

A COMPELLING STATE INTEREST: CONSTRUCTING A STATUTORY FRAMEWORK FOR PROTECTING THE IDENTITY OF RAPE VICTIMS*

The statistics are quite alarming. According to the Department of Justice, approximately 131,950 rapes occurred annually between the years of 1992 and 2000 in the United States.¹ Of the total number of rape victims, only 36% actually reported the crime to police.² Furthermore, the Department of Justice estimates that only 17% of rape victims who do not report the crime receive medical attention; whereas, 59% of rape victims who do report the crime receive medical attention.³

It is believed that many rape victims do not report a rape to authorities simply because they fear publicity and do not want others to know about the incident.⁴ According to the National Women's Study, 66% of women surveyed stated that they "would be more likely to report rapes if their identities would be protected," and 86% of the surveyed group thought that rape victims "would be 'less likely' to report rapes if those victims believed that the news media would disclose their names."⁵

Though the media typically monitors itself and does not reveal the identity of a rape victim, this is not always the case.⁶ In the early 1990s, many major news outlets published the name of the rape victim who accused William Kennedy Smith, nephew of President John F. Kennedy, of rape.⁷ Recently, the identity of the woman who accused Kobe Bryant, a well-known

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1. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, at 2 (2002), www.ojp.gov/bjs/pub/pdf/rsarp00.pdf.

2. *Id.*

3. *Id.* at 1.

4. See Sarah Henderson Hutt, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41 DUKE L.J. 368, 397-98 (1991) (citing Deirdre Carmody, *News Media's Use of Accuser's Name is Debated*, N.Y. TIMES, Apr. 18, 1991, at A22 (according to Anne Seymour, director of communications at the National Victim Center, "[i]f you want to seriously reduce the number of men and women who come forth and report cases of rape to the authorities, just publish and broadcast their names and addresses in the media")); see also *People v. Bryant*, 94 P.3d 624, 630 (Colo. 2004); Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1130-31 (1993); Dana Parsons, *Rape Remains a Vessel for Shame*, L.A. TIMES, Oct. 20, 2004, at B3.

5. Denno, *supra* note 4, at 1130-31 (citing NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 6 (1992)).

6. See Denno, *supra* note 4, at 1114-15; Gary F. Giampetruzzi, Note, *Raped Once, But Violated Twice: Constitutional Protection of a Rape Victim's Privacy*, 66 ST. JOHN'S L. REV. 151, 151-53 (1992).

7. Roger Cohen, *Should the Media Name the Accuser When the Crime Being Charged is Rape?*, N.Y. TIMES, Apr. 21, 1991, § 4, at 4.

basketball star, of rape was revealed by a Los Angeles talk show host.⁸ Less publicly, an Ohio sheriff, at a press conference, “released ‘highly personal and extremely humiliating details’ of the rape suffered” by a local citizen.⁹ Moreover, with the proliferation of the Internet, the identities of rape victims could increasingly be revealed in public forums.¹⁰ Accordingly, many rape victims have refrained from pursuing criminal action against their assailants because they fear that their identity will be publicly revealed if they report the crime to the authorities.¹¹

In an attempt to encourage rape victims to come forward, many states enacted laws to punish the press for publishing an alleged rape victim’s name;¹² yet, these statutes were ruled unconstitutional on several different grounds.¹³ As a result, several states have passed laws forbidding the government from disclosing an alleged rape victim’s identifying information.¹⁴ However, many of these statutes neither effectively protect the person’s identity nor meet constitutional standards.¹⁵ Moreover, states have not reached an agreement on the structure and substance of these statutes.¹⁶

In an effort to address these issues, the purpose of this Comment is to propose a framework for a model rape shield statute that will satisfy constitutional requirements and offer the most effective protection to rape victims. Part I introduces the three basic goals of rape shield laws. Part II discusses and analyzes the constitutionality of laws that punish the press for the publication of truthful information. Part III breaks down various non-disclosure statutes—which prohibit the government from disclosing an alleged rape victim’s identifying information—and considers the constitutional validity of these statutes. Finally, Part IV proposes a guideline for an ideal rape shield statute that should both survive constitutional scrutiny and effectively meet the statute’s goals. Though some commentators have made arguments against rape shield statutes on policy grounds,¹⁷ this discussion is outside the scope of this Comment.

8. Editorial, *Hits and Misses*, DALLAS MORNING NEWS, July 26, 2003, at 26A.

9. *Bloch v. Ribar*, 156 F.3d 673, 676 (6th Cir. 1998).

10. See Cindy Rodriguez, Op-Ed, *Our Nosiness in Bryant Case Fuels Frenzy*, DENVER POST, July 25, 2003, at B1; see also *People v. Bryant*, 94 P.3d 624, 635 (Colo. 2004) (stating that information about the Kobe Bryant trial was reported through the Internet).

11. Giampetruzzi, *supra* note 6, at 153.

12. For purposes of this Comment, a victim of rape and a victim of sexual assault are synonymous.

13. See *infra* Part II.B.

14. See *infra* Part III.

15. See *infra* Part III.A-E.

16. See *infra* Part III.

17. See Hutt, *supra* note 4, at 388-401 (arguing that withholding the victim’s name perpetuates the shameful stigma associated with rape; it is unfair to withhold the victim’s name while releasing the alleged assailant’s name; access to information is crucial to the media’s function as an overseer of the criminal process; and a “victim’s privacy interest is not susceptible to clear definition, boundaries, and limits”); see also Denno, *supra* note 4, at 1123-31 (arguing that withholding the rape victim’s name will not encourage victims to report the crime, journalists should decide whether to disclose a victim’s name, not courts or legislatures, and the victim’s identity should be disclosed by courts if the victim’s identity is already known to the public).

I. GOALS OF RAPE SHIELD STATUTES:
PRIVACY, PROTECTION, AND REPORTING

States pass rape shield laws to protect the identity of rape victims for a variety of public policy reasons. In general, the aims of these statutes are to maintain the victim's privacy, to protect the victim from future harm, and to encourage the victim to report the rape to law enforcement authorities.

First, a primary reason for the rape shield law is to protect a victim's privacy and to shield a victim from further humiliation.¹⁸ Justice White characterized rape as the "ultimate violation of self."¹⁹ While "a victim is suffering from the severe emotional and physical traumas brought on by the rape, she is also being scrutinized and judged by her community. There is no other crime in which the victim risks being blamed and in so insidious a way."²⁰ Consequently, rape victims are often subject to sharp scrutiny and unfair criticism regarding their sexuality and sexual lifestyle.²¹ The rape victim in *Florida Star v. B.J.F.*²² was completely humiliated when acquaintances discovered a newspaper article that published her identity, and as a result, she had to seek mental health counseling.²³

A second goal of rape shield statutes is to minimize additional harassment and protect the victim from retaliation.²⁴ An alleged rapist who is at large may be motivated to threaten or harm the victim again if the rapist is aware that the victim reported the crime to the police. For example, the victim in *Florida Star* "received several threatening phone calls from a man who stated that he would rape B.J.F. again,"²⁵ and as a consequence, B.J.F. was forced to seek police protection and change her phone number and address.²⁶ In the highly publicized Kobe Bryant case, *People v. Bryant*, the alleged victim received death threats, from an unknown person, as a result of reporting the crime to police and the intense media coverage.²⁷ According to an investigation, there existed a credible threat and "plan to kill the victim in the Bryant case for financial gain."²⁸

18. See *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("This interest in protecting the victims of sexual violence from humiliation, among other injuries, has prompted states to pass rape shield laws and to advocate against the publication of rape victims' names." (quoting Panel Discussion, *Men, Women and Rape*, 63 *FORDHAM L. REV.* 125 (1994)) (internal quotation marks omitted)).

19. *Florida Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (White, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)) (internal quotation marks omitted).

20. *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 13 (Cal. Ct. App. 1997) (quoting Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 *S. CAL. L. REV.* 1020, 1030 (1991)) (internal quotation marks omitted).

21. *Bloch*, 156 F.3d at 685.

22. 491 U.S. 524.

23. *Id.* at 528.

24. See *United States v. Megale*, 235 F.R.D. 151, 159 (D. Conn. 2006).

25. *Florida Star*, 491 U.S. at 528.

26. *Id.*

27. *People v. Bryant*, 94 P.3d 624, 636 n.12 (Colo. 2004).

28. *Id.*

Finally, in order for the police to better protect other members of the public and assist those who have already been victimized, the state has a strong interest in encouraging victims to report a rape offense.²⁹ Throughout the nation, “rape remains the most underreported crime within the criminal justice system.”³⁰ Further, as previously mentioned, rape victims are often discouraged from alerting authorities because they fear that the allegation may become public.³¹ Thus, many states have taken proactive measures to address these concerns by enacting statutes to secure a rape victim’s anonymity.³²

II. RAPE SHIELD STATUTES THAT PUNISH THE MEDIA FOR PUBLISHING TRUTHFUL INFORMATION LAWFULLY OBTAINED WILL NOT LIKELY SURVIVE CONSTITUTIONAL REVIEW

Initially, in an attempt to protect rape victims, many states passed statutes that were aimed at punishing the press for truthfully publishing an alleged rape victim’s identity;³³ however, these statutes often failed to survive constitutional scrutiny.³⁴ Subpart A discusses the structure of rape shield statutes that are aimed at punishing the press for the publication of truthful information, and subpart B analyzes the Supreme Court decisions that have nullified these statutes on First Amendment grounds.

A. Structure of Early Rape Shield Laws: Targeting the Media

States first attempted to protect the identities of rape accusers by enacting statutes that punished the press for disseminating a rape accuser’s identifying information.³⁵ The primary targets of these statutes differ: one statute punished “any instrument of mass communication,”³⁶ while another statute punished “any newspaper, magazine, periodical, or other publication.”³⁷ Regardless of the primary target, these statutes generally made it unlawful for a member of the media to publish the identity of an alleged rape victim.³⁸ According to the statutes, any person or corporation that violated these laws would be charged with a misdemeanor.³⁹

29. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); *Doe v. Bd. of Regents*, 452 S.E.2d 776, 780 (Ga. Ct. App. 1994); *supra* note 18.

30. *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 13 (Cal. Ct. App. 1997) (quoting *Marcus & McMahon*, *supra* note 20, at 1049-50) (internal quotation marks omitted).

31. See *supra* text accompanying notes 2-12.

32. See *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998).

33. FLA. STAT. § 794.03 (1981), *invalidated by Florida Star v. B.J.F.*, 491 U.S. 524 (1989); GA. CODE ANN. § 16-6-23 (1988), *invalidated by Dye v. Wallace*, 553 S.E.2d 561 (Ga. 2001); S.C. CODE ANN. § 16-3-730 (1976).

34. See *infra* Part II.B.

35. FLA. STAT. § 794.03; GA. CODE ANN. § 16-6-23; S.C. CODE ANN. § 16-3-730; WIS. STAT. § 942.02 (1958).

36. FLA. STAT. § 794.03.

37. GA. CODE ANN. § 16-6-23(a).

38. FLA. STAT. § 794.03; GA. CODE ANN. § 16-6-23; S.C. CODE ANN. § 16-3-730; WIS. STAT. §

B. Rape Shield Laws Aimed at Press Are Held to be Unconstitutional

With a great degree of success, the media responded by challenging the constitutionality of this type of rape shield statute on First Amendment grounds. In a series of cases, the Supreme Court continually held that it was unconstitutional to punish the press for publishing truthful information lawfully obtained and, in the process, severely limited the viability of rape shield statutes aimed at the press.

1. States Cannot Punish the Media for Publication of Truthful Information Contained in Public Records

The Court in *Cox Broadcasting Corp. v. Cohn*⁴⁰ held that a state may not punish the press for publishing truthful information contained in the court's official public records.⁴¹ In that case, a reporter, during an inspection of the court's public record, discovered the name of a deceased rape victim and revealed her name in a news report the following day.⁴² Afterwards, the victim's family brought suit against the broadcasting company based upon a Georgia statute⁴³ that made it illegal to broadcast the name of a rape victim.⁴⁴

In reaching its holding, the Court reasoned that “[p]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.”⁴⁵ Further, in order to protect First Amendment rights, the Court declared it critically important for the press to have the freedom to publish information contained in open government records.⁴⁶ Nonetheless, the Court did present an important alternative to the states when it added, in dicta, that states may protect privacy interests by avoiding public disclosure of private information.⁴⁷

942.02.

39. FLA. STAT. § 794.03; GA. CODE ANN. § 16-6-23; S.C. CODE ANN. § 16-3-730; WIS. STAT. § 942.02.

40. 420 U.S. 469 (1975).

41. *Id.* at 491.

42. *Id.* at 472-73.

43. See GA. CODE ANN. § 26-9901 (1972), replaced by GA. CODE ANN. § 16-6-23 (2003) (“It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.”).

44. *Cox*, 420 U.S. at 474.

45. *Id.* at 495.

46. *Id.* at 495; see also U.S. CONST. amend. I; U.S. CONST. amend. XIV.

47. *Cox*, 420 U.S. at 496 (explaining that a state must weigh the value of the private interest against the value of public knowledge and freedom of the press).

2. *States May Not Punish the Media for Publication of Truthful Information Lawfully Obtained Absent a State Interest of the Highest Order*

After *Cox Broadcasting*, the Court decided a trilogy of cases where it repeatedly found that states could not punish the media for publishing truthful information lawfully obtained. Though these cases did not involve rape victims, the cases created a framework for the Court to use in future cases directly addressing a rape victim identification statute.

In *Oklahoma Publishing Co. v. District Court*,⁴⁸ the Court ruled that states cannot proscribe the publication of information revealed during an open hearing.⁴⁹ In this case, a district court judge allowed the press to enter the courtroom and take pictures of a juvenile offender as he was leaving the courthouse.⁵⁰ After the local media published the juvenile's name and picture, the judge made a pretrial order to enjoin any further publication of the juvenile's identity.⁵¹ However, the Court held that the district court's order was unconstitutional since the press obtained the information in the public domain.⁵²

In *Landmark Communications, Inc. v. Virginia*,⁵³ the Court held that a Virginia statute impermissibly subjected the media to criminal sanctions for truthfully publishing information lawfully obtained regarding a judicial inquiry and disciplinary proceeding.⁵⁴ In its opinion, the Court stated "that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"⁵⁵ and that "[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."⁵⁶ Thus, despite the state's interest in protecting the reputation of its judges and preserving the integrity of its courts, the Constitution will not, "[a]t the very least," permit the states to punish the media for publishing truthful information publicly available in court records.⁵⁷

48. 430 U.S. 308 (1977).

49. *Id.* at 311.

50. *Id.* at 309.

51. *Id.* at 309 n.1.

52. *Id.* at 310-12 (holding that a state court cannot "prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public").

53. 435 U.S. 829 (1978). At issue in this case was a Virginia statute that punished the media for publishing information regarding a judicial inquiry and disciplinary proceeding; the goal of the statute was to protect the reputation of its judges and preserve the integrity of its courts. *Id.* at 841. The Court held that this interest was insufficient to justify the punishment of free speech. *Id.* at 841-42.

54. *Id.* at 838.

55. *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (internal quotation marks omitted).

56. *Id.* at 839 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)) (internal quotation marks omitted).

57. *Id.* at 840 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975)) (internal quotation marks omitted).

In *Smith v. Daily Mail Publishing Co.*,⁵⁸ the Court stated that only “a state interest of the highest order” can justify punishing the press for the truthful publication of lawfully obtained public information.⁵⁹ In this case, a West Virginia statute, which prohibited newspapers from publishing a juvenile offender’s identity,⁶⁰ was challenged by two newspaper companies after they were indicted for violating the statute.⁶¹ Here, the newspapers lawfully obtained the juvenile’s name by using ordinary reporting techniques.⁶²

The Court declared the statute unconstitutional and articulated three reasons for its ruling in this particular factual circumstance. First, the Court stated that protecting a juvenile offender’s anonymity is an insufficient state interest to justify criminally punishing the press for publishing a juvenile’s name.⁶³ Second, the Court held that the statute neither served its purpose nor met constitutional requirements since the statute restricted the punishment to newspapers and did not punish other types of media.⁶⁴ Finally, the Court found that criminal prosecution was unnecessary to achieve the state’s goal because the state had alternative means of protecting juveniles’ identity.⁶⁵

3. Florida Star: *The Court Articulates Three Explanations for Declaring a Florida Rape Shield Statute Unconstitutional*

Heavily relying upon *Oklahoma Publishing, Daily Mail*, and *Landmark Communications*, the Court in *Florida Star v. B.J.F.*⁶⁶ held 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.”⁶⁷ In this particular case, a newspaper was held civilly liable when it published the name of a rape victim in violation of a Florida statute.⁶⁸ The newspaper obtained the name of the victim from a public police report.⁶⁹

58. 443 U.S. 97 (1979).

59. *Id.* at 103.

60. W. VA. CODE § 49-7-3 (1976) (“[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court . . .”).

61. *Daily Mail*, 443 U.S. at 99-100.

62. *Id.* at 99. Specifically, the news reporters obtained the juvenile’s name by monitoring the police radio and asking various witnesses. *Id.*

63. *Id.* at 104.

64. *Id.* at 105.

65. *Id.* at 105 (noting that many states encourage juvenile courts and newspaper editors to cooperate and work together in protecting the juvenile’s identity).

66. 491 U.S. 524 (1989).

67. *Id.* at 541.

68. *Id.* at 526; *see also* FLA. STAT. § 794.03 (1981) (“No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense . . .”), *invalidated by Florida Star*, 491 U.S. 524.

69. *Florida Star*, 491 U.S. at 527.

The Court found that it was unconstitutional to hold a newspaper liable under the Florida statute for three reasons.⁷⁰ First, the newspaper lawfully obtained the victim's identity through public government records.⁷¹ According to the Court, holding the media liable for publishing lawfully obtained information would result in self-censorship.⁷² Further, by publicly releasing the victim's name, the state conveyed to the media that it expected the name to be disseminated.⁷³ Second, the statute's negligence per se standard was too broad because it ignored "whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern."⁷⁴ Finally, the statute was facially underinclusive and was not "evenhandedly" applied.⁷⁵ Specifically, the statute did not accomplish its goal by only punishing "instrument[s] of mass communication"⁷⁶ because it failed to punish all individuals who may reveal the victim's identity to a multitude of people.⁷⁷

4. *Globe Newspaper: States May Not Exclude Public from Court Proceedings*

As an alternative to enacting a statute prohibiting the disclosure of rape victims' identities, some states began excluding the public from court proceedings. In *Globe Newspaper Co. v. Superior Court*,⁷⁸ however, the Court held that it is unconstitutional for a state to bar the public from the courtroom, without exception, during the testimony of a sexual assault victim.⁷⁹ Specifically, the Court declared a Massachusetts statute⁸⁰ unconstitutional because it required courts, in every case, to exclude the public from the testimony of a minor victim in a sexual assault case.⁸¹

The Court stated that the public has a constitutional right to access trials, and this right "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."⁸² The Court articulated two main explanations for its holding.⁸³ First, histori-

70. *Id.* at 541.

71. *Id.* at 538-39.

72. *Id.* at 538.

73. *Id.* at 538-39.

74. *Id.* at 539.

75. *Id.* at 540-41. Further, the Court stated that "[w]hen a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *Id.* at 540.

76. *Id.* at 526 (quoting FLA. STAT. § 794.03 (1981)) (internal quotation marks omitted).

77. *Id.* at 540-41.

78. 457 U.S. 596 (1982).

79. *Id.* at 610-11.

80. MASS. GEN. LAWS ANN. ch. 278, § 16A (1981).

81. *Globe Newspaper*, 457 U.S. at 610-11.

82. *Id.* at 604.

83. *Id.* at 605.

cally, criminal trials have always been open to the public.⁸⁴ Second, public access to criminal trials serves a vital function in the judicial process, since it fosters public scrutiny.⁸⁵ Further, “public access to criminal trials permits the public to participate in and serve as a check upon the judicial process.”⁸⁶

Nonetheless, according to the Court, there are circumstances where the public can be denied access to information in criminal trials.⁸⁷ This denial of access must be “necessitated by a compelling governmental interest, and . . . narrowly tailored to serve that interest.”⁸⁸ While the Court agreed that there exists a compelling government interest in protecting juvenile victims of sexual offenses, it held that this interest does not warrant compulsory closure of the courtroom.⁸⁹ The Court stated that the decision to deny public access to portions of a trial should be made on a case-by-case basis.⁹⁰ Additionally, the statute was largely ineffective since it did not forbid access to court transcripts and records containing information regarding the minor’s testimony.⁹¹ The effectiveness of the statute depended upon keeping the minor’s name and testimony secret; however, the press could still obtain and publish this information by accessing court documents.⁹² Thus, the goal of the statute—encouraging minors to report sexual offense incidents—was not achieved.⁹³

5. Rape Shield Laws Aimed at the Media Will Not Likely Survive Constitutional Muster

Even though the Supreme Court has not expressly ruled that rape shield laws aimed at the media are unconstitutional,⁹⁴ it has nearly rendered them useless. Consistent with the holdings in *Oklahoma Publishing, Landmark*, and *Daily Mail*, where truthful information is available in the public domain, the Constitution will likely not permit jurisdictions to proscribe its publication.⁹⁵ Additionally, a rape shield statute can neither assert a negligence per se standard nor can it only punish the mass media.⁹⁶ Finally, the states’ ability to exclude the public from the courtroom, in order to protect a rape victim’s identity, is extremely limited.⁹⁷

84. *Id.*

85. *Id.* at 606.

86. *Id.*

87. *Id.*

88. *Id.* at 607.

89. *Id.* at 607-08.

90. *Id.* at 608-09.

91. *Id.* at 610.

92. *See id.*

93. *See id.*

94. *See generally* *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (stating the Court did not specifically hold “that a State may never punish publication of the name of a victim of a sexual offense”).

95. *See supra* Part II.B.1-2.

96. *See supra* Part II.B.3.

97. *Globe Newspaper*, 457 U.S. at 603-11.

Also, it is unlikely, under the Court's precedent, that a rape shield statute aimed at punishing the mass media can accomplish the goal of the statute—to protect the victims and to encourage victims to contact authorities. Unless the government withholds information, the victim's information is public record. The public and the media have full access to any identifying information available in government public records, and newspapers may publish any truthful information lawfully obtained.⁹⁸ Therefore, a rape shield law aimed at the media cannot effectively prevent the media from publishing a rape victim's identifying information and thus will likely be unsuccessful in achieving its goal.

III. AN ALTERNATIVE APPROACH: STATES' ATTEMPTS TO MINIMIZE THE PUBLIC'S ACCESS TO INFORMATION

In recent years, several states have adopted an alternative means of protecting rape victims. These states have enacted statutes that are aimed at the government and restrict the public's access to a rape accuser's identifying information,⁹⁹ which, as indicated by *Florida Star*, is likely permissible.¹⁰⁰ The specific intent of these statutes is not to forbid publication of identification information; rather, these statutes prohibit the government from disclosing information that would reveal the accuser's identity.¹⁰¹ Thus, if a rape accuser reports a sexual offense to the authorities, the accuser can be reasonably assured that the public—private citizens and the media—will not be able to obtain any identifying information from the government.

Although the states have not adopted a uniform statute to prohibit government disclosure of a rape victim's name, the statutes typically consist of several different features. The most relevant features are as follows: (1) the persons protected by the statute; (2) information protected by the statute; (3) exceptions to the statute; (4) methods of concealing the information; and (5) penalties for violating the statute. This Part explores the states' different approaches to these elements and analyzes the constitutional implications of each method.

98. See *supra* Part II.B.1-3.

99. The states that have specifically enacted statutes to restrict access to a rape victim's identity are Alaska, California, Connecticut, Florida, Massachusetts, Nevada, New York, Ohio, South Dakota, Texas, and Wyoming. See *infra* note 102.

100. *Florida Star v. B.J.F.*, 491 U.S. 524, 534-35 (1989) (citing *Landmark Commc'n, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (“[M]uch of the risk [from disclosure of sensitive information regarding judicial disciplinary proceedings] can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings.”)); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (“If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.”).

101. See generally Hutt, *supra* note 4, at 369. The types of information typically covered by these statutes are investigative documents or materials, court documents and transcripts, and incident reports. *Id.*

A. Persons Affected by Non-Disclosure Statutes: Offering Protection to Victims of Incest and Sexual Assault Will Most Likely Survive Constitutional Challenge

While all of the states' rape shield statutes discussed in this Comment offer protection to alleged sexual assault victims,¹⁰² some states have included victims of other types of crimes in their non-disclosure statutes. However, where a statute is overinclusive and offers protection to victims of a large variety of crimes, a statute may not overcome the presumption of openness and could be declared unconstitutional as it applies to certain crimes.

According to *Globe Newspaper Co. v. Superior Court*, a state must have a compelling interest to deny public access to information during a criminal trial.¹⁰³ The Court stated that preserving the psychological well-being of a minor is a compelling interest; however, in order to overcome the presumption of openness, the state should offer compelling empirical support to include a certain type of crime in a non-disclosure statute.¹⁰⁴ Otherwise, states could offer this protection for nearly every type of crime since one could argue that victims of almost every crime will psychologically suffer, in some way, by testifying in open court.¹⁰⁵

Most states only include victims of sexual assault and attempted sexual assault (or rape) in their rape shield statutes.¹⁰⁶ Sexual assault crimes have received the type of empirical support suggested by the Court. In *Florida Star v. B.J.F.*, the Court stated that the state has a "highly significant interest[]" in protecting the identities of rape victims.¹⁰⁷ The Sixth Circuit Court of Appeals, like many of its sister circuits, stated that rape victims have a fundamental right to prevent government officials from publicly releasing certain types of information about a rape.¹⁰⁸ The courts base their conclusions upon

a historic social stigma . . . attached to victims of sexual violence. In particular, a tradition of "blaming the victim" of sexual violence sets these victims apart from those of other violent crimes. Releas-

102. ALASKA STAT. § 12.61.140 (2006); CAL. PENAL CODE § 293 (West 1999); CONN. GEN. STAT. ANN. § 54-86e (West 2001); FLA. STAT. ANN. § 794.024 (West 2000); MASS. GEN. LAWS ANN. ch. 265, § 24C (West 2000); NEV. REV. STAT. ANN. § 200.3771(1) (LexisNexis 2006); N.Y. CIVIL RIGHTS LAW § 50-b (McKinney 1992); OHIO REV. CODE ANN. § 2907.11 (West 2006); S.D. CODIFIED LAWS § 23A-6-22 (1998); TEX. CODE CRIM. PROC. ANN. art. 57.01-57.02 (Vernon 2006); WYO. STAT. ANN. § 6-2-310 (2005).

103. 457 U.S. 596, 606-07 (1982).

104. *See id.* at 607, 609-10. The Court did state that this interest was insufficient to justify mandatory closure. *Id.* at 607-08.

105. *See id.* at 610.

106. *See, e.g.*, FLA. STAT. ANN. § 794.024; MASS. GEN. LAWS ANN. ch. 265, § 24C; NEV. REV. STAT. ANN. § 200.3771; N.Y. CIVIL RIGHTS LAW § 50-b; OHIO REV. CODE ANN. § 2907.11; WYO. STAT. ANN. § 6-2-310.

107. 491 U.S. 524, 537 (1989).

108. *Bloch v. Ribar*, 156 F.3d 673, 685-86 (6th Cir. 1998).

ing the intimate details of rape will therefore not only dissect a particularly painful sexual experience, but often will subject a victim to criticism and scrutiny concerning [his or] her sexuality and personal choices regarding sex.¹⁰⁹

Further, as previously mentioned, testimonies and surveys clearly suggest that rape victims would be much more likely to report a rape to authorities if they believed their identity would remain private.¹¹⁰

Alternatively, Alaska's rape shield statute offers protection to the widest variety of adult crimes, as it conceals the victim's identity in cases of sexual assault, kidnapping, incest, and indecent exposure.¹¹¹ The same type of evidence, justifications, and judicial support for suppressing the identity of rape victims¹¹² is not apparent in the crimes of kidnapping and indecent exposure. Admittedly, people may indeed be reluctant to report a crime of indecent exposure or kidnapping because of fear of their identity being released. However, victims of kidnapping and indecent exposure are not typically criticized or blamed for being involved in the incident, plus the historical social stigma attached to rape simply does not exist in respect to these crimes. Additionally, the public often has a legitimate interest in learning the identity of a kidnapped person since the public may be able to assist in locating the person and this crime involves a person missing from the community. Thus, a statute that proscribes the government from disseminating the identity of a victim of kidnapping or indecent exposure will likely neither overcome the presumption of openness nor survive a constitutional challenge without more evidentiary and judicial support.

B. Concealed Information Should Only Include Identifying Information

All of the rape shield statutes analyzed in this Comment offer to conceal the identity of the rape victim's name; however, the statutes differ in regards to the other types of information that they protect. Due to principles such as public interest and public scrutiny, a rape shield law should be narrowly tailored to satisfy the state's interest of protecting the alleged victim's identity.¹¹³

States such as Alaska and New York maintain the confidentiality of the alleged victim's name, residential address, business address, telephone number, or any document, photograph, or court file leading to the identification of the victim.¹¹⁴ These states have most likely satisfied the Court's

109. *Id.*

110. *See supra* text accompanying notes 4-11.

111. ALASKA STAT. § 12.61.140 (2006).

112. *See supra* text accompanying notes 107-110.

113. *See* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

114. ALASKA STAT. § 12.61.110 (maintaining the confidentiality of the alleged victim's name, residential address, business address, and telephone number); N.Y. CIVIL RIGHTS LAW § 50-b (McKinney 1992) (maintaining the confidentiality of any document, photograph, or court file leading to the identifi-

strict standard by only concealing a victim's personal identification information. As stated by the Court in *Globe Newspaper*, the constitutional right of public access to criminal trials ensures citizens that they have the ability to effectively and intelligently discuss governmental affairs.¹¹⁵ Proscribing disclosure of a rape victim's identity probably does not impinge upon the constitutional interest of public access since, in most situations, the victim's identity is not a relevant aspect of the government's affairs.¹¹⁶ Furthermore, in dicta, the *Florida Star* Court stated that "the government retains ample means of safeguarding . . . a rape victim's anonymity,"¹¹⁷ including classifying certain information as confidential.¹¹⁸ Thus, the Court clearly suggests that concealing a rape victim's identity is a constitutionally sound method of protecting a rape victim's privacy.

Several other states, in addition to suppressing the victim's name, conceal the "details of the alleged offense."¹¹⁹ However, as a constitutional right, the press has historically played a primary role in scrutinizing and divulging governmental affairs.¹²⁰ Also, according to *Landmark Communications Inc. v. Virginia*, the press plays a vital role in ensuring the integrity of the judicial process "by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."¹²¹ Thus, suppressing the details of a rape offense may be too broad.¹²² The details of a rape are often newsworthy and typically include the location of the rape, how the rape occurred, and the characteristics of the rape victim (e.g., age, race, hair color, etc.). This type of information can have significant public value and can reveal matters related to the government's affairs. For example, for safety reasons, the public has a natural interest in learning about the location of a rape or the profiles of recent rape victims. Further, this type of information may also reveal where the government is offering the least police protection. Thus, suppressing the details of a rape offense might significantly limit the role the press plays in checking and scrutinizing the judicial and governmental process.

cation of the victim). Similarly, the Texas statute conceals the victim's name, address, and phone number. TEX. CODE CRIM. PROC. ANN. art. 57.01 (Vernon 2006). The Nevada statute conceals the alleged victim's photograph, likeness, name, address, or telephone number. NEV. REV. STAT. ANN. § 200.3771 (LexisNexis 2006).

115. *Globe Newspaper*, 457 U.S. at 604-05.

116. *See generally id.* ("[T]o the extent that the First Amendment embraces a right of access . . . , it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one.")

117. 491 U.S. 524, 534 (1989).

118. *Id.*

119. *E.g.*, OHIO REV. CODE ANN. § 2907.11 (West 2006); S.D. CODIFIED LAWS § 23A-6-22 (1998).

120. *Globe Newspaper*, 457 U.S. at 605-06.

121. 435 U.S. 829, 839 (1978) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)) (internal quotation marks omitted).

122. *See generally* WXYZ, Inc. v. Hand, 658 F.2d 420, 427 n.9 (6th Cir. 1981) (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 108 (1979)) (holding unconstitutional a Michigan statute that required a court to issue an order suppressing the media from publishing the details of an alleged rape offense, and noting the statute was too broad and that "[t]he state interest asserted here can never justify the suppression of the 'details of the alleged offense'").

C. The Court Must Be Given Discretion in Applying the Statute and Certain Exceptions Should be Included in the Statute

In order to meet constitutional standards, a statute can only proscribe public access to information during a trial on a case-by-case basis.¹²³ Additionally, rape shield statutes should create mandatory exceptions where the rape victim's identity will always be revealed. A statute that *requires* information to be concealed may violate the public's constitutional right to access to trials.¹²⁴ According to the Court in *Globe Newspaper*:

A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a . . . victim. . . . Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.¹²⁵

Therefore, statutes might fail the constitutional test if they do not grant the court discretion in choosing to suppress information during a criminal trial.

In accordance with the decision in *Globe Newspaper*, several states have created exemptions where the rape victim's identifying information may be revealed.¹²⁶ Alaska allows information to be revealed "with the consent of the court" or to avoid double jeopardy.¹²⁷ Other states permit certain groups of people—such as the defendant, defendant's council, investigative personnel, or crisis counselors—to have access to the rape victim's confidential information.¹²⁸

Some statutes require the government to suppress the information only in the initial proceedings or until the alleged offender is arraigned, "the charge is dismissed, or the case is otherwise concluded."¹²⁹ However, a rape shield statute may not achieve its goals if it only protects the victim's identification in the initial proceedings. As one Georgia court stated, a statute's "attempt to encourage reporting of rape by protecting the identity of the

123. See *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Globe Newspaper*, 457 U.S. at 608-09.

124. See, e.g., *Hand*, 658 F.2d at 421, 426-27 (holding a Michigan statute, MICH. COMP. LAWS ANN. § 750.520k (West 2000), which *required* a court to issue an order suppressing the *media* from publicizing information relating to a rape until the alleged perpetrator was arraigned, "the charge [was] dismissed, or the case [was] otherwise concluded," unconstitutional under First Amendment principles because it mandated the suppression of information in every situation).

125. 457 U.S. at 608-09.

126. ALASKA STAT. § 12.61.140 (2006); CAL. PENAL CODE § 293 (1999); CONN. GEN. STAT. ANN. § 54-86e (West 2001); FLA. STAT. ANN. § 794.024 (West 2000); MASS. GEN. LAWS ANN. ch. 265, § 24C (West 2000); NEV. REV. STAT. ANN. § 200.3771 (LexisNexis 2006); N.Y. CIV. RIGHTS LAW § 50-b (McKinney 1992); OHIO REV. CODE ANN. § 2907.11; WYO. STAT. ANN. § 6-2-310 (Lexis Nexis 2005).

127. ALASKA STAT. § 12.61.140.

128. See CONN. GEN. STAT. ANN. § 54-86e; FLA. STAT. ANN. § 794.024; NEV. REV. STAT. ANN. § 200.3771; N.Y. CIV. RIGHTS LAW § 50-b; OHIO REV. CODE ANN. § 2907.11.

129. OHIO REV. CODE ANN. § 2907.11; S.D. CODIFIED LAWS § 23A-6-22 (1998).

victim at the initial stages would be ineffective if the protection was not offered until the rapist was adjudged guilty.”¹³⁰

D. Methods of Concealing a Rape Victim's Identifying Information

Some rape shield statutes merely state that the name of the victim shall not be disclosed in the record.¹³¹ A few other states have adopted statutes that replace the victim's name with pseudonyms or initials during court proceedings.¹³² According to a Texas statute, the victim may choose to be referred to by the same fictitious name in every court record, press release, and judicial proceeding (including the trial).¹³³

This manner of replacing the victim's name with a pseudonym seems to have been contemplated by the Court and will likely receive its support. In *Florida Star v. B.J.F.*, the Court stated, in dicta, that “[t]he government may classify certain information, [and] establish and enforce procedures ensuring its redacted release.”¹³⁴ Additionally, in order for the statute to achieve its purpose and goals, states employ this procedure *throughout* the legal process, which was advocated by the Court in *Globe Newspaper Co. v. Superior Court*.¹³⁵ Furthermore, despite several constitutional challenges, this method of concealing a victim's name has been upheld by the California, Connecticut, and Texas courts.¹³⁶ A California court, addressing the validity of a rape shield statute utilizing pseudonyms,¹³⁷ held that using pseudonyms to refer to a rape victim during a jury trial neither prejudiced the accused nor violated the accused's Sixth Amendment right.¹³⁸ Specifically, the court found that the defendant's right to cross-examine the accuser was not violated where the defendant was given access to the accuser's actual name, the accuser's privacy interest was sufficiently balanced against the defendant's right to confrontation, and the jury was not improperly influenced when they were instructed that the pseudonym was only used to protect the victim's privacy interest.¹³⁹ Additionally, if the court believes using a pseudo-

130. *Doe v. Bd. of Regents*, 452 S.E.2d 776, 781 (Ga. Ct. App. 1994).

131. *See* MASS. GEN. LAWS ANN. ch. 265, § 24C; NEV. REV. STAT. ANN. § 200.3771; N.Y. CIV. RIGHTS LAW § 50-b; OHIO REV. CODE ANN. § 2907.11; S.D. CODIFIED LAWS § 23A-6-22; WYO. STAT. ANN. § 6-2-310.

132. *See* CAL. PENAL CODE § 293.5; TEX. CODE CRIM. PROC. ANN. art. 57.02; *see also* *State v. Molnar*, 829 A.2d 439, 446 (Conn. App. Ct. 2003) (upholding a district court's use of a pseudonym in referring to the victim of sexual assault in order to comply with CONN. GEN. STAT. ANN. § 54-86e).

133. TEX. CODE CRIM. PROC. ANN. art. 57.02.

134. 491 U.S. 524, 534 (1989).

135. *Cf.* 457 U.S. 596, 610 (1982) (noting that a law barring access to the trial is likely ineffective).

136. *See* *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 12-15 (Cal. Ct. App. 1997) (denying defendant's Sixth Amendment challenge); *Molnar*, 829 A.2d at 445-46 (denying defendant's allegation that the use of a pseudonym violated his Fourteenth Amendment right to be presumed innocent); *Greeno v. State*, 46 S.W.3d 409, 413-14 (Tex. Ct. App. 2001) (denying defendant's due process challenge).

137. Unlike the Texas statute where the accuser may choose his or her fictional name, *see* TEX. CODE CRIM. PROC. ANN. art. 57.02, the California statute requires the accuser to be referred to as Jane or John Doe, *see* CAL. PENAL CODE § 293.5.

138. *Ramirez*, 64 Cal. Rptr. 2d at 13-15.

139. *Id.* at 13-16.

nym will “unduly prejudice the prosecution or the defense” (e.g., the victim’s identity is at issue), the court may refuse to replace the victim’s name with a pseudonym.¹⁴⁰

In accordance with constitutional requirements,¹⁴¹ replacing a victim’s name with a pseudonym is likely sufficiently narrowly tailored to meet the state’s interest. Specifically, there does not seem to be any other reasonable alternative to achieving the state’s goal without violating the public’s or the accused’s interest. Therefore, the process of replacing the victim’s name with a pseudonym will likely survive a constitutional challenge.

E. Administering Penalties Against Public Officials for Violating a Non-Disclosure Statute Will Likely be Constitutional

A rape shield statute likely would have little meaning if a state did not attach a penalty to the statute to enforce its application. While some states do not affix a penalty for failing to carry out the statute’s requirements,¹⁴² other states do punish public officials or organizations for violations.¹⁴³ Some states attach criminal penalties to the statute.¹⁴⁴ The penalties range from less than \$500¹⁴⁵ to \$10,000¹⁴⁶ and from sixty days or less in jail¹⁴⁷ to ninety days or less in jail.¹⁴⁸ Alternatively, the New York rape shield statute authorizes a right to a civil action and awards “reasonable attorney’s fees to a prevailing plaintiff.”¹⁴⁹

Regardless of the type of punishment assigned, the penalty will most likely be upheld by the Supreme Court. In *Florida Star v. B.J.F.*, the Court held that it was inappropriate to apply a “negligence *per se* standard” to media publication since “liability follows automatically from publication.”¹⁵⁰ Specifically, the Florida statute in question¹⁵¹ imposed liability regardless of whether the plaintiff actually suffered any injury.¹⁵² In addi-

140. CAL. PENAL CODE § 293.5; *see also* TEX. CODE CRIM. PROC. ANN. art. 57.02 (creating an exception to the court order if the victim’s identity is at issue in the case).

141. *See generally* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (In attempting to deny access to information, the state must show “that the denial . . . is narrowly tailored to serve [a compelling governmental] interest.”).

142. *See generally* ALASKA STAT. § 12.61.140 (2006); CAL. PENAL CODE § 293.5; OHIO REV. CODE ANN. § 2907.11 (2001); S.D. CODIFIED LAWS § 23A-6-22 (1998).

143. *See generally* FLA. STAT. ANN. § 794.024 (West 2000); MASS. GEN. LAWS ANN. ch. 265, § 24C (2000); NEV. REV. STAT. ANN. § 200.3771 (LexisNexis 2006); N.Y. CIV. RIGHTS LAW § 50-c (2004) (providing for a private cause of action by a victim); WYO. STAT. ANN. § 6-2-310 (2005).

144. *See* FLA. STAT. ANN. § 794.024; MASS. GEN. LAWS ANN. ch. 265, § 24C; NEV. REV. STAT. ANN. § 200.3771; WYO. STAT. ANN. § 6-2-310.

145. FLA. STAT. ANN. § 794.024.

146. MASS. GEN. LAWS ANN. ch. 265, § 24C.

147. FLA. STAT. ANN. § 794.024.

148. WYO. STAT. ANN. § 6-2-310.

149. N.Y. CIV. RIGHTS LAW § 50-c.

150. 491 U.S. 524, 539 (1989).

151. FLA. STAT. ANN. § 794.03.

152. 491 U.S. at 539. For instance, the statute imposed liability “regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject

tion, the statute was selectively applied against persons or entities in a position to publicize public records.¹⁵³

In contrast, under many of the rape shield statutes advocating government non-disclosure, liability does not automatically follow if the government mishandles information. Instead, these statutes grant the court discretion to release the information if disclosure is desired or if the plaintiff is not harmed by the disclosure.¹⁵⁴ Additionally, unlike the rape shield statute in *Florida Star*,¹⁵⁵ the punishment is evenhandedly applied since it punishes the only entity in a position to release public records: the government. Moreover, in dicta, the *Florida Star* Court stated that the legislature may “extend a damages remedy against the government or its officials where the government’s mishandling of sensitive information leads to its dissemination.”¹⁵⁶ Thus, the Court will likely not strike down a statute that places a penalty upon a government actor for publicly disseminating a rape victim’s identity.

IV. THE FRAMEWORK FOR AN IDEAL RAPE SHIELD STATUTE

This Part proposes a model non-disclosure statute by incorporating the four basic goals of a rape shield statute into each of the five primary elements discussed in Part III. The four basic goals of this model statute are to (1) protect the rape accuser’s identity; (2) minimize harassment of a rape accuser; (3) encourage rape accusers to come forward; and (4) satisfy the constitutional standards.

Subpart A analyzes the various approaches by the states and advocates the most effective approach according to the previously mentioned goals of the statute. By incorporating the most effective approaches of the states, Subpart B proposes a statutory framework for a rape shield statute that will offer ample protection to rape victims and survive a constitutional challenge.

A. Exploring the Five Basic Elements: What Should be Included in a Rape Shield Statute?

Subpart A analyzes the five basic elements of a rape shield statute in the following order: (1) the persons protected by the statute; (2) information protected by the statute; (3) exceptions to the statute; (4) methods of concealing the information; and (5) penalties for violating the statute.

of public concern.” *Id.*

153. *Id.* at 540.

154. *See* statutes cited *supra* note 126.

155. FLA. STAT. ANN. § 794.03.

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

1. The Statute Should Only Protect Crime Victims with a Compelling Government Interest

According to the Court in *Globe Newspaper*, the government should have a compelling interest in prohibiting access to information in court proceedings.¹⁵⁷ This interest should be supported through evidence, and the stigma associated with the crime should overcome a presumption of openness.¹⁵⁸

Many courts and state legislatures have found that the state has a compelling and justifiable interest in protecting the identities of sexual assault victims.¹⁵⁹ According to empirical evidence, “rape remains the most under-reported crime within the criminal justice system.”¹⁶⁰ And as previously mentioned, many studies and surveys suggest rape victims would be more likely to report an offense if they knew their identity would not be publicly revealed in connection with the offense.¹⁶¹ Although the courts have not stated that other crimes should be denied the protection of a non-disclosure statute, there does not appear to exist sufficient evidence, judicial opinion, or legislative history to overcome a presumption of openness. Thus, unless additional findings are made, victims of sexual offenses should be the only persons covered in non-disclosure statutes in order to conform to constitutional standards.

2. The Statute Should Only Conceal Information That is Necessary to Protect the Victim’s Identity

The Court stated in *Globe Newspaper* that if the state seeks to protect the identity of a rape victim, the state should narrowly tailor its access restrictions to serve those interests.¹⁶² Further, the public should be given access to information that reasonably relates to government and public affairs.¹⁶³ A victim’s identification information is typically a private interest and not a public interest.¹⁶⁴ However, the public does have a legitimate interest in learning about particular facts of a crime and the profile of the victim.¹⁶⁵ Thus, the information that is protected should be limited.

With certain exceptions discussed in Part III.C., the government should only conceal certain information, such as the victims name, address, telephone number, place of employment, and business address. By concealing this type of information, states will still be able to protect an accuser’s iden-

157. 457 U.S. 596, 606-07 (1982).

158. See *supra* text accompanying notes 103-105.

159. See *supra* text accompanying notes 106-110.

160. *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 13 (Cal. Ct. App. 1997) (quoting Marcus & McMahon, *supra* note 20, at 1049-50) (internal quotation marks omitted).

161. See *supra* text accompanying notes 4-5.

162. 457 U.S. at 606-07.

163. See *supra* Part III.B.

164. See *id.*

165. See *id.*

tity, meet constitutional standards, and minimize harassment. Further, if rape victims understand that their identifying information will not become public record, a victim may be more likely to report a rape crime.¹⁶⁶

3. The Court Should Have Discretion to Apply the Statute and Certain Exceptions Should Exist

In order to conform to the constitutional requirements, rape shield statutes should contain two types of exemptions. The first, according to *Florida Star*¹⁶⁷ and *Globe Newspaper*,¹⁶⁸ is that the court must have discretion in applying a statute that protects the identity of a rape accuser in public records or during a trial. Second, a valid and effective rape shield statute should not conceal information where the accuser wishes to reveal the information or where the state's or accused's interest outweighs the victim's privacy interest.¹⁶⁹ Accordingly, the government should disclose protected information when the victim requests the information to be revealed, a rape counselor who is assisting the victim requests the information, the defendant or the defendant's council requests the information, disclosure is necessary for the state to take appropriate measures in preventing a defendant from being charged twice for the same offense, disclosure is necessary for public officers to complete an investigation, or the concealed information is at issue in the case (e.g., the victim's address is the site of the alleged offense).¹⁷⁰

Finally, a state's non-disclosure statute will likely not achieve its goals if it suppresses information only until the accused is arraigned, "the charge is dismissed, or the case is otherwise concluded."¹⁷¹ If the victim knew his or her identification would be revealed immediately after the initial proceedings, he or she might still be reluctant to report a crime to the authorities and the purpose of the statute would not be achieved.¹⁷² Thus, to encourage a rape victim to report an offense, the state should suppress the victim's identifying information for an indefinite period of time after the case has concluded.

4. Replacing the Victim's Name with a Pseudonym is Likely a Sound and Effective Method of Concealing the Victim's Identity

The Texas and California rape shield statutes substitute the victim's name with a pseudonym. This practice will likely satisfy constitutional

166. See generally *supra* notes 4-5 and accompanying text (discussing how the fear of public shame deters some women from reporting a rape).

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

168. 457 U.S. 596.

169. See *Florida Star*, 491 U.S. at 539; 76 C.J.S. *Records* § 100 (1994).

170. See statutes cited *supra* notes 126.

171. OHIO REV. CODE ANN. § 2907.11 (2006); see also S.D. CODIFIED LAWS § 23A-6-22 (1998).

172. *Doe v. Bd. of Regents*, 452 S.E.2d 776, 781 (Ga. Ct. App. 1994).

standards and most effectively meet the goals of the statute. Specifically, it satisfies the interest of the state, protects the identity of the victim, and likely does not interfere with the rights of the press, public, or defendant.¹⁷³

Also, it is important to note that the jury should receive special instructions to minimize any potential prejudice to the defendant. As a California court noted, “the trial judge [shall] instruct the jury ‘that the alleged victim is being so identified [as Jane Doe or John Doe] only for the purpose of protecting his or her privacy.’”¹⁷⁴

5. *Civil Penalties Should be Imposed to Enforce the Statute*

As discussed in Part III.E., a non-disclosure statute contains little, if any, enforcement power if a penalty is not imposed for violations; therefore, a civil or criminal penalty should be attached to the statute. Though, in choosing between a criminal or civil penalty, the legislature should weigh many different factors,¹⁷⁵ and a civil remedy, such as the penalty set forth in the New York statute,¹⁷⁶ should be preferred over a criminal penalty for multiple reasons.

First, when it is difficult to identify the person who disclosed privileged information within a government agency, it may be beneficial for the person protected by the statute to allow him or her to bring a civil action against the agency itself.¹⁷⁷ Second, because of the procedural requirements in criminal law, such as double jeopardy, the right to a fair trial by jury, and proof beyond a reasonable doubt, a civil action is often easier to pursue than a criminal penalty against someone who did not actually commit an immoral act.¹⁷⁸ Finally, whereas a criminal punishment may only charge a guilty party with a misdemeanor and a \$500 fine,¹⁷⁹ a civil penalty could cost a violator of the statute several thousand dollars if the defendant is required to pay for the plaintiff’s injury and attorney’s fees and costs.¹⁸⁰ Thus, the monetary award and the deterrent value of a civil remedy could become quite significant.

173. See *supra* Part III.D.

174. *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 15 (Cal. Ct. App. 1997) (quoting CAL. PENAL CODE § 293.5(b)).

175. See *Kennedy v. Medoza-Martinez*, 372 U.S. 144, 168-69 (1963) (noting the many factors that distinguish criminal penalties from civil penalties, including “[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions”)

176. N.Y. CIVIL RIGHTS LAW § 50-c (1992).

177. See *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1311 (1979).

178. See *id.* at 1301-03.

179. See *supra* Part III.E.

180. See N.Y. CIVIL RIGHTS LAW § 50-c.

*B. The Proposal: An Effective and Constitutionally Sound
Rape Shield Statute*

Based upon the foregoing goals,¹⁸¹ this subpart proposes a model rape shield statute in accordance with the statute's five basic elements. This model statute should not necessarily be deemed exhaustive or complete, and states should retain discretion in implementing and in setting specific goals. Rather, it is merely a framework for states to follow in enacting a rape shield statute.

A rape shield statute should protect anyone who is an alleged victim of sexual assault or attempted sexual assault, as defined by the state's code, and reports the alleged offense to the authorities. Any person who reports an alleged sexual assault or attempted sexual assault must be informed that his or her identifying information will become a part of the public record unless he or she requests that this information remain confidential. If the alleged victim chooses to keep his or her identification confidential, no public servant—including any attorney licensed by the state—or law enforcement agency may directly or indirectly disclose the alleged victim's photograph, actual name, residential address, telephone number, place of employment, or business address in connection with the prosecution or investigation of the offense, except as otherwise provided. If the alleged victim chooses to keep this information confidential, it may not be deemed to be a part of the public record.

Only the following persons may have access to the information: anyone assisting in the prosecution, defense, or investigation of the case; the judge and the members of the court with competent jurisdiction over the offense; a person specified in an order entered into by the court with competent jurisdiction of the alleged offense; and a rape crisis councilor or sexual assault counselor who is offering services at the request of the alleged victim. Only to the extent necessary, the alleged victim's confidential information must be disclosed for the following reasons: where disclosure is required for the state to take appropriate measures in preventing a defendant from being charged twice for the same offense, where the concealed information is at issue in the case, and where the alleged victim requests the information to be disclosed. Additionally, a court with competent jurisdiction over the offense may retain discretion in determining whether to reveal the alleged victim's identification information.

An alleged victim may choose to be referred to by a pseudonym, of the alleged victim's choice, instead of the alleged victim's actual name in all public files, court documents, court records, press releases, and court proceedings concerning the offense. A court with competent jurisdiction over the offense retains discretion in denying the alleged victim's use of a par-

181. The four basic goals of this model statute are to (1) protect the rape accuser's identity; (2) minimize harassment of a rape accuser; (3) encourage rape accusers to come forward; and (4) satisfy the constitutional standards.

ticular pseudonym due to prejudice to another party or person. If the court orders the alleged victim to be identified by a pseudonym and there is a jury trial, the court must instruct the jury that the alleged victim is being so identified only for the purpose of protecting his or her privacy.

If the identity of the alleged victim is disclosed in violation of this statute, the alleged victim who is injured as a result of such wrongful disclosure may bring an action to recover damages. The court may also award reasonable attorney's fees to a prevailing plaintiff under this statute.

V. CONCLUSION

In light of rape victims' unique privacy interests and because rape is one of the most underreported crimes, there is a significant state interest in protecting the identities of rape victims. Though many of the rape shield statutes aimed at punishing the press have been declared unconstitutional, rape shield statutes prohibiting the government from disclosing a rape victim's identity will most likely pass constitutional muster.

A rape shield statute ought to protect the alleged victim's basic identifying information, such as the accuser's name, address, telephone number, and employment information. The statute should specifically protect the victim's identity by substituting the accuser's name with a pseudonym. This pseudonym will be used to refer to the alleged victim at all stages of the criminal proceeding, including the trial. The court must retain discretion in choosing to conceal the alleged victim's name, and the alleged victim's identity should always be revealed to certain persons or under certain circumstances. To enforce this statute, the states should apply a civil right of action against any government entity that violates the statute.

The statute proposed in this Comment is not perfect. In some situations, the media might still be able to obtain the identifying information of a rape victim by using ordinary reporting techniques.¹⁸² If the media lawfully acquires information, the state can do little to proscribe the media from publishing it. However, considering the trauma, harassment, and humiliation associated with rape, striving to protect the privacy of rape victims is an admirable and worthwhile goal for all state legislatures. Accordingly, if this statutory outline offers the most permissible and effective protection to rape victims, then states should consider this framework. By following this model, the legislatures will be able to assure their citizens that the government will make every earnest attempt to protect rape victims' significant privacy interests.

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182. See generally *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979).