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Using Crime Victims' Names In The News:  
Journalists' Legal Rights and Ethical Justifications

by

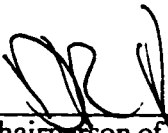
Michelle Johnson

A dissertation submitted in partial fulfillment  
of the requirements for the degree of

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(Chairperson of Supervisory Committee)

Program Authorized  
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Doctoral Dissertation

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Abstract

Using Crime Victims' Names In The News:  
Journalists' Legal Rights and Ethical Justifications

by

Michelle Johnson

Chairperson of the Supervisory Committee: Professor Don Pember  
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In the late 1980s and 1990s, individuals in the intellectual and academic circles of the journalistic community argued over whether or not journalists should publish the names of crime victims, particularly rape victims, in news stories. This dissertation examines journalists' practices in naming crime victims, their legal right to name victims, and their ethical justifications for naming victims. It finds that journalists actually name few crime victims in the news, although the First Amendment gives them nearly an absolute right to do so. Journalists' ethical justifications for naming crime victims vary greatly. Some journalists give a great deal of thought to their actions; some give little. Generally, journalists demonstrate good intentions but a lack of understanding of the potential consequences of their actions.

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## DEDICATION

**This work is dedicated to my mother, Barbara Domen, who believes in me when my chances of success are small and loves me regardless of whether or not I'm successful. You are the wind beneath my wings.**

## Introduction

During the 1990s, the naming of rape victims in the news has been one of the hot discussion topics in the intellectual and academic circles of the journalistic community. Most news organizations stopped publishing rape victims' names in the 1970s, but a few industry leaders have encouraged journalists to resume the practice. Victims' advocates have created their own lobby to persuade journalists not to publish rape victims' names. These advocates say such publication invades victims' privacy and subjects them to scorn within their communities.

This study looks at the larger issue surrounding the debate over naming rape victims in the news. It addresses the issue of crime-victim identification, asking when do journalists use crime victims' names? What is their legal right to do so? What is their ethical justification for their actions? The first part of the study (Chapters 1 through 3) focuses on journalists' legal rights and government action in this area. The second part (Chapters 4 and 5) focuses on practices within the journalistic community and journalists' ethical justifications for naming crime victims.

The first chapter gives a history of the discussion of victim identification within the legal community and explains the parameters of this discussion. Most lawyers and judges gave little thought to crime victims' rights until the victims' rights movement gained momentum in the 1970s. The movement prompted state and federal officials to pass laws and institute policies protecting victims' privacy, while several celebrated rape trials drew legal scholars' attention to the issue of victim identification. Members of the legal community realize constitutional law requires the government to strike a balance between the public's interest in the free flow of information and victims' right to privacy. However, the few legal scholars who have written on this issue focus on the narrow issue of rape-victim identification. A number assume information about

rape is private, and this assumption colors their analysis of the law, resulting in conclusions that give more weight to victims' privacy than the law does.

The second chapter reviews appellate court decisions involving news media that published crime victims' names. Most of these decisions come from privacy suits brought against news organizations by rape victims, but two involve criminal suits brought on victims' behalf by county prosecutors in Wisconsin and Florida. Almost all suits brought against news media for publishing victims' names have been unsuccessful. The U.S. Supreme Court has said the press cannot be punished for publishing truthful information that was legally obtained. In addition, many lower appellate courts have found crime victims' names to be of public interest, and the common-law tort of privacy does not allow the press to be held liable for publishing information that is of public interest. The only time appellate courts seem willing to punish news organizations for publishing victims' names is when victims show the publication jeopardized their physical safety by informing a criminal suspect still at large of the victim's identity and likely whereabouts.

The third chapter recounts the attempt in Washington state to stop a weekly newspaper from publishing child sex-crime victims' names by cutting off public access to those names. The Washington legislature passed a law in 1992 that required judges to close their courts during trials involving child sex-crime victims and to seal documents from those trials. Similar laws have been passed in other states. Washington legislators hoped news organizations would not publish child victims' names if reporters could not obtain the names from official sources. The Washington Supreme Court declared the law unconstitutional because it violated a clause in the state constitution which requires trials to be held in public. Judges may close trials or portions of trials in order to protect defendants' rights or witnesses' safety, but they must base closure orders on the facts of the cases being closed. Laws that require

judges to close all trials involving a particular crime place too great of a restriction on public access to the judicial system.

The fourth chapter provides a history of journalists' discussions about naming crime victims. Journalists gave almost no thought to the effect of their work on crime victims until the 1970s when the victims' and women's movements began lobbying journalists to stop naming rape victims. In the following decades, journalists became more concerned about their credibility as the growth in television, talk shows and tabloid journalism sparked charges of sensationalism and intrusiveness. For both journalists and the public, the debate about naming crime victims—specifically rape victims—in the news symbolizes the news media's larger problem of maintaining credibility, taste and quality as they struggle to hold on to readers and viewers.

The fifth chapter reports the results of a survey of Washington state journalists on the ways they identify crime victims. Generally, journalists do not name or otherwise identify victims of crimes that historically were considered shameful. Most commonly, this includes sex crimes, but some journalists also do not name domestic or child abuse victims. Journalists do name victims of other violent crimes, such as murder or assault. Most journalists demonstrate concern for victims' privacy, but other concerns, such as the need to maintain credibility and to meet traditional journalistic standards, often carry more weight. As a group, journalists seem uncertain as to how to handle crime-victim identification. They are torn between victims' pleas for privacy and traditional news values that demand journalists print all the available details of a crime.

The sixth chapter summarizes the study's findings and makes recommendations for future research. It concludes that journalists have a legal right to name any and all crime victims, but most journalists do not take advantage of this right. They try to balance respect for victims' privacy with their duty to inform the public. Ultimately,

however, journalists seem to find their duty to inform the public more compelling than victims' concerns about privacy. This may be due to most victims' inability to show tangible harm resulting from the publication of their names. The author recommends scholars interested in this issue engage in research on the effects of journalists' identification of crime victims on victims, criminal suspects and the general public. Once more is known about the effects of journalists' work, recommendations for industry standards on crime-victim identification can be made with more credibility. The current discussion over the relative merits of privacy and the free flow of information has reached an impasse largely because participants do not have evidence to substantiate their positions.

## Chapter 1: Privacy and Public Interest

On the night of March 29, 1991, Patricia Bowman met William Smith, along with his uncle Sen. Edward Kennedy and cousin U.S. Rep. Patrick Kennedy, at Au Bar, a trendy nightclub in Palm Beach. Later that night, she and two other women accompanied the Kennedys back to their Palm Beach estate. Bowman and Smith went for a walk on the beach, where she says he raped her. Smith claims they had consensual sex. Afterwards, Bowman called a friend, who took her to the hospital. That afternoon, Bowman reported the incident to the police. With that phone call, she was on her way to becoming one of the most famous crime victims in the nation.

The Palm Beach police kept the report quiet for a few days, but Florida law requires them to make public the report of a crime along with the date and location (but not the victim's name). On April 2, a police spokesman announced to reporters that a woman had reported being assaulted at the Kennedy home on March 30 at about 4 a.m.<sup>1</sup> The reporters were told the woman had been treated for minor injuries at the hospital. Police were investigating. No charges had been filed.

Perhaps because the police were tight-lipped, the first newspaper stories about the case were low-key. The *Washington Post* and the *New York Times* carried the stories in the middle of their national news sections, behind the major stories of the day. The newspapers had few details and could not point to a suspect. If no Kennedys were charged, the story would probably die a relatively quick death.

During the next few days, news trickled out of Palm Beach. The day after the police announcement, Sen. Kennedy and his son denied involvement in "the incident," leaving fingers pointing to William Smith as the only high-profile potential suspect.

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<sup>1</sup>"Woman Alleges Sex Assault at Kennedy Estate," *Washington Post*, 2 April 1991, sec. A, p. 6; Roberto Suro, "Woman Says She Was Raped at Kennedy Estate," *New York Times*, 3 April 1991, sec. A, p. 12.

The day's stories noted that Smith was the son of Jean Kennedy Smith and Stephen Smith.<sup>2</sup> He was referred to in all articles as William Kennedy Smith, probably to make his connection with the Kennedy family clear.

On April 4, the police officially named Smith as their suspect, and the major newspapers identified him as such. *The Palm Beach Post* had already carried a story naming Smith as the official suspect, but it relied on anonymous sources.<sup>3</sup> The same day, the *Washington Post* noted: "By midday yesterday, the name of the alleged victim was circulating widely through the status-conscious Palm Beach social set. Friends said she is a member of a less-prominent Palm Beach family."<sup>4</sup> The *Washington Post's* April 4 article also noted that journalists—particularly tabloid journalists—had swarmed on Palm Beach. By April 13, the media circus was in full swing. Alex Jones, a *New York Times* reporter, wrote: "In Palm Beach, the identity of the woman who accused Mr. Smith of rape is so well known that hot dog vendors are camped outside her house serving the scores of reporters as well as curious onlookers."<sup>5</sup>

In fact, the onslaught of reporters began hours after the police's first announcement. Several years later, Bowman wrote: "Less than 12 hours (after I reported the rape), my doorbell was ringing and the media were there. It wasn't one member, and it wasn't 20 members. There were somewhere near 100 members of the media outside my home within 24 hours of the crime."<sup>6</sup>

Also by April 13—two weeks after the incident and less than two weeks after the police announcement—editors were beginning to reconsider their policy of leaving

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<sup>2</sup>Laura Parker, "Police Say Little of Alleged Attack at Kennedy Home," *Washington Post*, 3 April 1991, sec. A, p. 16; Roberto Suro, "Rape Investigation Continues at Kennedy Estate," *New York Times*, 4 April 1991, sec. A, p. 17; John E. Yang and Laura Parker, "Kennedy Nephew's Statement Seeks to Stem 'Unwarranted Speculation,'" *Washington Post*, 4 April 1991, sec. A, p. 3.

<sup>3</sup>Roberto Suro, "Kennedy's Nephew Is Identified as Rape Suspect," *New York Times*, 5 April 1991, sec. A, p. 13.

<sup>4</sup>Yang and Parker, 3.

<sup>5</sup>Alex S. Jones, "Editors Debate Naming Rape Victims," *New York Times*, 13 April 1991, sec. A, p. 6.

<sup>6</sup>Jay Black, ed., "Privacy in America: The Frontier of Duty and Restraint," *Journal of Mass Media Ethics* 9(4): 218 (1994).

rape victims' names out of their reports.<sup>7</sup> London's *Sunday Mirror* had named Bowman in an article on April 7, and the *Globe*, a tabloid based in Boca Raton, Fla., named her and ran her picture on its April 14 cover.<sup>8</sup> Some editors wanted to abandon their policy of keeping rape victims out of the news and saw the Smith case as an opportunity to do so without provoking much criticism. Irene Nolan, managing editor of the *Louisville Courier-Journal* said she wanted reporters to name rape victims in stories as they did with other crime victims, but she feared public reaction. "There has to be a middle stage of beginning to name rape victims on a case-by-case basis," Ms. Nolan said, 'and I think Palm Beach is the perfect case to begin with.'<sup>9</sup> On April 16, NBC News named Bowman in a story about the debate on naming rape victims. The next day, the *New York Times* ran a profile of Bowman in which it used her name.<sup>10</sup>

The *New York Times* profile included details of Bowman's mother's divorce and remarriage, Bowman's "below-average" high-school grades, injuries from a car accident, speeding tickets, romantic relationships and daughter's bedroom. Many people—including *Times* staff members—thought the article leapt beyond the bounds of decency and invaded Bowman's privacy. The newspaper was widely criticized.<sup>11</sup> Bowman later said the *New York Times* article destroyed her faith in the media—the only way the reporter had been able to describe the interior of her home was by peeping

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<sup>7</sup>Jones, 6; CNN *Crossfire*, 11 April 1991, in Scripts library, NEXIS, transcript #287.

<sup>8</sup>"On Names in Rape Cases," *New York Times*, 17 April 1991, sec. A, p. 17; Jones, 6.

<sup>9</sup>Jones, 6.

<sup>10</sup>Fox Butterfield and Mary B.W. Tabor, "Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance," *New York Times*, 17 April 1991, sec. A, p. 17.

<sup>11</sup>Howard Kurtz, "Furor at N.Y. Times Over Rape Policy; Staff Protests Printing of Palm Beach Name," *Washington Post*, 20 April 1991, style section, p. 1; William Glaberson, "Media Memo: Times Article Naming Rape Accuser Ignites Debate on Journalistic Values," *New York Times*, 26 April 1991, sec. A, p. 14; CNN *Larry King Live*, 18 April 1991, in Scripts library, NEXIS, transcript #283; ABC News *Nightline*, 17 April 1991, in Scripts library, NEXIS; *MacNeill/Lehrer Newshour*, 17 April 1991, in Scripts library, NEXIS, transcript #4013; Susan Estrich, "Press Should Zip Its Lip In Rape Case Identifying Victim Serves No Purpose And Discourages Them From Coming Forward," *St. Louis Post-Dispatch*, 22 April 1991, sec. B, p. 3; Shann Nix, "Debate Over Naming Rape Victims," *San Francisco Chronicle*, 18 April 1991, sec. A, p. 1; "Naming Names," *Newsweek*, 29 April 1991, 26-32.

through a window.<sup>12</sup> While *New York Times* editors and NBC News president Michael Gartner defended their decisions to identify Bowman, both news organizations soon stopped naming her in stories.<sup>13</sup> In an editor's note on April 26, the *New York Times* made a tentative peace offering to its critics: "Whenever possible, The Times intends to continue its long-standing practice of withholding the names of sex crime victims while informing its readers in the fullest and fairest ways about major crimes."<sup>14</sup>

### TERMS OF THE VICTIM IDENTIFICATION DEBATE

Among journalists and media critics, the Bowman case has come to symbolize the problems involved in naming crime victims in the news. By naming her, they subjected her to unwanted, emotionally-damaging publicity. She became notorious. However, withholding her name seemed unfair to William Kennedy Smith, who received even more publicity. He was already notorious.

#### PRO-IDENTIFICATION

Fairness—to both parties—came up again and again during the Kennedy Smith trial, but it was not journalists' only consideration. NBC News president Michael Gartner, who became something of a spokesman on the issue after his network named Bowman, lists four reasons for naming rape victims. First, names are news. "They add credibility to stories and give viewers or readers information they need to understand issues."<sup>15</sup> Second, people who are newsworthy for any other reason are named. "Third, by not naming rape victims, we are participating in a conspiracy of silence which does a disservice to the public by reinforcing the idea that there is

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<sup>12</sup>Black, 219; *PrimeTime Live*, 19 December 1991, in Scripts library, NEXIS.

<sup>13</sup>"On Names in Rape Cases," 17; Glaberson, 14; Kurtz, 1.

<sup>14</sup>"Editors' Note," *New York Times*, 26 April 1991, sec. A, p. 3.

<sup>15</sup>Michael Gartner, "Commentaries: Panel Discussion," 61 *Fordham Law Review* 1133 (1993).

something shameful about being raped."<sup>16</sup> And finally, naming the accused without naming the accuser is unfair.

#### ANTI-IDENTIFICATION

People who believe the news media should not name rape victims have marshaled their own arguments. First, they say, rape victims are not treated like other crime victims by the legal system or society.<sup>17</sup> They are stigmatized, and only relative anonymity can help them avoid prejudicial treatment. Second, rape victims have committed no crime. They do not deserve to be treated as criminals.<sup>18</sup> Third, reporting victims' names could discourage reporting of the crime.<sup>19</sup>

Journalists and their critics have written hundreds of articles on the issue of whether or not to name rape victims. Most include variations of the arguments summarized above. Somewhat surprisingly then, one discovers that relatively little has been written about whether or not to name victims of other crimes. Like rape victims, many of them encounter problems and suffer injuries caused by publicity. For example, stigmatization and prejudice are all too familiar to victims of gay-bashing. A Michigan man whose friend was murdered in 1994 while he lay beaten and unconscious said that after he awoke and dialed 911, he was struck by one thought: People would learn he was gay. His life was over. Later, he said: "I've always had this paranoia about being gay. I thought if people knew, they would come and burn down my house, or paint 'gays go home' graffiti . . . I just know how people feel about gays."<sup>20</sup>

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<sup>16</sup>Ibid.

<sup>17</sup>Linda Fairstein, "Panel Discussion," 61 *Fordham Law Review* 1137, 1137-1139 (1993).

<sup>18</sup>Association with crime taints victims in the public mind. "To be covered by the media in association with a sex crime, whether as the victim or as the accused, is to be opened up to merciless exposure of one's past, one's personality, and particularly one's sex life. That is the way things stand today." Helen Benedict, "Panel Discussion," 61 *Fordham Law Review* 1141 (1993).

<sup>19</sup>Deborah W. Denno, "The Privacy Rights of Rape Victims in the Media and the Law," 61 *Fordham Law Review* 1113, 1130 (1993).

<sup>20</sup>Amber Arellano, "Gay victim of brutal crime says his 'life is over' because of publicity," Knight-Ridder Newspapers, 17 March 1995, distributed on Associated Press wire.

Victims of neglect and abuse also may feel embarrassed by unwanted publicity. In St. Paul, Minn., parents and state officials were horrified when the *Star Tribune* named three mentally-retarded children in a story about caretakers neglecting residents in a local home. "Families have enough stress in dealing with these extremely medically fragile patients," a state official said.<sup>21</sup>

### THE LEGAL DEBATE BEGINS

While rape victims have brought more lawsuits against the news media than other crime victims in recent years, they are relatively new entrants to the legal debate on victim identification. The first legal action against a news organization for naming a rape victim was reported in 1948.<sup>22</sup> Rape victims themselves did not begin suing until 1962.<sup>23</sup> But victims of other crimes began bringing complaints about media treatment of them in the 1920s.

### LAWSUITS

*Jones v. Herald Post Co.* The first reported lawsuit involving a crime victim came from Kentucky.<sup>24</sup> Lillian Jones and her husband, Thomas, were walking down a street when two men attacked them and killed Thomas. The next day, the *Louisville Herald Post* ran a story about the attack with pictures of the couple. Mrs. Jones sued for invasion of privacy. She lost. Judge William Rogers Clay noted the attack occurred on a public street and was of public interest.<sup>25</sup>

*Mau v. Rio Grande Oil.* In the next reported case, however, the crime victim was successful.<sup>26</sup> Howard Mau, a chauffeur, was robbed and shot in 1937. As a

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<sup>21</sup>Lou Gelfand, "Does son's disability justify privacy?" *Star Tribune*, 31 October 1993, sec. A, p. 29.

<sup>22</sup>*State v. Evjue*, 33 N.W.2d 305 (1948).

<sup>23</sup>*Hubbard v. Journal Publishing Co.*, 368 P.2d 147 (1962); Marc A. Franklin, "Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact," 16 *Stanford Law Review* 107, 108 (1963); Sally A. Blackmun, "Constitutional Law—Right of Privacy Versus Freedom of the Press—The Press Cannot Be Restrained From Reporting Facts Contained in Official Court Records,"

<sup>24</sup>*Enory Law Journal* 1205, 1220 (1975).

<sup>24</sup>*Jones v. Herald Post Co.*, 18 S.W.2d 972 (1929).

<sup>25</sup>*ibid.*, 973.

<sup>26</sup>*Mau v. Rio Grande Oil, Inc.*, 28 F.Supp. 845, 847 (1939).

result of the attack, he became "mentally ill, nervous and distraught."<sup>27</sup> A year later, when Mau heard a radio dramatization of the attack, he "suffered mental anguish" which was made worse by telephone calls from friends "desirous of rehashing the near-tragedy."<sup>28</sup> He sued the radio production company for invading his privacy. The U.S. District Court for the Northern District of California denied the production company's motion to dismiss, saying Mau could recover damages if he could prove his case.

### EARLY DISCUSSION

*Pre-1960s.* In spite of the *Jones* and *Mau* cases, the trauma media coverage creates for crime victims went relatively unnoticed by legal scholars for the first half of the century.<sup>29</sup> Even the first case involving the naming of a rape victim did not raise social consciousness. Scholars seemed more concerned about how that case would affect journalists.<sup>30</sup> The suit had been brought by the state of Wisconsin under a statute that prohibited the publication of any information that would identify a female victim of sexual assault.<sup>31</sup> One legal commentator noted: ". . . it is important that editors realize that mere omission of the name of the victim in a rape story does not necessarily mean that they have complied with the statute."<sup>32</sup> That particular author, Stuart Gullickson,

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<sup>27</sup>*Ibid.*, 845.

<sup>28</sup>*Ibid.*, 846.

<sup>29</sup>*Mau v. Rio Grande Oil, Inc.* did attract some attention but that was primarily due to it being the first invasion of privacy suit involving a radio broadcast. Scholars writing about the case did not give attention to Mau's status as a crime victim or the trauma he suffered. See Robert DeMott, "The Right of Privacy in Relation to Radio Broadcasts," 12 *Rocky Mountain Law Review* 127 (1940); William D. Chappers, "Torts—Right of Privacy—Radio Dramatization of Old News Even in Connection with Plaintiff's Name," 20 *Boston University Law Review* 156 (1940); James A. McKenna Jr., "Torts—Right of Privacy—Guaranteed by State Constitution," 28 *Georgetown Law Journal* 564 (1940); "Torts—Right of Privacy—Nature and Extent—Radio Broadcasting," 25 *Iowa Law Review* 387 (1940); John A. Callahan, "Torts—Right of Privacy—Unauthorized Radio Dramatization of Shooting," 24 *Marquette Law Review* 171 (1940); "Torts—Right of Privacy—Radio Broadcasting," 38 *Michigan Law Review* 748 (1940); "Torts—Right of Privacy—Violation by Broadcast," 18 *Texas Law Review* 356 (1940); "Torts—Radio Broadcast of Name and Experiences of Person Without His Consent—Right of Privacy," 14 *University of Cincinnati Law Review* 197 (1940); "Torts—Invasion of the Right to Privacy by Radio Broadcast," 88 *University of Pennsylvania Law Review* 374 (1940).

<sup>30</sup>Stuart Gullickson, "Constitutional Law—Standard of Certainty In Criminal Statute—Freedom of the Press—Presumption of Unconstitutionality," *Wisconsin Law Review* 359 (1949); "Constitutional Law—Freedom of Press—Restriction By Statute," 23 *St. John's Law Review* 340 (1949).

<sup>31</sup>*State v. Evjue*, 33 N.W.2d at 306.

<sup>32</sup>Gullickson, 360.

gave some consideration to the treatment of crime victims in the media, explaining the statute was passed to protect rape victims' privacy so they would not be afraid to testify against their attackers. However, careful examination of Gullickson's comments shows that he does not find the statute worthwhile because it protects victims' privacy but *because it encourages them to testify*. There is no indication in his writing that the protection of privacy is a worthwhile end in itself or in relationship to victims' emotional stability and safety.

The lack of significant discussion in the legal community about the media's treatment of crime victims in the first half of the century is significant because during much of the period crime coverage was sensational and, often, tasteless.<sup>33</sup> In her work on media standards in naming rape victims, Elizabeth Koehler cites multiple instances of newspapers naming sexual-assault victims in articles that detail the crimes against them.<sup>34</sup> Further, there was some discussion of the issue in the popular press, academic journals and journalists' trade publications. The lack of discussion among legal experts might be explained by the large amount of attention given to the free press-fair trial debate. Until the 1960s, when legal scholars and jurists thought about the press and crime coverage, they usually thought about potential interference with defendants' right to a fair trial.<sup>35</sup>

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<sup>33</sup>Leon R. Yankwich, "Sensationalism in Crime News: Newspapers and the Administration of Justice," 19 *American Bar Association Journal* 51 (1933); John Newton Baker, "The Press and Crime," 33 *Journal of Criminal Law and Criminology* 463 (1943); Joseph L. Holmes, "Crime and the Press," 20 *Journal of the American Institute of Criminal Law and Criminology* 6 (1929); Morris Gilmore Caldwell, "Sensational News in the Modern Metropolitan Newspaper," 23 *Journal of the American Institute of Criminal Law and Criminology* 191 (1932); Theodore Spector, "The Influence of Journalism on Crime," 15 *Journal of the American Institute of Criminal Law and Criminology* 155 (1924).

<sup>34</sup>Elizabeth M. Koehler, "Emergence of a Standard: The Rape Victim Identification Debate Prior to 1970" (master's thesis, University of Washington, 1995), 101, 114-119.

<sup>35</sup>Victor Rosewater, "The Bar's Complaint Against the Press," 11 *American Bar Association Journal* 211 (1925); Robert D. Highfill, "The Effects of News of Crime and Scandal Upon Public Opinion," 17 *Journal of the American Institute of Criminal Law and Criminology* 40 (1926); "How Should a Criminal Trial be Reported in a Newspaper?" 15 *American Bar Association Journal* 196 (1929); "The Press and Prejudiced Juries," 81 *Law Journal* 453 (1936); "Juvenile Courts and the Press," 102 *Justice of the Peace and Local Government Review* 309 (1938); Edward J. Meeman, "Newspapers and Lawyers—Defenders of Freedom—On Trial," 18 *Tennessee Law Review* 687 (1945); "Controlling

*The 1960s.* In the 1960s, legal scholars began to take an interest in crime victims.<sup>36</sup> This interest may have been due to the burgeoning victims' movement. Criminologists Martin Greenberg and R. Barry Ruback attribute the increase in concern for crime victims to three factors: the general concern during the period for victims of injustice and inequality; a rising crime rate; and several U.S. Supreme Court cases that seemed to benefit criminals at the expense of their victims.<sup>37</sup> Criminal justice scholars Steven Smith and Susan Freinkel link the movement to the rise of the welfare state with the related view of government as protector as well as lobbying on behalf of victims by high-placed government officials.<sup>38</sup> Regardless of the cause, the experiences of crime victims found a place in the legal literature from 1960 on, although the early articles

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Press and Radio Influence on Trials," 63 *Harvard Law Review* 840 (1950); Philbrick McCoy, "The Judge & Courtroom Publicity," 37 *Journal of the American Judicature Society* 167 (1954); J.J. Muldoon, "Press Participation in Criminal Trials," 33 *Chicago-Kent Law Review* 338 (1955); Margaret Chase Smith, "Fair Trial and Free Press: Pressures Exerted on Courts and Jurors," 42 *American Bar Association Journal* 341 (1956); Marcus D. Gleisser, "Newspapers and the Courts," 3 *Cleveland-Marshall Law Review* 156 (1954).

<sup>36</sup>However, when thinking about the judicial system and the media, their main concern through the 1990s has continued to be the free press-fair trial debate. "Trial by Newspaper," 33 *Fordham Law Review* 61 (1964); Harvey Gelb, "Fair Trials and Free Speech," 31 *George Washington Law Review* 607 (1963); Hubert L. Will, "Free Press v. Fair Trial," 12 *DePaul Law Review* 197 (1963); Harold D. Rogers, "Canon 35: Cameras, Courts and Confusion," 51 *Kentucky Law Journal* 737 (1963); Donald F. Burt, "Inflammatory Publicity in State Criminal Cases," 44 *Nebraska Law Review* 614 (1965); Paul C. Reardon, "Forward," 22 *Oklahoma Law Review* 125 (1969); E.H. Fremont, "Free press, fair trial: a constitutional quandary," 26 *Journal of the Missouri Bar* 520 (1970); George Koudelis, "Fair Trial v. Freedom of the Press in Criminal Cases," 35 *Temple Law Quarterly* 412 (1962); Gerhard O.W. Mueller, "Problems Posed by Publicity to Crime and Criminal Proceedings," 110 *University of Pennsylvania Law Review* 1 (1961); D.R. Wright, "Fair Trial and Free Press: practical ways to have both," 54 *Judicature* 377 (1971); Richard K. Leefe, "Free Press v. Fair Trial: A Constitutional Dichotomy," 20 *Loyola Law Review* 148 (1974); John Kaplan, "Free Press/Fair Trial Rights in Conflict: Freedom of the Press and the Rights of the Individual," 29 *Oklahoma Law Review* 361 (1976); D. Grier Stephenson Jr., "Fair Trial-Free Press: Rights in Continuing Conflict," 46 *Brooklyn Law Review* 39 (1979); Charles E. Ares, "Chandler v. Florida: television, criminal trials, and due process," *Supreme Court Review* 157 (1981); Gregory K. McCall, "Cameras in the criminal courtroom: a Sixth Amendment analysis," 85 *Columbia Law Review* 1546 (1985); Ralph Frasca, "Estimating the Occurrence of Trials Prejudiced by Press Coverage," 72 *Judicature* 162 (1988); Alfredo Garcia, "Clash of the Titans: the Difficult Reconciliation of a Fair Trial and a Free Press in Modern American Society," 32 *Santa Clara Law Review* 1107 (1992); Michael James, "Open Justice: Publicity and the Judicial Process," 46 *Current Legal Problems* 190 (1993); Scott C. Pugh, "Checkbook journalism, free speech and fair trials," 143 *University of Pennsylvania Law Review* 1739 (1995).

<sup>37</sup>Martin S. Greenberg and R. Barry Ruback, *After the Crime: Victim Decision Making* (New York: Plenum Press, 1992), 3-4.

<sup>38</sup>Steven Rathgeb Smith and Susan Freinkel, *Adjusting The Balance: Federal Policy and Victim Services* (New York: Greenwood Press, 1988), 16-17.

were devoted almost exclusively to the establishment of victims' compensation programs.<sup>39</sup>

#### DISCUSSION PARAMETERS: PRIVACY AND PUBLIC INTEREST

While crime victims and their advocates give many reasons for sheltering them from publicity, the concepts of privacy and public interest provide the foundation for almost all arguments.<sup>40</sup> One case that exemplifies the tension between these two principles is *Hubbard v. Journal Publishing Co.*, the first reported case of a privacy suit brought by a rape victim against a news organization that had identified her as such.<sup>41</sup> In this 1962 case, a young girl was raped by her 16-year-old brother who served 60 days in juvenile detention for the crime. In an article about her brother's sentencing by the court, the *Albuquerque Journal* identified the girl, who sued for invasion of privacy. In writing about the case for the *Stanford Law Review*, legal scholar Marc Franklin explained that a tradition of gallantry supported protection of victims' privacy. Identifying them in the news would shame them and probably discourage them from reporting the crime. In many cases, the public interest in protecting the victim may be paramount and justify the attempted suppression of her name. Franklin said. But, he continued, there are times when the victim's name makes a difference in the story. Franklin said *Hubbard* was such a case because the fact that the victim was raped by her brother made the crime more heinous.<sup>42</sup>

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<sup>39</sup>For example, H. Donnie Brock, "Victims of Violent Crime: Should They Be An Object Of Social Effection?" 40 *Mississippi Law Journal* 92 (1968); Gerhard O.W. Mueller et al, "Compensation to Victims of Crimes of Personal Violence: An Examination of the Scope of the Problem," 50 *Minnesota Law Review* 211 (1965); Robert D. Childres, "Compensation for Criminally Inflicted Personal Injury," 39 *New York University Law Review* 444 (1964); "Compensation for Victims of Crime," 33 *University of Chicago Law Review* 531 (1966); Mike Mansfield, "Justice for the Victims of Crime," 9 *Houston Law Review* 75 (1971).

<sup>40</sup>Benedict, 1141; Katha Pollitt, "Media Goes Wilding in Palm Beach," in *Taking Sides: Clashing Views on Controversial Issues in Mass Media and Society*, ed. Alison Alexander and Janice Hanson (Guilford, Conn.: The Dushkin Publishing Group Inc., 1995), 115.

<sup>41</sup>*Hubbard v. Journal Publishing Co.*, 368 P.2d 147 (1962).

<sup>42</sup>Franklin, 134.

## COMPETING INTERESTS

While the concepts of privacy and public interest had been used by judges and legal scholars in their writings since the early 1900s, *Time, Inc. v. Hill* clearly established them as *competing* interests. Unlike most privacy cases involving crime victims, *Time, Inc. v. Hill* involved fictionalization. In 1952, James Hill and his family were held captive in their homes for 19 hours by three escaped convicts.<sup>43</sup> The incident inspired a novel and then a play, both of which embellished the details of the incident. In February 1955, *Life* magazine published an article about the play, implying it was true to the Hills' experience. It was not, and James and Elizabeth Hill sued. While the U.S. Supreme Court acknowledged the Hills' right to be free from exploitation, it went on to say that in cases where the publication dealt with matters of public interest, the plaintiff must show actual malice.<sup>44</sup>

Dozens of articles in legal journals were written about the decision. All focused on the creation of the new fault standard, which seemed to provide the press with an invincible shield against privacy suits.<sup>45</sup> Only a handful of authors questioned the imbalance the Court had created between individuals' right to privacy and the public's

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<sup>43</sup>*Time, Inc. v. Hill*, 385 U.S. 374, 377-378 (1967).

<sup>44</sup>*Ibid.*, 388.

<sup>45</sup>"New York Right of Privacy—Constitutional Law—Freedom of Press—Freedom of Speech—*Time, Inc. v. Hill*," 31 *Albany Law Review* 364 (1967); "Torts—Privacy—Actual Malice Required for Redress of False Reports of Matters of Public Interest—*Time, Inc. v. Hill*," 16 *The American University Law Review* 442 (1967); "Constitutional Law—Application of *Times v. Sullivan* Doctrine to Right of Privacy," 33 *Brooklyn Law Review* 318 (1967); Richard A. Braun, "Constitutional Law—Freedom of Speech and of the Press—Right of Privacy—The Press May Publish Any Matter of Public Interest Unless With Knowledge of Its Falsity or Reckless Disregard of Its Truth," 44 *Chicago-Kent Law Review* 58 (1967); "Privacy, Defamation, and the First Amendment: The Implications of *Time, Inc. v. Hill*," 67 *Columbia Law Review* 926 (1967); Philip L. Kellogg, "Constitutional Law—State Cannot Award Damages for Invasion of Privacy Without Proof of Actual Malice," 45 *North Carolina Law Review* 740 (1967); Arthur Gregory, "Constitutional Law—Invasion of Privacy by Fictionalization of an Experience—No Recovery Absent Malice," 19 *South Carolina Law Review* 249 (1967); Norbert F. Abend, Jr. "Torts—Publishers of Matters of Public Interest Not Liable Absent Finding of Knowing Untruth or Reckless Disregard of Truth in Right to Privacy Actions," 18 *Syracuse Law Review* 661 (1967); W. Amon Burton Jr., "Constitutional Law—Torts—Right of Privacy—First Amendment Protection of Free Speech and Press Precludes Recovery Under Right-of-Privacy Statute for False Reports of Matters of Public Interest in the Absence of Proof of Knowing or Reckless Falsity," 45 *Texas Law Review* 758 (1967); Charles E. Friend, "Constitutional Law—Right of Privacy—*Time, Inc. v. Hill*," 8 *William and Mary Law Review* 683 (1967).

desire for information. A *Brooklyn Law Review* article said the Hills should not be held to the same fault standard as public figures because they did not voluntarily enter the public eye.<sup>46</sup> Celebrity was forced on them after the attack. In another article, legal scholar Richard Braun said publications about involuntary public figures should be held to a standard of absolute truth.<sup>47</sup> These articles are somewhat misleading. The Supreme Court did not say the Hills were public figures. It said *information* about their experiences as hostages was *of public interest*. Most legal scholars assumed the Court was correct on this point, stating the public interest value of the article as fact.<sup>48</sup> It would be another two decades before legal scholars seriously began to question what information about crime victims was truly of public interest and what ought to remain private.

#### THE CONCEPT OF PRIVACY

Today, privacy is an accepted legal concept composed of four torts: appropriation, intrusion, public disclosure of private facts, and false light.<sup>49</sup> Privacy cases involving the naming of crime victims usually fall under the public disclosure of private facts tort. This tort allows people to recover damages when the media disclose a fact about them that had been private and is "highly offensive and objectionable to a reasonable person of ordinary sensibilities."<sup>50</sup> Of the four privacy torts, public disclosure was the slowest to develop and—from the perspective of the plaintiff—has been the least successful.<sup>51</sup> Courts have been reluctant to punish news media for publishing or broadcasting truthful information of public interest, and they define

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<sup>46</sup>Constitutional Law—Application of *Times v. Sullivan* Doctrine to Right of Privacy," 323.

<sup>47</sup>Braun, 58-63.

<sup>48</sup>For example, see William J. Carl, "Right of Privacy: Knowing or Reckless Falsity in Publication Required to Sustain Liability Under New York Right of Privacy Statute," 28 *Montana Law Review* 243, 247 (1967).

<sup>49</sup>W. Page Keeton et al., "Privacy," chap. 20 in Prosser and Keeton on Torts, 5th ed. (St. Paul, MN: West Publishing Co., 1984), 851-863.

<sup>50</sup>*Ibid.*, 857.

<sup>51</sup>Don R. Pember, *Privacy and the Press* (Seattle: University of Washington Press, 1972), 238.

public interest broadly. Stories about a young woman's sterilization, a man's death from a drug overdose, the exploits of a bodysurfer and people's behavior on dates were all found to be of public interest.<sup>52</sup> Ironically, this is the kind of information the tort of privacy originally was supposed to protect.<sup>53</sup>

*The origins of privacy.* Until 1890, privacy was a relatively unknown concept. Although there were hints of it in case law, a right of privacy was not mentioned by Locke, Rousseau, Paine or any of the other great advocates of civil liberties.<sup>54</sup> In the seventeenth and eighteenth centuries, when the formative literature on civil liberties was produced, "Society had not yet become so complex that the individual's privacy was in danger of encroachment."<sup>55</sup>

During the 1800s, American society became more complex and, according to some, more invasive. More and more Americans moved to cities, where they worked in factories instead of on farms. Wealth became more evenly distributed, making the class structure more fluid. Qualifications for enfranchisement became more lenient, giving nearly all white male citizens the opportunity to vote. The press changed with society. Following the lead of Benjamin Day, editors began to produce inexpensive, politically-independent newspapers. In 1840, James Gordon Bennett started the *New York Herald*, where he began to develop the concepts of news and reporting as we know them today. In particular, Bennett and the other penny press editors liked crime news.<sup>56</sup> They discovered, as journalist Alfred Friendly wrote more than a century later, "that crime news is the hottest article on [an editor's] counter. Within limits—

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<sup>52</sup>*Howard v. Des Moines Register*, 283 N.W.2d 789 (1979); *Beresky v. Teschner*, 381 N.E.2d 979 (1978); *Virgil v. Time Inc.*, 527 F.2d 1122 (1975); *DeGregario v. CBS*, 43 N.Y.S.2d 922 (1984).

<sup>53</sup>Pember, 238.

<sup>54</sup>Keeton, 849; Louis Nizer, "The Right of Privacy: A Half Century's Developments," 39 *Michigan Law Review* 526, 526 (1941).

<sup>55</sup>Nizer, 526.

<sup>56</sup>Will Irwin, *The American Newspaper* (Ames, IA: The Iowa State University Press, 1969), 16.

within rather far extended limits, to be honest about it—the publication of crime news bolsters readership and circulation."<sup>57</sup>

In 1890, Samuel Warren and Louis Brandeis introduced privacy as a legal concept.<sup>58</sup> After describing what they saw as the improprieties of the press, they said:

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.<sup>59</sup>

Warren and Brandeis proposed the establishment of a tort that would provide compensation for feelings injured by publication. They also suggested the courts provide injunctions against further publication in some cases.

The new tort was very much a product of its time. In the nineteenth century, the relationship between the legal system, individual rights and public interest differed significantly from the present. Now, judges are called upon to protect individual rights—particularly the freedoms of speech and press—when society encroaches upon them. This role of the judiciary evolved during the 1930s and 1940s, when a number of cases involving political dissidents were heard.<sup>60</sup> In the 1800s, judges believed the law should protect the interests of the majority.<sup>61</sup> When state legislatures and Congress passed laws limiting publication in order to protect social, political and moral values, the courts upheld them.<sup>62</sup>

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<sup>57</sup>Alfred Friendly and Ronald L. Goldfarb, *Crime and Publicity* (New York: The Twentieth Century Fund, 1967), 35-36.

<sup>58</sup>Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890); Alan H. Johansen, "Right of Privacy—When Is It Invaded by Publication of News Items and Photographs?" 35 *Oregon Law Review* 42 (1955).

<sup>59</sup>Warren and Brandeis, 196.

<sup>60</sup>J. Edward Gerald, *The Press and the Constitution 1931-1947* (Minneapolis: University of Minnesota Press, 1948), 2-3.

<sup>61</sup>Timothy W. Gleason, *The Watchdog Concept* (Ames, IA: Iowa State University Press, 1990), 40.

<sup>62</sup>*Ibid.*, 41.

By 1890, many urban newspapers were copying the sensational style of Joseph Pulitzer and William Randolph Hearst, the respective owners of the *New York World* and *San Francisco Examiner*.<sup>63</sup> They catered to the common man's taste, emphasizing crime, corruption, entertainment and gossip, sometimes with less emphasis on truth than intrigue. Therefore, it is no surprise that when Warren and Brandeis looked at the pages of the urban newspapers and were offended, they turned to the law to solve the problem.

*The growth of privacy.* Privacy law grew sporadically, however. During the first decade after Warren and Brandeis published their article, no privacy cases were heard.<sup>64</sup> By 1930, when the first case involving a crime victim was reported, only 11 states recognized a right of privacy—seven in common law and four through statutes.<sup>65</sup> While little was written about *Jones v. Herald Post Co.*, there are indications in the literature that members of the legal community were uncertain how to distinguish private and non-private information. A convoluted *Kentucky Law Journal* article said the Kentucky Supreme Court had used an incorrect test for making its decision because it looked at whether the words brought Jones into "contempt, hatred, scorn or ridicule" and did not consider the truthfulness of the report.<sup>66</sup> In making his argument, the author relied on a previous law journal article that said "the test for wrongfulness should not be whether this opinion or utterance falsely attributed tends to bring the person into hatred, ridicule or contempt but whether the opinion ascribed is one which is disagreeable for the speaker to be supposed to entertain."<sup>67</sup> This indicates that a rule

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<sup>63</sup>Hearst later bought the *New York Journal*, which is better known for sensationalism than the *Examiner*.

<sup>64</sup>The first reported privacy case is *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902). The first case in which a right to privacy was acknowledged is *Pavesich v. New England Mutual Life Insurance Co.*, 122 Ga. 190 (1905).

<sup>65</sup>Kansas, Missouri, Georgia, Indiana, New Jersey, Kentucky, Louisiana and the federal territory of Alaska recognized a common law right of privacy. California, New York, Utah and Virginia had statutes protecting privacy. Michigan and Rhode Island had explicitly denied a right of privacy.

<sup>66</sup>"Torts—Right of Privacy," 18 *Kentucky Law Journal* 86 (November 1929). Also, *Jones v. Herald Post Co.*, 18 S.W.2d at 973.

<sup>67</sup>"Torts—Right of Privacy," 86.

similar to that in libel had been used in deciding privacy cases and that there may not have been a clear distinction between the two in the minds of many lawyers.

In fact, a *Harvard Law Review* article written at the same time shows the privacy tort was still relatively undefined and applied in a haphazard fashion. The author wrote:

It seems clear that most of the cases were, at least in part, decided on other grounds, and hence represent a slight advance in the law. Some proceeded on the theory of breach of trust or contract, or violation of a property interest. In others the court found, not only a violation of privacy but a cause of action in libel as well. In a few cases often cited for the recognition of the right, the express ground of decision was conduct amounting to fraud; and in some others the decisions could have been rested on other theories, though these were not adverted to.<sup>68</sup> (footnotes omitted)

The author goes on to discuss the problems involved in creating a workable tort. He or she notes that it is impossible to place a monetary value on the damage done by an invasion of privacy and that such damages could encourage frivolous suits. However, "the imperfections of this remedy should not destroy the right."<sup>69</sup> The author suggests using injunctions against further publication or criminal penalties "to curb the excesses of a tabloid-minded press."<sup>70</sup> These remedies seem extreme, and in a footnote the author admits criminal penalties could be used to retaliate against charges of political wrong-doing. Still, this article represents some of the better thought of the time. The author recognizes that invasions of privacy cannot be evaluated in the same way as slip-and-fall or other torts where actual damages can be assessed. Further, the suggested penalties, geared toward prevention of further damage, do not seem outrageous when considered in their social context.

The United States' tabloid press grew up in the 1920s.<sup>71</sup> In 1919, Britain's Lord Northcliffe started the *New York Daily News*. Like Britain's already successful

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<sup>68</sup>"The Right to Privacy Today," 43 *Harvard Law Review* 297, 298 (December 1929).

<sup>69</sup>*Ibid.*, 299.

<sup>70</sup>*Ibid.*, 300.

<sup>71</sup>For a full account of the growth of the tabloid press, see Simon Michael Bessie, *Jazz Journalism* (New York: E.P. Dutton & Co., Inc., 1938).

tabloids, the *Daily News* covered crime, sex and, when possible, crime-and-sex to an extent that no American newspaper had. Within two years, it had a circulation of 400,000 and had spawned numerous copycat papers. The *Daily News* and its progeny had a field day during the roaring '20s, covering scandals such as the Peaches and Daddy Browning marriage, Earl Carroll orgy, Kip Rhineland divorce and Hall-Mills murder. Further, newspaper editors across the country took notice of the tabloids' success and incorporated pieces of their style into regular news coverage.<sup>72</sup>

Perhaps as a result of this display of excess, some members of the legal community began to consider imposing restraints on the press, particularly in the area of crime news.<sup>73</sup> Journalists, taking these threats to heart, began to discuss self-censorship and created codes of ethics. By the mid-1940s, newspapers had begun to omit rape victims' names from their stories.<sup>74</sup>

*Privacy matures.* During the 1930s and 40s, legal scholars continued to discuss the uneven development of the privacy tort and its problematic nature. As one scholar noted, "To say precisely what is meant by the 'right of privacy' is a difficult matter."<sup>75</sup> Still, they gave it their best shot. Legal scholar Leon Green broke the tort into three areas: physical harms; harms of appropriation; and harms of defamation.<sup>76</sup> Green and other writers made a point of noting that privacy involved an interest in personality instead of property. What this meant in practical terms was unclear. As one scholar wrote, "It is hard to think of such an interest in personality as having value because

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<sup>72</sup>Ibid., 231-232.

<sup>73</sup>Koehler, 101, 108-109; "Restricting the Press," 74 *Law Journal* 167 (1932).

<sup>74</sup>Koehler, 111-121.

<sup>75</sup>"Necessity of Statutory Protection of the Right of Privacy," 81 *University of Pennsylvania Law Review* 324 (1933).

<sup>76</sup>Leon Green, "The Right of Privacy," 27 *Illinois Law Review* 237, 239 (1932); See also DeMott, 128.

anything of value has at some time, somewhere, by someone, been designated property."<sup>77</sup>

For the fiftieth anniversary of the publication of Warren's and Brandeis's article, a few journals pulled together more thoughtful reviews of the tort.<sup>78</sup> Legal commentator and scholar Louis Nizer explained that the privacy tort pitted two primary American ideals against each other. On the one hand, "It is the right of an individual to live a life of seclusion and anonymity, free from the prying curiosity which accompanies both fame and notoriety."<sup>79</sup> As journalist and legal scholar Don Pember has noted, the American colonies were settled in large part by people seeking seclusion and anonymity for religious worship.<sup>80</sup> However, the colonists also sought openness in government and public affairs. Thus, Nizer writes, "Opposed to this ideal [of seclusion] is the principle that the white light of publicity safeguards the public, that free disclosure of truth is the best protection against tyranny." More will be said on this subject later.

*Prosser defines privacy.* The 1960s ushered in a new era in privacy law. Until that time, scholars were still somewhat uncertain how to classify the tort. As late as 1959, they wrote articles with titles such as "What Do We Mean By 'Right To Privacy?'"<sup>81</sup> The framework outlined by Leon Green was still in use, although with slight modifications and the addition of intrusion.<sup>82</sup> But the August 1960 issue of the *California Law Review* contained an article by William Prosser, dean of the University of California, Berkeley, Law School, that redefined the tort of privacy.<sup>83</sup> Prosser

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<sup>77</sup>John B. Pew, "The Right of Privacy—Protection of Man's Personality," 1 *Kansas City Law Review* 4 (1933).

<sup>78</sup>For example, see "Right of Privacy Fifty Years After," 15 *Temple Law Review* 148 (1940).

<sup>79</sup>Nizer, 528.

<sup>80</sup>Pember, 4.

<sup>81</sup>Frederick Davis, "What Do We Mean By 'Right To Privacy?'" 4 *South Dakota Law Review* 1 (1959).

<sup>82</sup>The fourth privacy tort, intrusion, occurs when one individual invades the solitude of another. Don R. Pember, *Mass Media Law* (Dubuque, IA: Brown & Benchmark Publishers, 1996), 571.

<sup>83</sup>William L. Prosser, "Privacy," 48 *California Law Review* 383 (1960).

broke privacy into the four distinct torts legal scholars recognize today: appropriation, intrusion, false light and publication of private facts. In regard to the publication of private facts, he wrote: "The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation, into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth."<sup>84</sup>

Not everyone agreed with Prosser. Legal scholar Edward Bloustein said privacy was one tort, which involved insults to human dignity. The wrong involved in private facts, he said, was not a harm to reputation but an assault on "personal dignity and integrity."<sup>85</sup> Hyman Gross disagreed with both Prosser and Bloustein, defining privacy as a *condition* in which knowledge of a person or his affairs is limited.<sup>86</sup> The tort occurs when that condition is altered.

Still, Prosser's classification system was adopted by the legal community.<sup>87</sup> His definition of the private facts tort may have had some unforeseen ramifications for crime victims who brought suit under it. In the 1960s, the U.S. Supreme Court began to set fault standards for plaintiffs bringing libel suits. These standards protected the press from what could have been hefty damages and provided breathing room for the sometimes virulent political dialogue of the 1960s. In 1964, the Supreme Court said public officials bringing libel suits must prove journalists had knowledge of the falsity of their words or demonstrated a reckless disregard for the truth.<sup>88</sup> Three years later, it extended this rule to public figures.<sup>89</sup> Then, the Supreme Court began to construct a similar fault standard for privacy suits, making it difficult for crime victims to recover

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<sup>84</sup>*Ibid.*, 398.

<sup>85</sup>Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," 39 *New York University Law Review* 962, 981-982 (1964).

<sup>86</sup>Hyman Gross, "The Concept of Privacy," 42 *New York University Law Review* 34, 35-36 (1967).

<sup>87</sup>Carl, 243; "Right to Privacy: Social Interest and Legal Right," 51 *Minnesota Law Review* 531, 539 (1967).

<sup>88</sup>*New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>89</sup>*Curtis Publishing Co. v. Butts*, *AP v. Walker*, 388 U.S. 130 (1967)

damages. At least one writer has said that given the close conceptual ties legal scholars drew between libel and privacy, the creation of a fault standard for privacy was inevitable after the Supreme Court's 1964 decision.<sup>90</sup>

In addition, Prosser's definition has some interesting philosophical implications. If the concern of plaintiffs in privacy cases is harm to their reputation, they must believe that whatever is known about them will damage their reputation. However, one's reputation normally suffers only when one exhibits behavior or characteristics over which one has some control. To be called a liar or adulterer is harmful because the speaker is implying that one has voluntarily exhibited undesirable behavior. Yet there is nothing voluntary about being a crime victim. One can no more control the actions of one's attacker than one can change one's height. Prosser's definition, then, forces crime victims to acknowledge shame for something over which they had no control. Alternatively, it may be construed to mean that people bringing privacy suits because they were identified as crime victims feel shame because they are partly responsible for the event. This is a dangerous connotation, particularly in the case of rape victims, who were—and are—often blamed for the assault on them.

*Other concepts of privacy.* One major difficulty in dealing with privacy is the difference between the legal and common meanings of the word. By categorizing and defining four privacy torts, Prosser—perhaps unintentionally—excluded much from the legal definition of privacy that is contained within the common meaning of the word. People often think the right to privacy protects them more than it does.

Many people believe privacy is the right to control information about themselves. This view is supported by philosophers such as Charles Fried, who see information as a kind of "moral capital" people invest in each other.<sup>91</sup> Fried explains:

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<sup>90</sup>Isidore Silver, "Privacy and the First Amendment," 34 *Fordham Law Review* 553 (1966).

<sup>91</sup>Charles Fried, "Privacy [a moral analysis]," in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand David Schoeman (New York: Cambridge University Press, 1984), 203-222; also, Robert S. Gerstein, "Intimacy and privacy," in *Philosophical Dimensions of Privacy: An*

"The man who is generous with his possessions, but not with himself, can hardly be a friend, nor—and this more clearly shows the necessity of privacy for love—can the man who, voluntarily or involuntarily, shares everything about himself with the world indiscriminately."<sup>92</sup> He claims privacy gives people control over the amount of information about themselves that they give to others so they can create relationships with varying degrees of intimacy.

One can easily see that Fried's notion of privacy is broader than the legal definition. Fried would protect all information people conceal to maintain their relationships. In contrast, the private facts tort, which is most applicable here, protects only that information that is offensive to a reasonable person *and* not of public interest. Nor do any of the privacy torts protect people's right to live their lives without undue social pressure. Some philosophers say the right to privacy should include this. For example, Jeffrey Reiman says privacy is a social ritual in which people refrain from inquiring about others in order to show respect for them.<sup>93</sup> By refraining from making unwanted inquiries one allows others to develop as they choose. Privacy fosters individual autonomy.<sup>94</sup>

In light of the dichotomy between the common and legal definitions of privacy, one should not be surprised that individuals often pursue suits for invasion of privacy when anyone familiar with the tort could tell them they have no chance of winning. In particular, crime victims have been unwilling to accept the narrow legal definition of privacy.<sup>95</sup> In lawsuits, some have claimed the inclusion of their identities in public

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*Anthology*, ed. Ferdinand David Schoeman (New York: Cambridge University Press, 1984), 265-271; James Rachels, "Why privacy is important," in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand David Schoeman (New York: Cambridge University Press, 1984), 290-299.

<sup>92</sup>Fried, 211.

<sup>93</sup>Jeffrey H. Reiman, "Privacy, intimacy and personhood," in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand David Schoeman (New York: Cambridge University Press, 1984), 310.

<sup>94</sup>Other advocates of this position include Martin Gunderson, David J. Mayo, and Frank S. Rhame, *AIDS: Testing and Privacy* (Salt Lake City: University of Utah Press, 1989), 60.

<sup>95</sup>So have some legal scholars. Beginning in the 1970s, some writers tried to approach privacy from a philosophical perspective yet still address legal issues. For example, Thomas I. Emerson, "The Right of Privacy and Freedom of the Press," 14 *Harvard Civil Rights—Civil Liberties Law Review* 329

records should not void their right to privacy.<sup>96</sup> They think the courts should provide them with the protection they need to recover and reclaim control over their lives.<sup>97</sup> They do not think the press has a right to decide for them what the public will know about the incident and their personalities. In victims' arguments, one clearly can see the influence of an alternative conceptualization of privacy.

Before leaving the concept of privacy, there is one additional thing to consider. The focus of attention on privacy suits involving rape victims seems to have limited scholars' thinking on the matter. They tend to assume information about sexual assaults is private.<sup>98</sup> Most likely, this is because of the nature of the assault. Americans assume anything sexual is private. However, sexual assaults are not about sex as much as power. There is no intimacy between victim and attacker as there is between lovers. When one realizes rape is no more intimate than non-sexual assault, robbery or murder, one begins to question whether the details of the attack are indeed private. This leads to one of the questions to be explored in this study: can Americans—particularly American journalists—distinguish between private and public information? When legal scholars say sexual assaults are private and rely on the sexual aspect to justify their statements, they forego establishing workable guidelines that will aid journalists in deciding whether information about victims of other crimes is private.

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(1979); Edward J. Bloustein, "The First Amendment and Privacy: The Supreme Court Justice and the Philosopher," 28 *Rutgers Law Review* 41 (1974); Gerald G. Ashdown, "Media Reporting and Privacy Claims—Dealing in Constitutional Protection for the Press," 66 *Kentucky Law Journal* 759 (1977-78); "An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases," 124 *University of Pennsylvania Law Review* 1385 (1976); George Anastoplo, "The Public Interest in Privacy: On Becoming and Being Human," 26 *DePaul Law Review* 767 (1977); Peter L. Fletcher and Edward L. Rubin, "Privacy, Publicity, and the Portrayal of Real People by the Media," 88 *Yale Law Journal* 1577 (1979).

<sup>96</sup>For example, see *The Florida Star v. B.J.F.*, 491 U.S. 524; 109 S.Ct. 2603 (1989).

<sup>97</sup>See comments by rape victim Nancy Ziegenmeyer's representative in: Sylvia Paine, "Editor, Rape Victim Split on Secrecy," *Washington Journalism Review*, October 1990, 18.

<sup>98</sup>For example, see Russell D. Workman, "Balancing the Right to Privacy and the First Amendment," 29 *Houston Law Review* 1059, 1080 (1992); Kimberly Wood Bacon, "Florida Star v. B.J.F.: The Right of Privacy Collides with the First Amendment," 76 *Iowa Law Review* 139, 165 (1990); Kim Ruckdaschel-Haley, "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 *South Dakota Law Review* 94, 114 (1990).

As noted in the introduction to this chapter, victims of hate crimes and abuse—among others—suffer from publicity along with rape victims.

#### THE PUBLIC INTEREST STANDARD

Scholars generally agree that the Sixth Amendment guarantee of a public trial was intended to benefit the defendant alone.<sup>99</sup> However, that narrow legal interpretation belies a sense on the part of many Americans that they should be informed about criminal proceedings. As U.S. Supreme Court Justice John Paul Stevens wrote in *Gannett Co. v. DePasquale*:

There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.<sup>100</sup>

Today, many people might disagree with Stevens about the benefits of publicity, but the American guarantee of open judicial proceedings was created by men who realized all too well the harms created by a closed system. In the sixteenth and seventeenth centuries, the Star Chamber, a court established by King Henry VII and made up of high government officials, secretly heard cases involving breaches of the peace, seditious libel and other issues of great concern to the government.<sup>101</sup> After the abolition of the Star Chamber in 1641, common law courts adopted many of its rules, and although they usually held open hearings, they often engaged in coercive activities, particularly in the American colonies.<sup>102</sup>

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<sup>99</sup>*Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). Also, Max Radin, "The Right to a Public Trial," 6 *Temple Law Quarterly* 381, 392 (1932); Nick Johnson, "Right of Public and Press to be Admitted to a Criminal Trial," 35 *Texas Law Review* 429, 430 (1957).

<sup>100</sup>*Gannett Co. v. DePasquale*, 443 U.S. at 383.

<sup>101</sup>Cora Scofield, *A Study of the Court of the Star Chamber* (New York: Burt Franklin, 1900), 9-11; Frederick S. Siebert, *Freedom of the Press in England 1476-1776: The Rise and Decline of Government Control* (Urbana, Ill.: University of Illinois Press, 1965), 120.

<sup>102</sup>Siebert, 270; William E. Nelson, "The Jury and Consensus Government in Mid-Eighteenth Century America," in *The Bill of Rights: Original Meaning and Current Understanding*, ed. Eugene W. Hickok, Jr. (Charlottesville: University Press of Virginia, 1991), 333.

Thus, the creators of the Bill of Rights were nearly as suspicious of the judiciary as of the other branches of government.<sup>103</sup> With the Sixth Amendment, they created a check on the courts to ensure that defendants would be treated fairly. Subsequent history has shown the founding fathers were prudent in their actions. Closed immigration hearings in the early 1900s resulted in an abridgment of aliens' civil rights much like those experienced by Star Chamber defendants.<sup>104</sup> Since that time, the courts have been increasingly reluctant to bar journalists from judicial proceedings or suppress news of the criminal justice system.<sup>105</sup> Judges seem to believe any harms to defendants or victims caused by publicity are outweighed in the long-run by the public's ability to ensure justice.

*Newsworthiness.* While Warren and Brandeis thought people should be protected from the glare of publicity and the vulgar gaze of the public, they realized some individuals might want to keep information secret that the general welfare required the public to know. The young lawyers said the right to privacy should protect information about "the private life, habits, acts, and relations of an individual" as long as that information had no connection or bearing on his ability to hold a public office for which he made himself a candidate.<sup>106</sup> When individuals run for political office, their habits take on an importance not found in actions of ordinary people. Distinguishing between private individuals and public officials is fair, Warren and Brandeis said, because candidates for government office renounce their right to be free from public scrutiny when they declare their candidacy.<sup>107</sup> Thus, Warren and Brandeis

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<sup>103</sup>Nelson claims the colonists did not distinguish the judiciary from the executive branch, 334. Several documents in which colonists talk about their distrust of closed courts, particularly the Star Chamber, are contained in Leonard Levy, *Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* (New York: The Bobbs-Merrill Company, Inc., 1966).

<sup>104</sup>For a description of World War I exportation hearings, see Zechariah Chafec Jr., *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1942), 203-204.

<sup>105</sup>*Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise v. Riverside Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise v. Riverside Superior Court*, 478 U.S. 1 (1986).

<sup>106</sup>Warren and Brandeis, 216.

<sup>107</sup>*Ibid.*, 215.

wrote: "The right to privacy does not prohibit any publication of matter which is of public or general interest."<sup>108</sup> They also exempted information that would be considered privileged under libel law, such as court testimony or reports of legislative proceedings, and information the plaintiff had made available to the public.<sup>109</sup>

Courts readily accepted the "newsworthiness" defense, as the exemptions outlined by Warren and Brandeis were called. In fact, they were more generous than the two lawyers, finding information that had little or nothing to do with public officials or public office to be "newsworthy."<sup>110</sup> For most of the twentieth century, legal scholars also have supported a broad definition of newsworthiness. Often, they seemed to define newsworthy information as that which appears in the news. This passage by scholar Louis Nizer is typical of the discussion of newsworthiness:

"Names make news" is a primary tenet of the journalistic craft. It would manifestly be impossible, however, to publish a newspaper if it were necessary, before going to press, to obtain written waivers from the hundreds of individuals whose names appear in each issue. Since the safeguarding of a free press is of paramount public importance, all courts can agree that the right of privacy does not prohibit the publication of news and pictures in connection with items of legitimate public interest.<sup>111</sup>

*The Supreme Court's standard.* When the U.S. Supreme Court heard its first privacy case in 1967, it incorporated the idea of newsworthiness into its test for determining liability.<sup>112</sup> The Court said plaintiffs in cases where the publication dealt with material of public interest had to prove actual malice on the part of the defendants.

The creation of the public interest standard captured a lot of attention in the legal community, but it could hardly have been a surprise to lawyers and judges used to

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<sup>108</sup>*Ibid.*, 214.

<sup>109</sup>Warren and Brandeis also suggested an exception for oral communication, but this has become irrelevant in an era in which broadcasts reach more people than any newspaper or magazine.

<sup>110</sup>For example, the name of a rape victim. *Hubbard v. Journal Publishing Co.*, 368 P.2d at 148. See also, *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (1940); *Meetze v. A.P.*, 95 S.E.2d 606 (1956).

<sup>111</sup>Nizer, 540.

<sup>112</sup>*Time, Inc v. Hill*, 385 U.S. 374 (1967); Don R. Pember and Dwight L. Teeter Jr., "Privacy and the Press Since *Time, Inc. v. Hill*," 50 *Washington Law Review* 57, 90 (1974).

employing the newsworthiness defense. However, the rather liberal application of that standard in subsequent cases does seem to have caught many lawyers off guard.

In 1975, the U.S. Supreme Court decided its first privacy suit involving a rape victim.<sup>113</sup> The Court found the victim's name to be of public interest, although other factors such as the inclusion of the name in public records played a larger part in its denial of damages.<sup>114</sup> Several legal scholars questioned the correctness of the Court's judgment.<sup>115</sup> They pointed out that while the public had an interest in being informed about that particular rape-murder—and crime in general—the actual name of the victim did not add to the public's understanding or awareness of crime. One commentator wrote: "The Supreme Court stretched its imagination to find a public interest in the publication of a rape victim's identity, and overlooked the possibility that the public's need to be informed about the courts could be fulfilled without the publication of the rape victim's identity."<sup>116</sup>

Some scholars focused on the High Court's emphasis on the inclusion of the victim's name in the public record.<sup>117</sup> This may have created a misperception that the Court would rule differently if reporters did not get the victim's name from official documents. When the U.S. Supreme Court reaffirmed its decision in 1989, saying the press could not be held liable for invasion of privacy when it legally obtained a victim's name, many legal commentators took exception to the decision.<sup>118</sup> Primarily, they

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<sup>113</sup> The case was actually brought by the victim's father because the victim died during the rape. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

<sup>114</sup> *Ibid.*, 494-493.

<sup>115</sup> Deborah Studybaker and Steven Studybaker, "Cox Broadcasting v. Cohn: A Finer Definition of the Publication Privilege," 5 *Capital University Law Review* 267, 273 (1976); "Constitutional Law—First Amendment—A State May Not Impose Civil Liability for the Accurate Publication of a Rape Victim's Name Obtained from Publicly Available Judicial Records Maintained in Connection with a Public Prosecution," 9 *Georgia Law Review* 963, 974 (1975); Blackmun, 1223-1224.

<sup>116</sup> Studybaker and Studybaker, 275.

<sup>117</sup> For example, "State May Not Suppress Name of Rape Victim," 61 *American Bar Association Journal* 868 (1975).

<sup>118</sup> *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). For commentary, see Peter B. Edelman, "Free Press v. Privacy: Haunted by the Ghost of Justice Black," 68 *Texas Law Review* 1195, 1199 (1990); Julia A. Loquai, "Keeping Tabs on the Press: Individual Rights v. Freedom of the Press Under the First Amendment," 16 *Hamline Law Review* 447, 460 (1993); Mary Ellen Hockwalt, "Bad News:

argued that publication of the victim's name was not of public interest. Readers did not need to know the woman's name to be informed about the crime. Commentator Julia Loquai wrote: ". . . a rape victim's name generally has little or no public significance. In contrast, the publication of rape victims' names discourages victims from reporting assaults. This in turn reduces the legitimate self-governance information being made available to the public."<sup>119</sup>

*The influence of Meiklejohn.* Loquai and other commentators' conceptualization of public interest seems to have been influenced by the ideas of Alexander Meiklejohn.<sup>120</sup> Meiklejohn said the First Amendment exists to further democracy.<sup>121</sup> It protects political speech absolutely, but non-political speech can be regulated in order to achieve societal interests.<sup>122</sup> Many proponents of victims' privacy draw on this premise when they say people need to be informed about the workings of the criminal justice system but do not need to know the names of specific crime victims. They believe people need to know about government operations but not about the people who have contact with governmental entities. Kimberly Wood Bacon writes: "Application of Meiklejohn's guidelines would correctly balance the rape victim's privacy interest with the media's first amendment protection. If the Court would determine public interest by asking whether the contested facts facilitate self-governance, an appropriate balance of the competing interests could be achieved."<sup>123</sup>

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Privacy Ruling to Increase Press Litigation," 23 *Akron Law Review* 561, 573 (1990); Barbara Lynn Pederson, "The Rape of the Right to Privacy," 23 *The John Marshall Law Review* 731, 748 (1990); David M. Henry, "The Florida Star v. B.J.F.: Is Journalistic Irresponsibility Paramount to Individual Privacy?" 16 *Ohio Northern University Law Review* 93, 100 (1989); Ruckdaschel-Haley, 113.

<sup>119</sup>Loquai, 460.

<sup>120</sup>*Ibid.*, 462; Bacon, 156-157; Bloustein, 61.

<sup>121</sup>See generally, Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948).

<sup>122</sup>This conceptualization of protected speech is probably more in line with Warren and Brandeis's original idea of newsworthiness than later court interpretations were.

<sup>123</sup>Bacon, 156-157.

A few writers do see a societal interest in publicly identifying crime victims.<sup>124</sup> For example, Sarah Henderson Hutt notes that some victims actively seek the spotlight, attempting to increase social awareness of criminal issues and, in the case of rape victims, reduce the stigma surrounding the crime.<sup>125</sup> It is obvious, however, that Hutt and other minority writers use a broader definition of public interest than scholars who have been influenced by Meiklejohn's views.

### CONCLUSION

There is no clear-cut boundary defining what information the public needs to know. Most Americans probably think they have a right to know about legislative actions, acts by executive officers and the creation of official policy. Few would argue that information pertaining directly to government action should be kept secret. But when information about private individuals, or even the private lives of public officials, is involved, the consensus breaks down. People disagree on what should be known and how much should be known.

The controversy over identifying crime victims in the news provides an opportunity to study this issue through a case example. Crime is a public issue that touches private people. Citizens need to know about crime to protect themselves collectively and individually. Knowing who the victims are could increase public awareness and concern if people identify with the victims. On the other hand, the victims are private people who have not asked for attention. They have some right to be left alone to put their lives back in order, and one could argue that their identities lend no understanding to the question of why crime occurred. Many—if not most—criminals choose their victims because of opportunity not because of who they are.

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<sup>124</sup>Sarah Henderson Hutt, "In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims," 41 *Duke Law Journal* 386 (1991); Robert E. Drechsel, "Negligent Infliction of Emotional Distress: New Tort Problem for the Mass Media," 12 *Pepperdine Law Review* 889, 913-915 (1985).

<sup>125</sup>Hutt, 396-399.

Crime victims' identities lie in a gray area. The public may have a need to know them; it may not. Solid arguments can be made for both sides.

The courts have walked a fine line on this issue. In order to protect the news media's First Amendment rights, they have declared victims' names to be of public interest in specific instances.<sup>126</sup> At the same time, the courts limit their decisions to the immediate fact situation, refusing to rule out the possibility that there may be a situation in which the victim's name is private and has no public interest. Many scholars find the courts' decisions unsatisfactory because they acknowledge a state interest in protecting victims'—particularly rape victims'—privacy, yet they give little indication of how this can be accomplished without violating the First Amendment.<sup>127</sup> Some writers, such as Victor Dubose, say the trend in U.S. Supreme Court decisions makes it clear that the press interest is over-riding.<sup>128</sup> Still, the limited holdings give victims' advocates hope. The next two chapters will explore court decisions involving the naming of crime victims in the news in more detail, attempting to define more clearly the balance—or lack of balance—the courts have struck between individuals' right of privacy and the public interest in being informed.

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<sup>126</sup>For example, see *Jones v. Herald Post Co.*, 18 S.W.2d 972 (1929); *Hubbard v. Journal Publishing Co.*, 368 P.2d 147 (1962).

<sup>127</sup>Carey Haughwout, "Prohibiting Rape Victim Identification In The Media: Is It Constitutional?" 23 *University of Toledo Law Review* 735, 749 (1992); Paul Marcus and Tara L. McMahon, "Limiting Disclosure of Rape Victim's Identities," 64 *Southern California Law Review* 1019, 1037-1039 (1991).

<sup>128</sup>Victor Arnell Dubose, "The Florida Star—'Happy 200th' to the First Amendment, but a Setting Sun for Victims' Privacy?" 10 *Mississippi College Law Review* 193, 204 (1990).

## Chapter 2: The First Amendment in Action

Fort Worth resident Jane Doe was raped at knife point and terrorized in her home by a man who had been on parole for less than three months.<sup>1</sup> Following the early morning assault, the assailant robbed Doe, bound her with strips of bed sheets and stole her car. Doe managed to free herself and call the police. Two days later, police arrested the rapist while he was driving Doe's car in Oklahoma.

On a routine visit to the local police station, a reporter for the Fort Worth *Star-Telegram* read a copy of the police report on Doe's rape. The report included the victim's real name and address. The reporter, Betsy Tong, wrote two stories about the rape. One, published the day after the rape, reported Doe's age, neighborhood, possession of a home security system and a 1984 black Jaguar, and the fact that Doe was taking medication. The second article, published two days after the rape, identified Doe as the owner of a travel agency. While neither article included Doe's name, people who knew her could easily identify her as the victim.

Doe sued Tong and the *Star-Telegram* for invasion of privacy, intentional infliction of emotional distress and negligence. The trial court granted the newspaper summary judgment—a ruling in its favor that eliminates the need for a trial—because the articles were true and of public interest. The Texas Court of Appeals reversed the ruling.

The newspaper then appealed to the Texas Supreme Court, which ruled in its favor in spite of the fact that "there is a presumption under Texas law that the public has no legitimate interest in private embarrassing facts about private citizens."<sup>2</sup> The media should avoid unnecessary disclosure of private information, particularly when such

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<sup>1</sup>*Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471 (Tex. 1995); 1995 Tex. LEXIS 90.

<sup>2</sup>*Star-Telegram, Inc. v. Doe*, 1995 Tex. LEXIS 90, at \*8.

information could be embarrassing, the court said. But holding the media responsible for the effect of each disclosure could encourage self-censorship. The court concluded:

Facts which do not directly identify an innocent individual but which make that person identifiable to persons already aware of uniquely identifying personal information, may or may not be of legitimate public interest. To require the media to sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task; a task which foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public.<sup>3</sup>

The Texas court's 1995 opinion followed more than two decades of court decisions that said essentially the same thing: for all practical purposes, the law does not protect crime victims' privacy from the news media.

## CURRENT LAW

### STATUTORY PROTECTION

About half of the states offer some kind of statutory protection for crime victims who don't want their names known. However, most of the laws are limited in scope, and many only apply to sex-crime victims, who typically are seen as more vulnerable to harassment than victims of other crimes.

*Publication bans.* Three states—Georgia, South Carolina and Florida—took the direct approach and passed laws in the 1910s that prohibit mass media from publishing or broadcasting the names of sex-crime victims.<sup>4</sup> Wisconsin had a similar law from the mid-1920s to the mid-1970s, but the state legislature repealed it after the U.S. Supreme Court indicated Georgia's law could be unconstitutional.<sup>5</sup> Florida's

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<sup>3</sup>Ibid., at \*11.

<sup>4</sup>GA. CODE ANN. § 16-6-23 (1995); FLA. STAT. ANN. § 794.03 (1995); S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1993). Massachusetts has a law that could be interpreted as prohibiting publication of sex-crime victims' names by the mass media, although it was probably intended to prohibit the dissemination of victims' names by law-enforcement agents. There are no reported cases involving the statute, so the interpretation remains unclear. MASS. ANN. LAWS ch. 265, § 24C (Law. Co-op. 1996).

<sup>5</sup>WIS. STAT. ANN. § 942.02 (repealed by L. 1975, c. 184 § 6); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

legislature amended its statute after a state court of appeals declared it unconstitutional in 1993; it has yet to be tested again.

In addition, Florida passed a law in 1995 that gives sex-crime victims the means to sue anyone who discloses their identity before trial. Such a suit might be hard to win, however, because the statute requires victims to prove the person who disclosed their identity did so with "reckless disregard for the highly offensive nature of the publication."<sup>6</sup> Reckless disregard is the toughest standard of proof for people to meet. Libel plaintiffs must prove that the people who defamed them had serious doubts about the truth of their statements or should have had serious doubts. A similar standard probably would be used in a privacy suit brought under the Florida law, but as yet, there are no reported cases involving the civil-suit provisions.

*Limited access.* More commonly, state legislatures have tried to limit publication of victims' identities by controlling access to their names, addresses and other identifying information. At least 12 states have laws that make records identifying sex-crime victims confidential and exempt from public disclosure laws.<sup>7</sup> In some states, such as Florida and Texas, all records, including court documents and testimony, are covered.<sup>8</sup> In others, the law protects sex-crime victims' identities from disclosure only in certain documents or until testimony is given at trial.<sup>9</sup> Some states only protect child victims' identities.<sup>10</sup>

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<sup>6</sup>FLA. STAT. ANN. § 794.026 (1995).

<sup>7</sup>ALASKA STAT. § 12.61.140 (1995); CAL. GOV'T CODE § 54961 (West 1995); FLA. STAT. ANN. § 92.56 (1995); MASS. ANN. LAWS ch. 265, § 24C (Law. Co-op. 1996); MONT. CODE ANN. § 44-5-311 (1995); NEB. REV. STAT. § 81-1842 (1995); NEV. REV. STAT. ANN. § 200.3772-200.3774 (Michie 1995); TEXAS CODECRIM. PROC. art. 57.02 (1996).

<sup>8</sup>FLA. STAT. ANN. § 92.56 (1995); TEXAS CODECRIM. PROC. art. 57.02 (1996).

<sup>9</sup>CAL. GOV'T CODE § 54961 (West 1995); MASS. ANN. LAWS ch. 265, § 24C (Law. Co-op. 1996); NEB. REV. STAT. § 81-1842 (1995).

<sup>10</sup>Four states only protect the identities of child sexual-assault victims. IOWA CODE § 910A.13 (1995); ME. REV. STAT. ANN. tit. 30-A § 288 (West 1995); N.J. REV. STAT. § 2A:82-46 (1994); R.I. GEN. LAWS § 11-37.8.5 (1995). North Dakota protects the identities of child victims of all crimes. N.D. CENT. CODE § 12.1-35-03 (1995).

Victims of crimes other than sexual assault generally receive less protection for their privacy. Ten states have laws that permit law-enforcement officials to delete crime victims' addresses and phone numbers from law-enforcement records.<sup>11</sup> However, victims usually are required to give their names in court testimony if not earlier in the legal process.

### COURT DECISIONS

*Publication bans.* Once their names are published or broadcast, crime victims have very little recourse. Victims have been suing media outlets since the late 1920s for invasion of privacy. Almost uniformly, they have lost. The courts tend to be protective of news organizations when they deal with topics of public interest—and even more so when they deal with government-related issues. As much as crime seems like a personal affront to the victim, courts view it as a public issue; the administration of justice is as much a function of government as tax collection and industrial regulation. Everyone involved in the justice system, including victims, is subject to public scrutiny. In this area, the First Amendment is nearly absolute.

*Limited access.* Courts have been somewhat more lenient in interpreting laws that restrict public access to victims' names. Laws that require government officials and workers to keep victims' names confidential and exempt portions of law-enforcement records from open-records acts seem to be acceptable.<sup>12</sup> However, courts tend to find them more acceptable if they are limited in scope and apply to documents or government proceedings that traditionally have not been open to the public and the press. Laws that require officials to close traditionally-open documents and

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<sup>11</sup>ALASKA STAT. § 12.61.130 (1995); ARIZ. REV. STAT. ANN. § 13-4434 (1995); IND. CODE ANN. § 35-37-4-12 (Burns 1995); MICH. COMP. LAWS § 780.758 (1994); MONT. CODE ANN. § 44-5-311 (1995); OHIO REV. CODE ANN. § 2930.07 (Anderson 1995); UTAH CODE ANN. § 77-38-6 (1995); VA. CODE ANN. § 19.2-11.2 (Michie 1995); WASH. REV. CODE § 42.17.310 (1995); WYO. STAT. § 14-3-106 (1995).

<sup>12</sup>*Post-Tribune v. Police Department of the City of Gary*, 643 N.E.2d 307 (Ind. 1994).

proceedings, such as trials, in order to conceal victims' identities generally have not withstood judicial scrutiny.<sup>13</sup>

### STATE ACTION

Only Wisconsin and Florida have criminally prosecuted news organizations for publishing rape victims' names. Neither prosecution was successful, and given recent U.S. Supreme Court decisions, it seems unlikely that a conviction in such a case would be upheld. However, neither the federal or state courts have completely ruled out the possibility that some criminal action might be acceptable.

### CRIMINAL CASES

*State v. Evjue*. As noted above, the Wisconsin legislature passed a law in 1925 prohibiting the publication of rape victims' names. The law was not used, however, until 1947. On November 16, Madison's *Capitol Times* ran an account of a gruesome murder and rape on its front page.<sup>14</sup> University of Michigan student Janet Rosenblatt and her brother-in-law had been kidnapped by two men. Rosenblatt was raped, her brother-in-law was killed. *The Capitol Times* named both victims in its story, provoking an outcry from readers who felt Rosenblatt should not have been identified.

Other newspapers, including the *Milwaukee Journal* and *Milwaukee Sentinel*, also identified Rosenblatt, but they did it indirectly by describing her as a relative of the murdered man and a University of Michigan student.<sup>15</sup> Within a week of the crime, however, the *Chicago Tribune* and several Wisconsin newspapers identified Rosenblatt by name or photograph.<sup>16</sup> Yet the Dane County prosecutor chose to bring charges against only William Evjue, owner and editor of the *Capitol Times*.

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<sup>13</sup>*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205 (1993); *WXYZ, Inc. v. Hand*, 463 F.Supp. 1070 (1979).

<sup>14</sup>This account of the case facts comes from Kim E. Karloff, "To Know Her Name: Wisconsin v. Evjue and the Origins of the Rape Victim Identification Debate" (paper presented to the Commission on the Status of Women at the national convention of the Association for Education in Journalism and Mass Communication, Atlanta, Ga., August 1994).

<sup>15</sup>*Ibid.*, 11-12.

<sup>16</sup>*Ibid.*, 13.

Evjue responded to the charges by filing several motions that contended the statute prohibiting publication of rape victims' names violated both the U.S. and Wisconsin constitutions.<sup>17</sup> The trial judge sustained Evjue's pleas and declared the statute unconstitutional. The state then appealed to the Wisconsin Supreme Court, which heard the case in May of the following year.

In an opinion by the chief justice, the Wisconsin Supreme Court reversed the trial court judge's decision and declared the law constitutional. Noting that speech could be restricted if it presented a clear and present danger, the chief justice wrote: "These matters are primarily for the legislature and it is not for the office of this or any other court to set aside a legislative enactment unless it clearly contravenes some constitutional provision. Whether there is a 'clear and present danger' warranting the enactment of the statute is for the legislature."<sup>18</sup>

Today, the Evjue decision may seem inadequate because the court dodged the First Amendment issues the case raised. In the context of the times, however, the decision is more understandable. The U.S. Supreme Court had upheld convictions for speech that violated social standards and provoked people to violence.<sup>19</sup> The Wisconsin Supreme Court seemed to be following the higher court's lead in finding the publication of rape victims' names unworthy of First Amendment protection.<sup>20</sup> The state court maintained there was little social value in the publication of rape victims' names:

When the situation of the victim of the assault and the handicap prosecuting officers labor under in such cases is weighed against the benefit of publishing the identity of the victim in connection with the details of the crime, there can be no doubt that the slight restriction of the freedom of the press prescribed by sec. 348.412 is fully justified.<sup>21</sup>

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<sup>17</sup>*State v. Evjue*, 33 N.W.2d at 306.

<sup>18</sup>*Ibid.*, 311.

<sup>19</sup>*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>20</sup>*State v. Evjue*, 33 N.W. 2d at 311-312.

<sup>21</sup>*State v. Evjue*, 33 N.W. 2d at 312.

The trial judge, however, had the final say in the case. The Wisconsin Supreme Court sent Evjue's case back for trial, and the judge, who apparently did not agree with the appellate court's decision, dismissed the case for lack of evidence.<sup>22</sup> The district attorney again appealed to the state supreme court—Rosenblatt had been identified half a dozen times. The appellate court could do nothing, however. Overturning the trial judge's decision would place Evjue in double jeopardy.<sup>23</sup>

*State v. Globe Communications Corp.* Given the twisted outcome of the Evjue case, the other states may have been reluctant to test their criminal statutes. There were opportunities. Media organizations identified rape victims, a few of whom brought civil suits based on the criminal statutes, but the states themselves took no action.<sup>24</sup> Until Palm Beach.

As described in the first chapter, the news media swarmed on Palm Beach, Florida, after Patricia Bowman reported being raped by William Kennedy Smith. Even before Smith was charged, numerous newspapers and television stations profiled the alleged victim and suspect. By all accounts, the *Globe*, a tabloid newspaper based in Florida, was the first American news organization to publish Bowman's name.<sup>25</sup> It also ran pictures of Bowman and Smith under the headline "Rape Gal Exposed." On the same day that he charged Smith with rape, the Palm Beach County prosecutor charged the *Globe* with violating Florida's law prohibiting the publication of rape victims' names.<sup>26</sup>

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<sup>22</sup>Karloff, 16.

<sup>23</sup>*Ibid.*, 17.

<sup>24</sup>*Nappier v. Jefferson Standard Life Insurance Co.*, 322 F.2d 502 (1963); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Dorman v. Aiken Communications, Inc.*, 398 S.E.2d 687 (S.C. 1990).

<sup>25</sup>The first *Globe* issue to name Bowman was dated April 23, 1991. However, it appeared on newstands on April 15, the day before NBC News named the woman. *State v. Globe Communications Corp.*, 622 So.2d 1066, 1068 (Fla. App. 4 Dist. 1993).

<sup>26</sup>"Globe Charged for Identifying Alleged Victim," *News Media and the Law*, Summer 1991, 24.

Trial judge Robert Parker declared the law unconstitutional because it gave judges no leeway to consider the circumstances of a particular publication. In similar cases, courts found unconstitutional statutes that unilaterally barred publication of certain information or blocked access to court proceedings.<sup>27</sup> In order for statutes limiting access or publication to be constitutional, the judge said, they must allow judges to hold hearings to determine whether the case facts justified limiting the press's rights.<sup>28</sup>

In addition, Judge Parker said, the Florida statute was invalid because it applied only to mass media and not to interpersonal communication.<sup>29</sup> Noting the *Globe* originally obtained Bowman's name from a local woman who could not be punished, the judge remarked: "With regard to local gossips they had best do it by mouth only. At arguments on October 17th, the State Attorney threatened that 'if Mrs. Jones gets a megaphone or copy machine, we'll prosecute her too!'"<sup>30</sup>

Finally, it is questionable whether any substantial state interest exists to justify a statute prohibiting the publication of rape victims' names, the judge said.

The fact that forty-six states are able to conduct sexual assault investigations and trials without punishing the press criminally for a disclosure of the victim's identity is, in itself, a circumstance which leads this court to conclude that the state's expressed concerns about a victim's safety and privacy are somewhat exaggerated and overblown. The State has selected a weak factual scenario to demonstrate such concerns. Miss Bowman was not in any real, potential danger and surely she must have realized that charges would be filed and that she would have to testify in public, and in Florida, to attend a deposition at the instance of defense counsel. Or did the police and prosecutor tell her such things?<sup>31</sup>

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<sup>27</sup>Judge Parker relied on *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Gardner v. Bradenton Herald, Inc.*, 413 So.2d 10 (Fla. 1982); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

<sup>28</sup>*State v. Globe Communications Corp.*, 622 So.2d at 1072.

<sup>29</sup>Here, the judge relied on the U.S. Supreme Court's decision in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>30</sup>*State v. Globe Communications Corp.*, 622 So.2d at 1074.

<sup>31</sup>*Ibid.*, 1075-76.

The state appealed Judge Parker's decision to a District Court of Appeals, which affirmed it.<sup>32</sup> The state then appealed the appellate court's decision to the Florida Supreme Court, which affirmed the lower courts' decisions.

Relying heavily on the U.S. Supreme Court's decision in *Florida Star v. B.J.F.*, which will be discussed in the following section on privacy suits, the Florida Supreme Court said the state can rarely punish the publication of truthful information. It may never automatically impose liability as Florida attempted to do with its law, because there may be times when the publication of information as sensitive as that of rape victims' identities is in the public interest.<sup>33</sup> For example, the victim may want her name published as part of an effort to raise public awareness about rape.

Second, the state supreme court said, the law unfairly punishes mass media for disseminating victims' names. Individuals also may cause victims harm or embarrassment by spreading their names. The state had asked the court to interpret the law as including "both media giants and non-media individuals who broadcast the victim's identity through non-media instruments, such as megaphones, fliers and facsimile machines."<sup>34</sup> The Florida Supreme Court refused to interpret the law this way, however, because it did not think it would be consistent with the legislature's intent and "we do not rule out the possibility that the legislature could fashion a statute that would pass constitutional muster."<sup>35</sup>

## SUMMARY

Following the court of appeals decision in *State v. Globe*, the Florida legislature reenacted its law prohibiting the publication of sex-crime victims' names with a provision making information identifying victims confidential and exempt from the state

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<sup>32</sup>The state's appeal was a bit unusual. It conceded the law might be unconstitutional as applied to the *Globe* in this case, but it contended the statute wasn't unconstitutional on its face and should not be invalidated. *Ibid.*, 1067.

<sup>33</sup>*State v. Globe Communications Corp.*, 648 So.2d 110 (Fla. 1994).

<sup>34</sup>*Ibid.*, 113.

<sup>35</sup>*Ibid.*, 114.

open records act.<sup>36</sup> The new version has not been tested in court, so there is no way of knowing with certainty whether or not the courts will find it constitutional.

However, it seems unlikely that the new law would survive judicial scrutiny. While the courts have not ruled out the possibility of an acceptable criminal statute in this area, the criteria they have outlined for such a statute would be hard to meet. First, the state must show a substantial state interest. A few courts have already said the desire to protect victims' privacy and encourage reporting of sex crimes does not constitute a substantial state interest, particularly when the state has no evidence to support its claim that a publication ban furthers these two goals.<sup>37</sup>

Second, the state would have to make provisions in its statute for a hearing so that judges or juries could determine the merits of each publication. Doing so, however, may undermine the purpose of such a law because the news media would be able to publish victims' names without liability as long as they could make a strong argument that doing so was in the public interest. In common law privacy cases, the courts have been very willing to give media defendants the benefit of the doubt when determining whether information is of public interest.<sup>38</sup>

Finally, the law would have to apply to all people equally yet be no broader than necessary to accomplish the state's goals. These two provisions are hard to balance. If the law did apply to everyone, then a victim's friend could be prosecuted for telling another friend of the assault. But does such a prosecution further the state's interest?

Given such stringent criteria, it seems unlikely that many states would sink resources into fashioning a criminal statute that punishes the publication of victims' names. However, the three southern states have kept their laws active. Florida, in particular, has made a significant effort to fashion an enforceable law. These states

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<sup>36</sup>FLA. STAT. ANN. § 794.03 (1995).

<sup>37</sup>*State v. Globe Communications Corp.*, 622 So.2d at 1079, citing 457 U.S. 596, 610.

<sup>38</sup>Don R. Pember, *Privacy and the Press* (Seattle: University of Washington Press, 1972), 238-240.

may feel the mere existence of such laws provides an incentive for the media to self-censor. But if the laws don't work as a deterrent, there may yet be attempts within these three states to prosecute news organizations for identifying sex-crime victims.

### PRIVACY SUITS

As discussed in the previous chapter, crime victims only recently began to bring privacy suits against news organizations for the publication of their identity. Prior to the 1960s, *State v. Evjue* was the only reported legal case that specifically dealt with the identification of crime victims. In the late 1920s and 1930s, two crime victims brought privacy suits but these were based on the publication of details of the crime as much as on the publication of the victim's identity.<sup>39</sup>

In the 1960s, however, rape victims began to sue for invasion of privacy, claiming that the publication of their names in connection with the crime caused them humiliation and subjected them to harassment. These suits forced courts to confront the issue of whether news organizations could be prohibited from, or punished for, publishing truthful information that had the potential to harm victims. The answer to the question seems to be no.

### STATUTE-BASED COMPLAINTS

Most of the reported invasion of privacy suits brought by crime victims come from the three states that have statutes prohibiting publication of sex-crime victims' names. The U.S. Supreme Court has heard two such cases. Both times, it all but declared the statutes unconstitutional. Yet the state legislatures keep the laws on their books, and rape victims continue to bring suits in reference to the statutes. This has been possible because until the 1994 decision in *State v. Globe*, the federal and state courts were careful to limit the scope of their decisions to the facts in the cases before them.

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<sup>39</sup>*Jones v. Herald Post Co.*, 18 S.W.2d 972 (1929); *Mau v. Rio Grande Oil, Inc.*, 28 F.Supp. 845 (1939).

*Nappier v. Jefferson Standard Life Insurance Company.* During the early 1960s, the Dental Division of South Carolina's Department of Health sent two of its employees to public schools to teach dental hygiene. The two women, Patricia Nappier and Maxine Gunter, used a puppet called Little Jack in their presentations. As a result, the women were known throughout the state as "The Little Jack Girls."<sup>40</sup>

On November 27, 1961, the two women were raped in a hotel room in Kingstree, where they were to give presentations in schools the next day. The rapist then stole their station wagon, which had the Little Jack logo painted on both sides. Police found the station wagon in Florence, and an area television station took pictures of it the next morning. The television station broadcast pictures of the station wagon with a story about the rape on its evening and night news programs. During both broadcasts, viewers could see the Little Jack logo on the side of the vehicle.

The Little Jack Girls sued the television station, claiming it violated South Carolina's law prohibiting the publication or broadcast of rape victims' names. U.S. District Court Judge Charles Wyche dismissed their suit, saying the women had not actually been named in the broadcast. Further, Wyche said, the broadcast was privileged because the crime was a matter of public interest and public record.<sup>41</sup>

The U.S. Court of Appeals, however, disagreed. First, the court said, in the context of the statute, the word name also means identity. The women were identified when the television station showed their station wagon—a unique and identifiable vehicle—along with its story about the rapes.

Second, the women could sue on the basis of common or statutory law or a combination of the two.<sup>42</sup> The common law makes matters of public interest and public record privileged. However, the court said, South Carolina's statute removes

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<sup>40</sup>*Nappier v. Jefferson Standard Life Insurance Company*, 322 F.2d at 503.

<sup>41</sup>*Ibid.*

<sup>42</sup>*Ibid.*, 505.

that privilege in cases involving the identification of rape victims. In the court's opinion, Circuit Judge Albert Bryan explained:

No matter the news value, South Carolina has unequivocally declared the identity of the injured person shall not be made known in press or broadcast. . . . No constitutional infringement has been suggested. Indeed, Standard conceded in oral argument that if the broadcast did in fact and in law 'name' the plaintiffs, then they had a right of action.<sup>43</sup>

The *Nappier* decision came at a time when more and more states were recognizing a right of privacy. It lent support to the idea that the First Amendment protects speech that has social value, but where society derives no social value from speech or publication, First Amendment freedoms can be limited.<sup>44</sup> The U.S. Supreme Court would soon make it clear, however, that freedom of speech and freedom of the press rarely can be limited.

*Cox v. Cohn*. The pivotal case dealing with the identification of crime victims began on a hot summer night in 1971. Seventeen-year-old Cynthia Cohn went to a party with some friends in Sandy Springs, Georgia. She had quite a bit to drink and passed out. Later, she was found dead. Initially, police said the girl died of a drug overdose or alcohol poisoning.<sup>45</sup> As expected, an autopsy showed Cynthia died by choking on her own vomit. But it also showed she had been raped. Seven months later, six teens who attended the party were charged with rape and murder. Three eventually pled guilty to rape, and three to attempted rape.<sup>46</sup>

A local television station covered the hearing where five of the boys entered their guilty pleas. The sixth had a trial date set and later entered his plea. During the hearing, the station's reporter heard Cynthia Cohn's name. He also read copies of the

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<sup>43</sup>Ibid.

<sup>44</sup>Philosopher and scholar Alexander Meiklejohn seems to be the original proponent of the idea that the First Amendment absolutely protects speech related to government but allows limitations on speech related to other issues. See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper, 1948).

<sup>45</sup>"The Right to Privacy," *Newsweek*, 17 March 1975, 66.

<sup>46</sup>Ibid.

indictments, which contained the girl's name.<sup>47</sup> In his report for the evening news, the reporter detailed the crime and court proceedings. In his account, he used Cohn's name and showed a photograph of her taken from her high-school yearbook.<sup>48</sup> The station repeated the story the next day.

For Cynthia's family, the public disclosure of her name turned life into a nightmare. Her brother and sisters were subjected to humiliating taunts. Cruel children produced graffiti that read: FREE THE SANDY SPRINGS SIX. Hurt, mortified and angry, Cynthia's father, Martin Cohn, owner of a bill-collection company, brought suit against television station WSB-TV for invasion of privacy, invoking a Georgia statute that forbids the publication of a rape victim's name as a matter of public policy.<sup>49</sup>

The statute made publication of rape victims' names a misdemeanor. It did not mention civil sanctions for such a publication. However, the trial court accepted Cohn's argument, ruling that the statute allowed victims to seek civil damages. The trial court also granted Cohn summary judgment, saying the television station was responsible for harm suffered as a result of the broadcast of Cynthia's name. The actual damages, or monetary award, however, would be set by a jury after a trial.

Cox Broadcasting, which owned the Atlanta television station, appealed to the Georgia Supreme Court. The state supreme court said the trial court was wrong; the law applied only to criminal prosecutions. It did not allow people to bring civil suits as a result of being identified by the news media.

However, the court said, Martin Cohn could sue for a common law invasion of privacy.<sup>50</sup> This ruling was an anomaly; according to accepted law, privacy plaintiffs must show that private facts about themselves have been revealed. Martin Cohn was not named in the television broadcast; his daughter was, but she was dead, and accepted law also said privacy plaintiffs must be alive. The Georgia Supreme Court

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<sup>47</sup>*Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 472-473.

<sup>48</sup>*Ibid.*; "The Right to Privacy," 66.

<sup>49</sup>"The Right to Privacy," 66.

<sup>50</sup>Georgia was the first state to recognize a common law right of privacy.

ignored these legal standards and sent the case back to trial so that a jury could determine whether Cohn's "zone of privacy" had been violated.<sup>51</sup>

The television station then made a motion to have its case reheard, arguing that Cynthia Cohn's name was of public interest, and thus, could be published without penalty. This argument also was accepted law. Plaintiffs in privacy suits had to show that no one knew the information about them, that the information was offensive to a reasonable person and that it was not of legitimate public concern.<sup>52</sup> In response, the state supreme court said there was no public interest in knowing the name of a rape victim, and being pressed, declared the statute banning publication of rape victims' names constitutional.<sup>53</sup>

Cox Broadcasting then appealed to the U.S. Supreme Court. The high court could have disposed of the case easily by saying Martin Cohn could not sue because nothing in the broadcast pertained to him nor could he sue on behalf of his daughter because she was dead. The U.S. Supreme Court chose not to take the easy route, however. It seems likely that the Court wanted to hear the Cox Broadcasting case so that it could issue an opinion nullifying a California Supreme Court decision that seemed to be eroding the media's First Amendment protection.

The California case, *Briscoe v. Reader's Digest Association*, involved a privacy suit brought by a man who participated in a truck hijacking in 1956.<sup>54</sup> Eleven years later, *Reader's Digest* reported the crime in a story about "The Big Business of Hijacking." The man, Marvin Briscoe, sued the magazine, claiming he had been a model citizen since 1956 and public disclosure of his previous criminal activity humiliated him. Briscoe said that while the subject of the article was newsworthy, his name was not and should not have been included.

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<sup>51</sup>*Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 475.

<sup>52</sup>Pember, 239-240.

<sup>53</sup>*Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 475.

<sup>54</sup>*Briscoe v. Reader's Digest Association*, 483 P.2d 34 (1971).

The California court agreed with *Briscoe*. It said the First Amendment protects reports that have public interest, and reports of criminal activity certainly have public interest.<sup>55</sup>

However, identification of the actor in reports of long past crimes usually serves little independent public purpose. Once legal proceedings have been terminated, and a suspect or offender has been released, identification of the individual will not usually aid the administration of justice. Identification will no longer serve to bring forth witnesses or obtain succor for victims. Unless the individual has reattracted the public eye to himself in some independent fashion, the only public "interest" that would usually be served is that of curiosity.<sup>56</sup>

The California Supreme Court sent the case back to the trial court to decide whether *Briscoe's* name was newsworthy — or of public interest — according to the following test: (1) what was the social value of the name; (2) what was the depth of the article's intrusion into *Briscoe's* private affairs; and (3) to what extent did *Briscoe* voluntarily enter the public eye?<sup>57</sup>

Other courts began to adopt the *Briscoe* test.<sup>58</sup> Five months before the Supreme Court heard the *Cox* case, a Washington, D.C., trial court applied the *Briscoe* test to a case in which a rape victim sued the *Washington Post* for publishing her name.<sup>59</sup> The judge ruled in favor of the victim, saying, "the publication of the plaintiff's name and address was of no essential part of any exposition of ideas, and of such slight social value that any benefit that might have been derived from it was outweighed by the social interest in order and morality."<sup>60</sup>

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<sup>55</sup>*Ibid.*, 38-39.

<sup>56</sup>*Ibid.*, 40.

<sup>57</sup>*Ibid.*, 43. *Briscoe's* case was moved from the state trial court to a U.S. District Court for the Central District of California, where the judge granted *Reader's Digest's* motion for summary judgment. Harold L. Nelson and Dwight L. Teeter, Jr., *Law of Mass Communications*, 2nd ed. (Mineola, NY: The Foundation Press, Inc., 1973), 199; Don R. Pember and Dwight L. Teeter, Jr., "Privacy and the Press Since *Time, Inc. v. Hill*," 50 *Washington Law Review* 57, 88 (1974).

<sup>58</sup>*Ibid.*

<sup>59</sup>*Hunter v. Washington Post*, 102 Daily Washington Law Reporter 1561 (1974).

<sup>60</sup>*Ibid.*, 1567.

In the court's opinion in *Cox*, U.S. Supreme Court Justice Byron White noted the D.C. trial court's decision and the fact that the Georgia Supreme Court referred to the *Briscoe* decision in its opinion on *Cox*.<sup>61</sup> If the U.S. Supreme Court was concerned about plaintiffs using the *Briscoe* test to circumvent the First Amendment, *Cox* presented a timely opportunity for the justices to deal with the problem.

White began his analysis of the issue by acknowledging a right of privacy. However, he said, the *Cox* case was more problematic than many privacy suits because Cohn claimed his privacy was invaded by unwanted publicity about his private affairs. "Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press."<sup>62</sup>

Although the court required a high standard of fault, it permitted people to seek redress from the media for the publication of falsehoods.<sup>63</sup> As yet, White wrote, the court had not addressed the issue of whether the press could be punished for the publication of private but truthful information. Nor would the high court answer that question in *Cox*, White said. Instead, the court would limit its decision to the issue of whether the government could punish the press for publishing information—in this case, a rape victim's name—obtained from public records.<sup>64</sup> In short, White said, the government may not punish such publications.

In a democratic system, citizens have the responsibility to monitor government actions. Because "each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the

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<sup>61</sup>*Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 473, 475.

<sup>62</sup>*Ibid.*, 489.

<sup>63</sup>*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>64</sup>*Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 491.

press to bring to him in convenient form the facts of those operations."<sup>65</sup> In regard to the judicial system, White said, scrutiny by the press ensures fair trials and public attention to court operations. Therefore, information about crimes and subsequent prosecutions is of public interest.

Further, White said, there is such a public interest in the accurate reporting of judicial proceedings that information disseminated in them is privileged and can be republished or broadcast with immunity.<sup>66</sup> This privilege includes court documents as well as court testimony. When Georgia officials included Cynthia Cohn's name in court documents, they not only designated her name as being of public interest, they placed it within the public domain where anyone could discover it. To then prosecute the television station for broadcasting Cohn's name is a clear violation of the First Amendment. White explained:

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.<sup>67</sup>

In giving the press broad protection for publishing information contained in court documents or discussed in court proceedings, the supreme court did not leave states without means to protect rape victims' identities. State governments could ensure that victims' names never became public by leaving them out of public documents and avoiding mention in public proceedings.<sup>68</sup> In the years following the *Cox* decision, states and municipalities attempted to do this by passing laws and adopting policies that required employees to leave victims' names out of documents, use aliases or use victims' initials instead of their full names. Protection of victims' privacy, however,

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<sup>65</sup>Ibid.

<sup>66</sup>Ibid., 493-495.

<sup>67</sup>Ibid., 496.

<sup>68</sup>Ibid.

depended on public employees fulfilling their duties, and almost inevitably, one made an error.<sup>69</sup>

*Florida Star v. B.J.F.* On October 20, 1983, a woman reported being raped and robbed to the Jacksonville Sheriff's Department. A department employee prepared a crime report, which included the victim's full name, and placed a copy of the report in the department's press room. A reporter-trainee for the *Florida Star*, a weekly newspaper based in Jacksonville, copied the report verbatim. A *Star* reporter then prepared a brief from the reporter-trainee's notes. The brief included the victim's name. On October 29, the *Star* published the brief in the newspaper's "Police Reports" section, which contained 54 briefs about local crime.<sup>70</sup>

The victim's coworkers and acquaintances saw the article and mentioned it to her. Her mother received several threatening phone calls, and eventually the victim felt compelled to move, change her phone number, seek police protection and get mental-health counseling.<sup>71</sup> The victim sued the sheriff's department and the newspaper for violating Florida's statute that forbids the publication or broadcast of rape victims' names. The sheriff's department settled for \$2,500.

After a one-day trial, the judge gave the victim, known in court documents as B.J.F., a directed verdict, finding the newspaper negligent for violating the Florida law. A jury awarded her \$100,000 in damages. The newspaper appealed to a state court of appeals, which upheld the judge's decision in a three-paragraph opinion. The Florida Supreme Court refused to hear the case.

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<sup>69</sup>The first reported failure of state employees to keep a rape victim's name private after promising to do so was in *Doe v. Sarasota-Bradenton Florida Television*, 436 So.2d 328 (Fla. App. 2 Dist. 1983). This case is not reviewed in detail here because it neither created nor modified a legal standard. As in *Cox*, the television station obtained a rape victim's name from trial testimony. A Florida court of appeals affirmed the trial judge's dismissal of the case, using the same rationale as that provided in the *Cox* decision.

<sup>70</sup>*The Florida Star v. B.J.F.*, 491 U.S. at 527.

<sup>71</sup>*Ibid.*

The U.S. Supreme Court, however, agreed to hear the newspaper's appeal. It reversed the Florida courts' decisions and, in an opinion written by Justice Thurgood Marshall, said news organizations cannot be punished for printing information they legally obtained.

In its appeal, the *Star* relied on the supreme court's decision in *Cox* and two subsequent cases involving publication of the names of juvenile offenders.<sup>72</sup> The supreme court said the reference to *Cox* was inappropriate, however, because *Cox* involved information gathered during a court proceeding. The court ruled in favor of the television station largely because the press plays an important role "in subjecting trials to public scrutiny and thereby helping guarantee their fairness."<sup>73</sup> In the *Florida Star* case, there was no trial. In fact, B.J.F.'s assailant was never caught.

The proper precedent was one of the two juvenile cases, Marshall wrote. In *Smith v. Daily Mail Publishing Co.*, the court found unconstitutional an indictment of two newspapers for publishing the name of a juvenile offender.<sup>74</sup> Reporters had learned the name from police, witnesses and a local prosecutor. *DailyMail* established 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."<sup>75</sup>

Protecting the publication of lawfully-obtained information can be justified by three reasons, Marshall claimed. First, it still allows the government to protect people's privacy by withholding information from the press.

The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to dissemination. Where information is entrusted to the

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<sup>72</sup>*Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

<sup>73</sup>*The Florida Star v. B.J.F.*, 491 U.S. at 532.

<sup>74</sup>*Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

<sup>75</sup>*The Florida Star v. B.J.F.*, 491 U.S. at 533, citing 443 U.S. 97, 103.

government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.<sup>76</sup>

Second, Marshall said, punishing the press for publishing information that is already available to the public serves no purpose. Other people or organizations may not seek the information, but if they did, it would be available to them as well.

Punishing publication of information does not help keep the information private.

Third, punishing the press for publishing truthful information may result in self-censorship. A lack of First Amendment protection "would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication. This situation could inhere even where the newspaper's sole object was to reproduce, with no substantial change, the government's rendition of the event in question."<sup>77</sup> Given the press's role as a watchdog of the government, the possibility of self-censorship in this area is unacceptable.

Given the *Daily Mail* criteria, the supreme court said, the *Florida Star's* publication of B.J.F.'s name is protected by the First Amendment. The newspaper lawfully obtained the rape victim's name. The subject of the article, crime, was of public significance.<sup>78</sup> And finally, in this case there was no "state interest of the highest order."<sup>79</sup> The sheriff's department's release of B.J.F.'s name undercut any asserted state interest in keeping her name secret. The supreme court was careful, however, to avoid ruling out a compelling state interest in a similar case. It merely said that if states are going to prohibit the publication of rape victims' names, they must do so in a way

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<sup>76</sup>*The Florida Star v. B.J.F.*, 491 U.S. at 534.

<sup>77</sup>*Ibid.*, 536.

<sup>78</sup>When determining the public significance or public interest of an article or broadcast, the U.S. Supreme Court has always looked at the whole work. Some lower courts choose to look at the specific piece of information, but the high court's decisions indicate those courts erred in their approach to the issue. *Ibid.*, 536-537.

<sup>79</sup>*Ibid.*, 537.

that allows the courts to consider the circumstances of each publication and covers interpersonal communication as well as the mass media. Marshall concluded:

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under [the Florida statute] to appellant under the facts of this case.<sup>80</sup>

*Dorman v. Aiken Communications, Inc.* The year after the U.S. Supreme Court decided *Florida Star v. B.J.F.*, the South Carolina Supreme Court considered the constitutionality of that state's criminal statute. Following the example of the federal courts, the state court declined to rule the statute unconstitutional but did not hold the newspaper accountable under the law's provisions.

Real estate agent Joyce Dorman was raped at gunpoint in 1987 by a man to whom she was showing a house. After the rape, the man shot himself and died. The next day, police gave the *Aiken Standard* a statement about the attack. The statement did not include Dorman's name or the fact that she had been raped. The reporter working on the story obtained Dorman's name from other sources, however, and included it in the story. The following day, two other area newspapers ran stories on the incident that said a woman had been raped but did not identify her by name. Dorman sued the *Standard* for invasion of privacy and intentional infliction of emotional distress. She based her case in part on South Carolina's law prohibiting the publication of rape victims' names.

The newspaper asked for dismissal or summary judgment, saying the statute did not create a private cause of action, and in any case, the story was protected by the First Amendment.

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<sup>80</sup>*Ibid.*, 541.

The South Carolina Supreme Court rejected the newspaper's arguments. It noted the U.S. Supreme Court had not declared Florida's statute unconstitutional when given the opportunity in *Florida Star*. "Instead, it has addressed the First Amendment issue 'only as it arose in a discrete factual context.'"<sup>81</sup> Therefore, the South Carolina court said, it would not declare its state law unconstitutional.

However, the state court added, the law does not create a civil cause of action. From the way the statute was worded, the court concluded the legislature did not intend to create a civil cause of action along with the criminal offense.<sup>82</sup> "Although Dorman may benefit from its enforcement, the statutory provision is primarily for protection of the public as an entity, and this Court does not construe it to establish a private right of action."<sup>83</sup> If Dorman wanted to pursue her claim, she would have to do so under the common law.

*Macon Telegraph Publishing Co. v. Tatum*. In the most recent privacy suit to come from the three southern states, the rape victim did indeed base her suit on the common law instead of the state's law prohibiting publication of sex-crime victims' names.<sup>84</sup> Georgia resident Nancy Tatum woke up one Saturday morning to find a man standing at her bedroom door with a knife in his hand and his pants unzipped.<sup>85</sup> As the

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<sup>81</sup>*Dorman v. Aiken Communications, Inc.*, 398 S.E.2d at 688.

<sup>82</sup>*ibid.*, 689.

<sup>83</sup>*ibid.*

<sup>84</sup>In 1990, the Georgia Court of Appeals recognized crime victims' right to bring a common-law cause of action for invasion of privacy. In that case, a high-school student was attacked by a group of students during a school activity. He and his parents sued a local newspaper after it named him in a series of articles about the incident. While the court of appeals recognized the boy's common-law right of privacy, it ruled in favor of the newspaper because the crime was of public interest. *Tucker v. News Publishing Co.*, 397 S.E.2d 499 (Ga.App. 1990). The case facts do not make it clear whether the boy was sexually assaulted in *Tucker*. The Georgia Supreme Court's opinion in *Macon Telegraph* says he was. *Macon Telegraph Publishing Co. v. Tatum*, 436 S.E.2d 655, 657 (Ga. 1993). The *Tucker* decision is brief and makes no reference to Georgia's criminal statute prohibiting the publication of sexual-assault victims' identities. *Tucker* is not detailed in this paper because *Macon Telegraph* addresses the same issues and explains the differences between the common-law and statutory causes of action.

<sup>85</sup>"Georgia High Court Dismisses Privacy Suit," *News Media and the Law*, Winter 1994, 31-32; *Macon Telegraph Publishing Co. v. Tatum*, 436 S.E.2d at 657.

man walked toward her, Tatum shot him with a gun she kept near the bed. The police ruled the case a justifiable homicide.

*The Macon Telegraph* ran two stories about the incident. One article reported the attack and subsequent shooting, the other was a follow-up story on the life of the dead intruder. Both stories included Tatum's name and the street on which she lived. Tatum sued the newspaper for invasion of privacy. A jury awarded her \$100,000 in damages.

The newspaper appealed to the Georgia Court of Appeals, which affirmed the verdict.<sup>86</sup> The newspaper had relied on the U.S. Supreme Court's decision in *Florida Star v. B.J.F.*, saying that should prevent the state from finding it liable in a civil suit. The court of appeals distinguished the cases, however, noting B.J.F. based her cause of action on Florida's criminal statute while Tatum sued under the common law.<sup>87</sup> The common law cause of action allowed the jury to determine Tatum's case on its merits, which the court had not been able to do in *Florida Star*. Based on the case facts, the jury found Tatum's name had not been freely released by the police, making it a private fact, and the newspaper had published it negligently. Therefore, the court of appeals said, the *Telegraph* was liable.<sup>88</sup>

The newspaper then appealed to the Georgia Supreme Court, which reversed the lower court's decision. Like the court of appeals, the state supreme court distinguished the case from *Florida Star v. B.J.F.* because Tatum based her claim on the common law instead of the state's criminal statute.<sup>89</sup>

However, the Georgia Supreme Court said, it would accept the *Florida Star* test as the proper means for evaluating the constitutionality of Tatum's common law

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<sup>86</sup>*Macon Telegraph Publishing Co. v. Tatum*, 430 S.E.2d 18 (Ga. App. 1993).

<sup>87</sup>*Ibid.*, 21-22.

<sup>88</sup>*Ibid.*, 22-23.

<sup>89</sup>*Macon Telegraph Publishing Co. v. Tatum*, 436 S.E.2d at 657.

claim.<sup>90</sup> A newspaper may not be punished for publishing lawfully obtained, truthful information without a need to further a state interest of the highest order. The *Telegraph* lawfully obtained Tatum's name, the court said, and "the commission of the crimes, police investigation, and departmental decision that Tatum acted in self-defense are matters of public record."<sup>91</sup>

Further, the state supreme court said, Tatum's right to privacy does not outweigh the public's right to know and the press's right to publish because a "free press is necessary to ensure that government operates openly, fairly, and honestly."<sup>92</sup> In matters of public interest, individuals' right of privacy must give way, the court said. It concluded:

...that Tatum, who committed a homicide, however justified, lost her right to keep her name private. When she shot Hill, Tatum became the object of legitimate public interest and the newspaper had the right under the Federal and State Constitutions to accurately report the facts regarding the incident, including her name.<sup>93</sup>

#### COMMON LAW ACTION

In the 47 states that do not have criminal statutes dealing with victim identification, sex-crime victims have been just as unsuccessful in pursuing invasion of privacy claims. If anything, the courts have been less sympathetic to privacy suits brought under the common law because the state has indicated no interest in preserving victims' confidentiality. To win a common-law privacy suit, the victim must prove private facts about himself or herself were published, the publication of that information was highly offensive to a reasonable person and the information was not of legitimate public concern.<sup>94</sup>

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<sup>90</sup>*ibid.*

<sup>91</sup>*ibid.*

<sup>92</sup>*ibid.*, 658.

<sup>93</sup>*ibid.*

<sup>94</sup>Don R. Pember, *Mass Media Law* (Dubuque, IA: Brown & Benchmark Publishers, 1996), 240.

*Hubbard v. Journal Publishing Co.* The first reported civil suit involving a rape victim started with the criminal prosecution of the victim's brother. In 1960, 16-year-old Richard Hubbard was given a two-month sentence in a New Mexico juvenile detention home for running away from home and sexually assaulting his sister. The *Albuquerque Journal* published a brief notice of the boy's sentencing, including his name, his mother's name and their address. His mother sued the newspaper on her daughter's behalf, claiming the article humiliated her daughter, made people think her daughter was unchaste and lessened the girl's prospects of marriage.<sup>95</sup> The trial judge granted the *Journal* summary judgment.<sup>96</sup>

Hubbard and her daughter appealed to the New Mexico Supreme Court, which also ruled in favor of the newspaper. In a brief opinion, the chief justice cited a New Mexico statute that required state courts to make their records available to the public.<sup>97</sup> He then noted that in their original article on privacy, Warren and Brandeis suggested any information that would be privileged in libel law should also be privileged in privacy law. Libel law considers court documents, like other government records, privileged. No one can be found liable for republishing information obtained from court records.

The Hubbards then argued that even if information from court records was normally considered privileged, as the chief justice said it was, it shouldn't be in this case because the girl's name was not of public interest. The court disagreed. Referring to William Prosser's noted law review article on privacy, the chief justice said the *Journal's* article was clearly newsworthy.<sup>98</sup> People are interested in crime. While crime victims may be unwilling participants in public events, they nonetheless shed

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<sup>95</sup>This was the first privacy case heard in New Mexico. Hence, no statutory or common law right of privacy had been recognized yet by the state courts. *Hubbard v. Journal Publishing Co.*, 368 P.2d 147 (1962).

<sup>96</sup>Pember, *Privacy and the Press*, 258, 265.

<sup>97</sup>*Hubbard v. Journal Publishing Co.*, 368 P.2d at 148.

<sup>98</sup>*ibid.*, 148-149; William L. Prosser, "Privacy," 48 *California Law Review* 383 (1960).

some of their privacy rights when they are caught up in the drama of crime and punishment.

After the *Hubbard* decision, there were almost no reported privacy suits involving crime victims for a decade and a half. The two that were reported were based on the South Carolina and Georgia statutes. But in the late 1970s, courts decided a spurt of privacy suits brought by rape victims.

*Ayers v. Lee Enterprises Inc.* Julie Ayers was raped in June 1973. A few days after she reported the crime, her local newspaper, the *Corvallis Gazette-Times*, published a story about the crime that included Ayers's name and address. Ayers sued the newspaper and the police officer who gave the newspaper her name.

Ayers claimed her name should have been protected by an Oregon law that exempted crime reports from the state public disclosure law when "there is a clear need in a particular case to delay disclosure in the course of an investigation."<sup>99</sup> The law, however, did not become effective until a week after the *News-Gazette* printed its story. At the time of publication, Oregon law required police to make crime reports available to the public.<sup>100</sup> Given that, the Oregon Supreme Court followed the U.S. Supreme Court's decision in *Cox v. Cohn* and said the newspaper could not be held liable for publishing information obtained from a public record.<sup>101</sup>

The *Cox* decision gave the press a great deal of protection from privacy suits brought by crime victims. However, the U.S. Supreme Court had not ruled out the possibility of a successful suit, and victims were soon looking for ways around the privilege for information obtained from public records and hearings.

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<sup>99</sup>As a secondary source, Ayers referred to an exemption for personal information such as that included in medical, personnel and similar files. *Ayers v. Lee Enterprises Inc.*, 561 P.2d 998, 999-1000 (Or. 1977).

<sup>100</sup>*Ibid.*, 1002.

<sup>101</sup>*Ibid.*, 1003.

*Poteet v. Roswell Daily Record, Inc.* Shortly before the Oregon Supreme Court decided the *Ayers* case, a New Mexico newspaper printed a story about a preliminary hearing in a rape and kidnapping case. It included the 14-year-old victim's name in its account. The victim's parents sued the newspaper for invasion of privacy. Anticipating a decision like the one in *Ayers*, the parents said the newspaper waived its privilege when its reporter told an assistant district attorney the girl would not be named in a story about the incident.<sup>102</sup> Further, the parents said, the newspaper had a policy of not naming rape victims. By establishing such a policy, the newspaper made an implied promise not to name the girl. The newspaper's story about the preliminary hearing broke that implied promise, making the newspaper liable under the doctrine of promissory estoppel.

The New Mexico Court of Appeals rejected both arguments. The newspaper did not waive its privilege when its reporter told the assistant district attorney the girl's name would not be used, because the reporter had no authority to speak for the newspaper. "Absent authority, the statements of the reporter could not be considered as a waiver of a constitutional privilege by the defendant newspaper."<sup>103</sup>

In addition, the court said, promissory estoppel did not apply in this case. The doctrine applies when one person—or company—makes a promise upon which another relies. When that promise is broken, the person to whom it was made suffers. Therefore, as a matter of justice, the courts can order the promiser to make good on his or her promise. In the case against the New Mexico newspaper, there was no evidence that the girl, Renee Poteet, or her parents knew about the newspaper's policy before the hearing and subsequent publication of Renee's name, the court said. If the family did not know about the policy, they could not rely on it.<sup>104</sup>

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<sup>102</sup>*Poteet v. Roswell Daily Record, Inc.*, 584 P.2d 1310, 1311 (1978).

<sup>103</sup>*Ibid.*, 1313.

<sup>104</sup>*Ibid.*, 1312.

*Ross v. Midwest Communications, Inc.* While courts declared crime victims' names of public interest in case after case, they rarely explained why the specific victim's name or identity was crucial to public understanding of the crime and operation of the judicial system. Finally, in 1989, the U.S. Court of Appeals for the Fifth Circuit issued an opinion that explained, in at least one case, the value of the name.

Texas resident Marla Ross was raped in her home in 1983. The crime was never solved. During the police investigation, Ross viewed a police line-up that included Steven Fossum. Ross told police the man who raped her was not in the line-up. Fossum was later convicted of two other rapes.

In 1986, Minnesota television station WCCO produced a documentary about Fossum that said he had not committed the rapes for which he was convicted. The television station suggested Ross and one of Fossum's supposed victims were raped by the same man. Since Ross had not identified Fossum as the man who raped her, the documentary said, Fossum probably had not raped the other woman either. To make its case, the station pointed out similarities between the two crimes, including the way the rapist gained access to the home and specific demands the rapist made of his victims. In its account, the station used Ross's first name and a picture of the house she lived in at the time of the rape.

Ross and her husband sued the television station and two of its reporters for invasion of privacy. The district court granted the television station summary judgment, and the U.S. Court of Appeals affirmed that decision on the basis of Texas's recognition of newsworthiness as a defense in privacy suits.<sup>105</sup>

In her appeal, Ross claimed that while information about the crime might be of public interest, her name was not. Limiting its decision to the facts of the case, the court of appeals said Ross's name was indeed of public interest because personalization

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<sup>105</sup>*Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272-73 (5th Cir. 1989).

of the crime gave the account more impact and credibility.<sup>106</sup> People care less about victims they don't know, the court said, and in light of newspaper hoaxes, they may even doubt an anonymous victim exists. Circuit Judge Patrick Higginbotham concluded:

The argument establishing a logical nexus between the rape victim's name and a matter of legitimate public concern is peculiarly strong in this case because the point of the publication was to persuade the public, and in turn the authorities, to a particular view of particular incidents. Communicating that this particular victim was a real person with roots in the community, and showing WCCO's knowledge of the details of the attack upon her, were of unique importance to the credibility and persuasive force of the story.<sup>107</sup>

## SUMMARY

Crime victims have been almost completely unsuccessful in pursuing claims of invasion of privacy against news organizations that identify them. Even in sexual-assault cases where most people—including judges—recognize that publicity often causes the victim shame, humiliation and further trauma, the courts have been unwilling to sustain verdicts rendered against media defendants.

Judges seem to feel the public interest in having the media cover law enforcement and the judicial system thoroughly outweighs damage done to individual victims. They will not rule out the possibility of a case in which the victim's right of privacy outweighs freedom of the press and the public's right to know, but as yet no court has found a situation in which that is so. Even in states where criminal statutes designate sex-crime victims' right of privacy as an important state interest, the courts have said protecting victims' right of privacy is not worth risking a potential chilling effect on the press created by punishing the publication of truthful information.

To protect the press from liability in privacy suits, the courts have constructed three main defenses. First, the U.S. Supreme Court has said information obtained from public documents and court hearings is privileged. In addition, the high court

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<sup>106</sup>*Ibid.*, 274.

<sup>107</sup>*Ibid.*

established a privilege for information the press legally obtained—absent an overriding state interest that has yet to be demonstrated. Finally, lower courts have accepted newsworthiness or public interest as a defense, and they almost always find victims' names to be newsworthy. Together, these defenses make it highly unlikely that a victim of any crime will be successful in seeking remuneration from a news organization for publication of his or her identity.

### NEGLIGENCE SUITS

If crime victims can show the publication of their identities placed them in danger and that the news media should have anticipated harm occurring as a result of their publication, victims may be able to sue for negligence and recover damages. However, only two reported cases exist in this area, and in those cases the victim or witness to the crime could have been in real physical danger. Victims who suffer, or are likely to suffer, only emotional harm or embarrassment probably would not prevail in such a suit.<sup>108</sup>

### NEGLIGENCE CASES

*Hyde v. City of Columbia.* On August 20, 1980, Sandra Hyde was kidnapped by an unknown man, who pulled up next to her on the street, pointed a sawed-off shotgun at her and ordered her into his car. She escaped from his car and reported the incident to the Columbia, Missouri, police department. The police then gave details of the crime along with Hyde's name and address to reporters from the *Columbia Missourian* and *Columbia Daily Tribune*. The two newspapers published stories about the kidnapping that included Hyde's name and address.

Hyde sued the city and the two newspapers for negligence because the man who kidnapped her learned her name and address from the newspaper articles and repeatedly terrorized her. The trial court granted the city's and newspapers' motions to

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<sup>108</sup>For example, see *Doe v. American Broadcasting Companies*, 543 N.Y.S.2d 455 (A.D. 1 Dept. 1989).

dismiss because Hyde's name had been included in a public record and she failed to state a cause of action. Hyde appealed.<sup>109</sup>

The Missouri Court of Appeals reversed the dismissal and sent the case back for trial. To have a cause of action for negligence, Hyde had to show "a duty by the defendant to protect the plaintiff from harm, neglect of that duty, and injury to the plaintiff from that neglect."<sup>110</sup> In some cases, the appellate court said, the law imposes a duty when an actor should have foreseen that his action would harm another. The actor may be found negligent solely because he did not recognize the potential consequences of his action.

In Hyde's case, the court said, the police should have known better than to release her name and address. Although the state open records law requires police to make crime reports public, the court said, "[t]o avoid an absurd—even unlawful—application of the statute as written, we determine that the name and address of a victim of crime who can identify an assailant not yet in custody is not a *public record* under the Sunshine Law."<sup>111</sup>

Even after police gave Hyde's name and address to reporters, the information "retained its confidential character."<sup>112</sup> The fact that police erred in releasing the information does not excuse the newspapers from liability for publishing it, the court said. Further, traditional press defenses, such as newsworthiness, are not applicable in cases where the potential harm outweighs the utility of the speech.<sup>113</sup> Finding a cause of action against the newspaper as well as the city, the Missouri court concluded:

... the name and address of an abduction witness who can identify an assailant still at large before arrest is a matter of such trivial public concern compared with the high probability of risk to the victim by their publication, that a news

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<sup>109</sup>Only the city and the Columbia Daily Tribune were named in the appeal. *Hyde v. City of Columbia*, 637 S.W.2d 251, 254 (Mo.App. 1982).

<sup>110</sup>*Ibid.*, 255.

<sup>111</sup>*Ibid.*, 263.

<sup>112</sup>*Ibid.*, 264.

<sup>113</sup>*Ibid.*, 268.

medium owes a duty in such circumstances to use reasonable care not to give likely occasion for a third party [assailant still at large] to do injury to the plaintiff by the publication.<sup>114</sup>

*Times Mirror Co. v. Superior Court.* The second of two reported cases in this area involves a witness, not the actual victim of the crime. It's relevant, however, because the witness faced the same dangers victims do, and in many cases, victims are also witnesses to the crimes against them.

Just after midnight on July 13, 1981, a San Diego woman returned to her apartment and found her roommate, Rose Rende, laying naked on the floor. Rende had been beaten, raped and strangled. The woman, referred to in court documents as Jane Doe, looked up and saw a man standing five feet from her.<sup>115</sup> Doe fled, called the police and gave them a description of the man.

San Diego police withheld Doe's name from the public for her protection. A deputy coroner, however, noted in his report that Doe had identified the murder victim.

Amy Chance, a summer intern in the *Los Angeles Times's* San Diego office, heard about Rende's murder on the radio. She called the coroner's office, and an unidentified person gave her details of the murder, including Doe's name, her relationship to Rende and the fact that Doe discovered Rende's body. Chance gave the information to her editor and told him she knew Rende because she lived next door to her until shortly before the murder. The editor assigned Chance to the story. Chance then interviewed Rende's neighbors and a police detective, who told Chance that Rende's roommate had given a description of the murderer. The detective did not identify Doe by name, and he told Chance not to publish the fact that Doe had described the suspect.

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<sup>114</sup>Ibid., 269.

<sup>115</sup>William Overend, "Privacy Suit Could Empower Juries As 'Super Editors,'" *Los Angeles Times*, 14 June 1988, sec. 1, p. 3.

The next day, the *Times* printed Chance's story, which identified Doe by name and said she had discovered Rende's body. The story also said a witness gave the police a description of a man seen fleeing the scene.

Doe sued Chance and the *Times* for invasion of privacy, intentional infliction of emotional distress and negligent infliction of emotional distress.<sup>116</sup> The *Times* made two requests for summary judgment, which the trial court denied. After the second denial, the *Times* appealed to a state court of appeals, which upheld the trial court's ruling.<sup>117</sup>

The *Times* based its request for summary judgment on the fact that Doe's name was included in the coroner's report, and thus, was privileged as information obtained from public records.<sup>118</sup> The California court of appeals, however, said the key issue was not where the newspaper obtained the information but "whether the news media is privileged to print the name of a witness to a crime when doing so could subject that witness to an increased risk of harm."<sup>119</sup> After reviewing the *Hyde* decision, the appellate court said that when a witness could identify a suspect still at large, the First Amendment did not provide an absolute privilege for printing the witness's name. "The individual's safety and the state's interest in conducting a criminal investigation may take precedence over the public's right to know the name of the individual."<sup>120</sup>

In addition, the newspaper claimed reports of crime and the circumstances surrounding them are newsworthy and should be protected by the First Amendment. That is true, the court of appeals said, but even if a subject, such as crime, is

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<sup>116</sup>"High Court Says Crime Witness Can Sue," *News Media and the Law*, Summer 1988, 10.

<sup>117</sup>*Ibid.*, 11; *Times Mirror Co. v. Superior Court*, 244 Cal.Rptr. 556, 565 (Cal.App. 4 Dist. 1988).

<sup>118</sup>*Times Mirror Co. v. Superior Court*, 244 Cal.Rptr. at 559.

<sup>119</sup>The appeals court also found the source of Doe's name to be a triable issue of fact. No one from the coroner's office admitted to giving Doe's name to Chance. *Ibid.*, 559, 562.

<sup>120</sup>*Ibid.*, 560.

newsworthy, *all* the details may not be. Therefore, the court said, a jury must decide if Doe's name was newsworthy given the circumstances of the crime.<sup>121</sup>

The *Times* also argued that publication of Doe's name did not meet the common-law criteria for publication of private facts. Doe's discovery of Rende's body was announced by the police on the day of the murder, and Doe herself told friends and family members that she made the discovery. The court said that point was not valid. "Talking to selected individuals does not render private information public. . . we cannot say Doe rendered otherwise private information public by cooperating in the criminal investigation and seeking solace from friends and relatives."<sup>122</sup>

#### SUMMARY

Two cases from mid-level state appellate courts are not enough to define the law with a significant degree of certainty. But the *Hyde* and *Doe* decisions indicate courts do recognize a limit to the protection the First Amendment gives truthful publication. Although appellate court judges tend to apply the First Amendment broadly and give the press as much protection as possible, the judges in these cases did not see fit to protect speech that could place someone's life in jeopardy.

These cases are classic examples of judicial balancing. The state interest in fostering discussion about public issues outweighs most other interests. Therefore, freedom of speech and press are seen as primary rights and given precedence over other competing rights. However, no right is more basic than the right to life. People must live free from harm in order to exercise all their other rights. The courts will do all they

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<sup>121</sup>The newspaper also had claimed immunity for the publication of Doe's name because the law protects publication of information legally obtained. The court of appeals, however, said the protection for information that is legally obtained exists *only* when that information is deemed to be newsworthy. *Ibid.*, 562, 564.

<sup>122</sup>*Ibid.*, 561. The *Los Angeles Times* and Doe settled the suit out of court for an undisclosed sum shortly before the trial was to begin. William Overend, "Times, 'Jane Doe' Settle Invasion-Of-Privacy Suit," *Los Angeles Times*, 4 March 1989, sec. 2, p. 3.

can to ensure citizens' safety, even if it means abridging other citizens' primary civil rights.

## CONCLUSION

The courts have determined that the First Amendment protects the publication of truthful information nearly absolutely. While the Wisconsin Supreme Court permitted the prosecution of a newspaper for publishing a rape victim's name in 1948, it seems clear today that such an action directly conflicts with the First Amendment. Freedom of the press means nothing if not freedom from government sanctions for reporting on issues of public interest.

Likewise, the First Amendment gives broad protection to the press from civil suits that could inhibit or impair its reporting on government operations or issues of public interest. The U.S. Supreme Court has given the press near immunity for accurately publishing information obtained from public documents and government proceedings. Information obtained legally from other sources also receives a great deal of protection. Judges do not want to intimidate the press or encourage self-censorship. Most believe thorough reporting on public issues is vital to the welfare of society, and if people occasionally must sacrifice a bit of privacy in order for others to be well-informed, the courts find that an acceptable price.

While courts have permitted crime victims to seek damages when the press endangers their lives by publishing their identities, judges generally indicate that once information is publicly known, punishing the further dissemination of it is pointless. Instead, judges say, the preferred way to protect victims' privacy and safety is by having government agencies withhold identifying information from the public. The courts have been fairly tolerant of laws that exempt law-enforcement records and other records that identify crime victims from public disclosure laws. However, even here, there is a limit to how far the government can go in restricting access to such

information. The next chapter will examine this issue with a case study of Washington state law.

### Chapter 3: Naming Victims in Mason County

The *Shelton-Mason County Journal*, located in Washington's rural Olympic Peninsula, has the distinction of being one of the few American newspapers to incite people to such anger that they passed a law against it. The *Journal* has a policy of printing the names and testimony of all victims who testify in felony trials in Mason County Superior Court.<sup>1</sup> That includes the names of rape and child molestation victims. In 1992, the Washington legislature passed a law to force judges to close court testimony and court records that might reveal the identity of child sexual-assault victims. The legislation was intended to keep the *Journal* from acquiring the names of sex-crime victims. The law, however, also affected other media's ability to gather news and prosecutors' ability to conduct open trials. In the end, the Washington Supreme Court declared the law unconstitutional. The story of the law's short life illustrates the difficulties public officials face in enforcing social standards in a legal system designed to protect fundamental civil rights and ensure the open operation of government.

#### CONCEPTION OF A LAW

When publisher Henry Gay bought the *Shelton-Mason County Journal* in 1966, its policy on covering Mason County Superior Court was already established.<sup>2</sup> The newspaper covered all felony trials and reported the names and testimony of all witnesses. Mason County journalists may have followed this procedure since the newspaper's establishment in 1888. In doing research, staff members have come across articles from the nineteenth century in which crime victims, including sex-crime victims, were named.

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<sup>1</sup>The *Journal's* actual policy is to publish the names and testimony of all witnesses in felony trials in Mason County Superior Court. Victims who testify have the same legal standing as other witnesses and are treated the same as other witnesses.

<sup>2</sup>Where it is not otherwise noted, information about the *Shelton-Mason County Journal's* history comes from editor Charles Gay. Charles Gay, conversation with author, Shelton, WA, 22 March, 1996.

In the 1960s and 70s, other newspapers that named sex-crime victims stopped doing so, but the *Journal* continued. Henry's son, Charles, who has been the newspaper's editor since 1980, explained, "To change our policy, we feel, would be a dereliction of our journalistic duty, an unfair treatment of defendants and an action that sends exactly the wrong message to victims—you need to be protected, you should be ashamed, the world musn't know of your tragedy."<sup>3</sup>

For two decades, the *Journal* continued its policy with little trouble. The 9,400-circulation weekly covered a sex-crime trial perhaps once a year or once every 18 months. A few people would get upset about the use of the victim's name, but the complaints never lasted long. But, Charles said:

Then came 1985, when there were four sex-offense trials on top of each other. The anger in the community built after each one instead of dissipating. Someone called Channel 4 to ask for a "Town Meeting" on the subject to discredit us, and I agreed to appear. There followed broadcasts on Nightline and another national program as well as stories in the New York Times and other newspapers. We published about 40 letters to the editor on the subject that year, about 30 of them opposing the policy of covering trials completely, consistently and fairly.<sup>4</sup>

Coverage of the four trials, which were held from May through July, inflamed the community. About 450 people went to the taping of the Town Meeting television special to protest the *Journal's* policy.<sup>5</sup> In July, people picketed outside the newspaper office, and later in the year, someone organized a letter-writing campaign, asking about 200 businesses to pull their advertising from the *Journal*. The following year, 800 community members signed a petition asking the *Journal* to change its policy.

People were not just upset about the use of victims' names; they also were outraged by the publication of what some considered obscene material. The *Journal*

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<sup>3</sup>Charles Gay, remarks to the American Civil Liberties Union, Tacoma, WA, 2 May 1992.

<sup>4</sup>Ibid.

<sup>5</sup>Carolyn Maddux, "TV crowd rips Journal policy," *Shelton-Mason County Journal*, 4 November 1985, p. 1.

includes victims' names *and* testimony. Here are two accounts of victims' testimony from articles about the 1985 trials:

Kelly testified that in the early morning hours of November 21, he had been forced to have oral and anal sex with George, who was his cellmate at the time. He said the incident occurred after lockdown when the two were locked in their cell.<sup>6</sup>

and

She said he was holding her down on the bed and had her knees pushed up to her shoulders while she was trying to push him away with her hands.

She said while they were struggling, he ejaculated all over her and the bedding. She said he said, "Whoops." He then, she said, told her not to tell anyone and got up and left. She said that at one time during the struggle, he had penetrated her with his finger.<sup>7</sup>

Distressed by coverage they perceived as harmful to victims, community members asked the Journal to tone down its coverage. In a letter to the editor, one woman wrote:

The purpose of testimony in court is to determine the guilt or innocence of the accused. The repetition by the media of every lurid detail of that testimony serves no legitimate purpose — it can only satisfy the morbid curiosity of a minority and can incite into action those with unhealthy inclinations.<sup>8</sup>

And another woman wrote:

When will you stop and how far does the public have to go before you finally stop this scandalous way of running a newspaper? I think you owe us all an explanation of your reasoning for this type of policy, when the other newspapers such as the Daily Olympian, Tacoma and Seattle Times have no such policy. We are not asking you to change your newspaper, just be more sensitive on these issues and stop printing the names and addresses of these people who have suffered enough.<sup>9</sup>

The Gays, however, stood firm. They would not change their policy.

"It's absolutely a moral issue," says Charles. The Gays make two main arguments to support their position. First, designating a person as a victim and giving

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<sup>6</sup>"Jury convicts inmate of raping his cellmate," *Shelton-Mason County Journal*, 27 June 1985, p. 1.

<sup>7</sup>"Jury finds man guilty of rape," *Shelton-Mason County Journal*, 16 May 1985, p. 1.

<sup>8</sup>Virginia P. Martig, "Don't name the defiled," *Shelton-Mason County Journal*, 20 June 1985, p. 4.

<sup>9</sup>Stephanie Rice, "Does public have right to names?" *Shelton-Mason County Journal*, 6 June 1985, p. 5.

them anonymity before a verdict is rendered implies the person accused is guilty. That, Charles Gay says, is unfair given that our justice system is supposed to presume innocence until a person is found guilty. Second, concealing the names of sex-crime victims implies they have done something wrong or have something to be ashamed of. In a series of editorials, Henry, who still serves as the paper's publisher, explained the Gays' position:

From the beginning, a rape case is a trail of male clichés — original sin, jail bait, slice off a cut loaf, asked for it, man trap, damaged goods, poor little thing, pitiful creature and fallen woman. And at the end of the trail is the Big Daddy newspaper editor with his unctuous promise, "Don't worry, little lady. No one will find out from me that you're ruined forever."

We don't believe that rape victims are ruined forever. The term, damaged goods, is repugnant to us. We won't accept the description or the cruel premise on which it is founded. And we cannot understand why family and friends of the victim accept this atrocious, damaging indictment which is the good old boys' ultimate power play against women.<sup>10</sup>

Eventually, the furor faded, and business continued as usual at the *Journal*.

Only nine people had canceled their subscriptions, and the letter-writing campaign to advertisers generated only one letter from an advertiser who said he would think about withdrawing his business if the *Journal* continued to print rape victims' names. The *Journal* is the only source of local news and advertising for Mason County's 39,000 residents, Charles noted. People may cancel their subscriptions or advertising in anger, but eventually they cool down and come back.

Also, Charles said: "People realize that this is not something that's in the paper every week, and people realize it doesn't happen very often. And they understand we're standing up for principles we believe in."

### BIRTH OF A LAW

Parents of young sexual-assault victims had been trying for years to persuade state legislators from Mason County to do something about the *Journal's* policy, but legislators were reluctant to take on the press. The 1990 elections, however, resulted in

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<sup>10</sup>Henry Gay, "It's time to right the wrong," *Shelton-Mason County Journal*, 13 June 1985, p. 4.

a significant turnover in the state legislature. Shelton parents found their new state representative, Democrat Tim Sheldon, sympathetic to their plight.

"I just think it's wrong to put kids' names in the paper," said Sheldon, who has a young daughter.<sup>11</sup> He knew people had tried to no avail to persuade the Gays to change their policy. When parents approached him, "I said I'll just write a bill and see if it works."

It was a good time for Sheldon and his constituents to make a move. Liberal Democrats had dominated the Washington House of Representatives for years. "Throughout the 1980s, the House established a reputation for promoting some of the most progressive social and environmental legislation in the country."<sup>12</sup> But in 1990, voters elected more conservative members of both parties. In 1992, the Democrats faced a difficult election and the impending loss of two party leaders, Gov. Booth Gardner and House Speaker Joe King, who were not running for re-election. Attempting to please voters, legislators proposed plenty of "hero bills" that targeted socially-unpopular, politically-weak groups.<sup>13</sup> Many of these bills restricted civil rights, but they addressed problems, such as drunk driving and gang violence, that touched people's nerves.

"[Legislators] are trying to be responsive to what they perceive as complaints from home," Rep. Mike Riley said at the time. "But I think there is the underlying concern that they will be perceived as soft on crime if they try to rely on the Bill of Rights."<sup>14</sup>

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<sup>11</sup>Unless otherwise noted, comments attributed to Tim Sheldon come from an interview with the author on April 10, 1996.

<sup>12</sup>Barbara A. Serrano and Jim Simon, "Olympia's Right Turn; Democrats Retreat Before Conservative Agenda," *Seattle Times*, 15 March 1992, sec. A, p. 1.

<sup>13</sup>Annie Capestany, "Rights Come Under Attack in Olympia as Lawmakers Ponder Volatile Issues," *Seattle Times*, 11 March 1992, sec. B, p. 7.

<sup>14</sup>*ibid.*

Sheldon introduced his bill on January 15, 1992. Its main provisions were:<sup>15</sup>

- Law enforcement agencies cannot release information identifying child victims of sexual assault to the press or public without permission of the child or child's legal guardian. Identifying information includes the child's name, address, photograph, location and relationship to the perpetrator.
- During sexual-assault trials, judges must require observers to keep child victims' identities a secret. Reporters who violate judges' orders will be fined up to \$500.
- Judges must ensure that information identifying child victims of sexual assault is not given to the press or public, and if it is, must prevent the distribution of that information.
- Portions of court records that identify child victims of sexual assault must be sealed unless the identifying information is deleted.

#### THE HOUSE

On January 21, the House Judiciary Committee held a public hearing on the matter. Sheldon testified on behalf of the bill along with Mason County counselors, law enforcement officials and a parent of a child victim. Their testimony was compelling.<sup>16</sup>

Law enforcement officials said many sex-crime cases in Mason County are dropped or settled because parents do not want their children to testify in court and subsequently be identified in the newspaper. Victims always ask about publicity, Shelton police detective Gary Martzell said, "They're always hoping police or the courts can do something to keep their names out of the paper."

Counselors told the Judiciary Committee the publicity interferes with victims' treatment and recovery.

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<sup>15</sup>Washington, *Confidentiality of Identity of Child Victims of Sexual Abuse, Washington Laws* (1992), ch. 188.

<sup>16</sup>Comments from legislative hearings and committee meetings were obtained from tape recordings at the Washington State Archives, Olympia, WA.

"Two months ago, a 14-year-old girl came into our agency to talk about being sexually abused and raped," recalled Leauri Grindeland, a counselor at Recovery: AID to Victims of Sexual and Domestic Abuse. "Her uncle molested her for five years, beginning when she was 4-years-old. She told me of three other separate sexual assaults all committed within Mason County. Because she knew that I am required to report child sexual abuse to the proper authorities, she chose to speak to me anonymously. She told me her sole reason for remaining anonymous was because of the *Shelton Journal's* reporting policy."

The father who testified at the hearing asked to remain anonymous because his daughter had not testified in court yet, and he still hoped to protect her from publicity.

"I believe in freedom of the press," the father said. "And I believe in First Amendment rights, but I don't believe what the forefathers had in mind was publishing the names of children and the testimony so they can and will be chastised by their peers for years to come."

Charles Gay testified against the bill along with Roland Thompson, the lobbyist for Allied Daily Newspapers, an organization representing Washington's daily newspapers, and Jerry Sheehan, the American Civil Liberties Union's Washington state lobbyist. Gay explained his belief that victims have nothing to be ashamed of and that not naming them was unfair to the people on trial:

The Sixth Amendment guarantees the accused the right to meet his accuser in public. No law requires the press to practice the same principle, but we think the defendant should have the same right on our news pages, as a matter of fairness, when we cover these open, public trials. Just as we don't let someone attack another in an unsigned letter to the editor, the *Journal* doesn't let anonymous women accuse men of raping them or allow anonymous juveniles to accuse someone of sexually assaulting them.<sup>17</sup>

Thompson and Sheehan told the committee they believed Sheldon's bill was unconstitutional because it involved prior restraint. Thompson urged legislators not to

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<sup>17</sup>Gay's remarks were printed in the *Shelton-Mason County Journal* two days later. "Journal testimony at committee hearing," *Shelton-Mason County Journal*, 23 January 1992, p. 4.

pass legislation that would affect the entire news industry just to reach one small newspaper.

"What we're standing on here is a matter of principle," Thompson told the committee. "I don't condone what the Shelton *Journal* does. They're the only newspaper in the state that makes that decision. They probably account for less than one-tenth of 1 percent of circulation in the state of Washington. This problem is peculiar to that town."

If Shelton residents object to the *Journal's* policy, they can force the newspaper to change by canceling their subscriptions, Thompson added. Legal solutions are not the answer. "Once you institute prior restraint, it's a very difficult thing to stop," he said.

While Thompson and Sheehan raised pertinent legal issues, their testimony did not engage people's emotions like the parents' and counselors' had. The House Judiciary Committee approved the bill on February 4 with little discussion. A few committee members expressed concern that the bill might be found unconstitutional, but they said they would vote for it anyway.

"I don't like to encroach newspapers' rights or crowd First Amendment freedoms," committee member Curtis Ludwig said. "But I think the Shelton publisher leaves me no alternative but to vote for this bill."

Committee members clearly had been offended by copies of *Journal* articles sent to them. Rep. James Hargrove commented: "There needs to be some responsibility that goes with those freedoms and perhaps not just in the area of relating victims' names but in some of the other reporting that goes on in graphic detail about these types of crimes that I think encourages others, stimulation of other crimes of that nature."

The Washington House of Representatives passed the bill unanimously on February 18. A month later, several members expressed regret for voting for the bill and said they got caught up in the emotional aspects of the issue. But others stood by their decision.

Rep. Michael Heavey expressed the feelings of many representatives when he said: "It comes down to a balancing of 'do I want my daughter to be in the paper?' Freedom of speech and the press are not absolute."<sup>18</sup>

#### THE SENATE

Meanwhile, Sheldon was having some difficulty getting the bill through the Senate Law and Justice Committee. The House was controlled by members of Sheldon's party, but Republicans controlled the Senate. Talking about the politics of the issue later, Sheldon said: "Why would [the Republicans] want to let some yo-yo freshman get a high-profile bill passed?"

Other people don't remember party politics being an issue as much as the bill's constitutionality. Several members of the Law and Justice Committee were lawyers, and they had more lawyers on their staff. Newspaper and civil rights lobbyists found these legislators more receptive to their arguments than those in the House had been, Thompson recalled. In the end, however, the vote was emotional rather than logical.

Senate staff member Susan Carlson, who worked on the bill, said several of the committee members thought the bill might be found unconstitutional, but like their peers in the House, they felt compelled to vote for it because it dealt with child victims.<sup>19</sup>

"It would have been hard for them to say, 'Oh, it's unconstitutional so we're not going to do anything about it,'" Carlson recalled. In addition, legislators supported

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<sup>18</sup>Capestany, 7.

<sup>19</sup>Comments from Susan Carlson come from a conversation with the author on April 11, 1996.

Sheldon's cause. "Generally, down here, when you're talking about victims of crime, the Legislature is fairly sympathetic," Carlson noted.

Several Washington legislators and legislative staff members said the general rule in the state legislature is that if one likes a bill but has doubts about its constitutionality the proper thing to do is pass it and let the courts decide.

During the Law and Justice Committee hearing, one senator noted dryly, "This is probably unconstitutional. I do realize that rarely stops us from passing legislation here, but I do think it's at least worth pointing out."

After a brief discussion and a few remarks from Sheldon, the committee passed the bill even though other committee members also said they thought it might be found unconstitutional. In the end, Thompson said, the bill probably "got two minutes of thought." The committee had a large agenda that day because the deadline for bills to be passed out of committee was near, and the senators didn't have time to hash out legal issues. They would leave that to the full Senate or the courts.

On March 5, the day before the Senate was to vote on the bill, the *Shelton-Mason County Journal* published an account of the trial of a man who was found guilty of child rape. As usual, the paper named the 10-year-old victim and recounted testimony about the incident. The article included this passage: "She said three times while her mother was gone, Chambers came into the bedroom where she was sleeping and put his penis inside her. She said it happened three different nights. She said there was enough light in the bedroom that she could tell it was him."<sup>20</sup>

Sheldon bought 50 copies of the paper, highlighted the offensive passages and placed a copy on each senator's desk. If the vote hadn't been assured before, it was the moment the senators saw the article. Recalling the floor discussion, Thompson said,

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<sup>20</sup>"Jury finds Chambers guilty of child rape," *Shelton-Mason County Journal*, 5 March 1992, p. 12.

"They just held up the paper and talked about how awful it was, and that it came out that day."

The vote was 43-5. Several senators who were attorneys voted against the bill because they thought it was unconstitutional. Sen. Phil Talmadge, a lawyer who would later be elected to the state supreme court, proposed an amendment on the floor to try to address some of bill's problems. The amendment would have required prosecutors to make a motion to use a pseudonym or the victim's initials instead of the victim's name.<sup>21</sup> With a motion, judges would have to hear arguments and weigh the victim's rights against those of the defendant and the public. As written, the bill—at least in some people's opinion—made the victim's rights supreme and required judges to take action without discussion. To non-lawyers, the amendment probably seemed trivial, but it touched on an issue—mandatory closure—that would later cause the bill to be declared unconstitutional.

The senators rejected the amendment twice. Supporting the amendment would have been politically imprudent, Carlson said. The bill had the backing of victims' rights organizations and children's advocates, and they may not have accepted what could be seen as a weaker version.

"Some groups come in that people don't like to vote against," Carlson said.

On April 2, Washington Gov. Booth Gardner signed the bill into law. However, he vetoed the sections that forbid the release of identifying information to anyone other than law enforcement agencies without the victim's permission, required judges to exact promises from trial observers not to disclose child victims' identities

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<sup>21</sup>A copy of the proposed amendment is not included in the state archives. Details about the amendment and the vote on it were provided by Susan Carlson, who referred to notes in her files. Susan Carlson, conversation with author, 11 April 1996.

and allowed judges to fine reporters who did publish child victims' names.<sup>22</sup> The rest of the bill was to become active on June 11, 1992.

### A TROUBLED CHILDHOOD

Several years later, Roland Thompson said efforts to block the bill's passage were fairly futile. Legislators objected to the *Journal's* policy, and in an election year, it was difficult for them to vote against any bill that might help children. How could they go home and explain to voters that they had voted against children because of a legal technicality? They might as well ask to be voted out of office.

"The emotions were such that they didn't really care," Thompson said. "They wanted to send a message, and they didn't care if it was constitutional."<sup>23</sup>

Members of the newspaper industry realized quickly that they could not stop the bill in the legislature, Thompson said. They had a better chance of getting the law declared unconstitutional by the courts. Thus, even as the bill was working its way through the House and Senate committees, Allied Daily Newspapers began preparing a lawsuit.

### LAWSUIT

On May 27, Allied Daily Newspapers filed suit in King County Superior Court, asking Judge Norman Quinn for an injunction that would prevent state and county officials from enforcing the new law. The Washington Newspaper Publishers Association, which represents weekly newspapers, and Fisher Broadcasting Inc. joined Allied Daily Newspapers in the suit. Notably, the *Shelton-Mason County Journal* was involved only to the extent that it is a member of the Washington Newspaper Publishers Association. During the suit, other newspapers tried to distance themselves from the *Journal*. They wanted to make it clear that they were fighting for the First Amendment.

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<sup>22</sup>Booth Gardner, governor of Washington, *Veto Message on HB 2348-S, 2 April 1992* (Olympia, 1992).

<sup>23</sup>Comments from Roland Thompson come from a conversation with the author on April 10, 1992.

not the unpopular weekly. *Seattle Times* editor Mike Fancher wrote in an editorial in his paper:

In this case, we must defend one newspaper's right to act irresponsibly in order to preserve the underlying principles of our democracy.

And, there should be no mistake about it — what the Shelton-Mason County Journal does is wrong. It should stop.

If the Journal keeps printing the names of young victims of sexual assault, and chances are it will, the appropriate remedy is for people to stop reading it.

The public should defend the right of a free press to act irresponsibly, but it needn't support an irresponsible newspaper.<sup>24</sup>

*Key arguments.* Allied Daily Newspapers attacked the new law's constitutionality on several grounds. Their three main arguments were that the law violates the media's and the public's right of access to court proceedings and documents, erases the separation of powers in state government by mandating judicial action and abridges freedom of speech.<sup>25</sup>

First, they said, the law violates people's right of access to court proceedings and documents because it requires judges to close court proceedings and seal documents in which the victim's name is used. At minimum, judges would have to close the court during victim's testimony. More likely, the entire trial would be closed. In making this argument, the newspapers relied largely on the testimony of county prosecutors and in particular on statements made by Rebecca Roe, a senior deputy prosecutor in King County. After explaining how the law would convolute judicial procedure by requiring portions of trials to be closed and documents sealed, Roe said: "Disclosure of the victim's name to the judge and jury, and public spectators, cannot be avoided if we are going to conduct trials honestly."<sup>26</sup>

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<sup>24</sup>Michael R. Fancher, "Why We Support Law That Keeps Names Of Victims Public," *Seattle Times*, 31 May 1992, sec. A, p. 2.

<sup>25</sup>Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Injunction, *Allied Daily Newspapers v. Eikenberry*, King County Superior Court, No. 92-2-12149-2; Brief of Respondent, *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205 (1993), No. 59435-0.

<sup>26</sup>Affidavit of Rebecca Roe at 3, *Allied Daily Newspapers v. Eikenberry*, King County Superior Court, No. 92-2-12149-2.

In reply, the state, which was represented by Attorney General Kenneth Eikenberry, said the law didn't require judges to close courtrooms during trials.<sup>27</sup> Judges could order the use of the victim's initials or a pseudonym instead of the victim's name. They also could make people attending the trial agree not to disclose the child's name to others.<sup>28</sup> To support its position, the state referred to testimony by Victoria Meadows, Mason County's chief deputy prosecutor, who said it was possible to enforce the new law and still provide adequate public access to court proceedings. She noted that Mason County already used aliases for the victim in documents and proceedings leading up to trial and added, "Mason County expects to exclude the press during child victim/witness testimony, but make available tapes of the testimony, at cost, which have been excised, deleting the identifying information."<sup>29</sup>

Second, Allied Daily Newspapers said, the new law violated the separation of powers in government because the legislature was telling judges how to run court proceedings. The Washington Supreme Court had established guidelines for closing court hearings or documents in a series of cases. The media organizations said that in passing Sheldon's bill, the legislature was directing courts to ignore those guidelines and close any proceedings or seal any documents in which child victims were identified.

In reply, the state said the legislature intended the new law to complement, not replace, the court's guidelines. It noted that under normal circumstances, the public's and press's right of access to court proceedings would outweigh the victim's right to privacy. The new law simply assured victims that their right of privacy would be considered by judges in deciding whether or not to close proceedings or seal

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<sup>27</sup>State's Memorandum in Opposition to Plaintiffs' Complaint for Preliminary Injunction, *Allied Daily Newspapers v. Eikenberry*, King County Superior Court, No. 92-2-12149-2.

<sup>28</sup>*Ibid.*, 13.

<sup>29</sup>Affidavit of Victoria Meadows at 4, *Allied Daily Newspapers v. Eikenberry*, King County Superior Court, No. 92-2-12149-2.

documents. According to the attorney general, "[The law] neither states that a child victim's right to privacy has priority over the rights of others nor requires the court to protect the child's right to privacy in a constitutionally impermissible manner."<sup>30</sup>

Third, Allied Daily Newspapers said, the bill violated the press's and public's right to free speech in that judges could require people to agree not to disseminate victims' names before they were permitted to attend a trial. This constituted prior restraint in that it "forces the public and press to accept a violation of their free speech rights in exchange for exercising their right of access to open justice."<sup>31</sup>

In response, Eikenberry said the First Amendment does not protect speech involving information that was illegally obtained.<sup>32</sup> He said that if attorneys or witnesses told reporters victims' names after judges ordered them to keep it confidential, reporters would have illegally obtained that information, and judges could order reporters not to publish the name. Also, Eikenberry said, there is no First Amendment issue when people give up their right to free speech voluntarily in order to attend a trial that would otherwise be closed. According to the state, asking people to choose between agreeing to a gag order or being excluded from a trial is not a form of coercion.

#### PRELIMINARY INJUNCTION

On June 9—two days before the new law would have become effective—King County Superior Court Judge Norman Quinn issued a preliminary injunction forbidding Eikenberry or King County Prosecutor Norm Maleng or any of their employees to enforce the section related to court proceedings and documents. Quinn said the section was unconstitutional because it required judges to close court

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<sup>30</sup>Brief of Appellant at 14, *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205 (1993), No. 59435-0.

<sup>31</sup>Brief of Respondent, 40.

<sup>32</sup>Brief of Appellant, 26-27.

proceedings and "amounts to the Legislature telling courts what they may admit as evidence."<sup>33</sup>

In his decision, Quinn, at the request of the attorney general, also made the King County prosecutor a plaintiff in the suit instead of a defendant. Deputy prosecutor Virginia Kirk, who represented the prosecutor's office in the initial hearing, had surprised state attorneys by siding with Allied Daily Newspapers and saying the new law would interfere with prosecutors' ability to conduct trials.<sup>34</sup> Normally, Kirk would be expected to endorse the attorney general's interpretation of the law.

*Other court decisions.* While attorneys for Allied Daily Newspapers were preparing to argue for a permanent injunction and state attorneys were responding to Quinn's order, other Washington judges heard motions involving the new victim identification law. On June 16, a Yakima County Superior Court judge followed Quinn's ruling and refused to close a child molestation trial.<sup>35</sup>

The same day, Mason County Superior Court Judge James Sawyer used the new law to close the testimony of an 11-year-old sex-crime victim, instruct attorneys to use an alias for her in other portions of the trial and seal any records that would reveal her testimony. An American Civil Liberties Union lawyer protested the ruling on behalf of the *Shelton-Mason County Journal*, but both the defense attorney and the county prosecutor agreed to the closure. Shortly after Judge Sawyer made his decision, the defendant pled guilty to a lesser charge.<sup>36</sup>

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<sup>33</sup>George Tibbits, "Judge Bars Law on Release of Juvenile Sex Crime Names," *Oregonian*, 11 June 1992, sec. D, p. 15.

<sup>34</sup>Sean Hanlon, "Judge stops enactment of law against using names," *Shelton-Mason County Journal*, 11 June 1992, p. 1, 2.

<sup>35</sup>Peter Lewis, "Confusion over new shield law; Shelton judge to enforce challenged rule," *Seattle Times*, 17 June 1992, sec. B, p. 1.

<sup>36</sup>Al Ford, "Case was almost first one tried under no-names law," *Shelton-Mason County Journal*, 18 June 1992, p. 1.

In a declaration later made to the King County court, David Utevsky, who represented the ACLU in the case, described the Mason County judge's reasons for closing the trial:

Judge Sawyer emphasized that both the prosecution and the defense had endorsed the proposed procedure to implement [the new law]. The defendant had waived his right to an open trial, so his rights were not at issue. Judge Sawyer also concluded that [the law] could be enforced without violating the public right of access under the state and federal Constitutions, so long as the court did not restrict public access to a degree which was not necessary to protect the alleged victim's right of privacy.<sup>37</sup>

In his declaration to the King County court, Mason County prosecutor Gary Burleson said he expected most defendants to agree to closed court proceedings in child sexual-assault cases so there would be no conflict with their fair trial rights. In cases where defendants didn't agree to a closed trial, judges might have to keep the court open, he said.<sup>38</sup>

Mason County officials publicly sparred with King County officials over how the new law should be interpreted. In court documents, King County deputy prosecutor Rebecca Roe had said the new law would hinder her ability to prosecute sex-crime cases. Mason County prosecutor Gary Burleson then told reporters he respected Roe but "she hasn't prosecuted in the face of the press that is exposing everything."<sup>39</sup> Judge Sawyer told a *Seattle Times* reporter that Judge Quinn's ruling "doesn't set a precedent for me," which was a true albeit ungracious comment.<sup>40</sup>

At the time, a *Seattle Times* reporter noted that Mason County residents tended to get emotional in discussing enforcement of the new law. The reporter said Burleson "grew visibly excited in defense of the law" and quoted him as saying: "This isn't just

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<sup>37</sup>Declaration of David Utevsky at 3-4, *Allied Daily Newspapers v. Eikenberry*, King County Superior Court, No. 92-2-12149-2.

<sup>38</sup>Declaration of Gary P. Burleson at 4, *Allied Daily Newspapers v. Eikenberry*, King County Superior Court, No. 92-2-12149-2.

<sup>39</sup>Lewis, 1.

<sup>40</sup>*Ibid.*

theory or legal concepts. You're talking about ruining people's lives. In this context, the right to privacy takes on a real serious meaning."<sup>+1</sup>

#### PERMANENT INJUNCTION

On June 29, Judge Quinn made his injunction against the enforcement of the new law permanent. The injunction, however, applied only to the section of the law that referred to court proceedings and court documents.<sup>+2</sup> By requiring judges to close traditionally open proceedings and records, the law violated the state constitution, the judge said. Sections of the law that did not specifically refer to traditionally open judicial proceedings and court documents were acceptable because they didn't *require* closure, although they allowed judges to close proceedings and documents as they saw fit. The distinction Judge Quinn made between the sections eventually would allow the state to keep part of the law on the books and apply it to such things as police records and juvenile court proceedings.

Immediately after the judge made his decision, Assistant Attorney General Lee Ann Miller told reporters she would appeal to the state supreme court.

#### FROM ADOLESCENCE TO DEATH

#### PRECEDENT

In making a decision on the 1992 law, the Washington Supreme Court would refer to five previous judicial decisions. One came from the U.S. Supreme Court, which had decided a case involving a similar law 10 years earlier. The other four were previous Washington Supreme Court cases. Together, these cases made it clear that court proceedings and documents could be closed only in exceptional circumstances and that the closure had to be limited. If possible, the court should only close part of the hearing or trial instead of the entire proceeding. Sealed documents should be

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<sup>+1</sup>Ibid.

<sup>+2</sup>Declaratory Judgement and Order Granting Permanent Injunction, *Allied Daily Newspapers v. Eikenberry*, King County Superior Court, No. 92-2-12149-2.

opened as soon as possible; they could not be sealed indefinitely. A brief review of these five decisions explains Washington law as it stood when the state appealed the *Allied Daily Newspapers* decision to the Washington Supreme Court.

*Globe Newspaper Co. v. Superior Court.* In 1982, the U.S. Supreme Court issued an opinion that should have made it clear that laws like the one passed in Washington were unconstitutional. In 1979, a Massachusetts judge closed several pretrial hearings and the entire trial of a man charged with raping three teenage girls. The judge justified his actions by referring to a Massachusetts law that requires judges to bar the press and members of the public from courtrooms during the testimony of sexual-assault victims who are under the age of 18. *The Boston Globe*, which was covering the trial, sued the judge. A justice of the Massachusetts Supreme Court conducted an initial hearing and approved the trial judge's order. While the *Globe* was waiting for the whole Massachusetts Supreme Court to hear its appeal, the rape trial ended. The man was acquitted.

When the Massachusetts Supreme Court heard the *Globe's* appeal, it said the trial judge had made an error but not one that invalidated his ruling or the statute. The trial judge had interpreted the Massachusetts law to mean he had to close the entire trial if it involved juvenile sexual-assault victims. The Massachusetts Supreme Court said the law only *required* the judge to close the court during victims' testimony. Judges *could* close additional parts of trials if they saw fit. The law was meant to encourage child sexual-assault victims to press charges and to protect them from embarrassment once they did. The state supreme court considered this a substantial state interest that justified restricting the press's and public's access to the courtroom.

In a six-to-three vote, the U.S. Supreme Court overturned the Massachusetts court's decision. The U.S. Supreme Court's opinion, written by Justice William Brennan, made it clear that court proceedings could be closed only in exceptional

circumstances. Justice Brennan acknowledged that access to courts is not guaranteed by the First Amendment, but he said, the First Amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."<sup>43</sup> The First Amendment was intended to foster discussion of government affairs among citizens, Brennan said. Without information about government proceedings, citizens have nothing to discuss.

In regard to criminal trials in particular, citizens have a right of access because trials historically have been open and because access helps citizens monitor the operations of the judicial system and government as a whole. Justice Brennan said:

Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.<sup>44</sup> (footnotes omitted)

The right of access is not absolute, Brennan said, but it can be restricted only in exceptional circumstances. The court did not find the circumstances of the rape trial exceptional enough. The Massachusetts Supreme Court gave two reasons to justify the law, Brennan said. First, closing courts during child sexual-assault victims' testimony spares them the embarrassment and trauma of recounting the assault in front of others. Second, because it spares these victims embarrassment, the law encourages them to press charges and testify. The first reason is compelling, Brennan said, but "it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-

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<sup>43</sup>*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982).

<sup>44</sup>*Ibid.*, 606.

by-case basis whether closure is necessary to protect the welfare of the victim."<sup>45</sup>

Further, he said, there is no evidence to support the state court's claim that closing victims' testimony will encourage them to report crimes and testify. Brennan noted:

Although [the law] bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus [the law] cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity.<sup>46</sup>

If victims' willingness to testify depends on the state keeping that testimony secret, the Massachusetts law was inadequate.

Finally, Brennan said, even if the law furthered the state's interest in encouraging victims to testify, it did so in a way that undermined the principle of open government. If child sex-crime victims were allowed to testify in secret, other victims may ask to do so. For example, adult sex-crime victims probably suffer embarrassment and trauma like child victims. If the state could close child victims' testimony, it also could close adult victims' testimony.

While the court's opinion clearly said laws requiring judges to close portions of court proceedings are unconstitutional, Chief Justice Warren Burger wrote a dissenting opinion that could have given supporters of the Washington law hope. Burger said Brennan had applied the proper test by looking at whether the proceeding historically had been open and whether there was a substantial state interest that justified closing the court. But, he said, Brennan misinterpreted the facts and came to the wrong conclusion.

While criminal trials historically have been open, trials involving minors often have been closed. Burger noted that courts prohibit the release of juvenile offenders'

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<sup>45</sup>Ibid., 608.

<sup>46</sup>Ibid., 610.

names, bar the press and the public from juvenile court proceedings and seal juvenile court records. Then he said:

Yet today the Court holds unconstitutional a state statute designed to protect not the *accused*, but the minor *victims* of sex crimes. In doing so, it advances a disturbing paradox. Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused.<sup>47</sup>

Supporters of the Washington bill used this argument several times in testifying before the Washington legislature.

However, Burger went on to make a point that distinguishes the Massachusetts law from the one later passed in Washington and supports the notion that the Washington law is unconstitutional. Burger said Brennan misunderstood the intent of the Massachusetts law. The state did not want to deny reporters information about victims' testimony. This information would be available in transcripts. Rather, Burger said, the state wanted to spare children the trauma and embarrassment of having to testify in front of a large group of people. Massachusetts was not trying to keep information secret for an indefinite period of time. In contrast, Washington legislators wanted to keep victims' names secret permanently.

In addition to the *Globe* case, the Washington Supreme Court considered a series of its own decisions involving access to judicial proceedings. The first decision came from a 1975 case involving sealed court documents. The other three dealt with closed hearings.

*Cohen v. Everett City Council*. The Everett City Council revoked the city license of a sauna parlor owner during a closed meeting. The sauna parlor owner then appealed the city's decision to the Snohomish County Superior Court. In making his appeal, the sauna parlor owner got an order sealing the transcript of the city council

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<sup>47</sup>Ibid., 612.

meeting so that only the judge could see the file. *The Everett Herald*, a local newspaper, asked the judge to unseal the record. The judge refused. The sauna parlor owner had made some allegations against another person during the city council's closed meeting, and the judge did not want those accusations known. The judge then reviewed the meeting record, confirmed the council's decision to revoke the sauna parlor owner's license and ordered the record sealed. *The Everett Herald* again asked the judge to unseal the record, and when he refused, appealed to the Washington Supreme Court.

In the court's opinion, Justice Robert Brachtenbach said the Washington Constitution requires civil suits to be heard in open court unless there is a statutory exception or a compelling reason for closing the court.

The council claimed there was a statutory exception since records of executive sessions, or legitimately closed meetings, are not public records under state law. The Washington Supreme Court said that was true "But the minutes lost their confidential nature when they became the basis for judicial review on the merits. What is statutorily secret in one context is not necessarily so when it moves into the judicial arena."<sup>48</sup> When the records became the basis for a lawsuit, they became the equivalent of court testimony, Justice Brachtenbach explained.

Further, he said, there was no reason for the records to be closed. Concern about the consequences of the sauna parlor owner's remarks becoming known was not a compelling state interest. The supreme court ordered the records opened.

*Federated Publications v. Kurtz*. In November 1978, the Whatcom County prosecutor brought charges in a murder case that received a lot of local publicity. The *Bellingham Herald*, located in Whatcom County, covered the case as did several local television and radio stations. Between April 1978 and March 1979, the *Herald* published 16 stories about the murder and the upcoming trial. As a result, Whatcom

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<sup>48</sup>*Cohen v. Everett City Council*, 85 Wn.2d 385, 389 (1975).

County Superior Court Judge Jack Kurtz granted the prosecutor a change of venue, moving the trial to neighboring Skagit County. The change of venue was not adequate. About 1,000 of Skagit County's 63,000 residents read the *Herald* regularly. The jury pool could still be contaminated by people who learned of the murder from the newspaper.

The trial was supposed to begin on April 2, 1979, in Skagit County. In March, Judge Kurtz held a suppression hearing in Whatcom County to discuss whether the prosecutor could use the defendant's prior criminal record and incriminating statements as evidence in the trial. Part of the way through the suppression hearing, the prosecutor and defense attorney asked the judge to close the rest of the hearing and seal the records from it. The judge did. After the trial began, the newspaper sued the judge, asking the Washington Supreme Court to open the suppression hearing files and to prevent Judge Kurtz from closing future proceedings. A few days later, the judge opened the suppression hearing files. However, the Washington Supreme Court agreed to hear the case because the issue could come up again, and the court wanted to give lower court judges guidelines to follow in similar situations. Fifteen months after Judge Kurtz opened the hearing files, the Washington Supreme Court issued an opinion in his favor.

In a similar case the year before, the U.S. Supreme Court said the public has a right of access to suppression hearings, but that right was outweighed by the defendant's right to a fair trial.<sup>49</sup> The Washington Supreme Court referred to the high court's decision and said that because the Washington case facts were so similar to those in the federal court case "we are compelled to conclude that respondent's closure order and order temporarily sealing the file did not violate the United States Constitution."<sup>50</sup>

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<sup>49</sup>*Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

<sup>50</sup>*Federated Publications v. Kurtz*, 94 Wn.2d 51, 56 (1980).

However, the Washington court said, it would rather decide the case based on Washington law than federal law because the Washington Constitution has a clause that specifically addresses the issue while the United States Constitution does not. The U.S. Supreme Court justices were not able to agree on the source of the right of access to judicial proceedings. Four justices found the right in the Sixth Amendment. Four did not. One found the right in the First Amendment; the others avoided mentioning it. In the Washington Constitution, three clauses address the issue. The first one, which deals with the right to publish on all subjects, is similar to the First Amendment. The second, which deals with the right to public trials, mirrors the Sixth Amendment. The third clause has no match in the federal constitution. It reads, "Justice in all cases shall be administered openly, and without unnecessary delay," and it is the clause on which the Washington Supreme Court based its decision.

The Washington Constitution clearly establishes the public's right of access to judicial proceedings, the court said, but that right is not absolute. In some cases, judges must close their courts in order to protect people's right to a fair trial. The question judges must ask, Justice William Williams said in the court's opinion, "is whether the present circumstances were exceptional enough to justify closure."<sup>51</sup> To answer that question, the justice said, "the court needs workable standards that allow it to strike a balance between the public's right of access and the accused's rights to a fair trial including an impartial jury."<sup>52</sup> To help judges strike that balance, the court outlined the following test:

- The accused must show that an open trial or hearing will jeopardize his or her ability to get a fair trial.
- Anyone present when the closure motion is made must be allowed to object.

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<sup>51</sup>Ibid., 60.

<sup>52</sup>Ibid., 61.

- The objector has to show there are alternatives to closing the proceeding that will protect the accused's rights.
- The court must weight the competing interests of the accused and the public.
- The order to close the court cannot be any broader than needed to serve its purpose. In other words, if the judge can protect the accused's rights by closing part of a hearing or trial instead of all of it, he should close only part. If records from the hearing or trial are sealed, they should be opened as soon as possible.

The supreme court said Judge Kurtz met these criteria because he closed only a portion of the suppression hearing, opened records from the hearing soon after the jury was chosen and had reason to believe no alternative measures would protect the defendant's right to a fair trial. In deciding Judge Kurtz had no alternatives to closing the hearing, the court noted the judge had twice asked the *Bellingham Herald* not to publish information from ballistic reports, and the newspaper published the information anyway, violating the Washington Bench-Bar-Press Guidelines. Although the *Herald's* reporter promised to follow the Bench-Bar-Press Guidelines, the newspaper's previous actions gave Judge Kurtz no reason to believe it would not publish incriminating evidence from the suppression hearing, Justice Williams said.

*Federated Publications v. Swedberg*. The year after the Washington Supreme Court issued its opinion in *Federated Publications v. Kurtz*, it heard another case in which the *Bellingham Herald* sued a superior court judge for restricting access to a suppression hearing.<sup>53</sup> The suit came from a criminal trial involving Veronica Compton, the girlfriend of "Hillside Strangler" Kenneth Bianchi. Bianchi was convicted of killing two women in Bellingham and five in Los Angeles. While he was in jail awaiting trial, Compton attempted to kill a Bellingham cocktail waitress to divert suspicion from Bianchi. Compton was convicted of attempted murder and given a life

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<sup>53</sup>*Federated Publications v. Swedberg*, 96 Wn.2d 13 (1981).

sentence in 1981. She escaped from prison in 1988. Before Compton's trial, a suppression hearing was held in Whatcom County Superior Court. Compton's attorney asked the judge to close the court because media coverage of the hearing might prejudice jurors. Judge Byron Swedberg considered closing the hearing but decided to keep it open if reporters covering the hearing would sign an agreement to abide by Washington's Bench-Bar-Press Guidelines.

Reporters from the *Bellingham Herald* and a few other news organizations refused to sign the agreement and were asked to leave the courtroom. The *Herald* then sued Judge Swedberg, saying requiring reporters to sign an agreement on how they will cover a hearing before they attend that hearing constitutes prior restraint.

The Washington Supreme Court disagreed. The court said Judge Swedberg followed the guidelines outlined in *Federated Publications v. Kurtz* and determined closing the suppression hearing would be the only way to prevent prejudicial publicity without infringing on Compton's rights. A continuance or change of venue might have alleviated the dangers of pretrial publicity, but those options required Compton to give up her right to a speedy trial and right to be tried in the county where the offense was committed. Then the court said if Judge Swedberg could justifiably close the hearing, he could take other, less drastic action. In the court's opinion, Justice Hugh Rosellini wrote:

Ordinarily, members of the media who have declared their adherence to the guidelines do exercise restraint in such reporting, but it had been the experience of the trial judge here that mere oral commitment had not sufficed to produce that restraint. He recognized that by admitting members of the press to such a sensitive proceeding, even upon their written agreement to be guided by these standards, he was placing the defendant's interests in some jeopardy. Yet he was willing to try this method of securing compliance, as an experiment, to see if it would be effective in protecting the defendant while at the same time allowing the public, including the media, to attend the hearing. As we view this measure, it was a good faith attempt to accommodate the interests of both defendant and press which, hopefully, would prove both practical and effective as an alternative to closure.<sup>54</sup>

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<sup>54</sup>*Ibid.*, 21.

Justice Rosellini also said the court did not consider requiring the media to sign an agreement to abide by the Bench-Bar-Press Guidelines a prior restraint because the guidelines "are, by definition, not a set of rules but rather principles which guide the courts, lawyers and court personnel as well as the media. . ."55 Most of the guidelines are general suggestions and don't address the specific content of stories, although a few suggest not publishing items such as opinions about defendants' guilt or innocence, defendants' confessions and results of polygraph and ballistic tests.

Justice James Dolliver wrote a vehement dissent on this point, saying conditioning admission to the hearing on a promise to obey the guidelines was a prior restraint. and Judge Swedberg had not met the burden of proof needed to exercise prior restraint. While the Compton case would certainly receive a great deal of publicity, Dolliver wrote, the judge had no reason to believe it would be sensational, prejudicial or in violation of the Bench-Bar-Press Guidelines given the coverage up to that point. He implies the judge should have looked at media coverage of that particular case and not at media coverage of trials generally.

*Seattle Times Co. v. Ishikawa.* The year after the Washington Supreme Court ruled in the second *Bellingham Herald* case, it heard its first case involving a closure order that wasn't entirely based on a threat to the defendant's right to a fair trial.<sup>56</sup> The court modified the criteria for closure it established in the first *Bellingham Herald* case, creating the test that would be used in the *Allied Daily Newspapers* suit.

*Seattle Times Co. v. Ishikawa* came from a 1981 murder trial that wasn't particularly celebrated. Just before the trial, the defendant's lawyer made a motion to dismiss the case. He also asked the judge to close the courtroom while the motion to dismiss was discussed. After discussing the issue with the defense attorney and prosecutor in his chambers, King County Superior Court Judge Richard Ishikawa

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<sup>55</sup>Ibid., 20-21.

<sup>56</sup>*Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30 (1982).

agreed to close the court while the lawyers argued the motion to dismiss. In announcing his decision, Judge Ishikawa did not explain why he agreed to close the hearing. He did allow the press to object and to present alternatives to closure, but it was difficult for the media to do so when they didn't know why the court was being closed.

The judge heard arguments for the motion to dismiss, denied the motion and sealed the hearing record. The trial was held, and the defendant was convicted of murder.

After the trial, the *Seattle Times* and *Seattle Post-Intelligencer* again asked the judge to unseal records from the pretrial hearing. The judge refused, and the newspapers appealed to the Washington Supreme Court.

Because Judge Ishikawa had not explained his reasons for closing the pretrial hearing and sealing the records, the supreme court ordered him to explain his reasons before it heard oral arguments. The judge said he closed the hearing and sealed the documents to protect the defendant's fair-trial rights, avoid interference with a continuing investigation of the murder and protect witnesses' safety.

In its decision, the supreme court said it would expand the *Kurtz* test because Judge Ishikawa had not closed the hearing simply to protect the defendant's fair-trial rights and "we believe that closure to protect the defendant's right to a fair trial should be treated somewhat differently from closure based entirely on the protection of other interests . . ." <sup>57</sup> The court then outlined the following test:

- The proponent of closure must show some need. Defendants need only show a "likelihood of jeopardy" to their Sixth Amendment rights. Other people have a higher burden of proof. They must show a "serious and imminent threat to some other important interest." <sup>58</sup>

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<sup>57</sup>Ibid., 37. See also, *Federated Publications v. Kurtz*, 94 Wn.2d at 62-65.

<sup>58</sup>Ibid.

- Anyone present when the motion to close the court or documents is made must be allowed to object, *and* the person arguing for closure must give specific reasons for wanting closure so other people "have sufficient information to be able to appreciate the damages which would result from free access to the proceeding and/or records. This knowledge would enable the potential objector to better evaluate whether or not to object and on what grounds to base its opposition."<sup>59</sup>
- All parties must analyze whether the proposal for closure is the least restrictive means available for protecting the threatened interests.
- Judges must weigh the competing interests of the defendant and public and explain their thoughts in their decisions.
- The closure order must be as limited as possible. If it involves sealed documents, it must expire at a specific time unless the person asking for closure comes back to court at that time and gives a reason why the order should be extended.

The court, in an opinion by Justice Robert Brachtenbach, then said Judge Ishikawa did not meet these guidelines. Ishikawa did not tell the newspapers why the hearing and documents were going to be sealed, which deprived them of a reasonable opportunity to suggest alternatives to closure. Ishikawa did not explain his consideration of the defendant's and public's competing interests. He did not explain why other alternatives were not adequate, and he gave no reason to believe closing the entire hearing and sealing the records indefinitely was the least restrictive means of achieving his goals. The supreme court sent the case back to Judge Ishikawa, ordering him to follow the new guidelines in reconsidering the newspapers' motion to open the records.

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<sup>59</sup>*ibid.*, 38.

## ORAL ARGUMENTS

If a look at legal precedent left any doubt about how the Washington Supreme Court was likely to rule on the state's appeal in the *Allied Daily Newspapers* case, then a few minutes listening to oral arguments before the court should have erased it. The justices allowed Stephen Hassett, the assistant attorney general arguing the case for the state, some opening remarks about the legislature's intent and the harms the law was supposed to abate and then launched into questions that highlighted the weakest points in the state's argument. In contrast, they presented Cameron DeVore, who represented *Allied Daily Newspapers*, and Virginia Kirk, who represented the King County prosecutor, with questions that allowed them to elaborate and strengthen their arguments.

All parties made essentially the same arguments as they had in the trial court hearings. Hassett emphasized the need to protect children and encourage reporting of sex crimes. DeVore claimed that by requiring judges to close court proceedings the law violated the state constitution's clauses pertaining to open justice, freedom of speech, right to due process and separation of powers. Kirk said the law required prosecutors to ask for closed court proceedings and interfered with their ability to successfully prosecute cases.

Hassett spoke first because the state was the appealing party. He explained the legislature's desire to pass a law that would protect children from harm and encourage them to report sex crimes. As he began to discuss the chilling effect publicizing victims' names supposedly has on families' willingness to report sex crimes, a justice interrupted him to ask if the statute was aimed at one newspaper.<sup>60</sup>

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<sup>60</sup>This account of the oral arguments before the Supreme Court was produced from audiotapes of the hearing. Unfortunately, there is no way to tell from the tapes which justice asked a particular question. It is possible to tell which lawyer is speaking because they introduce themselves at the beginning of their statements. *Allied Daily Newspapers v. Eikenberry*, No. 59435-0 (Olympia: Washington Supreme Court, 1992), audiocassette.

Hassett replied that although only one newspaper currently named child victims of sex crimes, the legislature intended the statute to apply to all news organizations.

"The legislature, seeing actual harm taking place to those children, was compelled to act, correctly so, and simply cannot rely on the good graces of other media outlets in this state to continue the policies they've had in the past," Hassett said. "These policies can change. There may be pressures if one newspaper does it, another may feel compelled to do this."

Another justice immediately asked him what evidence the state had of harm to children. Hassett referred to parents', counselors' and the Mason County deputy prosecutor's testimony before the legislature, whereupon the justice asked if there was any medical testimony. Hassett said the counselors' testimony could be considered medical testimony since it showed psychological harm. Another justice then stepped in and noted an anecdote from one of the depositions that told of a child victim being taunted on the playground by children who said that if she had had sex with one person, she could have sex with them.

The justices would come back to the issue of harm later, but at that point they moved on, and one asked if the new law required judges to close court proceedings. This was the main point made by Allied Daily Newspapers, who could use the *Globe* decision to show that mandatory closure was not constitutional.<sup>61</sup> Hassett's answer indicates he was aware of the state's vulnerability on this issue.

"Probably the key words in the statute and in this controversy are the words that 'the court shall ensure that the information identifying the child victim is not disclosed to the press or the public,'" Hassett said. "If we take the position of the media respondents that those words mandate closure, then we would have to concede they

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<sup>61</sup>*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

have a point. The state does not concede that point. We feel that the court can ensure that the identifying information is not disclosed without closing the case every time."

Attorneys and judges could use the victim's first name, initials or a pseudonym, Hassett said. He noted prosecutors from two counties had said substituting initials or fake names would confuse children and make it difficult to prosecute cases, but these prosecutors didn't have to deal with news organizations that publish child victims' names. These alternatives to closing the court might not be feasible in cases involving young children, but they could be used with teenage victims, Hassett said.

One justice questioned Hassett's interpretation of the law and referred to the prosecutors' affidavits.

"They're both prosecutors," the justice said. "They've been before this court. They're knowledgeable about this specific area. They're saying under their view the law requires mandatory closure in every instance. How do you refute that?"

Again, Hassett said these prosecutors had no incentive to creatively apply the statute since they didn't have to deal with a newspaper like the *Journal*. It was obvious, however, he was having difficulty on this point, and DeVore and Kirk latched on to that weakness in their arguments.

"What has happened here is that the legislature has impermissably put its thumb on the scales of justice and has decided how matters that have been left to the careful balancing and wise discretion of the trial courts are going to come out in these circumstances," DeVore said.

The new law could have been written in an acceptable way, DeVore said, but "the legislature just didn't do it right." If the law said the child victim's privacy was an important issue that should be considered with other rights, that probably would be acceptable. But the law uses the word "shall" in saying courts shall prevent victims'

names from becoming known, and that forecloses any kind of balancing of interests, DeVore said.

Kirk, speaking on behalf of the King County prosecutor, backed up DeVore's statements. She noted that while prosecutors differed on how much of a trial would have to be closed, they agreed that some of each trial involving a child sex-crime victim would be held in secret. She referred to the affidavit of Mason County's deputy prosecutor, who supported the law.

"Even where this practice has been going on for some time in Mason County, the prosecutor there who handles these cases still believes that there's no other way to comply with this law, other than closure and excluding the media at least during the time when the child is testifying," Kirk said.

Kirk and DeVore also claimed that if child sex-crime victims were given special consideration under the law, other victims would ask for similar protection of their privacy.

"I think that would only add another layer of difficulty and problems to our effective prosecution of criminal cases," Kirk said.

When a justice asked Hassett if the law would be stretched to apply to other victims, the attorney said he could not give a conclusive answer. The law specifically addressed child sex-crime victims, but a clever attorney probably could find a way to make it apply to other victims, he said.

The key moment in the oral arguments probably came when a justice interrupted Hassett's explanation of why the law was needed when the *Ishikawa* test provided a mechanism for judges to close court proceedings.

"I think the practical reality is that there's nobody at the time of the trial or in the pretrial proceeding who's necessarily going to raise the issue on behalf of the child," Hassett said, explaining that prosecutors fear asking for a closed hearing because it

provides grounds for an appeal, and defense attorneys won't raise the issue because they want the victim to be uncomfortable.

At that point, a justice interjected: "Counselor, before you move on too far, could you comment on what you want us to do with article one, section 10, of our state constitution that says, quote, justice in all cases shall be administered openly, close quote. What do we do with that?"

#### THE DECISION

On April 1, 1993, the day before the one-year anniversary of the bill's enactment, the Washington Supreme Court declared the victim identification law unconstitutional.<sup>62</sup> The opinion, written by Justice Richard Guy, side-stepped the issues of freedom of speech, right to due process and separation of powers. It did not discuss the First or Fourteenth amendments to the U.S. Constitution. The only issue for the Washington court was the fact that the state constitution explicitly guaranteed the open administration of justice and the victim identification law could interfere with that. Guy wrote:

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.<sup>63</sup>

The right of access is not absolute, Guy continued, so the courts must apply the *Ishikawa* test when there is a question about whether to close proceedings or documents. Applying the first part of the test, the justice said protecting child victims from further harm is a compelling state interest and "on an individualized basis may be sufficient to warrant court closure."<sup>64</sup> However, the court adopted *Allied Daily Newspapers'* and county prosecutors' interpretation of the law. The problem, the

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<sup>62</sup>*Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205 (1993).

<sup>63</sup>*Ibid.*, 211.

<sup>64</sup>*Ibid.*

justices said, was that the victim-identification law required judges to close court proceedings and did not permit them to consider individual cases on their merits. The law required judges to close the court whenever that was the only means of keeping the victim's identity secret. Whether the victim needed anonymity was irrelevant. Guy noted, "In this way, a trial court might be forced to close its doors and to seal records when the child's psychological maturity, the nature of the crime and the child's and the relatives' wishes regarding closure all warrant keeping the trial open."<sup>65</sup>

Further, the court said, the law restricts people's ability to object to court closure and to offer alternatives. It requires judges to protect victims' privacy regardless of the other interests objectors or the judges themselves might suggest, and the law makes it nearly impossible to narrowly tailor closure orders since it places no time limit on the sealing of court documents. The law does not meet the *Ishikawa* guidelines in any way, the court concluded.

Allied Daily Newspapers and state attorneys had limited most of their arguments over the law to section 9, the portion King County Superior Court Judge Norman Quinn found unconstitutional. However, Allied Daily Newspapers' attorneys had mentioned in their briefs and arguments that other sections of the law also might be unconstitutional. The Washington Supreme Court chose not to make a decision on those sections of the law because the trial court found them constitutional and the Allied attorneys did not appeal that ruling. Thus, Sheldon's law would apply to government documents and proceedings that were not considered "traditionally open," such as police and juvenile court records.

The Washington Supreme Court's verdict was a foregone conclusion according to most of the people associated with the case. DeVore, who had worked on the *Kurtz* and *Ishikawa* cases, said the media organizations could not have lost. Even if the

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<sup>65</sup>*Ibid.*, 212.

Washington Constitution hadn't explicitly called for open court proceedings, the U.S. Supreme Court's decision in the *Boston Globe* case would have required the state court to declare the law void according to the federal constitution or face having the U.S. Supreme Court reverse its decision.

"We had two strings in our bow," DeVore said.<sup>66</sup>

The attorney general's attempt to meld the law to conform with previous court decisions made no sense, DeVore said. The state's attorneys were in a bad position in that they had to do the best they could with a poorly-written law, he noted somewhat sympathetically.

### EULOGY

The saga of Tim Sheldon's bill provides a perfect example of why the law is often an inadequate means of dealing with social problems. As a nation, Americans have agreed that some rights, such as the ability to monitor and criticize government, are so important that other rights, such as privacy, can be infringed in order to protect those primary rights. In addition, Americans were so concerned about preserving those primary rights that they agreed to protect those rights even when people abuse them. Infringement upon the rights of radicals can lead to infringement upon the rights of many.

Most of the time, this system of government works well. Of course, there are times when people's rights conflict. In particular, freedom of the press and the public's right of access to government documents and proceedings seem to be clashing more and more with people's rights to privacy and a fair trial. In order to avoid protecting one person's or group's rights to the detriment of others, judges, lawyers and members of the press have tried to come to terms about how trials, suspects and victims will be covered.

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<sup>66</sup>Cameron DeVore, telephone conversation with author, 23 April 1996.

In Washington, they have been fairly successful. The state's Bench-Bar-Press Association has a mediation committee, called the fire brigade, that works out compromises between judges who fear publicity will interfere with their ability to conduct a fair trial and journalists who fear their access to a trial will be cut off. In 1990, the brigade moderated a disagreement between the judge handling the Westley Dodd murder trial and a newspaper that published some of Dodd's writings.<sup>67</sup> Dodd, who was suspected of molesting numerous children, eventually plead guilty to murdering three young boys and was executed. While he was in jail awaiting trial, Dodd wrote a booklet that supposedly told children how to avoid sexual predators. He then gave the booklet to a newspaper in Vancouver, Washington, to publish. The judge handling Dodd's trial feared the publication would prejudice potential jurors and called the fire brigade. After much discussion, the newspaper published the booklet. While the judge and the prosecutor didn't agree with the decision, they respected it, and the newspaper was able to retain access to future court proceedings.

In Mason County, mediation was never attempted. In all likelihood, it would have been fruitless. Washington Supreme Court Justice Gerry Alexander—a former Mason County superior court judge and chairman of the fire brigade during the early 1990s—said mediation only works when the parties are willing to compromise. The Gays weren't willing to compromise.

"I really think in that case, they [the Gays] felt strongly about their position," Alexander said.<sup>68</sup>

With all non-legal avenues exhausted, opponents of the *Journal's* policy probably felt the law was their only hope. In his argument before the Washington Supreme Court, DeVore said the legislature passed Sheldon's bill "in obvious anger

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<sup>67</sup>Rob Philips, "A child murderer grants an exclusive," *Quill*, September 1990, pp. 19-22.

<sup>68</sup>Gerry Alexander, telephone conversation with author, 15 April 1996.

and frustration." He was right. Legislators wanted to send a message to the Gays—and they did.

But in the end, that was all the legislature did, because the Bill of Rights and civil rights clauses in the state constitution exist to protect deviant viewpoints. If the state can block the *Journal's* access because of its policy, the state can block the access of someone who publishes something unflattering about the court system. Given our system of citizen participation in government, the Washington Supreme Court had to protect citizens' right of access, even at the expense of victims' right to privacy.

## Chapter 4: Journalists Discuss Naming Victims

In 1991, Joe Goodman, managing editor of the *Winston-Salem Journal*, caught a lot of flack for naming two rape victims—one alive, one dead—from a small North Carolina mountain community. Perhaps he should have expected it. For two decades, most American newspapers had refrained from naming rape victims because public identification might stigmatize these victims in the eyes of their associates. Still, Goodman seemed a bit puzzled.

"The local paper in this community told the whole gory story in minute detail but didn't use the surviving victim's name," Goodman recalls. "We did the story — our basic short rape story — and used the name, which has been our policy since 1971. If you lay the two stories beside each other, it's immediately apparent which one is sensational and which is restrained. But we caught the heat."<sup>1</sup>

Goodman's comment illustrates a key fact journalists need to realize when they talk about naming crime victims in the news: they aren't just talking about whether or not to use the name. They are often talking about their ideas of appropriate topics to cover; should they mention the victim at all? Is the victim a story? Journalists also are talking about their ideas of the appropriate ways to cover crime; is using the name sensationalistic? Is describing the victim's actions, life or death sensationalistic? Ultimately, they are asking: what is news and how should journalists report it?

Journalists often get little response to these questions. Or they may get a long response that explains little. For while their peers may have *an* answer to these questions, they do not have *the* answer. The journalistic community is divided on how to report crime and how—or whether—to include victims in their coverage. In the past few decades, standards have changed, and particularly in the past few years, consensus on the issues seems to be fading away.

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<sup>1</sup>Joseph F. Pisani, "Is it time for us to start naming rape victims?" *ASNE Bulletin*, July/August 1991, 14. See also, Joe Goodman, "We name names," *ASNE Bulletin*, July/August 1991, 19.

## A LACK OF THOUGHT

Before the 1970s, journalists did not give much thought to how they wrote about crime victims. A few scattered articles addressed the issue. For example, the editor of the *Manchester Union Leader* wrote in 1954 that he did not publish the names of domestic violence offenders and victims because it reduced the chances of reconciliation between the two.<sup>2</sup> But journalists generally seem to have given little thought to how victims should be treated.<sup>3</sup> Several factors may have contributed to this lack of attention. First, crime has always been fodder for journalists. Most news organizations consider it their duty to write about what is wrong in the world. In response to a critique of journalists' ethics by H.L. Mencken, Ralph Pulitzer once attempted to explain this sense of duty. In 1914, he wrote:

Now 'muck-raking' rather than incense-burning is not a deliberate aim so much as a spontaneous instinct of the average newspaper. Nor is there anything either mysterious or reprehensible about this. The public, of all degrees, is more interested in hitting Wrong than praising Right, because fortunately we are still in an optimistic state of society, where Right is taken for granted and Wrong contains the element of the unusual and abnormal.<sup>4</sup>

Thus, journalists have long considered crime an appropriate thing to cover.<sup>5</sup> The question of how to cover it is an old one, involving issues of duty to suspects, victims and the public. Most journalists, however, have focused on the treatment of suspects to the exclusion of consideration of victims' needs.<sup>6</sup> This discrepancy in

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<sup>2</sup>"Shall I Print This?" *ASNE Bulletin*, 1 December 1954, 1.

<sup>3</sup>In 1959, Arthur Geiselman wrote that he was sure he did the right thing in taking pictures of a drowning victim even though the mother and a group of onlookers objected. See Arthur W. Geiselman Jr., "Take Pictures of Tragic Scene or Flee from Irate Onlookers," *Editor and Publisher*, 15 August 1959, 13.

<sup>4</sup>Joseph Pulitzer, "Newspaper Morals: A Reply," *Atlantic Monthly*, June 1914, 773. Pulitzer's comments were in reply to Henry L. Mencken, "Newspaper Morals," *Atlantic Monthly*, March 1914, 289-297.

<sup>5</sup>One editor said: "The hunger for news about crime and violence has existed since antiquity. The best we can hope for is that the press learns how to address these basic concerns and fears in a responsible way." Rebecca Ross Albers, "Crime!" *Presstime*, April 1994, 31. See also, Donald M. Gillmor, "Crime Reporting: From Delirium to Dialogue," in *Police and the Media*, ed. Patricia A. Kelly (Springfield, Ill.: Charles C. Thomas, Publisher, 1987), 193.

<sup>6</sup>For a sample of articles written about the problem of prejudicial publicity, see Gregory Favre, "Simply curbing the media will not protect high-profile prisoners' right to a fair trial," *ASNE Bulletin*, January 1995, 2; Kenneth O. Hartnett, "Newspapers should not identify people as 'suspects' until

concern is probably due to the fact that courts have been more active in protecting defendants' Sixth Amendment right to a fair trial than they have been in protecting victims' privacy. Criminals have a constitutional right to fair treatment by society. Victims don't.

Also, many crime reporters submerged themselves in law-enforcement culture, taking on the perspectives of the police officers they covered.<sup>7</sup> For these reporters, the crime, arrest and punishment was the story. They were concerned about law enforcement. Victims have little to do with enforcement. After they make the initial complaint, they may never appear in the official record again. Victims, then, may be as incidental to news stories as they are to murder mysteries. The writer devotes just enough attention to describing the crime against them to get the story going. Then he or she turns to the pursuit of justice.

### A NEW PERSPECTIVE ON VICTIMS EMERGES

In the 1960s and 70s, American society and American journalism underwent a number of changes. As a result, the way journalists thought about covering crime—and crime victims—changed. Some of the main influences on journalists seem to be the growing victims' and women's movements, the growth of television and changes in news writing, content and reporting techniques.

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police charge them," *ASNE Bulletin*, March 1990, 44; George Neavoll, "Should suspects be named before charges are filed? Yes, no, sometimes," *ASNE Bulletin*, April 1990, 60; Richard P. Cunningham, "Names make news, but not always," *Quill*, February 1985, 5-7; Raymond L. Spangler, "You have a Right to Know—What?" *Quill*, February 1970, 4; N. R. Howard, "Met Popular Demand," *ASNE Bulletin*, 1 January 1955, 5; and Michael Bradshaw, "Inflamed Public Opinion," *ASNE Bulletin*, 1 January 1955, 5-6. Journalists also have been concerned about the effect of publicity on young offenders' potential for rehabilitation. See Theron C. Liddle, "We Don't Print Their Names," *ASNE Bulletin*, 1 October 1957, 5-6; Richard H. Amberg, "We Do Print the Names of Juvenile Offenders," *ASNE Bulletin*, 1 November 1957, 6-7; Philip W. Porter, "Must We Print Their Names?" *ASNE Bulletin*, 1 May 1953, 12; Carl E. Lindstrom, "Printing the Names of Teenage Offenders," *ASNE Bulletin*, 1 April 1953, 7-9.

<sup>7</sup>David Shaw, *Journalism Today: A Changing Press for a Changing America* (New York: Harper's College Press, 1977), 59.

## CHANGES IN SOCIETY

*The victims' rights movement.* In the 1960s, victims of crime began to campaign for government recognition of their rights.<sup>8</sup> Unlike criminal suspects and defendants, victims could not rely on the U.S. Constitution to protect them.<sup>9</sup> The Sixth, Seventh and Eighth amendments guarantee criminal defendants speedy and public jury trials, protection against double jeopardy and freedom from excessive bails and cruel and unusual punishments. The Bill of Rights guarantees victims nothing.

In addition, victims of all crimes faced social stigma caused in part by research that "raised the possibility that victims did or said something that in some sense contributed to their being harmed."<sup>10</sup> Much victim-blaming resulted from the failure of writers and researchers to distinguish between actions that caused an attacker to focus on a victim, such as walking alone, and actions that provoked an attack, such as punching someone.<sup>11</sup> In the first case, victims are attacked because of their characteristics. In the second, victims are subject to counterattack because they initiated a confrontation.

During the 1970s, victims got support from new research on trauma. Psychologists entertained a brief interest in trauma during the late 1800s and again after World War I, but the subject was largely ignored during most of the 1900s.<sup>12</sup> After the Vietnam War, however, veterans and their supporters began to document evidence of trauma resulting from wartime experiences.<sup>13</sup> Picking up on this research, feminists began to document trauma in rape victims. As part of this work with rape victims, feminist volunteers began accompanying them to hospitals, police stations and court "in order to advocate for the dignified and respectful care that was so conspicuously

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<sup>8</sup>Joseph F. Sheley, *Criminology* (Belmont, CA: Wadsworth Publishing Co., 1991), 135.

<sup>9</sup>Sheley, 135.

<sup>10</sup>Sheley, 130.

<sup>11</sup>Sheley, 130.

<sup>12</sup>Judith Lewis Herman, *Trauma and Recovery* (New York: BasicBooks, 1992), 7-26.

<sup>13</sup>Herman, 26-28.

lacking."<sup>14</sup> Since the 1970s, researchers—feminist and non-feminist—have documented the poor treatment of victims by the criminal justice system and advocated reform.<sup>15</sup>

Also during the 1970s and 80s, victim-advocacy groups, such as the National Organization for Victim Assistance, Mothers Against Drunk Driving and Parents of Murdered Children, helped raise public awareness of victims' needs and promoted the creation of victim-assistance programs.<sup>16</sup> In response to heightened public awareness and calls for action from researchers and victims' advocates, federal and state legislators passed bills in the 1980s to help meet crime victims' needs. These include the Victim and Witness Protection Act, which made it a crime to harass victims, and the Victims of Crime Act, which established a fund for crime victims' compensation and assistance programs.<sup>17</sup>

While victims were campaigning for better treatment from the judicial system, reporters began to realize that the way they covered crime had political implications. In 1969, journalist Ben Heineman Jr. wrote an article about his coverage of the shooting deaths of four black men by off-duty police officers during the Chicago riots. When his editors assigned Heineman to the story, they told him to gather information about the victims. They did not tell him to question the performance of the police, who were actually in the wrong. Heineman realized focusing on the victims and their possible wrong-doing distracted public attention from the actions of the police who had killed the men. By blaming the victims for their deaths, the newspaper helped maintain public confidence in the police and the prevailing social order. Heineman concluded: "Subsequent events revealed that the paper was not committed very seriously to finding

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<sup>14</sup>Herman, 31.

<sup>15</sup>Steven M. Chermak, *Victims in the News* (San Francisco: Westview Press, 1995), 9.

<sup>16</sup>*Ibid.*, 7; Joel Best, *Threatened Children: Rhetoric and Concern about Child-Victims* (Chicago: University of Chicago Press, 1990), 7.

<sup>17</sup>*Ibid.*

those responsible for the West Madison Street fatalities. Stories about the coroner's inquests were written but not run. More importantly, when the Chicago Riot Study report was released in August, the Sun-Times was reluctant to run a special story rekindling the case. . ."<sup>18</sup>

As their awareness of the political implications of crime coverage grew, journalists helped foster the victims' movement by producing stories about victims' problems and vulnerabilities.

For example, during the 1970s rape received a great deal of media attention, which influenced public recognition of the seriousness of sexual assault and contributed to concern for rape victims. The growing interest in other special groups of victims, such as child victims, battered spouses, victims of drunk driving, the elderly, and—most recently—bias-related and campus crime victims, has also been thought to have resulted from the media's emphasis on these groups. Attention given to these specific groups has evolved into more general concern for all crime victims.<sup>19</sup> (citations omitted)

But as the media influenced the victims' rights movement, journalists also were affected by the movement's members. Journalists sometimes were criticized for being sensational or exploiting victims. Legislation passed to protect victims' privacy limited reporters' access to law enforcement records. As members of the press saw more and more of their access cut off, they began to treat victims' privacy more seriously. Journalists hoped a show of sensitivity toward victims would persuade legislators and victims' advocates that tighter controls on information were not needed.<sup>20</sup>

*The women's movement.* When journalists talk about naming crime victims, they are most likely to focus on whether or not they should name rape victims.<sup>21</sup> The attention given to rape victims is largely a product of the women's movement. Prior to the 1970s, many newspapers routinely listed the names of rape victims along with

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<sup>18</sup>Ben W. Heineman Jr., "Why silence shrouds the four who died," *Chicago Journalism Review*, February 1969, 3.

<sup>19</sup>Chermak, 9.

<sup>20</sup>Richard P. Cunningham, "When news features hurt the innocent," *Quill*, March 1987, 7.

<sup>21</sup>For a sample of articles on the naming of rape victims, see Geneva Overholser, "Covering rape: A time of transition," October 1990, *ASNE Bulletin*, 13-14, 16; "Understanding rape recovery," *ASNE Bulletin*, October 1990, 16-17.

victims of other crimes in their police blotters.<sup>22</sup> But in the late 1960s and early 1970s, women's groups and rape counselors began convincing editors to delete rape victims' names from their stories.<sup>23</sup>

These activists also were instrumental in getting more substantial coverage of the issue. Whereas rape had been covered when incidents occurred, in the 1970s, periodicals—particularly women's magazines—began running stories on the effects of rape and its aftermath on victims.<sup>24</sup> While most victims in these stories used a pseudonym, some agreed to have their real names published.<sup>25</sup>

Political and social action by feminists also generated coverage of rape and its affect on victims. As activists started victim-assistance programs and helped change laws, journalists covered their achievements.<sup>26</sup>

The women's movement did more than just raise journalists' consciousness about rape, however. As the movement expanded in the 1970s, activists began to concern themselves with domestic and child abuse.<sup>27</sup> Feminist publications, such as *Ms.*, carried some of the first articles on spousal abuse and services for victims. By the 1980s, women's magazines were carrying stories about the effects of a variety of crimes on women. In 1980, *Good Housekeeping* ran a story on the aftermath of a burglary and how the anxiety caused by it threatened the victims' marriage.<sup>28</sup> A few

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<sup>22</sup>Joel Kaplan, "State lawmakers are trying to seal key information in sex crimes," *ASNE Bulletin*, July/August 1993, 15.

<sup>23</sup>Ibid.; Pisani, 15.

<sup>24</sup>For example, see William H. Masters and Virginia E. Johnson, "The Aftermath of Rape," *Redbook*, June 1976, 74, 161; Alice Lake, "Rape," *Good Housekeeping*, November 1971, 104-105, 188-196; Moira A. and Ann Rule, "It happened to me: I was raped and too ashamed to tell anyone," *Good Housekeeping*, May 1978, 108-116.

<sup>25</sup>Mark Fitzgerald, "Rape victims' names, stories published 15 years ago," *Editor and Publisher*, 17 November 1990, 11.

<sup>26</sup>"Revolt against rape," *Time*, 22 July 1974, 85; Jim Castelli, "Remembering Crimes Victims," *America*, 21 December 1974, 404-406; Alice Lake, "What Women Are Doing About the Ugliest Crime," *Good Housekeeping*, August 1971, 84-85, 133-137; Frances S. Coles, "Social scorn and the victim," *Human Behavior*, May 1978, 70; Sandy Hotchkiss, "The realities of rape," *Human Behavior*, December 1978, 18-23.

<sup>27</sup>Best, 7; Sharon Howell, *Reflections of Ourselves* (New York: Peter Lang, 1990), 111-113.

<sup>28</sup>"A thief robbed my family of more than money," *Good Housekeeping*, September 1980, 34-38.

years later, *McCall's* published a story on female leaders of the victims' rights movement, telling their stories largely in their own words.<sup>29</sup> Mainstream news organizations also began to write about crime victims, and they turned to women's groups and self-defense classes to find subjects for interviews.<sup>30</sup>

## CHANGES IN MEDIA

As society changed, journalism did too. A greater concern with ethics and credibility combined with a realization that technology was influencing journalism in unanticipated ways made journalists rethink their approach to covering crime victims.

*A growing concern with ethics.* In the 1920s, journalists began to think seriously about ethical issues. They discussed standards for news gathering and publishing.<sup>31</sup> More and more journalists obtained college degrees, and they formed professional societies. These associations created codes of ethics to guide their members. Most of these codes expressed a general regard for a right of privacy, but none gave specific directions on how journalists should treat private people who suddenly found themselves objects of public interest.<sup>32</sup>

In the middle of the century, interest in ethics dwindled, but in the late 1960s and early 1970s, journalists took a renewed interest in ethical issues. They founded journalism reviews and published articles on ethics in trade journals. Some national, mainstream magazines began publishing articles on media criticism.<sup>33</sup> Many of these

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<sup>29</sup>Jeannie Ralston, "We're Fighting Back," *McCall's*, September 1985, 99, 151-152.

<sup>30</sup>For example, see John Leo, "What Crime Does to the Victims," *Time*, 23 March 1981, 29-30.

<sup>31</sup>For example, see Silas Bent, "The Invasion of Privacy," *North American Review*, September 1927, 399-405.

<sup>32</sup>For example, the American Society of Newspaper Editors' Canons of Journalism said: "A newspaper should not invade private rights or feeling without sure warrant of public right as distinguished from public curiosity." American Society of Newspaper Editors, "Code of Ethics," in *Proceedings of the 11th Annual Convention* (Washington, DC: American Society of Newspaper Editors, 1933).

<sup>33</sup>Cable Neuhaus, "Critique Chic or the relative ineffectiveness of all that media criticism," *Quill*, May 1973, 15-17.

articles dealt with journalism ethics generally, but some addressed specific areas of coverage, including crime.<sup>34</sup>

In addition, journalism instructors gave new attention to ethics. During the mid-1900s, discussion about ethics was largely absent in academia. When educators did address ethics, it was usually in regard to the media's role in society.<sup>35</sup> In the 1970s, educators began discussing ethics in relation to individuals' decision making.<sup>36</sup> The professors' interest reflected changes in the field, where reporters were demanding more control over decisions affecting them and their work.<sup>37</sup>

Journalists' reawakened interest in ethics seems to be a reaction to the times. Journalists covering the civil rights movement, Vietnam War and Watergate were alternately praised and reviled by different sections of society. Overall, public trust was low. Newspaper circulation was declining, and some journalists thought the industry's health depended on regaining credibility. *Washington Post* editorial page editor Philip Geyelin wrote in 1970:

You cannot convey news or opinion effectively when there is no confidence in the product, no matter what the reason for the loss of confidence. So we are going to have to fight down the feeling among us that this criticism, which comes at us from all directions, is unfair, or unsoundly based; it is tempting to be defensive about it, or merely outraged, on the grounds that it has to be a bum rap, when the Panthers and the hard hats both hate us. But this reaction will only get in the way of the kind of reform that is needed for its own sake—and never mind the current public mood.<sup>38</sup>

In addition, journalists themselves were troubled by what they saw in newsrooms and news media. In 1970, Edwin Diamond wrote: "Often as not, a good

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<sup>34</sup>In relation to crime coverage, see James O. Monroe, Jr., "Press coverage of the courts: a judge asks: Why, when it can be so good, is it now and then so bad?" *Quill*, March 1973, 22.

<sup>35</sup>Clifford G. Christians and Catherine L. Covert, *Teaching Ethics in Journalism Education* (New York: The Institute of Society, Ethics and the Life Sciences, 1980), 6, 10.

<sup>36</sup>*Ibid.*

<sup>37</sup>Due to a shortage in qualified journalists, reporters had more bargaining power in this era and were able to acquire more influence in the decision-making process. Edwin Diamond, "Reporter power' takes root," *Columbia Journalism Review*, Summer 1970, 12-13.

<sup>38</sup>Philip Geyelin, "Regaining the Public's Trust," *ASNE Bulletin*, July/August 1970, 3. See also, Norman E. Isaacs, "The New Credibility Gap—Readers vs. the Press," *ASNE Bulletin*, February 1969, 1-11.

university-trained reporter who is now in his or her late twenties picketed for civil rights while in high school, spent a freshman summer in Mississippi or Appalachia, and sat in at the Dean's office during senior year—or covered these events for the school paper. Now they are turning reformist toward their own profession."<sup>39</sup> For some reporters, this meant reforming newspaper management or establishing a right to participate in political demonstrations. But others were concerned with changing news content to reflect issues in society.

By the early 1980s, journalists—or at least journalistic organizations—had made it clear that ethics were a significant concern. In February 1982, *Quill*, one of the major trade magazines, published a lengthy essay entitled "The Virtuous Journalist." Former journalist and university professor Michael Kirkhorn outlined the qualities he found admirable in journalists, including integrity, independence and vigilance.<sup>40</sup>

Lapses of ethics also heightened journalists' awareness of the need for high standards in conduct. Particularly unsettling was the *Washington Post's* return of the Pulitzer Prize in 1981 because its reporter had faked a story about an 8-year-old heroin addict. Afterwards, editors at many newspapers reexamined their standards and procedures for enforcement of their ethical codes.<sup>41</sup>

Actions by the National News Council in the 1980s also contributed to the growing discussion among journalists about naming rape victims. The National News Council and several state councils were created in the 1970s to mediate disputes between news organizations and members of the public. In theory, the councils would eliminate the need for libel or invasion of privacy suits because citizens would receive a hearing and, if the council decided in their favor, an apology or compensation. The councils, however, had no enforcement power, and many news organizations refused

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<sup>39</sup>Diamond, 13.

<sup>40</sup>Michael J. Kirkhorn, "The Virtuous Journalist," *Quill*, February 1982, 9-23.

<sup>41</sup>"A searching of conscience," *Newsweek*, 4 May 1981, 50-55.

to participate in the hearings or abide by the councils' decisions. By the mid-1980s, most news councils had dissolved.

The National News Council had some influence in the journalistic community because reports of its decisions were published in trade journals. It could shame some news organizations into obedience. The Council heard several complaints against newspapers that published rape victims' names, and its decisions prompted the American Society of Newspaper Editors to conduct a study on the reporting of sex crimes.<sup>42</sup> By the time the National News Council was disbanded in the late 1980s, the question of whether to name rape victims was receiving significant attention.

*Television.* The growing concern about journalism ethics in the latter part of the twentieth century may be partially due to the increasing influence of television journalism on the news media as a whole. Even in television's childhood, journalists realized it would raise privacy issues unknown with print media. In print, journalists can easily omit individuals' names or identifying characteristics. Television needs pictures to be effective, and it's difficult to get pictures of an event that don't reveal participants' identities.<sup>43</sup>

Television also conveys emotion in a way print media do not.<sup>44</sup> It is one thing to read that a woman's child has been murdered; it is another to see footage of her sobbing or screaming with grief. People who do not object to having facts of their life revealed in print may feel violated when pictures of them at a vulnerable moment are shown. Television conveys not just information about an event but the event itself. Viewers can share the pain and the horror victims feel. The experience is more jarring for observers and for the subject.

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<sup>42</sup>"Post assailed for identifying rape victim, 14," *Quill*, November 1982, 50; "Rape victims' complaint reveals need to study sex-crime reporting," *Quill*, February 1982, 30.

<sup>43</sup>William Ruggles, "Intrusion on Privacy; A Plea for Greater Restraint by Newspapers," *ASNE Bulletin*, 1 January 1956, 10.

<sup>44</sup>Richard C. Wald, "This is Print...TV is Different," *ASNE Bulletin*, June 1969, 2.

There is evidence that audience members recognize the mechanical differences between television and print media and tailor their expectations accordingly. After the space shuttle *Challenger* exploded, many television stations showed footage of passenger Christa McAuliffe's family watching the explosion. When still pictures of the family appeared in newspapers the next day, readers complained. In discussing the different standards the public seemed to have for television and newspaper coverage of the moment, one newspaper editor suggested "people are always much more bothered by what they see in papers than what was on television, because the television image is here, and then it's gone, vanished. We, on the other hand, freeze that moment forever, and once frozen it becomes harder to deal with."<sup>45</sup>

While the pictures on television may be here and gone, the effects of them are not. Appearing on television can change people's lives—for better or worse. Journalists have begun to recognize this power of the box and its attendant responsibilities. In particular, the aftermath of the Big Dan's rape trial seems to have impressed upon journalists the need for caution in covering crime victims.

The Big Dan's case started in March 1983 with reports that a woman was gang raped in a New Bedford, Mass., bar in front of a cheering crowd. As local feminist groups organized anti-rape rallies, reporters and photographers flocked to the town to cover what promised to be the biggest rape case of the year. When the trial began in February 1984, a cable television company broadcast it live, including the testimony of the victim. While most of the news media covering the trial did not name the victim, the cable television company, a local television station and three area newspapers did. As a result, the victim was harassed until she left town three days after the end of the trial.

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<sup>45</sup>Richard P. Cunningham, "Fit for TV, but not for newspapers?" *Quill*, April 1986, 7.

The news outlets that named the Big Dan's victim received a significant amount of criticism from the public and journalists at other news organizations.<sup>46</sup> A study done shortly after the trial in Minneapolis and St. Paul showed most people supported a ban on the televising of rape trials, in part because the publicity could further traumatize the victim.<sup>47</sup> The researchers also found that if women thought rape trials would be televised, they would be less likely to report rapes.<sup>48</sup>

After the Big Dan's trial, journalists engaged in a period of self-criticism, generally agreeing they had subjected the victim to unnecessary trauma.<sup>49</sup> Bill Seymour says one important result of the Big Dan's trial was that print journalists realized they could not avoid being influenced by television in regard to some ethical issues. With cable stations televising the victim's name and court testimony, newspaper editors were "pushed into deciding whether their self-imposed and traditional policies—which barred disclosure—remained valid because of the television broadcasts."<sup>50</sup>

*Changes in writing style.* In order to slow circulation attrition and compete with television, newspapers developed new ways of presenting the news in the 1960s and 70s. Editors and reporters began experimenting with different styles of writing, attempting to make the news more personal, relevant and accessible. Some advocated "humanistic writing" in which news was "individualized and personalized, in the hope that the reader will see common threads of experience between his own life and that of another individual."<sup>51</sup> Humanistic writing emphasizes narrative and character. The

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<sup>46</sup>Helen Benedict, *Virgin or Vamp; How the press covers sex crimes* (New York: Oxford University Press, 1992), 115-116.

<sup>47</sup>Janet Swim and Eugene Borgida, "Public Opinion on the Psychological and Legal Aspects of Televising Rape Trials," *Journal of Applied Social Psychology* 17(5): 514 (1987).

<sup>48</sup>*Ibid.*, 515.

<sup>49</sup>Bruce DeSilva, "The gang-rape story," *Columbia Journalism Review*, May/June 1984, 42-44.

<sup>50</sup>Bill Seymour, "Reporting Rape: Live TV Coverage Generates a Debate," in *Police and the Media*, ed. Patricia A. Kelly (Springfield, Ill.: Charles C. Thomas, Publisher, 1987), 206.

<sup>51</sup>Alex S. Edelstein and William E. Ames, "Humanistic Newswriting," *Quill*, June 1970, 28.

reporter describes his subject in detail so readers can identify with him. At the same time, the reporter draws links between the experiences of the individual and trends in society, showing the effects of these trends on individuals.

Many reporters employ humanistic writing techniques today.<sup>52</sup> In particular, police reporters have found them helpful in illustrating the effects of crime. In *Crime Scene*, reporter Mitch Gelman talks about his search for a victim he could use to illustrate the effects of crime in New York. He writes: "In 1988, someone was murdered every five hours in New York City; the next homicide victim would be number 1,842, making it the bloodiest year in city history. That's big news in my business."<sup>53</sup> Gelman found the victim on Christmas Eve. Michael Evans was stabbed on his way home from Christmas shopping. On Christmas, Gelman went to the victim's home and interviewed his family. A photographer took a picture of Evans's widow and children standing sadly by their Christmas tree. "It showed the stark horror written in deep lines on their faces; the presents at their feet underscored the tragic timing of their loss."<sup>54</sup> In writing the story, Gelman wanted to bring the tragedy of murder home. But like many reporters, he had a conflict of interest. As he describes it:

I wanted to find one killing that would dramatize the entire surge of wasted minds, bodies, even bullets. I wanted readers to take a minute from Christmas Day to mourn this death and all the others. I wanted them to cry over this story and feel the loss. I was also looking for a murder that was provocative enough to make the front page.<sup>55</sup>

Humanistic writing connects with readers because it tells a story. In order for it to work, the story must have some emotional aspect the writer can play on. All

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<sup>52</sup>Humanistic writing sometimes results in a preponderance of feature and human interest stories. Some news organizations embrace this "soft" news. Others reject it. For a sample of the debate over content standards, see Stephen D. Isaacs, "Will soft and sexy succeed?" *ASNE Bulletin*, September 1980, 3-5; David Lipman, "A return to hard news," *ASNE Bulletin*, September 1980, 6-7; William Giles, "The key concept is 'mix,'" *ASNE Bulletin*, September 1980, 8-9; and Leonard Pardue, "Searching for fresh approaches," *ASNE Bulletin*, September 1980, 9-11; Joseph W. Shoquist, "A hard line for hard news," *ASNE Bulletin*, September 1980, 11.

<sup>53</sup>Mitch Gelman, *Crime Scene* (New York: Times Books, 1992), p. 3.

<sup>54</sup>*Ibid.*, 9-10.

<sup>55</sup>*Ibid.*, 5.

journalists choose the stories they cover. They decide what is newsworthy based on a number of factors, including the location of the event, the number of people effected and the prominence of the people involved. Journalists who adopt a humanistic writing style must also consider the emotional appeal of a story. As a result, victims who are appealing, intriguing or die in a particularly brutal way are more attractive to journalists. They and their families may suddenly find themselves the focus of overwhelming attention if journalists decide their story has "play." On the other hand, victims of more common crimes or less-interesting backgrounds may be ignored. As Gelman goes on to say in his book: "In New York, not every murder even got in the paper. This was not some small town or even a mid-size city. A killing had to have an angle or a hook to get good play."<sup>56</sup> Ironically, as some crime victims complain of invasions of their privacy, others suffer neglect.<sup>57</sup>

The other problem with humanistic writing is journalists sometimes have difficulty describing people in non-judgmental ways. For example, a 1990 *Seattle Times* story about a murdered college student described her educational goals, family ties and religious involvement. However, the first part of the story focused on her frequent visits to the bar from which she disappeared. By drawing attention to the woman's penchant for going dancing—often alone—the *Times* implied she had some responsibility for her death. Colleen Patrick, the *Seattle Times's* reader advocate, later said the story should have focused on the woman's educational goals and family ties before describing her social habits. If the story had, Patrick said, the victim would have been seen as a more complete person and her death as a greater loss.<sup>58</sup> Journalists who focus on victims' attire or lifestyle imply victims have some responsibility for their fate. Patrick went on to say: "I am not encouraging anyone to gloss over facts. If a

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<sup>56</sup>Ibid., 5-6.

<sup>57</sup>William E. Cote, "The focus on O.J. Simpson tends to obscure the victims and their families," *ASNE Bulletin*, August 1994, 14-15; Chermak, 62-74.

<sup>58</sup>Richard P. Cunningham, "Careless phrasing blames the victim," *Quill*, October 1990, 8.

victim is a dreadful individual, report it. Just make victims real, and don't blame them for their victimization."<sup>59</sup>

*Changes in reporting.* Changes in reporting accompanied the changes in journalists' writing style. Journalism scholars are used to talking about lapdog and watchdog journalism. In lapdog journalism, reporting reinforces the political establishment. In watchdog journalism, reporting questions the actions of political officials and holds them accountable for their actions. In *Feeding Frenzy*, political scientist Larry Sabato says journalists in the past two decades have engaged in a kind of "junkyard-dog" journalism when covering political campaigns.<sup>60</sup> Their reporting is harsher, more aggressive and more intrusive than in watchdog journalism. In addition, reporters tend to focus on the sensational aspects of stories and purvey gossip. Sabato documents moments when journalists' behavior in covering politicians has been excessive, invasive, destructive and indefensible.

Although Sabato is concerned solely with political news, several of the tactics he discusses also have been employed by reporters covering crime. First, more journalists are covering gossip as news. *The New York Times* article on Patricia Bowman exemplifies this. The inclusion of information about her speeding tickets, high-school grades and her mother's divorce was merely the dissemination of gossip. It had nothing to do with her charges of rape or the case against William Kennedy Smith. In *Virgin or Vamp*, journalism scholar Helen Benedict cites numerous examples of gossip in the media's coverage of Jennifer Levin's 1986 murder.<sup>61</sup> In that case, the New York tabloids wrote extensively about Levin's privileged upbringing, drinking habits and behavior with men. The inclusion of such gossip shifts the focus from the crime and the suspect to the victim, eroding the victim's privacy.

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<sup>59</sup>Ibid., 9.

<sup>60</sup>Larry J. Sabato, *Feeding Frenzy* (New York: The Free Press, 1991), 26.

<sup>61</sup>Benedict, 147-188.

Victim's privacy is further damaged by what Sabato calls "the feeding frenzy."

Once journalists sense a story, they swarm on the subject, seeking quotes, pictures and tidbits of information. Sabato describes it:

In the animal world, no activity is more classically frenzied than the feeding of sharks, piranhas, or bluefish when they encounter a wounded prey. These attack-fish with extraordinarily acute sense first search out weak, ill, or injured targets. On locating them, each hunter moves in quickly to gain a share of the kill, feeding not just off the victim but also off its fellow hunters' agitation. The excitement and drama of the violent encounter builds to a crescendo, sometimes overwhelming the creatures' usual inhibitions. The frenzy can spread, with the delirious attackers wildly striking any object that moves in the water, even each other. Veteran reporters will recognize more press behavior in this passage than they might wish to acknowledge.<sup>62</sup> (footnote omitted)

In her account of media coverage of the 1988 Pan Am airplane explosion over Scotland, former journalist and university professor Joan Deppa describes several feeding frenzies. These would be disturbing to anyone, but from the perspective of someone who has just suffered a great tragedy, they are particularly overwhelming. A woman who lost a child on the Pan Am flight described the media's advance on grieving relatives this way:

It was a blur somewhat, but this is what I can recall, that I can envision, in terms of what happened. I remember [a parent] coming into the room and then the door was absolutely packed full—I mean to the top—with reporters and cameras and they just followed her in and there is no way that the door could have been closed. I saw her; this woman, you know, and screamed and I said, 'Oh my God' because you couldn't help it. And then when I saw the reporters come in and they were going right at her. I remember that—swooping on over—it was like this herd of wild cattle coming. It was just awful. And I said, 'Oh my God, what are they doing? Oh my God, are they going to come for me next?' I was petrified.<sup>63</sup>

Of course, not all journalists participate in pack journalism. The more experienced realize packs intimidate victims and make them less likely to talk. These reporters have other, perhaps kinder methods of getting information, but the end result can be just as damaging to their subjects. In 1984, journalist Richard Kenyon handled

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<sup>62</sup>Sabato, 13.

<sup>63</sup>Joan Deppa, Maria Russell, Dona Hayes and Elizabeth Lynne Flocke, *The Media and Disasters: Pan Am 103* (New York: New York University Press, 1994), 31-32.

media calls for his family after his cousin was abducted by a serial killer. He turned away journalists who were rude, pestering and abrasive. But he was vulnerable to other reporting techniques. He writes:

Some reporters used charm. Edna Buchanan, for one. Edna Buchanan called and she was very calm and sweet and dripped with sympathy. She was so sorry. Was there anything she could do?

And the story the next day would be flip, cute, and done at the expense of Beth. She got a good story out of it, a cute, clever lead. Eventually, I wouldn't deal with her. Readers might like Edna Buchanan. Editors might like Edna Buchanan. But victims do not like Edna Buchanan. They know she is using them.<sup>64</sup>

Buchanan, who now writes novels, was known for being a tenacious reporter. She "had the drill down. When a family member would curse at her or hang up, she'd wait 60 seconds, pick up the phone and call again. By then, the person had changed his or her mind or a more receptive family member would answer the phone."<sup>65</sup>

Some crime reporters have tricks for getting interviews with victims. They send flowers, share stories of their own tragedies or pretend be having a casual conversation while they take notes over the phone. A few journalists employ ambush techniques, approaching victims or their families with cameras rolling and forcing them to talk. More and more, ambush or assault journalism is not accepted practice. But tricks of the trade still are.<sup>66</sup>

*Changes in content.* As writing and reporting techniques changed, so did the topics on which journalists focused. Beginning in the 1970s, journalists began producing fewer stories about government and more stories that had "human interest."<sup>67</sup> Journalists wrote about relationships, entertainment and television.

During the 1980s, more and more newspapers began using surveys to determine what issues to cover. Editors had used reader surveys to guide them before,

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<sup>64</sup>Richard Kenyon, "When it comes to crime news, 'reporting is exploitation' of the victims," *ASNE Bulletin*, October 1989, 20.

<sup>65</sup>Fawn Germer, "How Do You Feel?" *American Journalism Review*, June 1995, 38.

<sup>66</sup>*ibid.*, 40-42.

<sup>67</sup>David Nimmer, "Reinventing newspapers: Here we go again," *ASNE Bulletin*, October 1993, 5-6.

but the birth of *USA Today* in 1982 made the practice popular. The newspaper, which was designed after extensive market research, attracted 220,000 readers in its first month of circulation.<sup>68</sup> By its 10th birthday, it had an average daily, paid circulation of 1.9 million readers.<sup>69</sup>

As editors examined market research, they found "People naturally tend to be most interested in what is intimate and familiar."<sup>70</sup> People were most likely to read news about their local community, but they were as likely to define community in terms of race, economic status, common interests or common activities as they were to define it in terms of geography.<sup>71</sup> To engage readers, newspapers began to restructure their beats to address these new ideas of community. "Old institutional beats such as cops, courts and county government have been replaced by 'interest areas,' including family, the workplace, demographics, even shopping malls."<sup>72</sup>

At newspapers where the traditional beats, such as government and police, remain, reporters are covering new issues. Covering police used to be a matter of reporting arrests and providing a daily round-up of burglaries, drunk-driving citations and assaults. Sometimes, there would be a rape or murder for the front page. But in the past couple decades, crime has become increasingly violent and, often, personal. Tom Tozer, managing editor of the *Charlotte Observer*, describes crime in his area:

A man stalked by a female co-worker intent on ending his life with a firebomb because of a romance gone bad. His new wife caught up in the ordeal. A woman who spent \$20,000 on therapy to heal the emotional wound

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<sup>68</sup>Katharine Seelye, "Al Neuharth's technicolor baby," *Columbia Journalism Review*, March/April 1983, 28.

<sup>69</sup>Mary Hardie, "10 Years of USA Today," *Gannett*, September 1992, 12. *USA Today* did not earn a profit during its first 10 years in business, but it influenced the way other newspapers presented the news. "Patching the Cracks in the House that Al Built," *Business Week*, 16 December 1991, 87; Mary Ellen Schoonmaker, "The Color Craze," *Columbia Journalism Review*, March/April 1983, 35-37; Mark Monmonier and Val Pippis, "Weather Maps and Newspaper Design: Response to USA Today?" *Newspaper Research Journal* 8(4): 34, 40-41 (1987).

<sup>70</sup>Leo Bogart, "It's important for newspapers 'to touch the reader's heart,'" *ASNE Bulletin*, December/January 1984, 19.

<sup>71</sup>*Ibid.*

<sup>72</sup>Nimmer, 8. See also, Carl Sessions Stepp, "When Readers Design the News," *Washington Journalism Review*, April 1991, 20-24.

inflicted by an armed robber. A battered spouse. A mother who lost her daughter to a drunken driver. A husband who must live with the knowledge that his wife was murdered because her assailant wanted her car to attend a baseball game.<sup>73</sup>

Many crime reporters see telling the victims' stories as an essential part of their job. If they don't bring attention to victims' suffering, people may forget about it. These reporters say news stories that report crimes but don't explain their impact on survivors are not complete.<sup>74</sup> In addition, some journalists believe they can help victims by reporting their stories. In *Never Let Them See You Cry*, Edna Buchanan gives several examples of stories that resulted in community members coming to victims' aid. She writes:

In a world full of bureaucracy and red tape and social agencies that do not respond, this job can be a joy. A story in the newspaper can slash through red tape like a razor. Sometimes it can bring about justice in cases where it would never triumph otherwise. Cops' hands are often tied. Judges are often inept, corrupt or incompetent.

Sometimes, we are all the victim has got.<sup>75</sup>

As journalists spent more time reporting on private people, many realized they were uncomfortable talking to "regular" people. This discomfort forced them to examine the way they treated interview subjects and to think about issues of privacy. One editor said his discomfort with approaching private people was one of the reasons he left reporting. "You feel like you're intruding into their lives. You're kind of on the same level as a salesman. That's the problem."<sup>76</sup>

*Concern about quality.* The changes in journalism during the past several decades have led to a concern about quality on the part of many journalists. Particularly in the past decade, tabloid journalism has resurfaced with a vengeance. The supermarket tabloids have always outsold mainstream newspapers, but in the past they

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<sup>73</sup>Tom Tozer, "Crime victims offer useful views on coverage," *ASNE Bulletin*, March 1993, 15.

<sup>74</sup>Erin Hoover, "Covering my first murder tested all my writing skills—but good advice helped," *ASNE Bulletin*, February 1995, 22.

<sup>75</sup>Edna Buchanan, *Never Let Them See You Cry* (New York: Berkely Books, 1992), 3-4.

<sup>76</sup>Kevin McManus, "If you absolutely, positively have to talk to real people," *ASNE Bulletin*, November 1992, 18. See also, Germer, 36-42.

were easily dismissed by serious journalists. Many of the stories were too outrageous to be believed, and editors of some tabloids even admitted fabricating stories. But in recent years, the tabloids have become contenders in the race to break big stories. During the William Kennedy Smith and O.J. Simpson trials, the tabloids often had stories—even truthful stories—before the mainstream media.

At the same time, tabloid television shows attracted audiences the "serious" news shows envy. Their reliance on reenactments and paid interviews may make many journalists shudder, but *A Current Affair*, *Hard Copy* and their brethren bring in big audiences and ad dollars.

In *The American Newspaper*, journalist Will Irwin describes the spread of yellow journalism from Joseph Pulitzer's and William Randolph Hearst's New York newspapers to others around the country.<sup>77</sup> Few newspapers adopted yellow journalism as a whole, but many incorporated elements of the style in their product. Tabloid journalism has had a similar influence in recent years. Many mainstream newspapers or network news shows have incorporated some elements of sensationalism in their presentation. When the *New York Times* and *NBC News* named Patricia Bowman, many journalists noted with dismay that these respected news organizations were following the lead of the *Globe*, one of the nation's largest supermarket tabloids. In writing about CNN's coverage of the Bobbitt mutilation case, CNN president Tom Johnson noted: "Too many local TV "news" shows are, in reality, not much more than entertainment, catering to the same tastes as the lurid supermarket tabloids. There are times when the networks are sometimes guilty of the same lapses of discretion and judgment in regular newscasts."<sup>78</sup>

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<sup>77</sup>Will Irwin, *The American Newspaper* (Ames, IA: The Iowa State University Press, 1969).

<sup>78</sup>Tom Johnson, "Balancing Moscow and Manassas," *Presstime*, March 1994, 28.

Some journalists see a need for high ethical standards in order to distinguish between their news outlets and the tabloids.<sup>79</sup> These journalists link tabloid journalism to the general decline in public trust in the media.<sup>80</sup> In a 1989 discussion on television talk shows, journalists from news organizations including the *Los Angeles Times*, *Washington Post* and *60 Minutes* argued that television talk shows are in bad taste, convey little information and show examples of behavior no one would want the public to imitate. Television talk show hosts countered these criticisms with claims that they foster competition, inform the public "in between the male strippers," and attract viewers mainstream news organizations don't reach.<sup>81</sup> Journalists from mainstream news organizations were not reassured. At the end of the discussion, *Washington Post* television critic Tom Shales said: "I'll tell you how good this competition is for the networks. All three to the best of my knowledge, are now toying with the idea of putting tabloid shows on themselves. Bad news drives out good."<sup>82</sup>

Newspaper journalists, in particular, seem sensitive to issues of quality. In an era where people say they get most of their news from television, many newspaper reporters and editors believe the future of print journalism depends their ability to provide more detailed and reliable information than television.<sup>83</sup> Writing about the O.J. Simpson trial, Jane Healy, managing editor of the *Orlando Sentinel*, claimed most of the errors in coverage came from television, which was "going with the story before broadcasters have had time to thoroughly check it out. They go with one source, rather than two, and too often a flimsy one at that."<sup>84</sup> Newspapers can win an audience by

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<sup>79</sup>Friction between "quality" and tabloid newspapers is nothing new. *The New York Times* has long promoted itself as New York's respectable newspaper, implying or stating outright that its competitors are less than respectable. See Turner Catledge and Richard W. Clarke, "What's Fit to Print?" *ASNE Bulletin*, 1 October 1954, 1-2.

<sup>80</sup>"Who's a journalist? What's 'talk show journalism?'" *ASNE Bulletin*, July/August 1989, 20.

<sup>81</sup>*Ibid.*, 28.

<sup>82</sup>*Ibid.*, 29.

<sup>83</sup>For example, see Henry McNulty, "Anonymous sources again proved to be unreliable," *ASNE Bulletin*, August 1994, 10.

<sup>84</sup>Jane Healy, "This is a great story," *ASNE Bulletin*, August 1994, 6.

providing more information more accurately than television, Healy said. She added, "If we're smart, we'll use TV as a huge promotional device for our next day's paper and then complement its coverage in a big way."<sup>85</sup>

The O.J. Simpson trial generated many articles on the quality of news coverage. Errors in reporting and complaints of sensationalism made journalists realize they need to improve their reporting. *Detroit Free Press* managing editor Bob McGruder said:

Readers approve when our reporting gives them something of value, some knowledge they did not have. Sometimes we call that news. They are not as happy when we tell them the best we can do is another variation of the alien two-headed baby story because that is what the other guy is selling and/or that is what they demand.

Readers know better.<sup>86</sup>

At some newspapers, journalists have responded to questions about news quality by down-playing individual crimes and focusing instead on the ways crime affects society.<sup>87</sup> The "better papers have come to understand that the criminal justice system consumes a major portion of the local tax dollar each year, operates in a complex maze of law and regulations and is essential to a healthy, growing and productive city."<sup>88</sup> To cover these complex issues, newspapers have begun assigning experienced, knowledgeable reporters to the criminal justice and police beats. *New York Times* reporter David Burnham says: "No longer is it enough to assign the youngest and the least experienced reporter or the tired old alcoholic newshound to police headquarters and only ask for occasional tips on serious accidents and titillating murders and rapes."<sup>89</sup>

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<sup>85</sup>Ibid.

<sup>86</sup>Robert G. McGruder, "People can learn a lot from reporting on the issues," *ASNE Bulletin*, August 1994, 7.

<sup>87</sup>Tozer, 15.

<sup>88</sup>David Burnham, "Caught in the riptide of crime waves," *ASNE Bulletin*, September 1981, 40.

<sup>89</sup>Ibid.

## CHANGES IN PUBLIC OPINION AND SOCIAL STANDARDS

Since the early 1980s, complaints by the public have kept privacy at the top of journalists' agenda of ethical issues.<sup>90</sup> People have protested the publication of "graphic photographs of violence and accident scenes, bankruptcy notices and home sales, the names and addresses of burglary victims, the cause of death in obituaries (especially in cases involving suicide or AIDS), and divorces and marriages."<sup>91</sup> Information newspapers once published routinely has become controversial. In relation to crime stories, some editors speculate that people want to remain anonymous because they think publicity will make them targets of further crime.<sup>92</sup> Other editors remain puzzled by the increase in privacy complaints.

"It's very clear that more and more readers object to routine kinds of reporting and photography," said Craig Klugman, managing editor of *The Journal-Gazette* in Fort Wayne, Ind. "I'm puzzled what prompted it, but I know we get a lot more complaints than we used to."<sup>93</sup>

Writer Margaret Carter suggests people are not as concerned about invasions of privacy by the media as they are about invasions of privacy in general.<sup>94</sup> Computers allow private companies, the government and individuals to amass large amounts of information about others. Most commonly, the information is used for marketing products, but people are aware that complex descriptions of them can be constructed by people or organizations with less-than-benign purposes. When people think about invasions of privacy, they often lump sensational stories by the media with data collection, target marketing and government interference.

"It's as though when you're talking about caller ID (phone service), you're talking about abortion or publishing the names of rape victims," says

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<sup>90</sup>Mitchell Hartman, "Press and public collide as concern over privacy rises," *Quill*, November/December 1990, 3-5; Richard P. Cunningham, "Fit for TV, but not for newspapers?" 7.

<sup>91</sup>Hartman, 3.

<sup>92</sup>*Ibid.*, 4.

<sup>93</sup>*Ibid.*, 3.

<sup>94</sup>Margaret G. Carter, "Privacy and the need to know," *Presstime*, October 1992, 18-24.

Harold W. Fuson Jr., vice president and general counsel, The Copley Press Inc., and chairman of the NAA Legal Affairs Subcommittee.<sup>95</sup>

In regard to crime coverage, the public seems to have become more critical of invasions of privacy as it learns more about how publicity affects victims. In 1989, 78 percent of the people who responded to an American Society of Newspaper Editors poll said the press does not "worry much about hurting people."<sup>96</sup> Two-thirds of the respondents said journalists take advantage of victims. In a 1991 survey by the Times Mirror Center for the People & the Press, 80 percent of the respondents said the decision to name the woman in the Palm Beach rape case was commercially motivated. Seventy percent disapproved of that decision.<sup>97</sup>

In 1994, Minneapolis readers complained when the *Star Tribune* reported that a 15-year-old kidnapping victim had been sexually assaulted by his captor. They were concerned the publication might interfere with the boy's psychological recovery after he was released.<sup>98</sup> When the boy was later murdered, the newspaper reported he had been a client at a counseling center for gays and lesbians. Again, readers were upset. They felt the newspaper "had inexcusably published confidential information, and troubled teenagers would now be reluctant to seek counseling on sexual identity matters for fear their names might be made public."<sup>99</sup> Journalists justified the publication by saying readers couldn't understand the full story without knowing about the counseling. They said knowledge of the incident should heighten awareness of the need for such counseling for young people. Readers, however, seemed more concerned with what the effects were likely to be and not what they should be.

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<sup>95</sup>Ibid., 18.

<sup>96</sup>Laurence Zuckerman, "Knocking on Death's Door," *Time*, 27 February 1989, 49.

<sup>97</sup>Caryl Cooper and Virginia Whitehouse, "Rape: To name or not to name," *St. Louis Journalism Review*, March 1995, 11.

<sup>98</sup>Richard P. Cunningham, "Reporting sexual assault crimes can be a touchy subject," *Quill*, March 1994, 10.

<sup>99</sup>Ibid., 11.

## NAMING NAMES

As a result of social movements, changes in the news media and public opinion, journalists have given more and more thought in the past few decades to how they should cover crime victims. A key issue in their discussions has been whether or not they should identify victims in news stories. But all the thought and discussion devoted to the subject has done little to establish industry-wide norms. In considering whether to name victims, journalists have come to different conclusions about how victims of various crimes should be treated.

Many disagree about what the main issue is. For some, it is an obligation to respect victims' privacy. For others, it is a matter of protecting victims from harm. Still others frame it in terms of protecting victims from social stigma, informing the public, retaining journalistic autonomy, and fostering the execution of justice. But no matter how journalists define the issue, the underlying question is always the same. And fundamentally, it is the same question asked by lawyers and judges in their consideration of victims' privacy claims; does the harm to the individual outweigh the benefit to the public? Implicit in this question is the idea that the public derives some benefit from having crime victims identified, and this too has been questioned.

Journalist and scholar Philip Meyer says journalists have two ethical codes. The first is public and formal, contained within the written codes of news organizations and journalists' associations. The second is unwritten, made up of the informal and sometimes subconscious rules of behavior within the journalistic community. "Because it is often unconscious, this latter code is the more difficult to describe and analyze, but it is the more powerful of the two."<sup>100</sup> This is particularly true in regard to the ethics of naming crime victims. The codes of organizations such as the Society of Professional Journalists make general references to respecting subjects' dignity and

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<sup>100</sup>Philip Meyer, *Ethical Journalism* (Lanham, MD: University Press of America, 1987), 17.

privacy, but they do not specifically address the issue of how to treat crime victims.<sup>101</sup>

A few news organizations have written policies that set standards for covering crime, but editors' judgment usually plays a bigger role in how stories will be written.<sup>102</sup> A few rules seem to be generally accepted. Rape victims and juvenile offenders will not be named. A suspect's race won't be mentioned unless it's part of the description of a wanted person. But these rules barely begin to address the myriad of issues raised by crime coverage, and most journalists still make spur-of-the-moment decisions based on the facts in front of them.

#### ARGUMENTS FOR PUBLISHING VICTIMS' NAMES

Journalists justify naming victims with several reasons, including their rights under the First Amendment, their duty to report the public record, and their duty to inform the public. For most of the points they make, there are equally persuasive counter-arguments. However, it is still worth examining their reasons because they illustrate the values journalists hold dear and the underlying, often unspoken principles that may prompt them to reveal victims' identities.

*Maintaining a watchdog perspective.* The First Amendment is a result of early Americans' suspicion of government. People believed government that acted in secret was likely to become government that acted against the best interests of its citizens. Many Americans—and nearly all journalists—still believe that. Journalists claim they need to report as much about criminal proceedings as possible in order to keep the government honest. Part of that coverage is reporting suspects' confrontations with the

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<sup>101</sup>Society of Professional Journalists, "Code of Ethics," *Quill*, December 1973, 27; Society of Professional Journalists "Code of Ethics," *Quill*, November/December, 1995, 28; Society of Professional Journalists, personal communication, January 23, 1996; Radio-Television News Directors Association, personal communication, January 22, 1996. These guidelines seem to be obvious. Meyer notes: "Written codes are often criticized for being of little help in making decisions. The values they list seem to be obvious values, the behaviors enjoined are clearly bad behaviors. Ethics is more complicated than that." Meyer, 17.

<sup>102</sup>Albers, 32.

witnesses against them, including victims.<sup>103</sup> Former *Northern Virginia Sun* editor Herman Obermayer explains: "The accused only publicly faces his accuser in the press. Such confrontation is a fundamental part of our system. Facing each other in a courtroom, where only people associated with the trial are present, is not truly a public confrontation."<sup>104</sup>

In 1956, media coverage of a kidnapping prevented police from rescuing a month-old child. In writing about the case, *The Nation* admitted journalists went overboard in gathering and reporting details of police rescue efforts, but the magazine objected to readers' demand that police withhold information about future kidnappings from reporters. "Without the prying eye of the reporter, the police could become an OGPU overnight, bent on unseen errands for inscrutable purposes, responsible to no one but themselves," the magazine warned.<sup>105</sup>

*Publicity attracts testimony.* In addition to ensuring fair treatment of the accused by the government, some journalists believe covering the law enforcement system results in fairer treatment of suspects by society.<sup>106</sup> First, they say news coverage could attract witnesses who are willing to testify but may not be found by police. Second, they say publicity discourages people from making false reports of crime.

The argument about false reports is most controversial in regard to rape. Some journalists claim the identification of victims discourages them from making a false accusation.<sup>107</sup> They say this deterrent is important in regard to a crime where little evidence often exists and juries are asked to take one person's word against another's.

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<sup>103</sup>Pisani, 15.

<sup>104</sup>Herman J. Obermayer, "Rape: A double standard?" *ASNE Bulletin*, March 1978, 13.

<sup>105</sup>"Murder by the Press," *Nation*, 21 July, 1956, 49-50. The specter of government secrecy has been a constant worry for journalists. See Richard M. Schmidt, Jr., "Privacy legislation: Withdrawing from society's obligations," *ASNE Bulletin*, September 1979, 15-16.

<sup>106</sup>James Burges Lake, "Of Crime and Consequences: Should Newspapers Report Rape Complainants' Names?" *Journal of Mass Media Ethics* 6(2): 109-111 (1991).

<sup>107</sup>Obermayer, 13.

Now-retired editor Herman Obermayer has said: "The presumption that all rape complainants are "victims" is statistically and philosophically unsupportable. Over half the men indicted for this crime are found innocent. Even when charged with rape, a man should be considered innocent until proven guilty. Newspaper custom presumes the opposite."<sup>108</sup>

Journalist James Burges Lake says the stigma of rape used to deter women from making false accusations. Today, less stigma exists due to educational efforts, and so women may be more likely to make false accusations. Therefore, he writes, the "news media will face increasing responsibility, as part of their watchdog role, to report the names of those who may be using the judicial system for unjust ends, to hold complainants publicly accountable for their crimes."<sup>109</sup> Lake seems somewhat confused, however, because he goes on to say some stigma still exists, and so naming victims probably does more harm than good.<sup>110</sup>

*Informing the public.* Journalists often believe their duty to inform the public outweighs any harm that might result from their reporting.<sup>111</sup> They point out that not informing the public can have equally harmful results. In response to a 1992 story that got three homeless men evicted from their makeshift shelter, one reporter said: "Our responsibility is to inform. Despite the pain it may have caused these three people, a greater good may come out of it. Maybe the story will spark someone or some agency to really take on the homeless problem."<sup>112</sup> Non-journalists seem to be less likely to believe good will eventually result from publication. In the case of the homeless men,

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<sup>108</sup>Obermayer refers to the custom of omitting rape victims' names from articles. Obermayer, 13. Similar views have been expressed by other newspaper editors. See H. Eugene Goodwin, *Groping for Ethics in Journalism*, 2nd ed. (Ames, IA: Iowa State University Press, 1987), 251.

<sup>109</sup>Lake, "Of Crime and Consequences: Should Newspapers Report Rape Complainants' Names?" 114.

<sup>110</sup>*Ibid.*, 115.

<sup>111</sup>Christopher Meyers, "Justifying Journalistic Harms: Right to Know vs. Interest in Knowing," *Journal of Mass Media Ethics* 8(3): 135 (1993).

<sup>112</sup>Richard P. Cunningham, "Responsibility before compassion," *Quill*, January/February 1992, 6.

197 of the newspaper's readers called the paper and said they wouldn't have published the story.<sup>113</sup>

*The right to know.* Some journalists say they should publish victims' names because the public has a right to know such things. They note that "One of the fundamental tenets of democratic political systems is that the citizenry must have access to relevant information about their government, their social institutions, and so forth."<sup>114</sup>

Ethicist Sissela Bok says journalists' reliance on the phrase "public right to know" is largely a knee-jerk reaction intended to combat increased limits on their access to information.<sup>115</sup> At one time, the phrase may have had meaning, but as it was used more and more frequently to cover diffuse subjects, it became merely a rationalization for publishing. If nothing else, journalists' use of "the right to know" misuses the term "right." A right on the part of one implies a duty on the part of another. If the public has a right to know about my income, I have a duty to provide it. In our society, private people do not have a duty—at least a legal duty—to provide others with information about themselves. The government has a duty to provide some information to the public. Thus, the public has a right to know limited information about the government.<sup>116</sup> However, it also has an interest "in all information about matters that might affect its welfare, quite apart from whether a right to this information can be established."<sup>117</sup> Bok says journalists legitimately satisfy this interest.

Ethicist Christopher Meyers says journalists may satisfy the public's interest but they should not couch this work in terms of rights. Because rights involve obligations on the part of others talk of them should be limited to important issues. People "do not

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<sup>113</sup>Ibid., 7.

<sup>114</sup>Meyers, 135.

<sup>115</sup>Sissela Bok, *Secrets; On the Ethics of Concealment and Revelation* (New York: Pantheon Books, 1982), 256.

<sup>116</sup>Ibid., 257-258.

<sup>117</sup>Ibid., 258.

have a right to know about Madonna's latest love affair."<sup>118</sup> Meyers can see where a right to know the names of crime victims exists. He writes:

Because the actions, and, arguably, the characters of public officials directly affect citizens' lives and well-being, a legitimate claim of need and just entitlement to relevant information can easily be made. A similar, if more circuitous, defense can be given for revealing names of criminal defendants and victims; that is a system of justice works best when exposed to light.<sup>119</sup>

However, Meyers adds, the existence of a right to know does not mean it outweighs all other rights, such as the right to privacy.

*Secrecy versus privacy.* Perhaps because journalists consider themselves watchdogs and guardians of the public's right to know, they are suspicious of anything that smells like secrecy. Often, they—as well as non-journalists—confuse privacy with secrecy, making them suspicious of privacy.<sup>120</sup> Indeed, privacy and secrecy often go hand in hand. But privacy involves the protection of a person or thing from unwanted access, while secrecy entails the concealment of that thing. Bok explains: "Privacy and secrecy overlap whenever the efforts at such control rely on hiding. But privacy need not hide; and secrecy hides far more than what is private. A private garden need not be a secret garden; a private life is rarely a secret life."<sup>121</sup> Thus, a victim may not conceal the fact of his victimization but still object to the details of such being disseminated. These actions on the part of victims may seem contradictory to journalists, who assume that information known is information to be disseminated.

Of course, some victims do employ secrecy and have their names deleted from public records. Journalists may find this even more disturbing. Many have been taught—by their peers or by experience—that people only keep information to themselves when it is damaging to them. Reporters equate secrecy with government cover-ups and corruption. If victims want to keep something private, it must mean they

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<sup>118</sup>Meyers, 137.

<sup>119</sup>*ibid.*, 140.

<sup>120</sup>Bok, 10-11.

<sup>121</sup>Bok, 11.

have something to hide. Bok notes that suspicion of secrecy is common. "Why should you conceal something, many ask, if you are not afraid to have it known?"<sup>122</sup> In fact, all human beings require some measure of secrecy. Without it, people become overwhelmed by their contact with others and lose their sense of self.<sup>123</sup>

*The slippery slope.* Journalists also fear sliding down a slippery slope in regard to access to information. Information is journalists' bread and butter. If they allow the government to keep some information secret, the government may gradually eliminate reporters' access altogether.<sup>124</sup>

In addition, journalists seem to think there is a slippery slope in regard to publishing information. If they bow to public or government pressure and do not print some information, such as crime victims' names, will they come under more pressure to withhold other information?<sup>125</sup> A constant undercurrent of fear of impending government regulation seems to run through the journalistic community. It is not completely unwarranted. Broadcasting has been regulated. Congress recently passed restrictions on Internet content, and although none have been convicted, several newspapers have been criminally charged for naming rape victims. Editors want to maintain control over their news columns, and they fear that giving an inch in one case may mean giving a mile in another.<sup>126</sup>

In addition, some journalists argue that withholding information in any case subverts the journalistic process. In 1984, the mother of David, Houston's "Bubble Boy," wrote an anonymous article thanking the media for not revealing her family's

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<sup>122</sup>Bok, 8.

<sup>123</sup>Bok, 20-21. On a similar note, see Louis Hodges, "The Journalist and Privacy," *Journal of Mass Media Ethics* 9(4): 197-212 (1994).

<sup>124</sup>Richard M. Schmidt, Jr., "Privacy: the sexiest issue," *ASNE Bulletin*, March 1977, 9; John R. Finnegan, "Check that legislation," *ASNE Bulletin*, March 1977, 9; "Media say rape-name bans are unconstitutional," *Presstime*, June 1991, 69.

<sup>125</sup>Kaplan, 17.

<sup>126</sup>This is not a new concern. See generally, J. Edward Murray, "The Editor's Right to Decide," *Quill*, March 1970, 16-18;

name during or after David's life.<sup>127</sup> David, who had Severe Combined Immune Deficiency, attracted media attention because he lived his entire life in a sterile, plastic bubble. In response, Michael Gartner, who was then editor of the *Des Moines Register*, wrote an article criticizing members of the press who had not used David's full name. Gartner said withholding David's name made no sense given that many people in the community knew who he was, there was no legal barrier to using his name, and journalists frequently declare their right to name other people, such as criminal suspects. In conclusion, Gartner wrote:

The reporters entered the conspiracy because they wanted to be gentle, humane, caring and thoughtful. Those are noble goals for anyone, but they should not be the primary goals of a reporter or an editor. The primary goals of a reporter or an editor should be to gather news and print it — in as fair, accurate and thorough a way as possible. The stories on David were readable, interesting, fair, and accurate, but not thorough. I think that's shameful.<sup>128</sup>

While editors may legitimately worry that withholding information in one case sets a precedent for withholding it in others, Meyer says this concern does not justify a refusal to consider withholding people's names and other sensitive information. He says journalists who rely on the slippery-slope argument to justify publishing information are rationalizing their action without truly weighing the costs. The slippery slope argument is fundamentally unbalanced because it assumes one action will have infinite consequences. "And once you introduce the slippery slope into a cost-benefit equation, you have already made up your mind, because the slippery slope, by definition, is open-ended; its cost is infinite."<sup>129</sup>

#### ARGUMENTS FOR WITHHOLDING VICTIMS' NAMES

In the past few decades, journalists and others have developed several arguments to justify withholding victims' names from the public. Most journalists

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<sup>127</sup>David's mother, "A bouquet for the press from the mother of the 'bubble boy,'" *ASNE Bulletin*, October 1984, 32.

<sup>128</sup>Michael Gartner, "Why should we use last names at all?" *ASNE Bulletin*, November/December 1984, 44.

<sup>129</sup>Meyer, 85.

agree they have a duty to protect victims from further physical harm. Other reasons, such as the duty to protect victims from social stigma, the need to give victims control, and a responsibility to encourage the reporting of crimes, are disputed inside and outside the journalistic community.

*Protection from physical harm.* Awareness of the hazards media coverage presents for crime victims has been growing since at least the middle of the century. In 1939, *Reader's Digest* carried a story about a kidnapping victim who was killed after publicity about the case made his captors nervous.<sup>130</sup> In 1956, the *Nation* carried an account of a kidnapping in which media coverage prevented the police from rescuing an infant.

Newsmen ran wild; three of them in an automobile were permitted to keep watch on the spot from which the kidnapper was supposed to collect the ransom. Then a detective tipped off a reporter that the money was phony. Soon a bitter mother was telling the newsmen: "I could cut all your throats."<sup>131</sup>

It's hard to imagine such a scene involving today's press. Most news organizations and their reporters recognize a duty to protect individuals from physical harm and to refrain from interfering with police investigations. In recent decades, their tendency has been to err on the side of caution. When the son of a General Motors executive was kidnapped in 1975, all the Detroit-area news organizations held their stories until the boy was released.<sup>132</sup>

But there are still some lapses in ethical behavior. In 1987, a Minnesota newspaper published the name and address of a murder witness before police had arrested a suspect. The witness complained to the Minnesota News Council, which

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<sup>130</sup>Fulton Oursler, "A Life for a Headline," *Reader's Digest*, November 1939, 56. For another account of media interference with police investigations, see "Tacoma Tempest," *Time*, 31 October 1938, 36.

<sup>131</sup>"Murder by the Press?" 49.

<sup>132</sup>Paul Poorman, "Real-life test brings on-the-spot decisions," *ASNE Bulletin*, November/December 1975, 10-12.

said the newspaper was wrong to publish the woman's name while her safety was an issue.<sup>133</sup>

For many journalists, safety has been more of an issue with the publication of addresses than with names. Newspapers used to routinely print people's ages and addresses along with their names. This clearly identified people and helped journalists avoid libel suits based on mistaken identities. Today, however, most people do not want their address published or broadcast. In several instances, people have been targeted by criminals or unbalanced individuals because their names and addresses appeared in the newspaper. In one case, a North Carolina woman was harassed for weeks after the local newspaper published her name and address in the caption of a feature photograph of her walking her daughter to school.<sup>134</sup>

*Protection from social stigma.* Threats to victims' physical safety as a result of public identification are relatively rare. More often, victims are concerned with the social impact of being identified in the media. This is particularly true in the case of rape. "No crime is more horribly invasive, more brutally intimate. In no crime does the victim risk being blamed, and in so insidious a way: *She asked for it; she wanted it.* Perhaps worst of all, there's the judgment: *She's damaged goods* — less desirable, less marriageable."<sup>135</sup>

Some journalists claim the only way to reduce the stigma of rape is to treat rape victims like victims of other crimes, and that includes identifying them by name.<sup>136</sup> Former editor and now ombudsman Geneva Overholser notes: "Editors do not hesitate to name the victim of a murder attempt. Does not our very delicacy in dealing with rape

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<sup>133</sup>Richard P. Cunningham, "Name should not have been used," *Quill*, March 1988, 6-7.

<sup>134</sup>Greg Ring, "Are exact addresses always part of the story?" *ASNE Bulletin*, February 1986, 20-22.

<sup>135</sup>Geneva Overholser, "We should not have to keep hiding rape," *ASNE Bulletin*, November 1989, 32.

<sup>136</sup>Obermayer, 13; Carol Oukrop, "Is there a 'right' way to cover rape?" *ASNE Bulletin*, February 1983, 26; Terry Poulton, "Profile of controversy," *FineLine*, June 1991, 8.

victims subscribe to the idea that rape is a crime of sex rather than the crime of brutal violence that it really is?"<sup>137</sup>

But most journalists believe people still blame rape victims for the attack on them even though extensive efforts have been taken to change public attitudes. In 1982, editor Michael Rouse wrote an article arguing that rape victims should be named in part because people have been educated about rape and should not stigmatize victims.<sup>138</sup> Former journalist and university professor Zena Beth McGlashan responded:

A decade or so of public information doesn't re-mold society's biases. If change occurred on the tidy schedule which partially forms the basis for [journalist Michael] Rouse's argument, then women would have won the right to vote about 1858—ten years after the Seneca Falls Convention. History—and common wisdom such as that gained by being in the newspaper business for any length of time—tells us that society doesn't change its attitudes rapidly.<sup>139</sup>

Editor Michael Heywood echoed her sentiments, saying:

"Most women want men to adopt the slogan, 'Rape is not a crime of sexual passion, it is a crime of passion.' Politically correct men can get it out without stammering or blushing. A few feminist men can say it straight out and self-righteously, and if their feminism is real and deep, they may even believe the slogan.

"If most men really believed it, however, particularly most men making decisions about editorial policy, the questions about naming rape victims would not be an issue. . . We would decide whether to print the name of a rape victim the way we decide whether to publish the name of any other crime victim."<sup>140</sup>

Victims of other crimes also feel stigmatized when they are identified in the news. After a domestic-violence victim was identified, she told a journalist: "People come up to me at the office and say, 'How could this happen to a smart woman like you?'" she said. "They act like I deserved it."<sup>141</sup>

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<sup>137</sup>Overholser, "We should not have to keep hiding rape," 32.

<sup>138</sup>Michael Rouse, "Rape," *ASNE Bulletin*, February 1982, 3.

<sup>139</sup>Zena Beth McGlashan, "By reporting the name, aren't we victimizing the rape victim twice?" *ASNE Bulletin*, April 1982, 20.

<sup>140</sup>"Eighteen editors discuss how they cover rape," *ASNE Bulletin*, July/August 1991, 18.

<sup>141</sup>Deni Elliott, "Reporting Rape Charges: Treating Victims as Victims," *Baltimore Sun*, 28 April 1991, sec. D, p. 1.

Most journalists seem to think victims of crimes other than rape will not be harmed by public identification, but a few have begun to reexamine the issue. Editor James Ragsdale has acknowledged that victims of other crimes feel threatened by identification in the press. "A report that the burglars got all the paintings but missed \$150,000 worth of fine china—from the victim's perspective it is just a signal for more intrusion."<sup>142</sup> His newspaper, however, does identify victims of crimes other than rape.

*Giving the victim control.* Many journalists—and non-journalists—advocate letting rape victims decide whether their names will be used. They say crime takes away victims' control and anything that gives control back to them will help them heal. Some rape victims have chosen as part of their healing process to speak out and have their names used in the media. After writing an article about her rape, *USA Today* editor Karen Jurgensen reported: "Overwhelmingly, the women I talk to are going public or speaking out among friends because they feel ready to deal with the reaction, because it helps them fight back and because they hope understanding of the crime will help deter future rapes."<sup>143</sup>

But letting victims decide whether their names will be used is not the simple solution it seems. Whether a victim can make an informed decision on the matter is questionable. When confronted by a reporter, many people are inclined to open up and share whatever information the reporter wants. Often, there seems to be a desire to please the reporter. Journalist Janet Malcolm describes the public attitude this way:

Something seems to happen to people when they meet a journalist, and what happens is exactly the opposite of what one would expect. One would think that extreme wariness and caution would be the order of the day, but in fact childish trust and impetuosity are far more common. The journalistic encounter

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<sup>142</sup>James M. Ragsdale, "The Lessons of Big Dan's," in *Police and the Media*, ed. Patricia A. Kelly (Springfield, Ill.: Charles C. Thomas, Publisher, 1987), 209.

<sup>143</sup>Karen Jurgensen, "A survivor's experience," *ASNE Bulletin*, October 1990, 15. See also Jennifer L. Stevenson, "Telling a painful secret," *St. Petersburg Times*, 27 October 1991, sec. F, p. 1.6.

seems to have the same regressive effect on a subject as the psychoanalytic encounter.<sup>144</sup>

Even if people are cautious and reveal little, they may still open themselves up to harm. Few people can predict their reaction to a story about themselves until they see it. Even fewer can predict other people's reaction to the story.<sup>145</sup> In most cases, journalists have an advantage over their subjects because they can anticipate public reaction. They have seen how people reacted to previous stories and can guess how they will react to a current one. Within the journalistic community, this predictive ability is called news judgment. Victims don't have it.

Additionally, some victims are so traumatized by the attack against them that they are incapable of evaluating the possible effects of publicity. A 1982 article in *Quill* magazine tells of a 14-year-old rape victim who was named in an article by the *New York Post*. The child "collected clippings of the story and waved them out the apartment window asking passersby if they had seen it."<sup>146</sup> Additional outrageous behavior, including testifying on behalf of her attackers, led to the girl being ejected from the foster home where she was placed. Her social worker said "that if the child had been placed in a therapeutic situation immediately after the rape and protected from publicity, she might have behaved differently."<sup>147</sup> In cases like this, asking the victim's permission to use his or her name is meaningless because the victim is not emotionally or mentally capable of making a rational decision.

With young victims, even those who seem capable of making a rational decision may not be able to. Some researchers believe people are not developmentally capable of giving informed consent until the age of 18.<sup>148</sup> Some minors may be able to give

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<sup>144</sup>Janet Malcolm, *The Journalist and the Murderer* (New York: Vintage Books, 1990), 32.

<sup>145</sup>One newspaper dealt with this issue by warning a rape victim of people's possible reactions to a story identifying her. See Robin Hughes, "An exceptional case; Hartford Courant names rape victim," *FineLine*, October 1990, 4.

<sup>146</sup>"Post assailed for identifying rape victim, 14," 50.

<sup>147</sup>Ibid.

<sup>148</sup>Richard Wexler, "The 'outing' of Kiri Jewell," *Quill*, November/December 1995, 33.

informed consent, but anecdotal evidence suggests many children don't understand the effect going public could have on them and their relationships with others. One victim said she willingly testified about being sexually abused before a state legislative committee only to feel humiliated when her name was reported.<sup>149</sup>

Some journalists think that merely approaching a victim to get permission to use his or her name constitutes an invasion of privacy. Editor James Naughton said:

We would use the victim's name if she wanted us to, but as a general rule we wouldn't locate and question the victim. The likelihood is that the victim doesn't even want to talk to us about being identified. To initiate a policy in effect where you confront victims with that again—while probably useful from a social perspective—would repeat the trauma.<sup>150</sup>

Finally, giving the victim control may result in uneven news coverage. For example, a rape victim in Albuquerque agreed to be interviewed by a local newspaper and have her picture taken to run with the story. However, she stipulated that the story could not contain her name. Then, when another local newspaper ran a story with her name, she complained. To journalists covering the story, the victim's reaction seemed inconsistent. She could be identified by either the photographs or her name; what difference did using her name make? The victim said: "With those pictures, nobody could track you down, but with a name, they could. Thirty years from now, that still will be my name, but my face will change."<sup>151</sup> While the victim's perspective made sense in hindsight, it confused reporters covering the case who thought the victim had tacitly agreed to be identified when she testified in court, had her picture taken and gave a public statement after the sentencing. Journalists may respect victims' privacy and give them control, but they don't want to be forced to guess which forms of identification will be acceptable and which won't. They need consistent rules in order to make decisions on deadline.

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<sup>149</sup>Ibid., 32.

<sup>150</sup>"Eighteen editors discuss how they cover rape," 17.

<sup>151</sup>George Garneau, "Identifying rape victims—two different tacks," *Editor and Publisher*, 17 November 1990, 10.

*Encouraging reporting of crimes.* In regard to rape, many editors say they will not name victims because it may discourage them from reporting the crime. However, no cause-and-effect relationship has been established between media coverage and the reporting of crime. Most studies show victims "do not report crimes when they believe the incidents are not serious enough, the conflicts are personal matters, nothing can be done, or the police do not want to be bothered or are inefficient, ineffective or insensitive."<sup>152</sup> Victims generally do not mention fear of publicity as a reason for not reporting crimes, and overall, reporting rates remain fairly stable. The reporting rate for rape does fluctuate, but no agency has tied this variation to trends in the publication of victims' names.

However, journalists and victims' advocates produce anecdotal evidence to support the contention that sex-crime victims will not pursue justice if it means their names and experiences will become known.<sup>153</sup> An 18-year-old sodomy victim refused to testify against his assailant when the *Minneapolis Star Tribune* and *St. Paul Pioneer Press Dispatch* would not promise to maintain his anonymity.<sup>154</sup> The prosecutor was forced to dismiss the case when the judge refused to close the courtroom.<sup>155</sup> In an anonymous essay, another rape victim said one of the first things she thought about when considering whether to report the assault was whether her name would become public. "It was in fact the first thing I asked the state trooper after I had been examined in the emergency room at the hospital before I said anything. I asked him, Am I going to be identified to the media?"<sup>156</sup>

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<sup>152</sup>Sheley, 125.

<sup>153</sup>McGlashan, 20; Kaplan, 15; "Naming Names," *Newsweek*, 29 April 1991, 26-28; M.K. Guzda, "A right to privacy?" *Editor and Publisher*, 10 March 1984, 7.

<sup>154</sup>The newspapers did not publish the boy's name when he reported the crime nor when he was subpoenaed to testify. The editors said they probably would not use the boy's name in accounts of the trial but would make no guarantees. Richard P. Cunningham, "Preaching sexual abstinence," *Quill*, May 1988, 10.

<sup>155</sup>*Ibid.*

<sup>156</sup>"A Rape Victim to the Media: 'Don't You Know You're Dealing With People and People's Lives?'" in *Police and the Media*, ed. Patricia A. Kelly (Springfield, Ill.: Charles C. Thomas, Publisher, 1987), 216.

Victims' advocates say publicity also could deter victims of other crimes from making a report to the police. In particular, advocates fear victims of domestic violence may not report abuse if they think they will be named in the news. During the first 11 months after the *Caledonian-Record* in Vermont began publishing final orders in domestic violence cases, a local service for victims reported 10 cases in which women "backed off from securing restraining orders because they feared that the publication would lead to retaliation by their abusers."<sup>157</sup>

### CONCLUSION

For most journalists, the question of whether—or how, or when—to identify crime victims raises a conflict between their desire to respect individuals' privacy and their sense of duty to inform the public. They face the same conflict in deciding how to deal with political scandals, AIDS victims, suicides and a myriad of other issues.<sup>158</sup>

Some journalists question whether they should write about victims at all. After dealing with the media when his cousin was killed, journalist Richard Kenyon wrote:

My own impression is that coverage of these stories is exploitation. I don't think there's any way around it. Sometimes it serves a good purpose. Maybe sometimes a crime is solved, a victim is found, a victim's family member has a cathartic experience. But that is not why we journalists do those stories. We do them because they sell papers. We do them because they are good stories. People read them.<sup>159</sup>

Other journalists say the arguments for providing victims' names are valid, but using the names in stories that endanger victims or imply they are responsible for the attacks against them is wrong. Writing about the Palm Beach case, columnist Anna Quindlen argued that naming the victim "in a story that contained not only the alleged

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<sup>157</sup>Dorothy Giobbe, "Publicizing Domestic Abuse," *Editor and Publisher*, 18 December 1993, 13.

<sup>158</sup>Barrie Hartman and John Seigenthaler, "Editors struggle with stories that 'invade' privacy," *ASNE Bulletin*, July/August 1987, 4.

<sup>159</sup>Kenyon, 20.

victim's 'wild streak' but the past sexual history of her mother could not help but suggest that the use of the name was not informative but punitive."<sup>160</sup>

Most journalists seem to want to protect victims or at least not injure them further. But at the same time, they do not want to compromise their journalistic principles. They want to produce stories that will capture people's attention, inform them and, if necessary, prompt them to respond to correct some social ill. If including a victim's name will accomplish these purposes, many journalists are willing to risk some harm to the victim. The problem for many journalists arises from the fact that they are unsure of what including victims' names accomplishes.

For many journalists, this is a particularly touchy issue because members of the public have expressed concern about it. A wrong decision can have dramatic effects on news organizations' credibility, access to information and income. When the *Parthenon*, Marshall University's campus newspaper, named a rape victim in a story in 1992, it triggered a backlash against the paper that affected it for years.<sup>161</sup> Among other things, the newspaper lost part of its funding from student fees, the reporter was fired from his job as a lay minister, university officials attempted to take control of the newspaper from the Student Publications Board, and campus police cut off public access to victims' names and addresses. Obviously, journalists have an incentive to make a decision that is acceptable to members of their community. But many are not satisfied with making an acceptable decision. They also want to make a morally right decision. The next chapter will examine how journalists go about making what they hope are the right decisions.

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<sup>160</sup>Anna Quindlen, "Times story was punishment in the guise of information," *The [Everett] Herald*, 28 April 1991, sec. F, p. 2.

<sup>161</sup>Allan Wolper, "Publishing an alleged rape victim's name," *Editor and Publisher*, 17 July 1993, 17.

## Chapter 5: Washington Journalists Make Decisions

On January 3, 1996, 8-year-old Niki Sullivan was kidnapped from his school in Edmonds, Washington. Jason Murphy, 19, a family acquaintance, took the boy from school shortly after classes began at 9 in the morning. About 40 minutes later, a school staff member called Niki's mother because the child wasn't in class, and his mother realized he may have been kidnapped.

Police began an immediate search for Murphy, who had been charged in November with molesting the boy. Local and national media were informed of the search and given descriptions of Niki and Murphy.

For Seattle-area media, the story was big—front page, lead of the evening broadcast. *The Seattle Times* ran a prominent story in which it detailed what was known about the kidnapping, reported that Murphy worked at a local Boys and Girls Club and included comments from people who knew Niki.<sup>1</sup> By the next day, *Times* reporters uncovered the molestation charges. They wrote an update on the search and included the history of Murphy's obsession with Niki.<sup>2</sup>

The reporters also broke one of the newspaper's cardinal rules: sex-crime victims shall not be named. In 1992, the *Times* adhered to its policy while covering a civil suit brought by a woman who claimed she had been raped by members of the Cincinnati Bengals football team in a Seattle-area hotel. The *Times* named the 20 players involved in the suit, but unlike the *Cincinnati Enquirer* and several Seattle television and radio stations, the newspaper did not name the woman. At the time, executive editor Mike Fancher explained: "one of the most firmly held principles of the

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<sup>1</sup>Karen Alexander and Linda W.Y. Parrish, "Boy Feared Abducted from School," *Seattle Times*, 4 January 1996, sec. B, p. 1.

<sup>2</sup>Ferdinand M. De Leon, Peter Routman, Nancy Montgomery, Karen Alexander, Peyton Whitely, "Kidnap Plan No 'Whim'—Suspect Allegedly Had Spoken of Plan to go away with Boy," *Seattle Times*, 5 January 1996, sec. A, p. 1.

newspaper is that we don't name rape victims. Publishing their names further victimizes the victims and discourages other women from reporting rapes. We weren't going to make an exception without compelling reasons."<sup>3</sup>

The newspaper didn't explain what compelling reasons prompted it to name Niki Sullivan, but one can guess. One major objective of police—and perhaps journalists—was to make the public aware of the kidnapping and stir up leads. Therefore, all media covering the case used Niki's picture and name in their initial reports. After the molestation charges were known, there was still a need for publicity so people would continue to look for the child. In addition, it probably seemed pointless to stop using Niki's name when it was already well-known in his community.

The publicity saved Niki. He was found in New York City on January 6 after a hotel clerk recognized him from a story on "America's Most Wanted."<sup>4</sup> Murphy was arrested and charged with kidnapping.<sup>5</sup>

Bob Steele, who teaches ethics at the Poynter Institute for Media Studies, says many people, much of the time, make decisions based on their gut instincts about what is the right thing to do. The initial reaction of journalists covering Niki Sullivan's kidnapping was probably to publicize his name and picture so people who saw the child would know he was missing and call the police. In the same situation, most people probably would take the same action in order to help find the child.

Acting on one's gut instincts, however, may not always be the best way to deal with problems. When people go with their gut reaction, Steele says, they sometimes ignore aspects of the situation they would find important if they carefully thought through the issue. For example, Niki will grow up in a community in which everyone

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<sup>3</sup>Mike Fancher, "To Name or Not Name Woman—Tough Call in Bengals Rape Case," *Seattle Times*, 13 September 1992, sec. A, p. 2.

<sup>4</sup>Ignacio Lobos, "Missing Boy Found; He's OK," *Seattle Times*, 7 January 1996, sec. A, p. 1.

<sup>5</sup>Karen Alexander and Ferdinand M. De Leon, "Suspect in Kidnapping Returns—Arraignment Scheduled Today; His mother plans a statement," *Seattle Times*, 12 January 1996, sec. B, p. 1.

knows he has been sexually abused. At some point, people's knowledge of what happened to him may embarrass him, cause people to treat him differently from other children, and add to the trauma he has already suffered. While Niki's family and teachers have tried to help him return to a "normal" life, it's unlikely that his life will ever be the same as it was before he became famous.<sup>6</sup>

In Niki's case, journalists can justify naming the child—the publicity led to his rescue. But whether they realized it or not, journalists had an alternative to publishing or not publishing a sex-crime victim's name. They could have withheld some details of Murphy's crimes. The public needed to know about the kidnapping in order to find Niki; did it also need to know the child had been molested?

## PREVIOUS RESEARCH

### STUDIES ON VICTIM IDENTIFICATION

*Identification practices.* Every day journalists make decisions about whether or not to name crime victims. Their decisions have ramifications for their subjects, their news organizations and members of the public. Yet relatively little is known about how journalists make those decisions. In the 1980s and early 1990s, communications scholars did a series of studies that showed fewer and fewer journalists were using crime victims' names in stories.<sup>7</sup> This was particularly true in the case of sex-crime

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<sup>6</sup>Ferdinand M. De Leon, "Little Boy's Family Now Eager to Fade from Limelight," *Seattle Times*, 12 January 1996, sec. B, p. 1.

<sup>7</sup>Tommy Thomason and Paul LaRocque, "Television and Crime Coverage: A Comparison of the Attitudes of News Directors and Victim Advocates" (paper presented to the Radio-TV Journalism Division at the annual convention of the Association for Education in Journalism and Mass Communication, Boston, August 1991); Samuel P. Winch, "On naming rape victims: How editors stand on the issue" (paper presented to the Commission on the Status of Women at the annual convention of the Association for Education in Journalism and Mass Communication, Boston, August 1991); Tommy Thomason and Paul LaRocque, "Newspaper Identification of Crime Victims: Editors Change Address Policies" (paper presented to the Newspaper Division at the annual convention of the Association for Education in Journalism and Mass Communication, Minneapolis, August 1990); Rita Wolf, Tommy Thomason and Paul LaRocque, "The Right to Know vs. the Right of Privacy: Newspaper Identification of Crime Victims." *Journalism Quarterly* 64(2/3): 503-507 (1987); Carol Oukrop, "Views of Newspaper Gatekeepers on Rape and Rape Coverage" (Kansas State University, Manhattan, Kansas, 1982, photocopy); "Many editors agree on how to report rapes," *Editor and Publisher*, 22 January 1983, 2.

victims. In 1988, 96 percent of newspaper editors said they would not identify rape victims.<sup>8</sup> But editors also said they would not name victims of crimes who were named routinely by journalists even in the late 1970s. For example in 1976, 48 percent of the editors in a national survey said they would identify a robbery victim by name and address.<sup>9</sup> In 1985, only 9 percent said they would.<sup>10</sup> During that time, some editors just stopped using robbery victims' addresses, but most stopped using the victims' names too.

The authors of that study, Texas researchers Rita Wolf, Tommy Thomason and Paul LaRocque, said editors told them they were changing their policies to offer more protection to private people who became victims of crime.<sup>11</sup> But why editors did that remains something of a mystery. Thomason and LaRocque, who conducted most of the studies on this issue, have two main hypotheses. First, journalists are becoming more respectful of victims' privacy.<sup>12</sup> Why this may be so, however, is not clear. Victims' advocates seem to believe they have influenced journalists in this regard, but most journalists said advocates had not convinced them to change their practices.<sup>13</sup> Journalists also discounted the influence of professional organizations.<sup>14</sup> Of course, journalists may want to appear independent in their thinking; they value detachment and objectivity.<sup>15</sup> But if one takes journalists at their word, there is no apparent reason for their increased sensitivity.

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<sup>8</sup>Thomason and LaRocque, "Newspaper Identification of Crime Victims: Editors Change Address Policies," 6.

<sup>9</sup>Wolf, Thomason and LaRocque, 506.

<sup>10</sup>Ibid.

<sup>11</sup>Ibid., 507.

<sup>12</sup>Ibid, 507.

<sup>13</sup>Thomason and LaRocque, "Newspaper Identification of Crime Victims: Editors Change Address Policies," 10; Thomason and LaRocque, "Television and Crime Coverage: A Comparison of the Attitudes of News Directors and Victim Advocates," 9.

<sup>14</sup>Ibid.

<sup>15</sup>Herbert J. Gans, *Deciding What's News* (New York: Vintage Books, 1980), 183-186.

Thomason's and LaRocque's second hypothesis is that journalists have changed their behavior because they fear being censored if they are not cautious in using victims' names.<sup>16</sup> Many editors say not using victims' names interferes with the public's right to know.<sup>17</sup> But just as many say the public might try to limit what could be published if journalists are not more careful about using victims' names.<sup>18</sup> Perhaps journalists think self-censorship is better than government censorship.

*Methodological issues.* Thomason, LaRocque and a few other researchers have documented a trend in journalism toward not naming crime victims in the news. There are questions about what is causing the trend, but its existence seems established. Yet conversations with working journalists indicate the trend may not be as clear as it seems.

Until now, studies on how journalists identify crime victims have been done with mail surveys that rely on closed-ended questions. Typically, editors or television producers or whoever is being studied receive a questionnaire that first describes a hypothetical crime, such as "Mrs. Jones is raped by an individual who has committed several other rapes," and then asks respondents, "Would you (a) print Mrs. Jones' name and address; (b) print Mrs. Jones' name; (c) print neither Mrs. Jones' name or address?"<sup>19</sup> Another typical research question contains a statement such as "Rape victims should not be named because they are subject to societal stigma," and asks journalists to indicate whether they strongly agree, agree, disagree or strongly disagree with the proposition. The problem with these questions is that they force journalists to choose an answer closest to their probable course of action or their belief but not

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<sup>16</sup>Wolf, Thomason and LaRocque, 507; Thomason and LaRocque, "Newspaper Identification of Crime Victims: Editors Change Address Policies," 10.

<sup>17</sup>Wolf, Thomason and LaRocque, 507.

<sup>18</sup>Ibid.

<sup>19</sup>Questions in this section are typical of those used by other researchers, but they are not the exact questions used by them.

necessarily identical to that action or belief. Many nuances are left out, and so journalists' responses may be more uniform than their actions and beliefs really are.

During the planning stages of a survey for this dissertation, several working journalists were asked whether their news organizations name rape victims. They tended to say things like, "Usually no, but if was the mayor's wife or something, maybe we would," or "No, but sometimes when television does, you have to wonder what's the point?" These journalists were reluctant to answer questions that asked them to say conclusively what they would do in hypothetical situations. They did not feel closed-ended questions reflected the complexity of the decisions they faced.

*Another look at identification practices.* A 1991 study by journalism professor Samuel Winch hints at the complexity of journalists' decision-making. Editors in his study outlined eight different approaches to naming rape victims.<sup>20</sup> They also outlined a variety of policies for naming victims of other violent crimes. Yet because the majority of editors' answers clustered in one or two categories—for example, 79 percent said they never name rape victims or only name them in exceptional circumstances—it's easy to dismiss the diversity of their responses. Editors who gave other answers appear to be on the fringe of thought in their field when in actuality they may just be the people who took the time to write in more detailed answers. It's easier to say "we don't name rape victims" than to say "we don't name rape victims unless they're really famous, the name is already known, they've been the victim of another crime such as murder, or they gave us permission."

### 1996 SURVEY – PURPOSE

To find out more about how journalists decide whether or not to use crime victims' names, a survey was done of newspaper and television journalists in Washington state. The study sought to answer two main questions. First, do

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<sup>20</sup>Winch, 6.

journalists have policies or accepted practices they rely on in deciding whether or not to name crime victims? Second, what influences journalists when they are deciding whether or not to use victims' names?

## POLICIES AND PRACTICES

Former journalist and ethicist Bob Steele classifies journalists' decision-making into three categories: the gut reaction, rule obedience and reasoned thought.<sup>21</sup> Gut reactions are those immediate responses described in the introduction to this chapter.<sup>22</sup> Naming Niki Sullivan probably seemed like the obvious course of action for most Seattle journalists. Reasoned decision-making, which Steele says is the desirable way of making decisions, occurs when people examine their dilemma from the viewpoints of the people involved, think about the consequences of their actions, consider alternatives and try to take the course of action that will harm the fewest people.

In between gut reactions and reasoned thought lies rule obedience. It occurs when people have rules of conduct that apply to most situations, but they follow those rules even when they don't adequately address the current situation. For example, a newspaper's policy says it will name all victims of felony crimes. The newspaper's staff follows this rule and names an armed robbery victim even though the robber has not been arrested and the victim may be in danger. Those journalists are trapped by rule obedience; they haven't thought enough about the situation or their practice to realize they need to make an exception to the rule or they will place the victim in jeopardy.

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<sup>21</sup>Steele adapted his ideas from the work of scholars Louis Hodges and Henry Aiken. For a discussion of the levels of ethical decision-making, see Henry David Aiken, *Reason and Conduct* (New York: Alfred A. Knopf, 1962), 65-87.

<sup>22</sup>Gut reactions are fairly common in journalism. See Dona Hayes, "Local Television Coverage: Ethics and Decision Making," *American Behavioral Scientist* 35(2): 166-180 (1991); Carl Hausman, *The Decision-Making Process in Journalism* (Chicago: Nelson-Hall Publishers, 1990), 4, 99.

Journalists have demonstrated rule obedience in dealing with ethical issues other than the identification of crime victims.<sup>23</sup> For many, the main rule is to be objective.<sup>24</sup> As long as journalists don't accept gifts, belong to community organizations they cover, or do anything else to compromise their image as a detached observer, they don't worry much about how they write their stories. One journalist told Rilla Dean Mills, dean of the University of Missouri's School of Journalism:

A reporter's job is to report the news fairly and accurately. In writing a story, he doesn't ask himself, "Is this right or wrong?" but rather "Am I portraying this accurately?" In deciding what questions to ask and what information to put into a story, he's making professional decisions, not ethical ones. I've seldom been asked to do anything I considered unethical in my work, but I have been asked to do many things I considered stupid.<sup>25</sup>

In looking at journalists' approach to victim identification, one might expect them to have some policies or common practices they follow. The absence of policies or accepted guidelines could indicate journalists are making only gut-level decisions about whether or not to use victims' names. However, if journalists follow policy or adhere to standard practice in all cases, that could indicate they are bound by rule obedience. If they are trying to make reasoned decisions, journalists will probably report having policies or accepted practices that they modify depending on the situation. The more situational factors they consider, the more effort they may be putting into making their decisions.

## INFLUENCES ON JOURNALISTS

Past studies show many journalists make decisions about naming crime victims on a case-by-case basis.<sup>26</sup> At least some of the time, journalists probably engage in

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<sup>23</sup>For example, see Patrick R. Parsons and William E. Smith, "R. Budd Dwyer: A Case Study in Newsroom Decision Making," *Journal of Mass Media Ethics* 3(1): 84-93 (1988).

<sup>24</sup>See Rilla Dean Mills, "Newspaper Ethics: A Qualitative Study," *Journalism Quarterly* 60(3): 589-594 (1983); John C. Merrill, "Is Ethical Journalism Simply Objective Reporting?" *Journalism Quarterly* 62(2): 391-393 (1985).

<sup>25</sup>Mills, 590.

<sup>26</sup>Thomason and LaRocque, "Newspaper Identification of Crime Victims: Editors Change Address Policies," 4; Wolf, Thomason and LaRocque, 505.

reasoned decision-making, weighing situational factors and consulting other people. The second purpose of this study is to learn more about what influences journalists when they try to make reasoned decisions about naming crime victims.

Implicit in previous studies is the assumption that journalists will be influenced by the type of crime. Journalists are asked if they would identify rape victims, robbery victims and murder victims.<sup>27</sup> It remains to be asked, however, whether journalists regard the type of crime as the most important factor to consider when deciding whether to name victims. Do journalists think victims of some crimes need to be treated differently than others? Given the discussion in the trade literature, it seems journalists think sex-crime victims need to be protected from social stigma, but they give little thought to whether identification in the news would harm victims of other crimes.

Other situational factors may be just as important to journalists as the type of crime, however. They may want to know whether the victim's family has been notified, whether the victim is a child and perhaps more vulnerable to the effects of publicity, or whether a suspect still at large threatens the victim. This information could help journalists assess the potential harm identification could cause the victim as well as—or perhaps better than—the type of crime could.

Journalists also may be influenced by their sense of duty. Many journalists think their primary obligation is to inform the public. These journalists may name crime victims regardless of the circumstances. Other journalists may feel obligated to respect victims' privacy or protect them from harm; these journalists may be less likely to name crime victims.

Finally, journalists may be influenced by other people. Thomason and LaRocque have suggested journalists are influenced by police and by victims'

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<sup>27</sup>Thomason and LaRocque, "Television and Crime Coverage: A Comparison of the Attitudes of News Directors and Victim Advocates," 3-6; Winch, 5-6; Thomason and LaRocque, "Newspaper Identification of Crime Victims: Editors Change Address Policies," 9; Wolf, Thomason and LaRocque, 505.

advocates. Journalists also may be influenced by community members and their peers; one would expect community and industry standards to help shape journalists' practices.

## RESULTS

In February 1996, 72 journalists at Washington newspapers and television stations were interviewed about how they decide whether or not to use crime victims' names (For a description of the survey methodology, see Appendices A and B). The average interviewee was an editor of a rural, community-oriented newspaper who had worked in journalism for 19 years and been with his current paper for 10 years. Collectively, the answers of the 72 journalists reflect practices at the largest and most influential news organizations in the state.

Before discussing what journalists said about naming crime victims, it's important to point out that most of the news organizations represented in this study do not carry a lot of crime news. Fifty-six percent carry less than three local crime stories per issue or broadcast.<sup>28</sup> Only 3 percent carry more than six local crime stories.

There seems to be a popular conception that news media focus on crime in order to attract readers and viewers.<sup>29</sup> At least in Washington state, that is not true. Journalists seem to be fairly conservative in their approach to crime coverage, and that conservatism is evident in both the quantity of crime news they report and the manner in which they report it.

## POLICIES AND PRACTICES

*Existence of and adherence to official policies.* While almost half of the news organizations represented in this study have a policy on the identification of crime victims, most journalists do not treat those policies as the final word on whether or not

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<sup>28</sup>For newspapers, stories were defined as articles of more than three column inches. Some newspapers run news briefs or shorts about crime in addition to stories.

<sup>29</sup>Joe Holley, "Should the coverage fit the crime?" *Columbia Journalism Review*, May/June 1996, 27-29.

to use a crime victim's name. Eighty-one percent of the journalists interviewed said they decide on a case-by-case basis whether or not to identify a victim.

There were differences between news organizations, however. Daily newspapers were more likely to have policies on victim identification, and their employees were more likely to make decisions based solely on company policy (See Tables 1 and 2). Editors at daily newspapers may be more likely to institute policies because they have larger staffs. At weekly newspapers and many television stations, newsroom supervisors generally have fewer reporters covering crime (See Table 3). These managers probably have more individual contact with their reporters, and their reporters may be more likely to report directly to them. Therefore, managers at weekly newspapers and television stations may have a greater ability to deal with issues related to crime-victim identification as they arise. In contrast, daily newspaper editors often supervise a number of crime reporters, and at large newspapers, those reporters may work a variety of shifts. In addition, reporters may submit their stories to mid-level editors who make decisions about what information to include. When multiple people are involved in deciding whether or not to identify crime victims, an official policy helps ensure that decisions will be made consistently.

News organizations' policies varied quite a bit. Two newspapers name all crime victims.<sup>30</sup> Four newspapers don't name any victims. The other news organizations fall somewhere between the two extremes. The most common provisions of newsroom policies deal with sex-crime victims and juveniles. Sixty-two percent of

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<sup>30</sup>This result was surprising and may be misleading. All news reports on the subject say only one newspaper in the state regularly names victims of all crimes, including sex crimes. Therefore, only one newspaper was expected to fall into this category. However, comments made by editors at some of the small weeklies indicated that when they think about naming crime victims, they don't think about victims of violent crimes, such as rape or murder, because they have few of those crimes in their areas. For example, one editor said no rapes and only one murder have been reported in his circulation area during the 18 years he has worked at the paper. The response of one of the two newspaper editors who said they name all crime victims should probably be considered in this context. The editor has a policy of naming victims of all crimes that occur in his area, but it's likely that he hasn't dealt with a story about a sex crime.

the journalists surveyed said their newspaper or television station does not name sex-crime victims.<sup>31</sup> Thirty-five percent said they don't identify juvenile victims or suspects.

*Informal guidelines, industry standards.* More than half of the journalists in this study had informal guidelines they followed in addition to or instead of an official policy. These guidelines seem to illustrate industry standards better than the official policies respondents outlined because they are more widespread and consistent. Also, as journalist and scholar Philip Meyer has noted, unwritten codes are often more influential than those people put on the record.<sup>32</sup>

Sixty percent of the journalists in this study said they always name victims of some crimes (See Table 4). Generally, journalists tend to identify victims of serious, or felony, crimes. They say they do this because these crimes have greater effects, people want to know about them, and people have a right to know about them.

Most commonly, journalists name murder victims. When asked why they name murder victims, journalists said the severity of the crime—the fact that it resulted in death—makes it important to name the people involved. In addition, people want to know who has been killed, often so they can verify that the victim is not someone they know and care about. Finally, a few journalists said they might as well name the victim. The person can't be harmed by publication and, from a practical standpoint, can't sue for libel or invasion of privacy.

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<sup>31</sup>A few of these allowed identification if the victim files a civil suit. There is a sense among journalists that victims become unwilling participants in the judicial process when they file a crime report. Victims are not seeking publicity but justice, and therefore, their privacy should be respected. But when victims file civil suits, they choose to become part of a court-room battle, and if they win, they benefit financially from their participation. Some journalists feel that in deciding to become part of a public proceeding, victims inject themselves into the public eye and forfeit some of their privacy rights. This perspective, to some extent, reflects the organizational structure of the legal system. In criminal trials, the state brings charges against the perpetrator because a law has been broken. The victim may serve as a witness but nothing more. In a civil suit, the victim accuses the perpetrator, taking on the role the state has in a criminal trial. Eduard A. Ziegenhagen, *Crime and Social Control* (New York: Praeger Publishers, 1977), 74-75.

<sup>32</sup>Philip Meyer, *Ethical Journalism* (Lanham, MD: University Press of America, 1987), 17.

Table 1: Existence of a formal policy by news organization type

|                  | All  | Weekly newspaper | Daily newspaper | Television |
|------------------|------|------------------|-----------------|------------|
| Formal policy    | 47%  | 36%              | 78%             | 30%        |
| No formal policy | 53   | 64               | 22              | 70         |
| 100% =           | (72) | (39)             | (23)            | (10)       |

$\chi^2=12.00$ ,  $df=2$ ,  $p<.01$

Table 2: Decision method by news organization type

|                              | Weekly newspapers | Daily newspapers | Television stations |
|------------------------------|-------------------|------------------|---------------------|
| Decide on case-by-case basis | 87%               | 61%              | 100%                |
| Follow a policy              | 13                | 39               | 0                   |
| 100% =                       | (39)              | (23)             | (10)                |

$\chi^2=9.20$ ,  $df=2$ ,  $p<.01$

Table 3: Number of staff members covering crime by news organization type

|                                 | All  | Weekly newspaper | Daily newspaper | Television |
|---------------------------------|------|------------------|-----------------|------------|
| One person, part-time           | 29%  | 46%              | 9%              | 10%        |
| More than one, part-time        | 42   | 49               | 26              | 50         |
| One person, full-time           | 6    | 5                | 9               | 0          |
| One full-time, others part-time | 17   | 0                | 35              | 40         |
| More than one, full-time        | 7    | 0                | 22              | 0          |
| 100% =                          | (72) | (39)             | (23)            | (10)       |

Table 4: Crimes for which news organizations name victims

|   | News organizations |
|---|--------------------|
| All crimes                                      | 1%                 |
| All crimes except sex crimes (including murder) | 6                  |
| All serious crimes/felonies (including murder)  | 17                 |
| Murder  | 29                 |
| Property crimes                                 | 6                  |
| 100% =  | (72)               |

Seventy-eight percent of the journalists interviewed cited crimes for which they would never identify the victim (See Table 5). Generally, these were crimes that historically have been seen as embarrassing or reflecting on the victim's character. Most often, they were sex crimes. Fifty-eight percent of the journalists said they will not name rape victims. Forty-four percent will not name child molestation victims.

The most common reason journalists gave for not naming victims of socially sensitive crimes was that they don't want to embarrass them or subject them to social stigma. A number of journalists also expressed a desire to protect victims from further emotional or physical harm and to show respect for their privacy. A few said people don't need to know the names of sex-crime victims.

#### INFLUENCES ON JOURNALISTS

*Type of crime.* The most noticeable influence on journalists' decision-making is the type of crime a victim suffered. When journalists were asked to rate 11 situational factors on how important they would be to the journalist in making a decision about naming a victim, the only thing journalists said was more important than the type of crime was whether the victim's family had been notified (See Table 6).

Table 5: Instances in which news organizations don't name victims

|   | News organizations |
|---|--------------------|
| Sex crimes (including rape and child molestation) | 68%                |
| Juvenile victims of any crime                     | 14                 |
| Child abuse                                       | 6                  |
| Domestic violence                                 | 4                  |
| Minor, less serious crimes                        | 3                  |
| Suicides  | 4                  |
| 100% =  | (72)               |

Table 6: Factor importance in making a decision on naming victims

|  | Average score<br>(Maximum possible=5; Minimum possible=1) |
|--|---|
| Whether the victim's family had been told about the crime.     | 4.31  |
| The kind of crime.   | 4.08  |
| Whether the victim is a minor.                                 | 3.90  |
| Whether the name came from the police or an unofficial source. | 3.88  |
| A policy established by your news organization.                | 3.86  |
| How well-known the victim was in the community.                | 3.40  |
| Whether the victim was alive.                                  | 3.35  |
| Whether the crime was one in a series.                         | 3.03  |
| A request by the victim not to use his/her name.               | 2.96  |
| Whether a suspect had been arrested.                           | 2.78  |
| Another news organization in the area using the victim's name. | 2.13  |

Understandably, journalists do not want victims' relatives to learn about their loved one's injury or death from the media.

Eighty-one percent of the journalists interviewed said the type of crime would be important or very important to them in making a decision about whether or not to name a victim. In comparison, only 17 percent said another news organization using the victim's name would be important — and that's something one would expect to be important to journalists who value competition.<sup>33</sup>

Generally, the items journalists said would be important—family notification, the type of crime, the age of the victim, the source of the name—indicate they are cautious about using victims' names. Journalists don't want to be the first to tell people of a family tragedy, they don't want to offend community mores by naming sex-crime victims, they don't want to place a child at risk, and they certainly don't want to identify a victim and then learn they had the wrong name. Of course, journalists in this study may be more cautious than those in other parts of the country. Certainly, residents of Washington's rural areas are known for having conservative, traditional values. But these journalists' values probably reflect those of journalists who work in community-oriented media in other states, and these are the journalists who are most likely to cover crime. Journalists from large national news organizations cover only a few, select, sensational crime stories, such as the William Kennedy Smith and O.J. Simpson trials.

*Sense of duty.* While journalists in this study seemed to be fairly cautious about identifying crime victims, nearly all said there were times when community members wanted or needed to know victims' names (See Table 7). Most often, journalists said people wanted to know who the victim was because it could be

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<sup>33</sup>Gans, 176-181.

someone they know. If nothing else, the name of a stranger reassures people that their friends and family members have not been harmed.

In talking about why they might name a crime victim, many journalists expressed a sense of duty to their community in regard to the information they provide. They feel obligated to give people information they need in order to take action; sometimes that includes crime victims' names. A number of journalists said people need to know who the victim was so that they can check on funeral arrangements, offer condolences to the victim's family, or if needed, offer the victim help. Other journalists thought knowing the victim's identity might have an indirect affect on people. It could raise their awareness of crime, perhaps by making the victim seem more human, or it could warn people of potential danger by letting them know someone like them had been hurt.

Not all journalists have the best intentions. A few said including victims' names in stories was important because it satisfied people's curiosity and attracted them to the newspaper. One editor said he uses victims' names because it shows people that most of the crime in his town occurs within a particular ethnic community. Editors like this one, however, are a minority in the journalistic community. The vast majority of journalists interviewed gave socially-responsible reasons for naming crime victims.

*Influence of other people.* In addition to situational factors and their sense of duty, journalists seemed to be influenced by the police and, to a lesser degree, other journalists and community members. Most journalists had discussed victim identification with other people (See Table 8). When asked why they didn't name sex-crime victims, a number of journalists said doing so would violate journalistic tradition or community standards. These responses indicate journalists are influenced by their peers.

Table 7: Value journalists think victims' names add to news stories

|   | Journalists |
|---|-------------|
| Viewers or readers may know victim.   | 38%         |
| Makes the story more complete.  | 31          |
| Makes the victim seem more real, less like a statistic.   | 21          |
| Name satisfies people's curiosity.  | 15          |
| Name helps locate the victim geographically or demographically so people can assess their own risk. | 15          |
| Name helps raise awareness of crime in the community.   | 14          |
| People may be inspired to reach out and offer support to the victim.                                | 11          |
| It provides a public record of the crime, particularly in the case of death.                        | 8           |
| 100% =  | (72)        |

Table 8: Groups with whom journalists have discussed naming crime victims

|                                 | Journalists |
|---------------------------------|-------------|
| Other journalists               | 61%         |
| Local police                    | 75          |
| District attorney or prosecutor | 59          |
| Victims' advocates              | 39          |
| Community members               | 72          |
| 100% =                          | (72)        |

Stronger evidence suggests the police influence journalists' decisions. Nearly one-fourth of the journalists surveyed said they would hesitate to use crime victims' names if the police asked them not to or if they thought it would interfere with a police investigation. In addition, journalists who discussed crime victim identification with police were more likely to make changes in their newsroom policy or practices as a

result of those discussions than were journalists who discussed the issue with other groups of people.<sup>34</sup>

This evidence supports Thomason's and LaRocque's hypothesis that journalists are being more cautious about identifying crime victims because they fear police will cut off their access to information if they are not considerate. Three-fourths of the Washington journalists who were interviewed said their local police department had withheld victims' names from them on at least one occasion. One editor noted that his paper did not make changes in its policy as much as it reacted to policy changes made by police in regard to the release of victims' names. Several other journalists noted that they used victims' names "when we can get them."

One thing that remains unclear is whether journalists are influenced by victims themselves. Little more than a third said a victim's request not to be identified would be important to them in deciding whether or not to use the victim's name. Forty-three percent said it would have some importance, and 22 percent said it would not be important at all. These figures indicate that most journalists don't think much of victims' requests for anonymity.

Yet of the 52 journalists who had actually received requests from victims not to use their names, 75 percent honored the request in at least some cases. Twenty-nine percent left the victim's name out of their stories whenever they received a request. It seems like journalists are influenced by victims in some cases, but it's difficult to separate victims' impact on journalists' decision-making from the impact of others. A few journalists said they honored victims' requests to remain anonymous, but they probably wouldn't have used those victims' names anyway because of the type of crime.

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<sup>34</sup>Forty percent of the journalists who discussed victim identification with police subsequently made changes in their policy or practices. In comparison, eight percent of those who discussed the issue with other groups of people changed their policy or practices.  $\chi^2=4.28$ ,  $df=1$ ,  $p<.05$ .

## CONCLUSION

When deciding whether or not to name crime victims in news stories, journalists focus first, and perhaps foremost, on the type of crime committed. This focus allows them to create informal guidelines to assist them in making decisions. The use of guidelines seems to have two main effects. First, it deters journalists from making gut-level decisions. It helps create consistency in decision-making within and between news organizations and lets the public and crime victims know what to expect in regard to some crime coverage. In most cases, sex-crime victims can expect to remain anonymous; most news organizations name them only in rare circumstances. Murder and assault victims should expect to be identified, however. Many journalists think it's important to include the names of victims of violent felonies in crime stories.

The second effect of journalists' focus on the type of crime could be a tendency toward rule obedience. Nearly all the journalists surveyed had some absolute rule for victim identification that was based on the type of crime. This rule may apply only to one crime, such as rape, but its existence means there are times when journalists may focus exclusively on the type of crime in deciding whether to use victims' names. From the results of this survey, one might conclude rule obedience is most likely to occur in regard to the handling of stories about sex crimes and murder. Fewer journalists have rules on how to deal with other crime victims, and their identification practices seem to vary quite a bit, particularly in regard to property crime victims.

The good news from this study, however, seems to be that most journalists try not to fall into the trap of rule obedience. When asked what situational factors they would consider in deciding whether or not to name crime victims, journalists, on average, said they would consider half of a dozen factors. Some of these had to do with journalistic standards, such as the source of the name or their newsroom policy,

but several factors that journalists considered important related to the effect identification could have on victims or their relatives.

In addition, a few journalists worked for news organizations that based their victim-identification policies on their perceived responsibility to the victims and not on the type of crime. For example, one newspaper's policy called for journalists to respect crime victims' privacy. Three news organizations said employees should not identify victims if identification could jeopardize their safety.

Journalists cannot consider only the desires of victims when deciding whether or not to use names in stories. They also have an obligation to inform the public, and in this study, most were very conscious of this duty. They hesitate to withhold any information they think might be of use to their readers or viewers. However, they do seem willing to consider the circumstances of each crime and to listen to victims' requests for anonymity. If victims make the effort to contact journalists, it seems likely that journalists will honor their requests not to use their names. This places a burden on crime victims, many of whom may not want to deal with the media after they have been traumatized, but it gives them a means of protecting their privacy, which they may not realize they have.

## Chapter 6: Rights and Responsibilities

In July 1989, then-editor Geneva Overholser wrote a column about rape victims and the press for the *Des Moines Register*. The column caused a stir within the journalistic community and was reprinted in the *New York Times* and a number of other periodicals. Like most American newspapers, the *Register* did not publish rape victims' names, and Overholser wrote:

I understand why newspapers tend not to use rape victims' names. No crime is more horribly invasive, more brutally intimate. In no crime does the victim risk being blamed, and in so insidious a way: She asked for it; she wanted it. Perhaps worst of all, there's the judgment: She's damaged goods—less desirable, less marriageable.<sup>1</sup>

But in withholding victims' identities from the public, Overholser continued, newspapers allow the prejudice against rape victims to go unquestioned. "Editors do not hesitate to name the victim of a murder attempt," she wrote. "Does not our very delicacy in dealing with rape victims subscribe to the idea that rape is a crime of sex rather than the crime of brutal violence that it really is?"<sup>2</sup> Comparing the stigma of rape to that of homosexuality and AIDS, Overholser said that only by encouraging rape victims to come forward and tell their stories would journalists be able to educate the public and reduce the crime's stigma.

Three weeks after she read Overholser's column, Grinnell, Iowa, resident Nancy Ziegenmeyer contacted Overholser and volunteered to tell her story about being raped. During the next seven months, *Register* reporter Jane Schorer interviewed Ziegenmeyer, her family, her friends and the people who handled her case as it progressed through the legal system. In February 1990, the *Register* ran a series of articles about the rape and its aftermath. In a column that accompanied the first story, Overholser acknowledged that the newspaper could have recounted Ziegenmeyer's

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<sup>1</sup>Geneva Overholser, "Why Hide Rapes?" *New York Times*, 11 July 1989, sec. A, p. 19.

<sup>2</sup>Ibid.

ordeal in a less offensive manner—no graphic details of the rape, fewer intimate details of her thoughts and feelings. But, Overholser wrote:

We decided against all those choices. I am convinced that we have a unique opportunity to make a difference. Not with salacious details used gratuitously, but with the truth. I concluded that were I to meet Ziegenmeyer's courage with my timidity, shy away from offending readers, and render her story more palatable, I would be missing a chance to inform and to move readers in a meaningful way.<sup>3</sup>

The series won a Pulitzer Prize and inspired other journalists to reexamine the way they write about sex crimes and victims. At present, cooperation between journalists and crime victims, such as that displayed by Overholser, Schorer and Ziegenmeyer, seems to be the best way to inform the public about crime's impact on society without invading individuals' privacy. These partnerships provide journalists with information they could not get from court testimony and public records. Victims acquire more control because they can decide whether or not they want to make their stories public. Cooperation may not be the answer in all situations. There may be times when the public interest demands journalists write about a victim who wants to remain anonymous. But cooperation reconciles journalists' and victims' interests with the public interest in a way the law cannot and current journalism ethics do not.

### LEGAL RIGHTS

A review of judicial decisions in regard to the identification of crime victims makes it clear that victims have little or no means of recourse through the judicial system. The U.S. Supreme Court has said news organizations cannot be punished for publishing truthful, legally-obtained information.<sup>4</sup> They cannot be punished for publishing information obtained from public proceedings or documents, and they cannot be punished for publishing newsworthy information.<sup>5</sup> Given these broad

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<sup>3</sup>Geneva Overholser, "A troubling but important set of stories," *Des Moines Register*, 1990 reprint, p. 16.

<sup>4</sup>*The Florida Star v. B.J.F.*, 109 S.Ct. 2603 (1989).

<sup>5</sup>*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Jones v. Herald Post Co.*, 16 S.W.2d 972 (1929); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989).

defenses, it seems unlikely the courts will ever hold news organizations liable—either civilly or criminally—for publishing victims' names and thus invading their privacy.

Although a few lower-level courts have held news organizations responsible when publication of victims' identities results in threats against their lives, that does not seem to reflect on the judiciary's overall dedication to protecting the news media's First Amendment rights. The situations in which news organizations have been found negligent for publishing victims' names are few, extreme and unreflective of most journalists' and victims' experiences.<sup>6</sup>

#### THE PRESS AS PROTECTOR

*Watchdog on government.* Legal scholar Henry Abraham has said the courts are the last protectors of American civil liberties.<sup>7</sup> Certainly, they are the protectors of freedom of speech and press. They will allow the legislative and executive branches to make provisions for keeping victims' identities confidential, but they will not allow the government to restrict press access to information too much nor will they permit punishment for publication. Freedom of the press, the courts have said, provides a necessary check on government.

The authors of the Bill of Rights felt secret government was dangerous government. Having some experience with the British system, which allowed punishment for criticism of government and, during some periods, secret trials, colonial Americans feared the new nation's federal government could become equally oppressive. The American system gave citizens the power to vote government officials out of office if they failed to represent the people, but citizens needed information about government action and public issues in order to vote wisely. By guaranteeing freedom of speech and press, the authors of the Bill of Rights hoped to enable Americans to

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<sup>6</sup>*Hyde v. City of Columbia*, 637 S.W.2d 251 (1982); *Times Mirror Co. v. Superior Court*, 244 Cal.Rptr 556 (Cal.App. 4 Dist. 1988).

<sup>7</sup>Henry J. Abraham, *The Judiciary: The Supreme Court in the Governmental Process*, 5th ed. (Boston: Allyn and Bacon, Inc., 1980), p. 53.

become informed about governmental affairs, discuss them openly and reach a consensus about how public issues should be handled. In 1787, Thomas Jefferson wrote to a friend, "The basis of our governments being the opinion of the people, the very first object should be to keep it right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate to prefer the latter."<sup>8</sup>

*Guardians of justice.* The nation's founders objected generally to government suppression of speech. In addition, they had a particular interest in fostering openness in the judicial system. Many were familiar with the Star Chamber, a British court that held secret, political trials during the reigns of the Tudors and early Stuarts.<sup>9</sup> During the colonial period, the courts were no less abusive than other parts of the government, and in some ways, may have been more so. Legal scholar William Nelson explains, "Because there was no modern bureaucracy, the judiciary and officials responsible to it (e.g., sheriffs) were the primary link between a colony's central government and its outlying localities. The judiciary alone could coerce individuals by punishing crimes and imposing money judgments."<sup>10</sup> The Sixth Amendment guarantee of a public trial was intended to prevent miscarriages of justice, such as those that occurred in British courts.

When accusations are made in secret, they gain the power of rumor. People tend to accept rumors as true—or at least as having some truth—because they cannot evaluate the source and the information on which the rumor is based. A necessary part

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<sup>8</sup>Thomas Jefferson, "Letter to Edward Carrington," in *Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories*, ed. Leonard W. Levy (New York: The Bobbs-Merrill Company, Inc., 1966), 333.

<sup>9</sup>Letter from the *New York Gazette*, in *Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories*, ed. Leonard W. Levy (New York: The Bobbs-Merrill Company, Inc., 1966), 108-109; Cora L. Scofield, *A Study of the Court of Star Chamber* (New York: Burt Franklin, 1900); Frederick S. Siebert, *Freedom of the Press in England 1476-1776: The Rise and Decline of Government Control* (Urbana, Ill.: University of Illinois Press, 1965).

<sup>10</sup>William E. Nelson, "The Jury and Consensus Government in Mid-Eighteenth-Century America," in *The Bill of Rights: Original Meaning and Current Understanding*, ed. Eugene W. Hickock, Jr. (Charlottesville: University Press of Virginia, 1991), 333.

of each suspect's criminal defense is the questioning of prosecution witnesses and the calling into question of these witnesses' veracity and knowledge. If court officials and jurors were able to accept accusations without question then the execution of justice would be no more than a witch hunt. Suspects' guilt would be presumed, and the only mission of law-enforcement officials would be to extract a confession or to pass sentence. The Sixth Amendment forces court officials and jurors to listen to evidence on defendants' behalf by ensuring that such evidence will be presented publicly. It is assumed that members of the public will raise a hue and cry if defendants are not treated fairly by the legal system.

Some legal scholars and jurists also believe the First Amendment fosters justice by encouraging and protecting coverage of the legal system. Justice Harry Blackmun once wrote:

It has been said that publicity "is the soul of justice." And in many ways it is: open judicial processes, especially in the criminal field, protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts. Publicity is essential to the preservation of public confidence in the rule of law and in the operation of courts.<sup>11</sup> (citation omitted)

In many cases, the public need not know crime victims' identities or personal information about them in order to understand the investigation, prosecution and sentencing of a criminal. But as U.S. Court of Appeals Judge Patrick Higgenbotham said in *Ross v. Midwest Communications*, there are times when knowledge of the victim's identity can help sway public opinion.<sup>12</sup> In *Ross*, it seemed likely the wrong man was convicted of rape. To rectify that wrong, the television station needed to convince the public the man's conviction was unjust. Details of the rape and the victim's identity, in the court's opinion, lent credibility and power to the television station's documentary and spurred people to act on the prisoner's behalf. Instances of

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<sup>11</sup>*Gannett v. DePasquale*, 443 U.S. 368, 448 (1979).

<sup>12</sup>*Ross v. Midwest Communications, Inc.*, 870 F.2d at 274-275.

potential injustice, like that in *Ross*, are the ones the founding fathers were concerned about when they guaranteed the rights to free speech, free press and a public trial. They knew the government would make mistakes, and informed citizens would be needed to correct miscarriages of justice.

### FREEDOM OF THE PRESS

*The public interest.* The public interest in having a citizenry that is informed about the operations of the criminal justice system makes it difficult for the courts to justify limiting the publication of truthful information about crime, criminals, victims and issues of justice. As noted in the first chapter, judges weigh the public interest in being informed against crime victims' right of privacy. In almost all cases, they find the public interest outweighs the victims' right. Former journalist and professor Don Pember explained in his study of privacy law:

Jurists, imbued with the belief that an informed society should take precedence over the rights of the individual, especially when there is a great public interest involved, have worked to foster the freedom of the press. The law of privacy does not provide a remedy for every annoyance that occurs in daily life. Even on the infrequent occasions when the media publish material that is in bad taste, the courts generally will support the right of the editors to decide what is newsworthy.<sup>13</sup>

The government may protect crime victims' privacy by trying to keep their names from becoming public. Law enforcement agents may delete victims' names from crime reports. Other service agencies and some courts will not use victims' names in their records. In some cases, usually involving child victims of sex crimes, judges may close victims' testimony and require attorneys to use a pseudonym in court. These limited measures tend to be fairly effective, particularly in run-of-the-mill cases that don't receive much media attention.

If limited measures are not effective, however, the courts will not permit the government to take more drastic action. Laws that prohibit the publication of crime

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<sup>13</sup>Don Pember, *Privacy and the Press* (Seattle: University of Washington Press, 1972), 243.

victims' names, or other information about them, constitute prior restraint, and the First Amendment was intended first and foremost to prohibit prior restraint.<sup>14</sup> Florida, Georgia and South Carolina forbid the publication of rape victims' names, but the courts have repeatedly found these states' laws unconstitutional and unenforceable.<sup>15</sup>

The First Amendment also makes punishment after publication unacceptable in most cases. In *State v. Globe Communications Corp.*, the Florida court of appeals said the difference between prior restraint and punishment after publication was largely semantic.<sup>16</sup> Both measures discourage the press from doing its job in reporting on issues of public concern. Thus, in order to punish the press for publishing truthful, legally-obtained information, the government must show "the highest form of state interest."<sup>17</sup> The court doesn't say what that state interest might be, but it seems clear that as yet, the government has not articulated a state interest important enough to meet the court's criteria.

Finally, the government may not grossly inhibit the press's or the public's ability to gather information about the criminal justice system. Judges cannot unilaterally close trials or seal records in order to protect victims' identities.<sup>18</sup> They may close a portion of a trial or redact some documents if the state can prove such a measure is needed to protect victims' privacy or safety, but the state bears a heavy burden of proof. Judges assume a strong public interest in the open administration of justice. U.S. Supreme Court Chief Justice Warren Burger justified that assumption by writing:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure

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<sup>14</sup>*Near v. Minnesota*, 283 U.S. 697 (1931); Martin Shapiro and Douglas S. Hobbs, *The Politics of Constitutional Law* (Cambridge, MA: Winthrop Publishers, Inc., 1974), 377.

<sup>15</sup>*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *State v. Globe Communications Corp.*, 648 So.2d 110 (Fla. 1994)

<sup>16</sup>*State v. Globe Communications Corp.*, 622 So.2d 1066, 1075 (Fla.App. 4 Dist. 1993).

<sup>17</sup>*Ibid.*

<sup>18</sup>*Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205 (1993).

knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>19</sup>

## PROBLEMS WITH COMPLIANCE

The main problem courts have faced in dealing with news media's identification of crime victims is non-compliance with established law. When courts issue a decision, all lower courts within the same jurisdiction should follow that precedent.<sup>20</sup> But in some cases involving news media's identification of crime victims, trial and lower appellate courts have allowed victims to pursue privacy suits against news organizations even though the U.S. Supreme Court has said the First Amendment protects news organizations in such cases.<sup>21</sup> In addition, victims have pursued such suits even when courts at every level ruled against them.<sup>22</sup>

The U.S. Supreme Court must take some responsibility for these judicial challenges. When the high court issues decisions that avoid certain issues or are ambiguous, it increases the likelihood of further litigation. Participants in a particular controversy may think they can persuade lower courts to adopt rulings more favorable to them, or they may attempt to force the high court to reconsider its position.<sup>23</sup> Thus, the U.S. Supreme Court's reservation of the question of whether news organizations can *ever* be punished for publishing rape victims' names gives crime victims encouragement.

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<sup>19</sup>*Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508 (1984).

<sup>20</sup>Henry J. Abraham, *The Judicial Process*, 4th ed. (New York: Oxford University Press, 1980), 238.

<sup>21</sup>*Doe v. American Broadcasting Companies*, 543 N.Y.S.2d 455 (A.D. 1 Dept. 1989); *Dorman v. Aiken Communications, Inc.*, 398 S.E.2d 687 (S.C. 1990); *Macon Telegraph Publishing Co. v. Tatum*, 430 S.E.2d 18 (Ga.App. 1993).

<sup>22</sup>*Doe v. Sarasota-Bradenton Florida Television*, 436 So.2d 328 (Fla.App. 2 Dist. 1983); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471 (1995).

<sup>23</sup>Stephen L. Wasby, "The Pure and the Prurient: The Supreme Court, Obscenity, and Oregon Policy," in *The Supreme Court as Policy-Maker: Three Studies on the Impact of Judicial Decisions*, ed. David H. Everson (Carbondale, IL: Southern Illinois University Public Affairs Research Bureau, 1968), 105-106.

Slightly more unusual than such judicial non-compliance is Florida's, Georgia's and South Carolina's legislatures' insistence on retaining criminal laws that forbid the publication of sex-crime victims' names. Florida's legislature reenacted its law after its own state courts declared it unconstitutional.<sup>24</sup> South Carolina officials periodically use their law to harass newspapers.<sup>25</sup> Legal scholar Stephen Wasby claims legislators propose policies "more in conformity with the perceived sentiment of interested publics than with Supreme Court opinions when that sentiment is strong and differs from the opinions."<sup>26</sup> It appears that while rape victims and their supporters have been only somewhat effective in shaping journalists' policies, they have been effective—at least in these three states—in shaping public policy on journalism. Legislators in these states may believe the courts will reverse themselves if repeatedly presented with opportunities to endorse measures protecting victims' privacy.<sup>27</sup> Or perhaps they hope their willingness to press the courts on the issue will satisfy victims and their supporters.

The U.S. Supreme Court's decisions have been ignored by lower courts, the government and the public in regard to other controversial issues such as desegregation and flag salutes in public schools.<sup>28</sup> Eventually, however, the court's decisions and public behavior were reconciled. The executive branch enforced desegregation. The high court changed its mind in regard to flag salutes, eventually ruling public schools could not require students to salute.<sup>29</sup> Legal scholar Henry Abraham says the U.S. Supreme Court—and lower tribunals—must eventually fall in line with each other and with public opinion. Courts cannot enforce the law; they can only persuade people to obey. Therefore, Abraham writes:

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<sup>24</sup>FLA. STAT. ANN. § 794.03 (1995).

<sup>25</sup>"Two Arrested for Naming Rape Victim," *News Media and the Law*, Summer 1992, 26.

<sup>26</sup>Wasby, 104.

<sup>27</sup>Wasby, 103.

<sup>28</sup>Abraham, *The Judicial Process*, 238-245.

<sup>29</sup>*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

*In the short run*, the [Supreme] Court has often been out of step with that law-making majority, but there it either succeeded in its short-run educational mission or it "came around" in the long run; and in the appropriate words of Edwin S. Corwin, "the run must not be too long a run, either!"<sup>30</sup>

It still seems unclear whether the U.S. Supreme Court's decisions conflict with public opinion on the issue of naming crime victims in the news. In 1991, 77 percent of Americans included in a *Newsweek* poll said they did not think the news media should publish rape victims' names.<sup>31</sup> Believing the news media should not publish rape victims' names, however, is not the same as believing the news media should be penalized for publishing those names. In addition, public sentiment about rape victims may not reflect public opinion on the issue of naming crime victims generally.

Given the uncertain nature of public opinion, the fact that few Americans are directly affected by the news media's identification of crime victims, the relatively low level of public concern in comparison to other social issues, and the critical role of free speech in a democracy, it seems unlikely the U.S. Supreme Court will change its position on this issue. The court threw victims a bone by not declaring outright that freedom of the press outweighs their right to privacy.<sup>32</sup> The court's restraint may have encouraged victims to pursue their privacy claims. If so, victims and their supporters made too much of that token acknowledgment. The U.S. Supreme Court has given the press near immunity in regard to publishing false information about public issues.<sup>33</sup> It is unlikely to give less protection to the publication of truthful information.

### ETHICAL RESPONSIBILITIES

Crime victims' pursuit of legal protection for their privacy is not surprising since journalists only recently gave any thought to the way they cover crime victims.

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<sup>30</sup>Abraham, *The Judiciary*, 203.

<sup>31</sup>"Naming Names," *Newsweek*, 29 April 1991, 26.

<sup>32</sup>*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>33</sup>*New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

As discussed in the fourth chapter, journalists became interested in ethics in the 1960s, when it became clear that public trust in—and attention to—the media was declining. Only in the 1970s, when victims attained some legal rights, did journalists begin to reconsider their policies on identifying rape victims. It took nearly two more decades, a Pulitzer Prize, and public outcry over the coverage of the Big Dan's and William Kennedy Smith trials to generate widespread questioning of identification practices within the journalistic community. Today, many journalists still believe their other responsibilities, such as informing the public and maintaining their credibility, are more important than protecting victims' privacy.

#### CURRENT PRACTICES

*Sex-crime victims.* Most journalists divide crime victims into two classes. One class contains sex-crime victims, the other contains victims of all other crimes. The women's and victims' rights movements educated journalists about sex-crime victims.<sup>34</sup> Most journalists believe these victims will suffer social stigma, including embarrassment, harassment and ostracism, if they are named in a news story. Journalists also think that in most cases the potential harm sex-crime victims might suffer as a result of identification outweighs the public good that might come from naming them.

Some journalists disagree with the majority, of course. They believe that by hiding rape victims' identities, journalists perpetuate the stigma attached to the crime.<sup>35</sup> Keeping victims' names secret implies victims have reason to be ashamed. These journalists believe the only way to reduce the stigma attached to sex crimes is to treat all victims alike. A handful of news organizations, such as the *Shelton-Mason County Journal*, have done this. More commonly, news organizations have named victims in

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<sup>34</sup>Joseph F. Pisani, "Is it time for us to start naming rape victims?" *ASNE Bulletin*, July/August 1991, 14.

<sup>35</sup>Geneva Overholser, "Why Hide Rapes?" 19; Henry Gay, "It's time to right the wrong," *Shelton-Mason County Journal*, 13 June 1985, p. 4.

select cases where they gave permission or there seemed to be public interest in knowing their names.<sup>36</sup>

Children are the only other identifiable group of victims that journalists protect. Journalists who were surveyed as part of this study said they don't use child victims' names, or are cautious about doing so, because children are vulnerable, impressionable and more likely to be scarred by publicity and others' remarks. A few journalists said they thought it was illegal for them to name child victims. It is not, but many states take measures to keep child victims' names from the media.

*Other crime victims.* Journalists feel free to name adult victims of crimes other than rape. As a practical matter, however, they do not name most crime victims. Most victims suffer property crimes or other minor wrongs. Journalists usually only cover felony or violent crimes. In high-crime areas, they may not even cover all violent crimes. Thus, most crime victims will be ignored by the media.

The few who find their names in the news, however, are probably those who have been most threatened and are most vulnerable. In murder cases, identification is not an issue. The victim cannot be harmed further. But in assault or kidnapping cases, identification could jeopardize the victim's safety if the perpetrator has not been arrested. Most journalists say they consider such situational factors when deciding whether or not to name a crime victim, but a significant number do not. One third of the Washington state journalists who were surveyed as part of this study said whether or not a suspect had been arrested would have no bearing on whether they named a crime victim.

## ETHICAL JUSTIFICATIONS

*Reasons for naming victims.* Journalists are trained to gather information and report it. They learn that the more information they collect, the more details they

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<sup>36</sup>For example, see Jim DeFede, "Against all the rules," *FineLine*, April 1990, 3.

include in their stories, the more praise they will receive for their work.<sup>37</sup> Some, perhaps many, journalists give little thought to naming crime victims in their stories. They assume they should use all the details they have gathered in reporting. Later, they fall back on traditional journalistic rhetoric to justify their actions. The name makes the story complete. It provides a public record of the event. And finally, people want to know the name, and it's journalists job to tell them what they want to know.

Other journalists give more reflective answers when asked what value victims' names have for the public. These journalists say the name helps raise awareness of crime; it makes the victim seem like a person and not a statistic. The name tells people if someone they know has been hurt and enables them to offer support to the victim or the victim's family. Finally, the name may help readers form a picture of the victim and decide whether they and the victim have common characteristics that may put them in danger.

*Shortcomings in journalistic ethics.* All of these reasons justify using victims' names in some circumstances. But, some critics say, they do not justify the routine use of victims' names. Ethicist and media critic Deni Elliott wrote:

Most of life's personal tragedies—diagnosis of a serious or terminal disease, getting fired from a job, divorce, death of a family member, most traffic accidents—pass without personal pain magnified by media attention. And, the information that a particular person has been hurt doesn't do much to help us govern ourselves.

Despite popular belief, we don't need names to get the information that homes in our neighborhood are being burglarized and that we're not safe on the streets at night. And, naming the victim doesn't help us understand the charge any better.<sup>38</sup>

By segregating crime victims, Elliott says, journalists have shown the flaws in their reasoning. They report on rape without using victims' names and feel their stories are complete. Why should the absence of other crime victims' names affect journalists'

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<sup>37</sup>Brian S. Brooks, George Kennedy, Daryl R. Moen, and Dan Ranly, *News Reporting and Writing*, 5th ed. (New York: St. Martin's Press, 1996), 90-93.

<sup>38</sup>Deni Elliott, "What to consider when deciding answer. . . That is the question," *FineLine*, April 1990, 8.

estimation of a story's quality? Elliott explains, "If the name of the victim is incidental to the charge and to the pattern of sex crime in the neighborhood, then it is incidental for other kinds of assault as well."<sup>39</sup>

*The future in ethics.* Saying that more journalists are adopting Elliott's viewpoint and reconsidering their policies on victim identification would provide a nice, conclusive end to this study. It would give victims hope, and reassure the public that journalists are indeed sensitive people. Such a conclusion, however, is impossible to make.

During the 1970s and 80s, journalists reconsidered how they covered crime victims. Nearly all stopped using victims' addresses. Many stopped using their names.<sup>40</sup> When asked about how they identify crime victims and why they do so, most journalists display a great deal of concern for victims' privacy as well as a willingness to consider victims' individual circumstances and to forego using their names if it would place them in danger. Washington journalists said they have not used victims' names in most instances where victims contacted the newspaper or television station and asked not to have their names made public. In short, most journalists are fairly sensitive to victims' concerns. They may occasionally act thoughtlessly when rushing to cover a story, but if given time to think and prompted to do so, journalists seem willing to consider the matter from victims' viewpoints.

This level of open-mindedness may be as much as victims can expect from journalists. In the past few years, journalists have come to question whether they are doing their job by withholding victims' names from the public. In asking this, journalists are not concerned much with traditional reporting standards that dictate that all details be included in stories. Today, journalists admit they select details in writing

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<sup>39</sup>Ibid.

<sup>40</sup>Rita Wolf, Tommy Thomason, and Paul LaRocque, "The Right to Know vs. the Right of Privacy: Newspaper Identification of Crime Victims," *Journalism Quarterly* 64(2/3): 503-507 (1987).

their stories.<sup>+1</sup> Instead, journalists are asking whether they allow the public to retain its biases by not forcing it to recognize the way real people are victimized. Former editor and current *Washington Post* ombudsman Geneva Overholser has expressed this new school of thought most clearly in her writings about coverage of rape victims.<sup>+2</sup>

During her tenure as editor of the *Des Moines Register*, Overholser did not institute a policy of naming rape victims. While she believed naming victims was the way to educate the public and eradicate the stigma of the crime, she was "unwilling to sacrifice today's unwilling victims for long-term good."<sup>+3</sup> A few Washington state journalists volunteered the same opinion when they were questioned about their victim-identification policies. They said they thought rape victims should be named like other crime victims, but they did not want to violate current community standards. They said they hoped journalists soon would decide to bring the issue into the light and name victims.

In the United States, the press's role in society and relationship to the government has been defined first and foremost by the idea that the public needs to know . . . nearly everything. One might persuade journalists to withhold certain information that could harm innocent people, but one cannot expect them to routinely withhold information without question. Michael Gartner, a newspaper editor and president of NBC News during the William Kennedy Smith trial, once wrote: "we are in the business of disseminating news, not suppressing it. Names and facts are news. They add credibility to stories and give readers or viewers information they need to understand issues. Accordingly, my inclination is always toward telling the public all

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<sup>+1</sup>Carl Sessions Stepp, *Editing for Today's Newsroom: New Perspectives for a Changing Profession* (Hillsdale, NJ: Lawrence Erlbaum Associates, Publishers, 1989), 83; Joe Holley, "Should the coverage fit the crime," *Columbia Journalism Review*, May/June 1996, 30.

<sup>+2</sup>Geneva Overholser, "Covering rape: A time of transition," *ASNE Bulletin*, October 1990, 13-14; Geneva Overholser, "We should not have to keep hiding rape," *ASNE Bulletin*, November 1989, 32.

<sup>+3</sup>Overholser, "We should not have to keep hiding rape," 32.

the germane facts that we possess."<sup>44</sup> Gartner takes an extreme stand on the issue; his newspaper names all crime victims. Most journalists still observe the accepted practice of not naming rape victims, but in asides and off-the-record comments, many express agreement with Gartner's basic idea. The practice of withholding information from the public makes them uncomfortable.

### CONCLUSION

This study started with three basic questions. When do journalists name crime victims? What is their legal right to do so? How do they justify their practices? It seems impossible to find a conclusive answer to the first question. Journalists have a wide range of policies and practices. Generally, one can say journalists name crime victims when the crime and injury caused by it is severe enough to warrant public attention. These instances include murders, violent assaults and deaths caused by drunk driving. Journalists tend not to name crime victims if they think it will embarrass them or subject them to harassment, as in the case of rape.

The second question can be answered more conclusively. The First Amendment gives journalists nearly absolute freedom to publish crime victims' names. The courts have said such freedom is essential to the administration of justice. Details of crime and punishment must be made public so the public knows the criminal justice system works. The only time courts seem willing to restrict the press's freedom is when a criminal suspect who does not already know the victim's identity is still at large. The First Amendment does not protect journalists who jeopardize citizens' lives.

Answering the third question presents the most problems. Journalists justify naming—or not naming—crime victims in a variety of ways. Some journalists' reasons are reflective, analytical and indicative of a desire to serve the public while respecting victims' needs. Others' reasons reflect little serious thought. Most

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<sup>44</sup>Michael Gartner, "Commentaries: Panel Discussion," 61 *Fordham Law Review* 1133 (1993).

journalists seem to fall somewhere between the two extremes. They want to fulfill their duty to inform the public, and they want to show care for the people in their community who become the subjects of news stories. Little regarding this issue seems settled in journalists' minds. Only two decades ago, journalists, who had a centuries-old tradition of naming crime victims, were asked to stop naming certain classes of victims. Then, almost as soon as journalists became accustomed to this practice, industry leaders asked them to reexamine their policies and once again uniformly name crime victims. As described in the introduction to this chapter, some journalists, such as Overholser, have taken a middle road and worked with crime victims to produce compelling stories about the effects of crime. Most journalists, however, cover crime on a deadline. They sometimes have to make decisions before they can get victims' input.

In discussing crime-victim identification, victims and their advocates have an advantage over journalists. Their only concern is for their interests. They can devote all their energy to producing reasons why journalists should not name crime victims. Journalists, on the other hand, have obligations to their subjects, their news organizations and the public. Most journalists acknowledge a duty to portray their subjects in an accurate and fair manner. In addition, many journalists say they feel morally obligated to respect their subjects' privacy—as long as that doesn't interfere with their other obligations. Journalists must balance their consideration for their subjects with their duty to inform the public of issues that affect it or its members. They also must consider the effect of their actions on their news organizations. If journalists don't ask the hard questions and publish the gory details when their peers do, will their hesitancy make their news organizations look inept or soft? Will the public trust a news organization if it knows the organization's employees have a tendency to self-censor or selectively print information on crime?

The problem with many journalists' decision-making is not that they don't consider victims' needs or their responsibilities to the public. They do. As discussed in chapter five, most journalists articulate socially-responsible reasons for both naming crime victims and, in certain situations, withholding victims' names. The problem seems to be that journalists often have to make fairly quick decisions based on little information. Journalists know the arguments in support of and in opposition to naming crime victims, but these arguments are fairly abstract.

Discussions of privacy, the right to know, credibility and social stigma revolve around intangible concepts that are supported by anecdotal evidence. For example, victims' advocates and lawyers tell journalists that if they publish rape victims' names, fewer victims will report the crime. But no one has more than anecdotal evidence to support this claim. A few surveys have been done in which women are asked if they would report a rape if they knew their name would be made public, but these surveys only show what people say they would do.<sup>45</sup> Traumatized individuals often act in unexpected ways. In fact, Mason County, Washington, where the *Shelton-Mason County Journal* regularly publishes the names of sex-crime victims, has a higher reporting and conviction rate for sex crimes than other counties in its region.<sup>46</sup>

#### FUTURE RESEARCH

Scholars who are interested in the issue of crime-victim identification need to give journalists more information on which to base their decisions. Researchers need to find out whether a significant number of people do not report crimes because they fear publicity. This requires a random-sample survey of the population. Studies of women who turn to rape trauma centers or battered women's shelters reflect the

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<sup>45</sup>Janet Swim and Eugene Borgida, "Public Opinion on the Psychological and Legal Aspects of Televising Rape Trials," *Journal of Applied Social Psychology* 17(5): 507-518 (1987); George Gallup Jr. *The Gallup Poll: Public Opinion 1991* (Wilmington: Scholarly Resources, Inc., 1992), 251.

<sup>46</sup>The *Journal* used reporting and conviction data from the Washington Association of Sheriffs and Police Chiefs to prepare a report on this issue. Sean Hanlon, "Our day in court," *Shelton-Mason County Journal*, 3 December 1992, p. 11.

experience of only a small subset of the population. They do not involve male crime victims, female victims of crimes other than rape or domestic violence, or crime victims who do not seek help from any agency.

Scholars should also explore in more depth how media attention affects crime victims. Journalism professor and scholar Helen Benedict does this to a limited degree in *Virgin or Vamp*, but her work relies largely on second-hand accounts as two of the victims she writes about have died.<sup>47</sup> To date, most of the educational efforts designed to teach journalists how their work affects the victims they cover have been sessions at conferences or workshops in which a few victims tell journalists their personal stories. These lectures and discussions are helpful, but they don't provide an overall picture of how media attention affects victims. Nor do they provide a lot of depth or diversity; the sessions usually involve rape victims or murder victims' relatives and last about an hour. A systematic study involving multiple victims of a variety of crimes would give journalists a broader perspective. Joan Deppa's book on how media attention affected relatives of victims of the Pan Am 103 explosion could provide a model for this kind of research.<sup>48</sup> Deppa and her research team repeatedly interviewed family members and friends of victims, witnesses, rescue workers, and corporate and government officials. Their report not only shows how media attention affected survivors but how survivors' perceptions of the media changed over time and how their perceptions differed from those of the journalists covering them.

In addition, scholars need to give some attention to journalists' other masters. How does journalists' identification—or non-identification—of crime victims affect their news organizations and the public? Washington journalists seemed to believe their readers and viewers not only wanted to know crime victims' names but that their

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<sup>47</sup>Helen Benedict, *Virgin or Vamp; How the Press Covers Sex Crimes* (New York: Oxford University Press, 1992).

<sup>48</sup>Joan Deppa, Maria Russell, Dona Hayes and Elizabeth Lynne Flocke, *The Media and Disasters: Pan Am 103* (New York: New York University Press, 1994).

thoughts and actions were influenced by this knowledge. Yet 64 percent of Americans surveyed in 1991 said they approved of news organizations' practice of withholding rape victims' names from the public.<sup>49</sup> No research seems to exist on what effect knowing a crime victim's name has on members of the public. Does it really raise their awareness of crime and prompt them to protect themselves? Are they more likely to treat victims with sympathy? Do they have more trust in news organizations that provide names or do they think these news organizations are sensational and insensitive? Public opinion polls that quiz people about coverage of celebrated cases, such as the William Kennedy Smith trial, provide some information but not nearly enough. Celebrated crimes are written about extensively, and media consumers become familiar with the people involved. Most crimes are written about—at the most—three times. News organizations do a story when the crime occurs, when an arrest is made and when a verdict or plea is entered. Most newspaper readers or television viewers do not become familiar with the victim or the suspect. Scholars should find out whether victims' names matter to people in these standard situations.

It's easy to talk about crime-victim identification in regard to heavily-publicized trials, and it's even easier to talk about crime-victim identification in regard to celebrated sex-crime trials. One can decry the media's invasiveness, tackiness, stupidity and insensitivity. *The New York Times's* profile of Patricia Bowman, discussed in the first chapter, typifies the worst media coverage of crime victims. It's easy to focus on that story and say journalists should not name rape victims because they cannot write about victims without tainting their reputations and subjecting them to harassment.

But journalists and journalism scholars need to stop looking at the easy cases. Most crime stories do not involve rape. Most crime stories are not blatantly biased or sensational. In fact, many crime stories do not include victims or refer to them only

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<sup>49</sup>Gallup, 251.

tangentially. Reporters most often focus on the perpetrators of crime. Has a suspect been arrested? What evidence do the police have? Is a guilty plea or conviction likely? Given this bias in news coverage, journalists and scholars need to ask whether referring to someone as "the victim" implies guilt on the part of the person charged with the crime. Does it diminish defendants' ability to get a fair trial? Does granting victims anonymity encourage people to make false accusations? It's this author's belief that anonymity does not encourage false accusations, but again, that is an assumption made without evidence. Certainly, the effect of victim identification—or lack of identification—on criminal defendants' ability to get fair treatment from society and the judicial system needs to be studied.

#### FINAL ANALYSIS

The discussion of journalists' identification of crime victims seems to have reached an impasse. Journalists, lawyers, crime victims and advocates have been critiquing journalists' practices from a moral standpoint. They talk about privacy and the public interest, and depending on which concept they value more, they approve or disapprove of current practices. Values are difficult to change. It's unlikely people who place a high value on privacy will ever be convinced that public identification of crime victims is worthwhile, and it's unlikely that people who value the free flow of information will ever believe secrecy is in the public interest. Therefore, participants in this discussion seem to have three options. They can continue to debate the same points, making little real progress in their discussion. They can agree to disagree, or they can change the terms of the discussion.

Changing the terms of the discussion is the most promising option—in this author's opinion—because it could result in the development of standards for covering crime victims. Given journalists' moral obligation to monitor the criminal justice system and inform the public of important issues and events, one cannot expect them to

self-censor in order to promote some amorphous value such as privacy. Few people can distinguish private and public issues with any kind of consistency. Few can explain what tangible good comes from privacy or what harm comes from its loss. At best, people provide anecdotal evidence of emotional suffering due to invasions of privacy, but each of these stories can be matched with a story in which there is a compelling public interest in knowing "private" information. People who are concerned about journalists' identification of crime victims need to focus on the tangible outcomes of journalists' work and make recommendations for industry standards based on those outcomes.

As discussed in the previous section, little is known about the effects of journalists' work, and more information is needed before any recommendations can be made on how journalists should handle victim identification. But, hypothetical examples can be used to explain how research could result in outcome-based standards for the practice of journalism. For example, if researchers could show that burglary victims whose names and addresses were published in their local newspaper were more likely to be robbed again than victims whose names and addresses were not published, then journalists might stop publishing those victims' names and addresses. Instead, journalists could report the neighborhood or block in which a burglary occurred. Or, researchers might find that children who have been publicly identified as victims of sex abuse are more likely to have emotional or eating disorders when they grow up. Journalists might then decide they do not wish to identify sex-crime victims under the age of sixteen or eighteen, and they may also decide not to name suspects in sex-crime cases involving children if the victim will be identified by his or her relationship to the suspect. Some journalists already take these precautions, but they do it without solid evidence of harm. Journalists' current policies are based to a great extent on their individual notions of right and wrong. Evidence of the harm or lack of harm caused by

the publication of crime victims' names would allow journalists and journalism scholars to recommend *and justify* industry-wide standards.

Outcome-based standards also would prevent journalists from engaging in too much self-censorship. Currently, some journalists publish the names of few—or no—crime victims. They have decided to err on the side of caution in respecting victims' privacy. But many of these victims may not mind if their name is published, and they may not be harmed by such publication. Research on the effects of victim identification in the news would help journalists narrowly define the categories of victims who need to remain anonymous.

Journalists have been fairly content to conduct their business with relatively little contact with the communities they cover. Periodically, news organizations survey their readers or viewers to find out what people like or dislike in the news. Editors and producers know how many people are interested in sports, business news and celebrity profiles. They know how many people regularly read or watch stories about government, international affairs and health. But journalists know relatively little about how the news touches people's lives. They don't know whether stories on recycling convince people to adopt environmentally-friendly behaviors or whether stories on gay rights change people's attitudes. And journalists do not know much about how crime stories affect people's attitudes and behavior. They don't know how the stories affect suspects, victims or regular community members.

Even with extensive research, journalists will not be able to anticipate all of their work's effects, and this is not a call for kid-glove handling of crime victims. There may be times when protecting suspects' rights to a fair trial or informing the public about an issue of importance results in unavoidable harm to a crime victim. But journalists and journalism scholars can learn more about the effects of journalists' work on their subjects and the public and try to create industry standards that minimize the

harm to crime victims. Journalists pride themselves on looking at their communities and community issues with detachment, but detachment is not synonymous with ignorance, and journalists have been ignorant for too long about how their work influences people's lives.

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## APPENDIX A: SURVEY METHOD

A telephone survey of newspaper and television journalists was conducted during February 1996. At the newspapers, interviews were done with the city editor or the staff member designated by others as most appropriate. At television stations, the news director was interviewed except in two cases. In one case, an interview was done with a news producer, and in another a public relations director was interviewed after it was determined that he was familiar with the news operations of the station and the news director and producers could not be reached. City editors and television news directors were identified as the most desirable respondents because in most cases they make the final decision on whether or not to use victims' names.

When respondents were initially contacted, they were told the purpose of the study and asked to name an interview time that would be convenient for them. In about one-fourth of the cases, respondents said they could do an interview immediately. In two cases, questionnaires were mailed to editors who insisted they did not have time for a phone interview. On average, the interviews took about 15 minutes.

All television news departments and mainstream daily newspapers were included in the sample. In addition, the largest weekly in each of Washington's 39 counties was chosen from a list of newspapers provided by the Washington Newspaper Publishers Association. Four counties did not appear to have a weekly newspaper, so in their cases, one was substituted from a nearby county.

In total, 79 news organizations were contacted, and 72 interviews were completed, yielding a response rate of 91 percent. The response rate for television stations was 71 percent as contact could not be made with news directors at four stations even after more than five attempts. The response rate for daily newspapers was 96 percent, with one editor declining to be interviewed. The response rate for

weekly newspapers was 95 percent. One editor declined to be interviewed, and at another newspaper, the editor's position was temporarily vacant. To replace these two newspapers, two more weeklies were chosen from the same area, so that of 41 weeklies contacted, interviews were completed at 39.

The average respondent was an experienced editor of a small, rural newspaper. Forty-nine percent worked for weekly newspapers. Five percent were from semi-weekly newspapers. Thirty-two percent worked at daily newspapers, and 14 percent were television journalists. For the purposes of analysis, editors of weekly and semi-weekly newspapers were grouped together.

Respondents had worked in journalism for an average of 19 years; their experience ranged from four to 52 years. They had worked for their current news organization for an average of 10 years. Eight had been with their current organization for one year or less; one had been with his newspaper for 37 years.

Most of the news organizations were community-oriented media. Fifty-five percent of the newspapers had a circulation of less than 10,000. Twenty-one percent had a circulation of 10,000 to 24,999, and 16 percent had a circulation of 25,000 to 50,000. Only 8 percent—or five newspapers—had a circulation of more than 50,000.

Sixty percent of the television stations reached an audience of less than 500,000. Ten percent reached an audience of 500,000 to 1,000,000, and 30 percent reached more than one million people.

In addition, most of the newspapers and television stations were located in rural communities. Seventy-three percent of the newspapers and 70 percent of the television stations were located in towns centered in rural areas. Only 11 percent of the newspapers and 30 percent of the television stations were located in urban areas. Another 16 percent of the newspapers were located in suburbs near a major city.

**APPENDIX B: SURVEY QUESTIONNAIRE  
(NEWSPAPER VERSION)**

1. My impression from working as a reporter and reading articles on the subject is that editors usually decide whether or not to use a crime victim's name on a case by case basis. Would you say that's true at your newspaper?

yes

no

[If no] 2. What procedure do you use to decide whether or not to use a victim's name?

3. First, are there any crimes for which you always name the victim?

yes

no

[If yes] 4. Which ones?

5. Why do you use the name in that case?

6. Are there any crimes for which you never name the victim?

yes

no

[If yes] 7. Which ones?

8. Why don't you use the name in those cases?

Okay, I'm going to read you a list of items that you might consider in deciding whether to use a crime victim's name. Some items would probably have more impact on your decision than others. As I read each item, I'd like you to tell me how important that factor would be to your decision. Would it be very important, important, somewhat important, a little important or not important.

9. The first item is: a formal policy established by your newspaper?

10. The kind of crime?

11. Whether the crime was one of a series?

12. Whether a suspect had been arrested?

13. Whether the victim was alive?

14. Whether the victim's family had been told?

15. Whether the victim was well-known in your community?

16. Whether the victim was a minor?

17. Whether you obtained the name from the police or an unofficial source?

18. Another news organization in your area using the victim's name?

19. A request from the victim or some intermediary not to use his or her name?

20. Is there a condition that I haven't mentioned that you would consider in making your decision?

[Policy was a factor] 21. Okay, you said your newspaper's policy would influence your decision. Could you briefly describe your newspaper's policy, or if it's long, could you mail me a copy?

22. What would you say is the value to readers of knowing a victim's name?

23. Has your local police department withheld victims' names from your reporters?

- yes  
 no  
 not sure

[If yes] 24. In those cases, did you forego using the name or try to get the name from other sources?

- forego using the name  
 tried to get the name from other sources  
 other

25. Have you ever received requests from crime victims or some intermediary to withhold their names?

- yes  
 no  
 not sure

[If yes] 26. And did you withhold their names in those cases?

- yes  
 no  
 in some cases

I'm trying to find out if the identification of crime victims is a subject discussed outside individual newsrooms. Have you discussed your policy/practices for identifying crime victims with any of the following groups of people:

- |  |                              |                             |
|--|------------------------------|-----------------------------|
| 27. Journalists other than your staff members? | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| 28. Local police?                              | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| 29. Local prosecutors/district attorneys?      | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| 30. Victims' advocates?                        | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| 31. Other members of your community?           | <input type="checkbox"/> yes | <input type="checkbox"/> no |

32. Where changes made as a result of that discussion(s)?

- yes       no

33. [If yes] Could you please describe those changes?

34. Has your newspaper received phone calls or letters about your practices in identifying crime victims?

- yes  
 no  
 not sure

35. [If yes] Generally, did these phone calls or letters support or oppose the naming of victims?

support

oppose

split equally between support and oppose

36. I'd like to know a little bit about how much of your newspaper's resources are taken up by covering crime. Could you give me an idea of the number of crime stories—that is stories of more than three inches, not briefs—that appear in an average issue of your newspaper. Would you say:

two or less

three to six

more than six

37. How many staff members cover local crime at your newspaper? Would you say:

one, part-time

more than one part-time

one, full-time

one full-time and others part-time

more than one full-time

38. And do you discuss with your staff whether to name a crime victim:

with each story

with many stories

with a few stories

with no stories

other

39. How many years have you worked in journalism?

40. And how many years have you worked at your current newspaper?

Finally, I'd like to check the circulation information I have for your newspaper:

41. You publish:

weekly

semi-weekly (2-4 days per week)

daily

42. Your circulation is:

less than 10,000

10,000-24,999

25,000-50,000

more than 50,000

43. And your location is best described as:

rural

suburban

urban

## VITA

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University of Washington. Ph.D. Communications, 1996.

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### Publications and Conference Presentations

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#### Conference presentations

Johnson, Michelle. "Speakers' Rights in Private Forums: How the First Amendment Might Look on the Information Superhighway" presented at the annual convention of the Association for Education in Journalism and Mass Communications in Washington, D.C. August 11, 1995.

Johnson, Michelle. "Internships' Impact on Student Finances" presented at the annual convention of the Association for Education in Journalism and Mass Communications in Washington, D.C. August 11, 1995.

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