. 1963) (reaffirming that South Carolina recognizes a common law cause of action for "intrusion upon privacy").

98. 230 S.C. 330, 95 S.E.2d 606 (1956).

99. *Id.* at 333–34, 95 S.E.2d at 607–08.

100. *Id.* at 337, 95 S.E.2d at 609 (quoting 41 AM. JUR., § 14 (1946)).

101. *Id.* at 337, 95 S.E.2d at 609 (quoting Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940)).

102. *Id.* at 337, 95 S.E.2d at 609.

103. *Id.* at 338, 95 S.E.2d at 610.

Berkeley Publishers.[104] There, the state supreme court held that a newspaper's truthful publication that an inmate was a sexual assault victim while incarcerated is "of legitimate public . . . interest" *as a matter of law*.[105] The court of appeals decision that the issue was for the jury to consider was reversed because the court "erred in separating the plaintiff's identity from the event."[106] The court applied *Meetze* and reasoned that state law requires that when a person is involved in an incident "of public or general interest, . . . 'the publication of his connection with such an occurrence is not an invasion of his right to privacy.'"[107]

Berkeley is consistent with *Florida Star*, although the *Berkeley* court did not cite *Florida Star*. In *Berkeley*, the Supreme Court of South Carolina, like the United States Supreme Court in *Florida Star*, found a crime-related incident to be the public's business as a matter of law, taking from the jury's hands the chance to decide.[108] The *Berkeley* court's decision is contrary to the legislature's impression of what constitutes public interest, as is indicated by South Carolina's rape shield statute, and it is reflective of the finding in *Florida Star* that the public has an interest in crime. The *Berkeley* court used the same logic as the United States Supreme Court in *Florida Star* when it declined to separate the victim's identity from the event at issue.

B. Doe 2 v. Associated Press

The most recent decision addressing publication of sexual assault victims' identities in South Carolina is *Doe 2 v. Associated Press*.[109] In *Doe 2*, a sexual molestation victim brought an action against a media defendant for publishing his name.[110] The victim agreed to make a victim impact statement after the judge allegedly ordered the press to refrain from publishing his name.[111] Later, the victim learned from friends that his name had been published.[112] The trial court awarded a motion to dismiss for failure to state a claim, and Doe appealed.[113]

South Carolina demands that the defendant must have "intentionally committed 'public disclosure of private facts about the plaintiff'—facts 'in which there is no legitimate public interest.'"[114] The Fourth Circuit Court of Appeals, applying South Carolina law, reasoned that the courtroom was open to anyone and South Carolina

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104. 329 S.C. 412, 496 S.E.2d 636 (1998).
105. *Id.* at 413, 496 S.E.2d at 636.
106. *Id.* at 414, 496 S.E.2d at 637.
107. *Id.* at 414, 496 S.E.2d at 637 (quoting *Meetze*, 230 S.C. at 337, 95 S.E.2d at 609).
108. *Id.* at 413, 496 S.E.2d at 636.
109. 331 F.3d 417 (4th Cir. 2003).
110. *Id.* at 419.
111. *Id.* at 419–20.
112. *Id.* at 420.
113. *Id* at 419.
114. *Id.* at 421 (quoting Snakenberg v. Hartford Cas. Ins. Co., 299 S.C. 164, 170–71, 383 S.E.2d 2, 6 (Ct. App. 1989)).

case law does not indicate that there is a privacy interest in information obtained from open court proceedings.[115] Further, closing the courtroom would have been contrary to public policy as "our criminal law tradition *insists* on public indictment, public trial, and public imposition of sentence."[116] Public access to criminal proceedings "is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused."[117] The *Doe 2* court indicated that the name of the victim, as information revealed in the courtroom, is certainly a matter of public interest.[118] In consideration of the circumstances under which the victim's name became public concern, the *Doe 2* court stated that, as in *Berkeley*, the victim's involvement in an incident in which the public has an interest makes that connection of public interest as well, even though that involvement was involuntary.[119] Thus, the victim's claim was properly dismissed despite that he was not a willing participant in the event precipitating the trial, and he likely would not have been a willing participant in the post-trial proceeding had the judge not assured he would remain anonymous to the public.

The *Doe 2* result is consistent with recent South Carolina case law and recent United States Supreme Court decisions. The Supreme Court of South Carolina stated that crime is a legitimate public interest and implied that the victim's name is entwined with the crime story.[120] The United States Supreme Court has not made the constitutionality of the privacy tort completely clear in the context of publishing sexual assault victims' names, but has indicated that publicly accessible information is fair game when truthfully reported, and the public has a legitimate interest in crime as a matter of law. The legal analysis in *Doe 2* was correct based on *Berkeley*, or on *Cox* and *Florida Star*, but the ultimate outcome is harsh.

C. South Carolina's Rape Shield Statute Does Not Provide a Civil Remedy

South Carolina addresses publication of sexual assault victims' names by statute[121] and has done so since before 1912.[122] *Dorman v. Aiken Communications, Inc.*[123] changed the potential impact of the statute by addressing whether the rape shield statute creates a civil cause of action.[124]

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115. Doe 2 v. Associated Press, 331 F.3d 417, 421–22 (4th Cir. 2003).

116. *Id.* at 421 (quoting Smith v. Doe, 123 S. Ct. 1140, 1150 (2003).

117. *Id.* (quoting *Smith*, 123 S. Ct. at 1150).

118. *Id.* at 421–22.

119. *Id.* at 422 (quoting Doe v. Berkeley Publishers, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998)).

120. *Doe*, 329 S.C. at 413–14, 496 S.E.2d at 636–37.

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

122. *See* O'Brien, *supra* note 40, at 874 n.17.

123. 303 S.C. 63, 398 S.E.2d 687 (1990).

124. *Id.* at 67, 398 S.E.2d at 689; *cf.* Nappier v. Jefferson Standard Life Ins., Co., 322 F.2d 502, 505 (4th Cir. 1963) (declining to address whether the statute would allow a civil remedy because the women involved had a case for common law tortious invasion of privacy based on the statute's

Dorman involved a sexual assault victim's attempt to bring a civil action against a publisher for reporting her identity in violation of South Carolina's rape shield statute after discovering the name and details from private sources.[125] The victim was a real estate agent who was raped at gunpoint.[126] The Supreme Court of South Carolina held that the statute on which the plaintiff based her tort action was not unconstitutional, but did not create a private cause of action for civil liability against the publisher.[127] The *Dorman* court found that the statute at issue, as indicated by its clear language, is a criminal statute which provides criminal sanctions for the purpose of protecting the public at large and not individuals.[128]

The statute is now of little value to a rape victim whose identity is revealed by the publisher. The criminal sanctions, aside from potential jail time which likely would be reserved for the most egregious scenarios, do not carry the same deterrent value as potential tort damages. Arguably, a publisher could weigh the value of papers sold, the unfettered freedom to publish information he deems publishable, and the likelihood that sanctions would be exacted, against the cost of the fine imposed, and not be deterred from publishing a victim's name.

It seems that the law is settled that if something is a part of a public record, it is then a matter of public interest. A "proper case" would be one in which the interests were so significant as to be considered of the highest order; there were no other alternatives to protect the victim; it is based on common law or statutes allowing case-by-case analysis; and the information was unlawfully obtained.[129] If the press obtains this information legally, as it surely would since it is accessible to the public, then the information is likely privileged with or without the consent of the subject. This privilege attaches despite the fact that the information is merely peripheral to a true story. Victims appear to be left with few options: increasing government regulation of what goes into a public record; allowing the press to self-regulate,[130] thus leaving sexual assault victims vulnerable to a critical and purposeful, yet still profit-driven, business; or continuing to present variations of the facts to the courts until a proper case is found.

IV. The Successes and Failures of Alternative Approaches

This section explores alternative approaches, both successful and unsuccessful, for concealing the identities of sexual assault victims or permitting certain remedies, and analyzes how lower courts have received these approaches.

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existence).

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

126. *Id.* at 64–65, 398 S.E.2d at 688.

127. *Id.* at 66–67, 398 S.E.2d at 689.

128. *Id.* at 67, 398 S.E.2d at 689.

129. Perry, *supra* note 82, at 130.

130. *See* Doe v. Sarasota-Bradenton Fla. Television Co., 436 So. 2d 328, 332 (Fla. Dist. Ct. App. 1983) (finding that the media must self-monitor using its own balancing test).

A. Generally, Alternative Causes of Action Have Not Been Successful

Attorneys for sexual assault victims who wish to remain anonymous have attempted to use other causes of action to support, or replace, the tort of publication of private facts because the United States Supreme Court has rendered the tort ineffective in this context.[131] Some suggested alternatives include fraudulent misrepresentation and infliction of emotional distress.[132] These alternative legal theories must be excluded from any workable, consistent solution.

Courts have rejected intentional misrepresentation claims because a "promise to do something in the future . . . which . . . is not kept, is not fraud."[133] Additionally, it is difficult at best to establish a pecuniary loss resulting from publication, which is an essential element of any claim for fraud.[134] Intentional infliction of emotional distress claims have been unsuccessful in general because the use of a victim's name is typically not "outrageous in character, or so extreme in degree, as to go beyond all possible bounds of decency in a civilized community."[135] Ultimately, courts have indicated that the interests involved remain the same regardless of whether attorneys call the claim intentional infliction of emotional distress or publication of private facts, and therefore, such claims must fail.[136]

Where a publisher, directly or through a reporter, has made a promise, courts may allow a plaintiff to proceed on a promissory estoppel theory because the United States Supreme Court has indicated that general laws apply to the press as they do to individual citizens.[137] Unfortunately, many victims never have an actual promise on which they rely. The typical scenario, as reflected in cases such as *Florida Star* and *Cox*, is that the reporter obtains the victim's name either through public records or court proceedings.[138] When the State attempts to play the role of editor for the

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131. The *Doe 2* court summarily rejected each alternative claim advanced by the plaintiff. *Doe 2 v. Associated Press*, 331 F.3d 417, 422 (4th Cir. 2003). The fraudulent misrepresentation claim was based on the theory that the reporter made an implicit agreement with the plaintiff when he failed to reveal his intent to publish the victim's identity despite the judge's order that the information must remain confidential. *Id.* at 420. The *Doe 2* court refused to recognize in the press a fiduciary duty to strangers about whom they publish stories. *Id.* at 421.

132. *See id.* at 420–22; *see also* Morgan v. Celender, 780 F. Supp. 307, 310–11 (W.D. Pa. 1992) (rejecting misrepresentation and intentional infliction of emotional distress arguments).

133. *Morgan*, 780 F. Supp. at 311 (citing Krause v. Great Lakes Holdings, Inc., 563 A.2d 1182, 1187 (Pa. Super. Ct. 1989)).

134. *Id.*

135. *Id.* at 310.

136. *See* Uranga v. Federated Publ'ns, Inc., 67 P.3d 29, 35 (Idaho 2003) (changing the name of the cause of action to infliction of emotional distress makes no difference constitutionally).

137. Cohen v. Cowles Media Co., 501 U.S. 663, 671–72 (1991).

138. Florida Star v. B.J.F., 491 U.S. 524 (1989) (holding that the publication of information about the victim that was obtained in a pressroom at the police station is protected by the First Amendment); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (holding that the publication of information about the victim that was obtained from the clerk of court is protected under the First and Fourteenth Amendments).

press by imposing liability upon publication of certain information, courts are likely to find such actions to violate the First Amendment.[139] When the parties themselves determine their obligations, the court may find that generally applicable laws apply because of a business-like relationship.[140] If applied to more typical circumstances, a promissory estoppel approach would not be a successful alternative because there would be no promise. Alternative legal theories, then, frequently accompany or replace the publication of private facts tort, but these theories are not any more workable than the privacy tort.

B. Injunctions

Injunctions initially seem logical in facilitating anonymity and likely would have protected the victim in *Doe 2*. Why, then, are they not systematically used to preserve the anonymity of those who are sexually assaulted?

Injunctions and contempt orders pose serious constitutional problems when used against the media in the context of court proceedings. Any order to refrain from publishing information disclosed in an open courtroom, and any contempt charge for such publication, are subject to close examination because of the control the court would exercise over the content of expression.[141] There are rare times when a prior restraint is constitutionally valid, but when the information is disclosed in public forums or records, "the United States Supreme Court and appellate courts around the country have consistently rejected any restraint on its publication."[142] Prior restraints seldom are successful[143] and are not likely to be a reliable alternative for victims.[144]

C. Statutes Directed Toward Nonpublication

Statutes targeting publication of victims' names (i.e., rape shield statutes or rape confidentiality statutes) provide another alternative approach to protecting sexual assault victims' anonymity. Reliance on this approach is tenuous because *Cox* and *Florida Star* struck down statutes targeting publication. *Florida Star* indicated, however, that not all nonpublication statutes would be found unconstitutional and

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139. *See Cohen*, 501 U.S. at 670.

140. *Id.*

141. *See* Jeffries v. Mississippi, 724 So.2d 897, 899–900 (Miss. 1998) (stating that a prior restraint on speech is presumptively invalid and finding that a court order to refrain from publishing information obtained in open court and the subsequent contempt charge amounted to prior restraint).

142. *Id.* at 900.

143. *See* N. Y. Times Co. v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (implying that restraints cannot occur unless disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people").

144. *But see* In re a Minor, 595 N.E.2d 1052, 1055–57 (Ill. 1992) (finding that court admittance conditioned upon a pledge of silence was proper). *In re a Minor* does not reflect the majority of jurisdictions on this issue, and appears to illustrate the adage that hard facts make bad law.

suggested the form of a constitutional statute.[145] The interest that would justify civil liability must be "of the highest order."[146] The problem is that the Court also implied that the interest in protecting the information at issue was outweighed by First Amendment concerns, especially in the context of a crime-related story. If a statute is to survive a constitutional hurdle, it would also have to allow for a case-by-case review.[147] It appears, however, that the *Daily Mail* balancing analysis would always make this statutory approach risky, or at least ineffective, as long as courts can theorize other alternatives to punishing the press.[148]

D. Statutes Directed Toward Governmental Nondisclosure

An approach to protection of rape victims' privacy that appears to have the United States Supreme Court's approval is legislation directed toward governmental nondisclosure of such information. In both *Cox* and *Florida Star*, the Court suggested that government agencies should take steps to prevent disclosure of information that is considered confidential and even recommended "extend[ing] a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination."[149]

California and New York have noteworthy forms of legislation addressing governmental disclosure of sexual assault victims' names.[150] In *People v. Ramirez*,[151] the California statute precluded a defendant in a criminal sexual assault case from forcing the accuser to use her real name in court proceedings.[152] The *Ramirez* court, after noting that the statute was enacted in response to *Cox* and its progeny, found that the defendant's right to confront his accuser did not outweigh the victim's right to privacy, and in any event, was only slightly impinged upon by the statute's provision for the use of pseudonyms.[153] The statute allows the use of pseudonyms in court records as long as it is "reasonably necessary" to protect the

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145. Florida Star v. B.J.F., 491 U.S. 524, 538–41 (1989).

146. *Id.* at 533.

147. O'Brien, *supra* note 40, at 884–85 (posing that changing South Carolina's rape shield statute to allow for case-by-case review might allow the state to salvage the statute).

148. *See generally* Dye v. Wallace, 553 S.E.2d 561, 562–63 (Ga. 2001) (striking down Georgia's rape confidentiality statute as unconstitutional because the punishment was not "'narrowly tailored to a state interest of the highest order'") (quoting *Florida Star*, 491 U.S. at 541); Florida v. Globe Communications Corp., 648 So. 2d 110, 112 (Fla. 1994)) (finding Florida's rape shield statute unconstitutional because the same interests in this case "were not sufficiently furthered by the automatic imposition of civil sanctions under the statute to establish a 'need' within the meaning of *Daily Mail* for such extreme measures").

149. *Florida Star*, 491 U.S. at 534.

150. *See* CAL. PENAL CODE § 293.5 (West 1992); N.Y. CIV. RIGHTS LAW § 50-b, c (McKinney 1992).

151. 64 Cal. Rptr. 2d 9 (Ct. App. 1997).

152. *Id.* at 14.

153. *Id.* at 12, 15.

victim's privacy and will not "unduly prejudice the prosecution or the defense."[154]

New York's statutory scheme also places responsibility for protection of sexual assault victims' identities in government hands.[155] The scheme extends privacy protection from governmental disclosure to adult sexual assault victims.[156] Disclosure may occur only upon application to the court and victim notification, and at the court's discretion or with the victim's permission.[157] Additionally, the scheme creates a statutory cause of action to recover damages suffered "by reason of such wrongful disclosure" and allows "reasonable attorney's fees to a prevailing plaintiff."[158]

It is significant that neither statute punishes the media for truthful publication of the identity and details personal to a sexual assault victim. Instead, they focus on the public official who disclosed the information. This approach is clearly in line with *Cox* and *Florida Star*. These statutory schemes also allow for case-by-case consideration in that they allow judicial discretion and the balancing of interests. Although *Florida Star* did not specifically call for case-by-case analysis in the context of governmental nondisclosure, such discretion is strongly implied in the Court's rejection of the per se standard used in Florida's rape confidentiality statute and the Court's use of *Daily Mail* to balance competing interests.

E. Redacted Records

Redaction of information is another device for consideration in protecting a victim's anonymity. Redacting names would simply involve blacking out the names of victims in publicly accessible information. The *Florida Star* opinion specifically mentioned and approved the use of redaction in the context of sexual assault victims.[159] An important factor in the use of this device is whether the state considers the victim's name confidential. Freedom of Information statutes vary from state to state, and some states do not specifically catagorize sexual assault victims' names as confidential.[160]

In *Doe v. Board of Regents of the University System of Georgia*,[161] the Georgia Court of Appeals crafted a solution to this problem.[162] The plaintiff could find no support in Georgia's Open Records Act for an injunction restraining the press from

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154. *Id.* at 12 (quoting CAL. PENAL CODE § 293.5 (West 1992)).

155. N.Y. CIV. RIGHTS LAW § 50-b, c (McKinney 1992).

156. *Id.*

157. *Id.* at § 50-b (McKinney 1992); *see also* Deborah S. v. Diorio, 583 N.Y.S.2d 872, 881 (Civ. Ct. 1992) (finding that the victim of acquaintance rape was entitled to keep her identity confidential pursuant to the 1991 New York statutory amendments in a civil suit against her attacker), *modified on other grounds, aff'd*, 612 N.Y.S.2d 542 (App. Term 1994).

158. N.Y. CIV. RIGHTS LAW § 50-c.

159. Florida Star v. B.J.F., 491 U.S. 524, 534 (1989).

160. *See* GA. CODE ANN. § 50-18-72 (2002); S.C. CODE ANN. § 30-4-40 (Law. Co-op. 1991).

161. 452 S.E.2d 776 (1994).

162. *Id.* at 780.

gaining access to police records targeting her rape.[163] In the alternative, she argued that her name should be redacted by virtue of Georgia's rape victim confidentiality statute.[164] The court stated that the law favors disclosure and any exclusion or exemption not enumerated in the Act would have to be narrowly applied.[165] The *Board of Regents* court reasoned, though, that in the event of a "stalemate between the Open Records Act and the confidentiality statute, it must be resolved in favor of providing the shield rather than the sword."[166] Because the confidentiality statute was specific as opposed to the Open Records Act, the *Board of Regents* court granted the injunction preventing the University from releasing the victim's name.[167] The rape confidentiality statute was later held unconstitutional in *Dye v. Wallace*.[168] The application of one statute to fortify another seems sound, however. If legislation is drafted according to the *Florida Star* suggestion, redacting records seems to be a relatively sound tool.

V. RECOMMENDED LEGISLATION

Regulation addressing governmental nondisclosure is the most reliable option for protecting the privacy of sexual assault victims. In *Florida Star* and *Cox*, the United States Supreme Court endorsed this type of regulation as a reasonable alternative.[169] The Court gives its approval even though increased governmental regulation of the media's access to information would be contrary to the policy of subjecting the government to public scrutiny. It appears that there is no completely satisfactory alternative given the nature of the conflict and the interests involved. The United States Supreme Court has indicated that legislation targeting the governmental nondisclosure might be appropriate because it would be more narrowly tailored to protect the interests involved.

Several states such as New York, California, and Texas have statutory schemes that address the issue of governmental disclosure of sexual assault victims' identities. Some statutory schemes allow governmental discretion in determining what should be disclosed, or whether pseudonyms should be used.[170] Such discretion might be more acceptable to the Supreme Court because it is less drastic than a carte blanche application. *Florida Star* indicated that case-by-case consideration is necessary in rape shield statutes, rather than a per se standard. Statutes addressing governmental nondisclosure and those that address

163. *Id.* at 779.
164. *Id.*
165. *Id.* at 780.
166. *Id.*
167. Doe v. Board of Regents, 452 S.E.2d 776, 780 (Ga. Ct. App. 1994).
168. 553 S.E.2d 561, 561–63 (Ga. 2001).
169. Florida Star v. B.J.F., 491 U.S. 524, 534 (1989); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).
170. Two examples are Georgia's Open Records Act and South Carolina's Freedom of Information Act. GA. CODE ANN. § 50-18-72 (2002); S.C. CODE ANN. § 30-4-40 (Law. Co-op. 1991).

nondisclosure by the press should be distinguished, however. The interests are not the same in cases of governmental nondisclosure. The reason for demanding a per se standard is that the singling out of the media from the general public violates the First Amendment. Statutes that address the government's disclosure of names would be applied equally. If a nondisclosure statute directed toward the government allowed too much discretion, it would be difficult to impose any sanctions for violations because the duty would no longer be ministerial.[171] Thus, legislation directed toward the government must not allow for so much discretion that it makes the scheme ineffective and superfluous.

A cause of action against government agencies, or some sort of compensation system, would be a necessary part of such a statute in order to make it more effective.[172] The problem in many cases is government officials disclosing information considered confidential.[173] If no remedy were allowed, there would be little deterrent value, and little incentive to take precautions. The plaintiff in *Doe 2*, however, would not benefit from a private cause of action because the judge would be shielded through immunity, as would the solicitor.[174] Arguably, the existence of a civil remedy might make everyone involved more cautious about protecting the victim's identity and educating victims about safeguards available to them.

Upon determining that the names of sexual assault victims are confidential, the legislature should develop a scheme that would call for more consistent use of pseudonyms in court room documents and proceedings.[175] South Carolina uses pseudonyms, but has no statutory procedure in place to call for consistency on pain of sanctions. California and Texas statutes call for judicial discretion to allow the judge to consider the rights of both the accuser and the accused, and pseudonyms are used upon application of the accuser.[176] In *People v. Ramirez*,[177] the court held

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171. *See generally* Bloch v. Ribar, 156 F.3d 673, 687 (6th Cir. 1998) (holding that a law enforcement official was not liable for invasion of privacy because of qualified immunity due to lack of notice, but that law enforcement officers in the state were on notice from this decision); Bellamy v. Brown, 305 S.C. 291, 291, 295, 408 S.E.2d 219, 219, 221 (1991) (holding that FOIA, a statutory disclosure scheme, created no special duty of confidentiality to an individual through its exceptions because the exceptions are discretionary).

172. *See Florida Star*, 491 U.S. at 534.

173. *See* Doe 2 v. Associated Press, 331 F.3d 417, 419 (4th Cir. 2003); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 472 (Tex. 1995); Macon Tel. Publ'g Co. v. Tatum, 436 S.E.2d 655, 657 (Ga. 1993); Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 1517–18 (E.D. Pa. 1990).

174. Note that the *Doe 2* opinion does not lay blame on any particular person for releasing the name in such a manner, and the victim participated in the proceedings voluntarily.

175. E-mail from Jay Bender, Esquire, Baker, Ravenel & Bender, LLP, to Kimberly Blackburn, Law Student, University of South Carolina School of Law (Sept. 16, 2003, 06:50:00 EST) (on file with author) (indicating that, in *Doe 2*, pseudonym use might have effectively balanced the interests of the press and society and the interests of the victim).

176. People v. Ramirez, 64 Cal. Rptr. 2d 9, 15 (Ct. App. 1997) (citing CAL. PENAL CODE § 293.5 (West 1992)); *Star-Telegram, Inc.*, 915 S.W.2d at 477 (Gonzalez, J., concurring) (referring to a Texas law that allows a victim to use pseudonyms).

177. 64 Cal. Rptr. 2d 9 (Ct. App. 1997).

that the California statute allowing use of a pseudonym by a sexual assault victim in a civil court action brought against her attacker did not deny the accused his Sixth Amendment rights because it allowed a balancing of rights.[178] Of course, it would be a more effective protection of privacy if pseudonyms were systematically and automatically used in cases of sexual assault. This systematic use could protect a victim like the victim in *Doe 2* from any carelessness that would lead to disclosure of his identity. The legislature could provide for the same balancing of rights by having the accused party make application for disclosure of the victim's name. This approach, modeled after the New York statute in *Diorio*, would allow for consideration of the rights involved but would leave less room for error.

An additional requirement should be to systematically redact the names of rape victims from police records. It is not clear how this requirement could be reconciled with the Freedom of Information Act (FOIA) in South Carolina, or similar acts in other jurisdictions. South Carolina's FOIA statutes allow for exemptions.[179] In South Carolina's FOIA, however, the exemptions listed are acted upon at the discretion of the government.[180] This might be best addressed as it was in *Board of Regents*, where the court used the rape confidentiality statute to create an exception under the State's Open Records Act.[181] The Supreme Court of Georgia later found the rape confidentiality statute used was unconstitutional,[182] but the approach seems sound. The United States Supreme Court indicated in *Florida Star* that states may consider sexual assault victims' names confidential.[183] Thus, there is support behind a state legislature developing statutes calling for redacted names as standard procedure.[184]

As with the application of tort law or confidentiality statutes, the use of legislation addressing governmental nondisclosure is not without its problems and likely would result in continued debate. An advantage is that there would be no direct conflict between the victim and the media. Additionally, such legislation would lead to a more systematic handling of personal information upon which

178. *Id.* at 15.

179. S.C. CODE ANN. § 30-4-40 (Law. Co-op. 1976).

180. *Id.*

181. Doe v. Board of Regents, 452 S.E.2d 776, 780 (Ga. Ct. App. 1994).

182. Dye v. Wallace, 553 S.E.2d 561, 561 (Ga. 2001).

183. Florida Star v. B.J.F., 491 U.S. 524, 534, 537 (1989).

184. South Carolina has addressed the rights of victims in its South Carolina Victims' Rights Amendment to the State Constitution. The Hon. Marc H. Westbrook & Thad H. Westbrook, *Balancing The Scales: Victims' Rights in South Carolina's Justice System*, S.C. LAWYER, May-June 1999, at 27 (quoting S.C. CONST. art. I, § 24) (indicating the purpose of the amendment is "[t]o preserve and protect victims' rights to justice and due process."). The implementing statutes address the accused giving restitution to the victim if convicted, but do not call for civil liability, and do not call for use of pseudonyms or redacting information specifically. Westbrook & Westbrook, *supra*, at 29–30. South Carolina, by statute, classifies a victim's name and identifying information as confidential except when used for the purpose of contacting the victim when the convicted perpetrator has changed holding facilities, which illustrates the legislature's interest in protecting victims' privacy. S.C. CODE ANN. § 16-3-1525(C) (Law. Co-op. 2003).

victims can rely. However, such legislation might foster conflict between the press and state and local governments because the policies behind protecting the rights of the press are the same whether their foe is the victim in the courtroom or the government in the records room. There may be no constitutionally bullet-proof solution. It appears that the United States Supreme Court has offered a solution it believes to be the best available in consideration of the interests involved. The press retains its right to publish information it obtains, even though it may be an illusion of freedom. The government becomes more careful, but also more powerful. And the victim feels a little more secure, but effectively is without a remedy against the press if the information reaches them by way of wrongful disclosure.

VI. CONCLUSION

The United States Supreme Court has limited the alternatives for protection from or remedy for the publication of sexual assault victims' identities by the media. The overwhelming majority of jurisdictions in which this issue is heard agree that sexual assault victims' privacy rights in this context are dramatically undercut. Although not all rape confidentiality statutes have been found unconstitutional, the Supreme Court is consistent in finding that a name connected with a crime is legitimately a public matter, and that the press cannot be punished for publication of truthful, newsworthy information unless this right is countered by a state "interest of the highest order."[185] The Court also indicated by its holding in *Florida Star* that not even physical protection of the individual victimized by a rape is a reason sufficient enough to warrant punishment for publication of a victim's name.[186]

The most reliable way to protect a victim from unwanted publicity after an assault is to follow the suggestion of the Supreme Court and enact legislation that codifies procedures to prevent the information from getting into the hands of the press. Pseudonyms, redacted names, and civil liability for officials who "mishandle" confidential information are possible alternatives. Codification of procedures for dealing with victims' identities, as well as providing for civil remedies, would encourage more diligent maintenance of assault victim's identities. This solution is not without problems, but the Supreme Court has indicated that it would be a constitutionally acceptable alternative.

Kimberly Kelley Blackburn

185. *Florida Star*, 491 U.S. at 533.
186. *Id.* at 528, 541.