

Mitigating the Impact of Publicity on Child Crime Victims and Witnesses

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Children and adolescents become crime victims at shockingly high rates. They are twice as likely to suffer violent crimes as adults (Hashima & Finkelhor, 1999; Klaus & Rennison, 2002). This disproportion has remained consistent even as overall crime rates have dropped. Children and adolescents are the victims of 75% of the sex offenses that come to police attention (Finkelhor & Ormrod, 2000).

When the perpetrator of a crime against a child is another child, both the victim and the offender are generally shielded from public scrutiny (*Globe Newspaper Co. v. Superior Court*, 1982; Laubenstein, 1995; McLatchey, 1991). As a society, we generally believe that shielding young offenders from public attention promotes their rehabilitation and healthy development. Because criminal proceedings against adult offenders are generally public, when the perpetrator is an adult, which occurs in about half of all reported violent offenses against children, both the victim and the offender are thrown into the public arena. For news organizations, reporting the identity of the victim and the witness increases the story's human interest value. This creates a paradox for children in

the justice system: for offenders, proceedings remain confidential in most states, while victims harmed by adults often have no such confidentiality.

Victims' identities are almost always revealed in news stories regarding abductions ("Elizabeth's Journey," 2003; "Kidnapped Pair Safe," 2002) and homicides ("Slain Girl Used Internet to Seek Sex, Police Say," 2002). Although greater privacy is afforded for sex crimes, in some states information about rape victims is public, which some news organizations publicize. Disclosing a rape victim's identity and graphic details of her rape is the subject of ongoing controversy, including when the victim is an adult (Elliott, 1989; Finkelhor, 2003; Gartner, 1991; Hackney, 2003; Magowan, 2003; Roeper, 2002).

While publicizing victims' names may not be the norm for all crimes committed against children, it occurs quite often. The disclosure of victims' identities and the details of the crimes raises legal and ethical issues. From the legal standpoint, how should the law resolve the conflict between children's privacy interests and freedom of the press? From the standpoint of ethics, how

can society balance the media's power to promote sympathy and justice for child victims against the danger that it may increase the victim's anxiety and shame and impede the individual's healing? These issues raise the question of whether the legal system could do a better job of protecting young crime victims and witnesses from the potentially adverse impact of becoming the object of media and public scrutiny. Such questions arise in sensational cases but also with routine crimes reported in the local newspaper, where a victim's schoolmates, friends, or neighbors may see it.

Concerns about confidentiality extend to young witnesses as well. Children who witness criminal acts are sometimes required to reveal embarrassing or unflattering personal information in direct testimony or cross-examination. Young witnesses may also be concerned about retaliation or the attention a notorious criminal case may draw. Thus, the confidentiality accorded to juvenile offenders might also benefit juvenile witnesses as well as victims if it were available.

The practice of identifying child victims or witnesses in criminal cases raises many important questions of public and legal policy. How should the law balance the interests of individual crime victims and witnesses against the public's need or desire to know the details of crimes? Should the protections vary depending on the stage of the proceedings? Which crimes raise the specter of public stigma for child victims and witnesses such that they should be protected from public scrutiny? Should victims, young witnesses, and their parents choose whether the children should be identified publicly or should the law presume or forbid that choice? Should the burden be on victims in the first instance to prove that their privacy should be protected, or should the law presume that those interests will be protected and place the burden on parties seeking disclosure of victim and witness identities?

Part I of this chapter describes the effects of publicity on young persons. Part II traces how we shield young offenders, but not young victims or witnesses, from intense scrutiny. Part III outlines various statutory approaches to protecting the privacy interests of child victims and witnesses. Part IV explores whether other potential responses for protecting young witnesses and crime victims such as personal injury lawsuits, systems of applied ethics for journalists, or informal measures would likely be more helpful than statutes in protecting victims' privacy interests and rejects these mechanisms as impractical. Ultimately we conclude that greater and more uniform laws to protect the identities of child victims and witnesses from publicity are warranted.

IMPACT OF VICTIMIZATION AND PUBLICITY

Crime victimization of a child is a major trauma that poses considerable peril for the child's subsequent development, including increased risks of depression, substance abuse, post-traumatic stress disorder, conduct disorder, delinquency, and additional child and adulthood victimization (Boney-McCoy & Finkelhor, 1995a, 1995b, 1996; Kendall-Tackett, Williams, & Finkelhor, 1993; Kilpatrick, Saunders, & Smith, 2002). Little research has isolated the specific contribution that publicity makes to these problematic outcomes. Nonetheless, many specific theoretical and empirical findings point strongly to their probable negative contribution.

Most models of the serious negative impact of childhood sex offenses posit a major role for stigma or shame in the etiology of subsequent problems (Andrews, 1995; Finkelhor & Browne, 1985). Indeed, victims with greater levels of shame and negative self-perceptions related to the offense tend

to be more negatively affected (Mannarino & Cohen, 1996). Victims who recant disclosures made to the authorities or fail to disclose the more embarrassing elements of the episodes often do so because of shame and the realization that a larger audience than the victim originally anticipated will know.

The experience of testifying in criminal cases also provokes anxiety in children (Goodman et al., 1992). Children who experience more intensive cross-examination or are involved in cases that drag on over a longer period of time have higher levels of anxiety and depression than children who lack these experiences. Prosecutors and courts have adopted reforms to minimize these anxieties (Myers, 1994), especially children's concern that their testimony will result in public exposure of embarrassing information.

Reputational issues are very important and sensitive for school children. Negative life events, family circumstances, and sex-related biographical details frequently are the basis for bullying and exclusionary behavior (Ross, 1996). Reputations among school children, once established, are difficult to alter (Jacobs-Sandstrom & Coie, 1999). In addition, young victims and witnesses are more likely than other children to experience subsequent victimization because they are seen as legitimate victims or easy targets.

Thus, publicity may compromise the recovery of juvenile crime victims in several ways. First, the anticipation that people will learn about an embarrassing victimization may increase the victim's anxiety, embarrassment, and shame. This concern depends not just on the number of people who will potentially know, but also on whether specific individuals, such as classmates, relatives, or church members, will likely learn the details. Second, publicity may extend the recovery time for child victims because more individuals may potentially remind children about

their victimization. Recovery from crime victimization is more rapid when children are able to put the experiences behind them and escape the victim role (Runyan, Everson, Edelsohn, Hunter, & Coulter, 1988). Third, publicity about victimization may in some cases cause children to be targeted for hazing, exclusion, or even additional victimization.

While all crime victims may suffer from publicity, several aspects of childhood elevate the costs of exposure for child victims. First, children are less able to directly represent their experience to journalists or to analyze and correct misrepresentations in portrayals of their experience. Second, school-age children cannot easily insulate themselves from a large and frequently harsh community of peers, short of leaving school entirely. Third, early formative sexual experiences laced with shame and humiliation have consequences that are sometimes difficult to reverse, so that anything that heightens the shame poses a serious risk.

Not all effects of publicity are necessarily negative. Publicity may marshal outpourings of support and protection, and it may allow victims the opportunity to shed stigmas and unrealistic expectations of rejection. Obviously, reactions will differ greatly according to circumstances and individuals. Nonetheless, social scientific findings and anecdotal experience both suggest that publicity is a burden on many child crime victims.

PRIVACY AND AN EVOLVING LEGAL LANDSCAPE

Before we explore whether legislatures might do a better job of protecting victims' privacy rights, we should analyze the sources and limits of crime victims' legal rights to privacy. States' efforts to protect the privacy of child victims have clashed with the news media's First Amendment protections. It is thus

essential to understand the controlling legal doctrines before proposing alternative rules or practices to protect child victims' privacy rights in criminal litigation.

In this section we briefly review the origins of notions about privacy, inventory the various contexts in which the United States Constitution has been held to establish a right to "privacy," and analyze cases in which the First Amendment limits states' ability to enact legislation to protect the privacy rights of crime victims.

Constitutional Privacy

The word "privacy" has several meanings. In what is perhaps the oldest and most common use, it means the state or condition of being withdrawn from the society of others, or from public interest; seclusion, especially in one's home (Hall, 1990; Oxford English Dictionary, 2003). Beginning in the 19th century, however, the word came to be associated with the notion of rights. In this context, "privacy" means the state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; and includes freedom from interference or intrusion (Oxford English Dictionary, 2003). It might thus be argued that although the idea of being withdrawn from society is deeply rooted, the idea that it is a human right protected by law is of more recent origin (Hall, 1990; Perrot, 1990).

The seminal discussion of "the right to privacy" in American law appeared in 1890 in a law review article of that name by Samuel Warren and Louis Brandeis (1890). Since then, it has been the subject of extensive scholarly debate (Kalven Jr., 1966; Zimmerman, 1983). Warren and Brandeis theorized that the right to privacy originated in the common law, meaning the body of cases decided by courts, not in the Constitution or legislation. They equated this right with common-law legal rights that traditionally require a

balancing of interests, rather than creating absolute protections. Describing privacy as a desirable and protected mental and emotional state, Warren and Brandeis argued that the "next step" that the law should take in protecting the "right to be let alone," would be to establish better protections from the intrusions of photographers and newspaper reporters (p. 195).

For the first 80 years after the article's publication, tort law remained the focus for privacy. Beginning in the 1960s, legislatures enacted laws to protect a variety of privacy interests, especially in information held by government agencies (Stevens, 2003). Although some scholars believe the privacy tort is in decline (Kalven Jr., 1966; Zimmerman, 1983), statutes regulating access to and disclosure of information that the government possesses about individuals continue to increase.

Classifying Privacy

Freedom from public intrusion into personal matters

The "right" to be free from public intrusion into private matters has poorly defined constitutional underpinnings and has largely been left to state regulation (*Whalen v. Roe*, 1977).

Information gathered about individuals and held by government agencies, however, stands on slightly different footing. Federal legislation extensively regulates both government and private access to information in a variety of contexts (The Family Educational Rights and Privacy Act of 1974; The Privacy Act of 1974; Stevens, 2003; Warren & Brandeis, 1890). Although these regulatory schemes are both detailed and extensive, they generally govern the collection, access, and dissemination of data by subject matter. The breadth of federal and state legislation in this area suggests two things: first, respect for privacy has taken deep root; and second,

statutory rights expressing this respect are likely to give way when they conflict with specific rights granted by the Constitution. As we shall see below, this has been especially true when statutory privacy rights conflict with the media's First Amendment's rights to publish truthful information.

FLORIDA STAR V. B.J.F.: FIRST AMENDMENT V. PRIVACY

A child victim's or witness's interest in preventing the publication of his or her name and identifying characteristics arises from the interest in avoiding intrusion into personal matters. This branch of privacy law is not derived from the Constitution, but from state and federal statutes that have been enacted during the last 30 years. Many state laws that restrict the news media's ability to report public facts have been found unconstitutional, as *Florida Star v. B.J.F.* (1989) illustrates.

In *Florida Star*, a woman reported to the Duval County Sheriff's Department ("Department") that she had been robbed and sexually assaulted. The Department prepared an incident report and placed it in its press relations room, an area open to the public. A reporter from the *Florida Star* prepared a story that included the victim's full name, which the paper published. The publication of B.J.F.'s full name violated both a Florida statute that made it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" (p. 524) the name of a sexual assault victim, and the paper's own internal policies. B.J.F. sued the Department and the *Florida Star* for negligent violation of the state statute. The Department settled, while the *Florida Star* defended itself, arguing that the statute violated the First Amendment.

B.J.F. testified at trial that she learned about the article from fellow workers and acquaintances. Her mother received several

phone calls from an individual who threatened to rape B.J.F. again. These events caused B.J.F. to move from her home, change her phone number, seek police protection, and get psychotherapy. The jury awarded B.J.F. \$75,000 in compensatory damages and \$25,000 in punitive damages, and the *Florida Star* appealed. The newspaper lost in Florida's appellate courts and then appealed to the United States Supreme Court, which reversed.

Writing for the court, Justice Marshall first distinguished the earlier case of *Cox Broadcasting Corp v. Cohen* (1975), which struck down a state statute prohibiting the dissemination of a rape victim's name. Here, the newspaper publicized information gleaned from a police report, not a trial or court record. Justice Marshall characterized both press freedom and privacy rights as "plainly rooted in the traditions and significant concerns of our society" (p. 535), and did not "rule out the possibility that, in a proper case imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance" (p. 537) state interests as to survive First Amendment scrutiny. He located the privacy interest in "the protections which various statutes and common-law doctrines accord to personal privacy" (p. 530) (*Cox Broadcasting Corp v. Cohen*, 1975; Kalven Jr., 1966; *Oklahoma Publishing Co. v. Oklahoma County District Court*, 1977; *Smith v. Daily Mail Publishing Co.*, 1979) and held that the statute was unconstitutional. For Justice Marshall, the fact that the *Florida Star* obtained B.J.F.'s name lawfully, through a news release provided by the government, was a fact of paramount importance.

IMPLICATIONS FOR LEGISLATION DESIGNED TO PROTECT PRIVACY

The line of cases ending with *B.J.F.* establishes this rule: when a state statute that seeks

to preserve a crime victim's privacy conflicts with the First Amendment, the statute must pass exacting constitutional scrutiny. Such a statute must be narrowly tailored to serve a state interest of the highest order (*Florida Star v. B.J.F.*, 1989; Marcus & McMahon, 1991). The difficulty for state legislatures and those seeking to better protect crime victims' privacy interests is that the *B.J.F.* court effectively determined that those interests are not of the highest order, where a news-gathering organization has lawfully acquired information about a crime victim and publishes it.

Protective Statutes

The federal government and numerous states have adopted a variety of measures designed to protect the privacy of victims and witnesses. A review of these statutes and cases analyzing their constitutionality allows us to draw some preliminary conclusions as to which protections are likely to be effective in protecting children and withstand constitutional muster.

Three state interests underpin state victim confidentiality statutes:

- promoting the well-being of crime victims by preventing stigmatization, even inadvertent stigmatization, by press, peers, or community;
- encouraging crime victims to report crimes committed against them, thereby both aiding the process of psychological healing and preventing additional crimes against them; and
- enabling crime victims better to endure the rigors of the investigative and litigation process.

All of these interests are stronger when the object of the protection is a child. The law has traditionally viewed children as meriting greater protection than adults, and allowed states greater freedom to enact protections for children (*Ginsberg v. New York*, 1968;

Maryland v. Craig, 1990; *Prince v. Massachusetts*, 1944). While this interest in protecting children will not overcome a First Amendment violation, it might support limiting the access of the press to court proceedings and documents involving child crime victims.

Federal Law: 18 U.S.C. § 3509

18 U.S.C. § 3509 establishes significant protections for children who are either witnesses or victims of a broad category of crimes. The statute provides that child victims may testify under some circumstances by closed-circuit television or videotaped deposition (18 U.S.C. § 3509 (b)(1) & (2)) and requires that challenges to the competency of child witnesses be supported by an offer of proof. The latter does not require a hearing unless the court finds compelling reasons for one, and any competency hearing that is conducted must occur outside the jury's presence (18 U.S.C. § 3509 (c)).

Most importantly, the statute prevents information about child victims and witnesses from falling into the public domain (18 U.S.C. § 3509 (a)(2)). It imposes a duty to safeguard information on the entire trial work group, which encompasses everyone involved with the trial, including investigators, prosecutors, defense counsel, and court personnel (18 U.S.C. § 3509 (d)(1)(B)). The entire work group must keep all documents containing the child's name or any other information concerning a child in a secure place, and may disclose them only to persons who have reason to know the information they contain (18 U.S.C. § 3509 (d)(1)(A)). Court papers referring to child witnesses and victims are filed under seal, and counsel must prepare redacted copies for filing in the public record of the proceedings (18 U.S.C. § 3509 (d)(2)). Finally, the trial judge may exclude members of the public and the press from the court room who do not have a direct interest in the case if the trial judge

finds that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate (18 U.S.C. § 3509 (e)).

The statute's constitutionality has been challenged only at the district court level (*United States v. Broussard*, 1991). In that case a newspaper challenged the seal requirement that resulted in redactions to otherwise public documents. The district court found the requirement was narrowly tailored to serve the compelling interest of protecting the identity of children and avoiding unwanted pretrial exposure. It interfered neither with the defendant's Sixth Amendment right to public trial nor the press's First Amendment right of access to criminal proceedings and documents (*United States v. Broussard*, 1991; *United States v. Carrier*, 1993; *United States v. Farley*, 1993; *United States v. Rouse*, 1997).

Although the federal statute imposes additional procedures and related expenses on law enforcement officials, prosecutors, defense counsel, and court officials, it provides excellent protection for child victims and witnesses. Unfortunately, it only applies in federal courts and no state has adopted this comprehensive model.

Overview of State Statutes

Many states have attempted to protect sex-crime victims' privacy by enacting legislation that allows public officials to withhold information about the victim from the press and public, including Alaska, Arizona, California, Florida, Indiana, Massachusetts, Michigan, Montana, Nebraska, Ohio, Texas, Virginia, Washington, and Wyoming, among others (Alaska Statute § 12.61.140, 2003; Ariz. Rev. Stat. Ann. § 13-4434, 2003; Calif. Gov't Code § 54961, 1995; Fla. Stat. Ann. § 92.56, 2002; Ind. Code Ann. § 35-37-4-12, 1995; Mass. Ann. Laws ch. 265 § 24C, 2003; Mich. Comp. Laws § 780.758,

2003; Montana Code Ann. § 44-5-311, 2002; Neb. Rev. Stat. § 81-1842, 1995; Nev. Rev. Stat. Ann. § 200.3772-200.3774, 2003; Ohio Rev. Code Ann. § 2930.07, 1995; Tex. Code Crim. P. Ann. art. 57.02, 2002; Utah Code Ann. § 77-38-6, 2003; Va. Code Ann. § 19.2-11.2, 1995; Wash. Rev. Code § 42.17.310, 2003; Wyo. Stat. Ann. § 14-3-106, 2003).

State legislators have pursued a number of strategies to protect crime victims from the potential stigma of publicity, including prohibiting the publication of victim identity, requiring the redaction names or use of pseudonyms in police reports and court filings, allowing victims to request redaction or the use of pseudonyms in official documents, protecting victims from the normal requirement that witnesses identify themselves on the public record at trial, exempting police reports and court filings relating to certain crimes from public records requirements, and allowing trials to be closed to the public in some circumstances.

These laws vary in scope. Although state legislators have created a variety of protections, no state statute is as comprehensive as the federal statute. Some protect the identities of sex-crime victims during all stages of the investigation, pretrial, and trial proceedings (Fla. Stat. Ann. § 92.56, 2002; Mass. Ann. Laws ch. 265 § 24C, 2003; Nev. Rev. Stat. Ann. § 200.3772-200.3774, 2003; Tex. Code Crim Code art. 57.02, 2002). Some apply only to certain public documents or only until the victim testifies at trial (Alaska Statute § 12.61.140, 2003; Calif. Gov't Code § 54961, 1995; Ind. Code Ann. § 35-37-4-12, 1995; Mich. Comp. Laws § 780.758, 2003; Mont. Code Ann. § 44-5-311, 2002; Neb. Rev. Stat. § 81-1842, 1995; Ohio Rev. Code Ann. § 2930.07, 1995; Utah Code Ann. § 77-38-6, 2003; Va. Code Ann. § 19.2-11.2, 1995; Wash. Rev. Code § 42.17.310, 2003; Wyo. Stat. Ann. § 14-3-106, 2003). In four states, the law protects

the identities of only *child* sex-crime victims (Iowa Code § 910A.13, 1995; Maine Rev. Stat. Ann. tit. 30-A § 288, 2003; N.J. Rev. Stat. § 2A:82-46, 2004; N.D. Cent. Code § 12.1-35-03, 2003; R.I. Gen. Laws § 11-37-8.5, 1995). A few states protect child witnesses as well as victims.

Prohibitions on Publication

South Carolina's statute, similar to the statute in *B.J.F.*, criminalizes publication of a rape victim's name. The statute makes it a misdemeanor to publish the name (but not the image or other identifying information) of victims of criminal sexual conduct (S.C. Code Ann. § 16-3-652-656, 2002). The statute exempts from criminal liability names published by order of a court. It does not establish a private cause of action for invasion of privacy, meaning the victim cannot sue the publisher (*Dorman v. Aikman Communications Inc.*, 1990). A Georgia statute also prohibits the publication of victim identities (Ga. Code Ann., § 16-6-23, 2004). Although state courts have not yet declared these statutes unconstitutional, the *B.J.F.* and *Cox Broadcasting* decisions cast significant doubt on the validity of such statutes, at least as they apply to the publication of truthful information lawfully acquired from public documents or court records.

Voluntary Protections

Some states permit victims or prosecutors to make the victim's identity confidential or to initiate proceedings to do so. After *B.J.F.*, Florida enacted a statute permitting crime victims to obtain court orders restricting the use of their names and other identifying information. It protects the victims of sexual offenses, child abuse, and other crimes directed toward children (Fla. Stat. Ann. 92.56(1), 2002). Crime victims must show three things in order to protect their names and identities:

- The victim must establish that nothing has occurred to disqualify him or her from receiving the court's protection; the victim's identity is not already known in the community; the victim has not called public attention to the offense; and the victim's identity has not already become a "reasonable subject" of public concern (Fla. Stat. Ann. § 92.56 (1) (a)–(c), 2002).
- The victim must establish that disclosure of his or her identity would be offensive to a reasonable person (Fla. Stat. Ann. § 92.56 (1)(d), 2002).
- The victim must show harm from disclosure, such as likelihood of retaliation, severe emotional harm, or interference with trial testimony (Fla. Stat. Ann. § 92.56 (1)(e), 2002).

Once a protective order is granted, the defendant in the case is entitled to access to identifying information, but may not disclose the information to persons not connected with his or her defense (Fla. Stat. Ann. § 92.56 (2), 2002). The statute authorizes the parties to use pseudonyms in court filings to protect the victim's identity (Fla. Stat. Ann. § 92.56 (3), 2002). In addition, it imposes a duty on law enforcement personnel, court staff, counsel, and litigants to maintain the confidentiality of victims' identification.

Rather than criminalizing the publication of a victim's name or identifying information, the statute treats disclosure or publication of such information as a contempt of court. In this regard, it is significantly different from its predecessor in *B.J.F.* and the South Carolina and Georgia statutes, which impose criminal sanctions for the publication of names and identifying information.

The revised Florida statute acts preemptively to prevent the identity of a qualifying victim from reaching the public domain. The Florida statute should pass constitutional muster. It requires a case-by-case showing of need, a demonstration that disclosure would be offensive to a reasonable person, and a particularized showing of harm.

The Florida statute nevertheless suffers from at least three drawbacks. First, it requires crime victims to take the initiative and move for the court's protection. Second, it requires victims to shoulder significant evidentiary burdens in order to invoke the court's protection (Anderson, 2002). Third, by requiring victims to prove that their identity has not already been disclosed, it creates the real possibility that they cannot carry that burden if a charging document or other court filing inadvertently includes their name. It may even create some incentive for the media to discover and disclose a victim's identity before the victim has a chance to apply for a protective order. The Florida procedure is thus of limited practical usefulness.

Other states impose fewer burdens on crime victims seeking to preserve the confidentiality of their identity. Texas gives victims of sexual crimes the right to be referred to by pseudonym in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings. Victims who elect to use this procedure complete a "pseudonym form" developed and distributed by the Sexual Assault Prevention and Crisis Services Program of the Texas Department of Health, which records their name, address, telephone number, and pseudonym (*Greeno v. State*, 2001; *Stevens v. State*, 1995; Tex. Code Crim. Proc. art. 57.02, 2002).

Completed pseudonym forms are confidential. After victims complete the form, the investigating law enforcement agency may not disclose the victim's name, address, or telephone number in the offense's investigation or prosecution (Tex. Code Crim. Proc. art. 57.02, 2002), and must take steps to protect the form's confidentiality. The form may be disclosed to defendants and their attorneys but not to anyone else without a court order. Prosecutors must designate the victims by their chosen pseudonyms in all legal proceedings (Tex. Code Crim. Proc. art. 57.02,

2002). This protection extends to victims of a wide variety of sexual crimes, including indecency with a child, sexual assault, aggravated sexual assault, compelling prostitution, and sexual performance by a child. While the statute does not expressly address child victims, it also does not exclude them from the procedure. A public servant's wrongful disclosure of a victim's identifying information is a misdemeanor (Tex. Code Crim. Proc. art. 57.02, 2002).

The Texas statute provides two routes for disclosure of identifying information about victims. A court may order the disclosure if it finds that the information is "essential" in the trial or the victim's identity is disputed (Tex. Code Crim. Proc. Art. 57.02 (g), 2002). Victims or their parents or guardians may consent to disclosure. The Texas statute has been twice challenged on non-constitutional grounds and has withstood those challenges both times (*Greeno v. State*, 2001; *Stevens v. State*, 1995). One lower court has noted that it is an error to identify a child crime victim by name at trial where the victim had followed the statutory procedure for using a pseudonym, meaning that this practice is barred by the statute (*Stevens v. State*, 1995). Although the Texas statute has not yet been challenged on constitutional grounds, it appears likely to withstand constitutional scrutiny because it requires the use of a pseudonym after steps have been taken to prevent victims' names from falling into the public domain (*KPNX Broadcasting Co. v. Arizona Superior Court*, 1982; *Nixon v. Warner Communications, Inc.*, 1978a).

The concept of allowing crime victims to control public access to their identities is appealing on the surface. The choice protects those who want their identity to remain private while allowing those who want to come forward to do so. For some victims it is beneficial to confront possible stigma head-on, and coming forward helps educate the public about the impact of crime.

Three policy arguments against such an approach, however, should be considered. First, the relatively infrequent utilization of the Texas procedure suggests that without a mandate, the justice system may be fairly passive. At a minimum, more resources should be invested in informing the law enforcement and victim services communities about the procedure. Second, where a crime occurred recently, victims or their parents may be in a poor psychological condition to rationally consider their privacy needs, and may later regret a decision to disclose their identity because it cannot be revoked. Finally, putting the burden on victims to invoke privacy protections clearly runs the risk that ill-informed victims who would otherwise invoke the protections will be publicly identified, a policy that seems inequitable to crime victims, especially to children.

Mandatory Redaction or Use of Pseudonym

Some states have required that the names of crime victims be treated as confidential under some circumstances unless a court or the victim releases the identity. New Jersey is *one such state*. It enacted a statute to protect the privacy of child victims of aggravated sexual assault, sexual assault, aggravated criminal sexual conduct endangering the welfare of a child, and abuse and neglect actions. The statute requires the use of initials or a pseudonym in all court filings and provides that police reports, to the extent to which they would ordinarily be public, are confidential and unavailable to the public (N.J. Stat. Ann. § 2A:82-46, 2004).

Unlike statutes that require victims to invoke confidentiality protections, the New Jersey law prevents information from falling into the public record, where the First Amendment protects the news media from regulation or sanction. In this respect the statute works like laws requiring that court

records relating to juvenile *offenders* be confidential (N.J. Stat. Ann. § 2A:82-46, 2004). Such statutes probably should withstand constitutional challenge.

Although no reported cases test the constitutionality of the New Jersey statute, we believe it should be found constitutional. Rather than punishing the publication of victim information after it enters the public domain, the New Jersey statute, like other confidentiality statutes, protects the information from making its way into the public domain in the first place. Similar laws have withstood constitutional challenge (*Nixon v. Warner Communications, Inc.*, 1978a).

This is the right result. The First Amendment generally does not grant the press a right to information about criminal proceedings superior to that of the general public (*Nixon v. Warner Communications, Inc.*, 1978b). Because protective statutes keep details of victims' identity out of the public record in the first instance, they do not restrict the news media's right to copy and publish information open to the public.

These statutes offer a number of benefits. Crime victims are not required to shoulder the burden of triggering confidentiality protections. These statutes do not depend upon victims being notified of the availability of such protections. Uniform procedures requiring that identifying information in certain categories of offenses be withheld from the public are less burdensome than the dual record-keeping procedures under a Texas-style opt-in statute.

Although we favor a mandatory approach, it also has its drawbacks. First, it requires investigators, prosecutors, defense counsel, and court officials to maintain one set of records containing victims' identifying information for their own use and a second set without that information for public disclosure. The approach thus imposes significant costs and administrative burdens. Second, it can be difficult to design an effective enforcement

mechanism, given that the targets of enforcement action (police, prosecutors, defense counsel, and court administrators) generally derive no personal benefit from violating the statutes. Finally, for reasons that will be discussed further below, such statutes may not deal effectively with protecting victim privacy after the criminal verdict.

Public Access to Investigative and Court Records

Another approach to protecting the privacy of victims and witnesses is to exempt certain identifying information in public records from disclosure. A number of states take this approach (e.g., Alaska Stat. § 12.61.110, 2003; Mass. Ann. Laws ch. 265, § 24C, 2003; N.D. Cent. Code, § 12.1-35-03, 2003; N.J. Stat. § 2A:82-46, 2004; R.I. Gen. Laws § 11-37-8.5, 2002; Wash. Revised Code § 10.97.130, 2003). In Massachusetts, identifying information about victims of sexual crimes in law enforcement and court records is not subject to disclosure under the Massachusetts public records law (Mass. Ann. Laws ch. 265, § 24C, 2003).

Changes to public records laws offer the same advantages that mandatory protections provide. They offer the additional advantage that if structured correctly, they can continue to shield identifying information about child victims and witnesses from disclosure after a criminal case has been adjudicated. Moreover, from a functional standpoint, law enforcement agencies and courts generally deal with requests for disclosure in the analytical context of public records laws. Their chief disadvantages are (a) that they are not always applicable to court records, and (b) they often put the burden to establish that records are exempt from disclosure on the party opposing disclosure (*Ames v. City of Fircrest*, 1993).

Shielding information from public disclosure brings two important values into

conflict: protecting the privacy interests of crime victims and preserving transparent governmental function. While there is a right to inspect and copy public records and documents, including judicial records (*Nixon v. Warner Communications, Inc.*, 1978a), that right is not absolute. It is subject to the court's supervisory power over its own records and files and the trial judge's discretion.

Protections at Trial

Protection for young crime victims and witnesses during criminal trials takes two forms: protections against being required to divulge identifying information during trial testimony, and procedures to close the courtroom to the public and news media during the child's testimony.

Several states provide that victims may not be compelled to provide identifying information during court testimony under some circumstances. By themselves such statutes probably do not go far enough. But when coupled with statutes requiring or allowing redaction, they provide important protection.

In contrast, closure of trial proceedings burdens the court system and the public in ways that the use of pseudonyms in court filings or allowing children not to provide detailed identifying information in trial testimony do not. Only Massachusetts and the federal statute expressly provide that criminal trials may be closed to protect child crime victims (Mass. Ann. Laws ch. 278, § 16A, 2003; 18 USC § 3509 (e), 2004; Alaska Stat. § 12.61.150, 2003). In Massachusetts, a trial judge must exclude the public and the press from the trial proceedings of a variety of cases in which a child is the victim of a sexual crime (Mass. Ann. Laws ch. 278, § 16A, 2003). In 1982, the *Boston Globe's* parent company requested access to the trial of a defendant charged with sexual crimes against

three girls (*Globe Newspaper Co. v. Superior Court*, 1982), and the district court denied it. The United States Supreme Court struck the statute down on First Amendment grounds.

Writing for the court, Justice Brennan observed that the right of access to criminal trials has constitutional stature, but is not absolute. Orders to close criminal trials, however, must be supported by a compelling government interest and be narrowly tailored to serve that interest. Justice Brennan identified two interests in the Massachusetts statute: protecting minor victims of sex crimes from further harm, and encouraging such victims to come forward and testify fully and credibly.

While safeguarding the physical and psychological well-being of young crime victims is a compelling state interest, the Court concluded that this did not justify mandatory closure of all criminal trials. Rather, it requires a more narrowly tailored approach, including a case-by-case analysis to decide whether closure is necessary to protect the victim. Factors that the trial court must consider include the victim's age and psychological maturity, the nature of the crime, the interests of parents and relatives, and the victim's preference.

After the Supreme Court's decision, the Massachusetts legislature neither repealed nor amended the statute. Massachusetts courts have interpreted the statute to require the findings and narrowly tailored protections mandated by the United States Supreme Court. Courts outside Massachusetts also use a case-by-case analysis to decide whether closure is necessary to protect the victim (*Commonwealth v. Martin*, 1994). In highly newsworthy cases, where public and press interests are at their highest, a judge may be reluctant to close a trial.

The federal statute largely tracks the *Boston Globe* requirements. Thus, carefully drawn statutes allowing judges to close hearings to the public are constitutional.

Protections for Witnesses

A few states give crime witnesses a general right to keep their identities confidential in police reports and court documents (see Alaska Stat. § 12.61.130, 2003; N.D. Cent. Code, § 12.1-35-03, 2003; Rev. Code Wash. (ARCW) § 7.69A.050, 2003; Wash. Rev. Code, § 42.17.310, 2003) or trial proceedings (see Utah Code Ann. § 77-38-6, 2003). Such statutes should be found constitutional to the same extent as statutes protecting crime victims. They offer the benefit of protecting children collaterally involved in crimes performed by adults or other children, who may become subjects of publicity themselves.

Such statutes suffer from a number of practical drawbacks. First, stigmatizing publicity appears to affect crime witnesses less often than victims, and imposing this burden on law enforcement, prosecutors, defenders, and court administrators may be unnecessary. Second, it is not always clear who will become a witness at trial, especially during the investigation or pretrial phase. Finally, public records of a criminal case, especially investigative records that often become public when the adjudicative phase ends, often include the names of dozens of persons categorized as "witnesses," both laypersons and professionals; requiring nondisclosure of their names could be difficult and consume public resources better spent elsewhere.

Enforcement

States have chosen a variety of enforcement mechanisms for statutes protecting the privacy of victims and witnesses. Some make disclosure a crime (see, N.J. Stat. § 2A:82-46 (b), 2004), others punish disclosure as contempt of court (see, R.I. Gen. Laws § 11-37-8.5 (c), 2002), others establish a fine (Mass. Ann. Laws ch. 265, § 24C, 2003), others treat disclosure as a professional conduct violation (see Alaska Stat. § 12.61.125, 2003), and others are silent on enforcement

(see, N.D. Cent. Code, § 12.1-35-03, 2003; Tex. Code Crim. Proc. art. 57.02, 2002).

Statutes shielding the identity of a crime victim face several practical barriers to enforcement. Absent new direction from the United States Supreme Court, there would be significant constitutional barriers to punishing representatives of the news media for publishing truthful information obtained by a wrongful disclosure (*Bartrnicki v. Vopper*, 2001; Halstuk, 2003; Leone, 1993). Thus, the likely targets of enforcement would be law enforcement personnel, prosecutors, defense attorneys, court employees, and other public employees. It might be unwise as a policy to impose criminal sanctions for negligent or reckless disclosure of confidential information against persons who do not personally benefit from the disclosure (see Nev. Rev. Stat. § 200.3772 (7), 2003). Proving willful disclosure by public employees might be difficult, and legislators are probably justified in assuming that such disclosures will be rare. It thus may be beneficial for such statutes to establish a variety of enforcement measures, including contempt remedies, fines, and referrals to licensing agencies in such statutes, and to allow courts and prosecutors to select the most appropriate remedy.

Scope

States use a wide variety of strategies in determining the scope of privacy protections extended to crime victims. Some states limit protections to minors or to a small class of offenses (Nev. Rev. Stat. § 200.3772 (1), 2003; R.I. Gen. Laws § 11-37-8.5, 2002; Wyo. Stat. § 14-3-106, 2003); others appear to grant the protections to all crimes (Alaska Stat. § 12.61.130 & Alaska Stat. § 12.61.125, 2003; Ariz. Rev. Stat. § 13-4434, 2003; N.D. Cent. Code, § 12.1-35-03 (2), 2003; Utah Code Ann. § 77-38-6 (1), 2003); and others tailor the protections to the offense involved (see, Conn. Gen. Stat. § 1-210 (b)(3)(F), 2003;

Fla. Stat. § 92.56, 2002; Maine Rev. Stat. 30-A M.R.S. § 288, 2003; Mass. Ann. Laws ch. 265, § 24C, 2003; Mich. Comp. Laws § 780.758 (2), 2003; Mont. Code Ann., § 44-5-311, 2002; N.J. Stat. Ann. § 2A:82-46, 2004).

Obviously the scope of protections offered to crime victims is a matter of legislative policy. Protections that are too narrow may not promote victims' privacy interest and encourage cooperation with law enforcement efforts, while extending the protections too broadly may impose costly administrative burdens.

Elements of a Model Statute

Although many states have enacted statutes to protect the identities of crime victims or witnesses, few establish a comprehensive approach to such protections at the investigative, trial, and posttrial phases of the case. It may be that effective models for protecting the privacy of crime victims have simply not received sufficient dissemination. Child and victim advocates could draw upon such models in their efforts to protect children and adults more effectively.

Although a detailed legislative proposal is beyond the scope of this chapter, several objectives for such a proposal emerge from the foregoing analysis. These include the following:

- Establish a right for child victims and witnesses of enumerated crimes to be identified by pseudonym in police reports, charging documents, and court filings, thus preventing public disclosure of identifying information, rather than seeking to punish publication after it arrives in the public domain.
- Make the protections mandatory. This avoids imposing the burden and expense of requiring special findings or detailed showings of harm on victims, while allowing victims to choose to disclose their identities.
- Designate a list or class of crimes for which victim and witness information will be protected. Although sexual assault is

too narrow a category, because children can feel deep shame about being victims of bullying, physical assaults, and offenses by caretakers, including too many crimes, especially for adult victims, may increase administrative burdens and costs and compromise the fundamentally public nature of criminal proceedings. It may even be desirable to establish separate lists of “eligible” crimes for adults and children.

- Establish procedures for defense counsel to obtain the identities of victims and witnesses, subject to the requirement not to disclose or re-disclose the information.
- Do not limit the privacy protections to adult females; include both children and sexual crimes against men and boys within the scope of the protective statute.
- Even if the protections are mandatory, exempt from prosecution victims who purposely or inadvertently put their identifying information in the public domain.
- Establish an exception allowing courts to order prosecutors to disclose identifying information when a victim’s identity is disputed or when disclosure is otherwise necessary to protect a defendant’s constitutional rights.
- Ensure that law enforcement personnel, prosecutors (and their staff), defense counsel (and their staff), and court administrative personnel are all subject to the statute to avoid allowing some actors with knowledge of the victim’s identity to place identifying information in the public domain. Provide protections for negligent disclosure of identifying information by law enforcement officials, prosecutors, and court officials, even when common law or statutory privileges would arguably be a defense to prosecution.
- Amend public records laws so that the portions of investigative, prosecution, and court records that identify child victims and witnesses remain confidential after the disposition of the case.
- If protections of the statute are to be extended to witnesses, do so only for child witnesses who have requested, individually or through their parent or guardian, that their identity remain confidential.
- Adopt a variety of enforcement measures for knowing violations, ranging from contempt, referral to licensing bodies, and criminal sanctions, to encourage compliance without unduly penalizing negligent acts by law enforcement, administrative officials, or attorneys.
- Although the scope of protection is at the heart of legislative policymaking here, statutes that make confidential identifying information for (a) child victims and witnesses in all crimes, and (b) all victims of sexual crimes seem generally to strike the best balance between promoting crime victims’ privacy interests and protecting the transparency of the criminal justice process.

Summary

The federal government and several states have chosen to fashion laws to protect crime victims’ privacy. Those statutes have been subjected to vigorous constitutional challenges. When considered in light of controlling constitutional principles, however, statutes requiring or allowing victims to be identified by pseudonyms in police reports, charging documents, and court filings appear to be constitutional. They thus serve as useful models for other states to draw upon in their efforts to serve the needs of child and adult crime victims. In particular, the federal statute offers the most thorough protections in terms of its scope, its protections for victims and witnesses, and its consideration of the need in some cases to close evidentiary hearings.

OTHER RESPONSES TO PROTECTING VICTIMS’ PRIVACY INTERESTS

There are no guarantees that protective legislation will either be enacted or survive constitutional challenges. We thus turn to an analysis of whether informal measures would provide better assurances that victims’ privacy interests can be protected in the criminal process.

Informal Measures to Protect Victims

Although it appears impractical to protect victims' privacy through expanded rights under personal injury law, it is important for victims and victim advocates to understand a few practical considerations that may limit intrusion on victims' privacy interests.

Avoid relying on oral or vague promises

Reporters and news producers request interviews with crime victims with some frequency. They often promise to provide "favorable" treatment to victims in the resulting stories and to use their broader understanding of the crime's "context" gleaned from the interview to "inform" their coverage of the case. The unexpressed promise in these instances is that unfavorable facts will be minimized and balanced with favorable facts. In addition, reporters or victims may wish to classify some comments or subjects as being "off the record."

Although there may be cases where victims or victim advocates have prior personal experience with a reporter and may reasonably rely on such representations, there are at least two reasons why reporters are unlikely to protect crime victims from intrusive publicity. First, such promises are likely to be found to be legally unenforceable because oral promises are hard to prove and written promises are rare. Second, reporters' and producers' promises usually are too vague to be enforced even when they can be proven.

Protect the victim's physical space

The First Amendment protects nearly everything that the news media obtains from public documents and public places. It does not, however, give representatives of the news media a license to trespass into private property or into nonpublic areas on public property. Whenever possible, prosecutors and

court officials should cooperate in providing crime victims with nonpublic places to sit while waiting to testify or to learn of a jury's verdict. In addition, reporters, photographers, and producers should not be allowed to invade victims' homes and yards. Police officers generally are willing to assist in removing reporters and producers from victims' front lawns. Victims are not required to consent to the entry of reporters or producers into their homes or other nonpublic places.

Choose when to make statements

Reporters and producers sometimes imply that a victim is morally or legally obligated to provide them with an interview or statement merely because the victim has provided a statement to the police or testified in court. This is not true. Reporters are entitled to publish and broadcast information obtained from public statements and public documents, but they cannot compel a person to provide additional statements. Indeed, the most compelling and effective victim accounts often emerge after the criminal case has been fully litigated and both the reporter and the victim understand how any potentially unfavorable aspects of a victim's life or experience relate to the case.

Special Considerations for Children and Adolescents

Finally, it is worth noting that special care must be taken in explaining these considerations to the parents and guardians of children who are the victims of crime. It appears that it is not infrequent for parents to effectively waive their child's privacy through hasty, angry, or unsophisticated judgments about what statements to disclose to the news media. Children and adolescents may be unable to cope effectively with the additional burdens of publicity, even if they initially express a willingness to enter the public spotlight. Three questions may help guide parents and

guardians in this situation: (1) What facts would I want disclosed if I were the crime victim? (2) What press disclosures will help this child heal the most quickly? (3) What help is available to this child to cope with the effects of publicity?

Practical Considerations for Officials

Although we favor the adoption of protective statutes modeled after 18 USC § 3509, we believe that there are informal steps that law enforcement officers, victim advocates, prosecutors, and court administrators can consider in the meantime to protect the privacy of child victims and witnesses. Such measures include the following:

- Asking victims, witnesses, and their families during investigations if they are anxious about publicity and documenting their concerns and any factual basis for them with some care. For instance, care must be taken to document the concerns in a way that does not lead to the child being unfairly impeached as unbelievable or otherwise emotionally unstable if that is not the case;
- Developing, where appropriate, procedures for creating and maintaining police investigatory reports and records so as to protect the identities of child victims and witnesses from public disclosure;
- Advising victims and witnesses as part of their debriefing about how they may choose to avoid publicity, and providing informational brochures to them outlining their rights vis-à-vis the press;
- Refusing to disclose identities of victims and witnesses to reporters if disclosure is not legally required, and advising reporters of the wishes of victims and their families regarding their identities and related publicity;
- Requiring a demonstrated factual basis for any challenge to the competency of a child victim or witness to testify, and holding closed hearings on competency;
- Where state criminal procedure allows it, voluntarily using pseudonyms instead of

actual names of child victims and witnesses in charging and other documents filed in court, subject to defendants' rights to adequate notice and discovery;

- Considering issues of trial publicity at pretrial structuring conferences in appropriate cases, which will inform the court of the needs of child victims and witnesses and may result in protective orders regarding the procedures for identifying and safeguarding information about child victims and witnesses; and
- Requesting closed evidentiary hearings when it can be established that publicity is likely to harm a child victim or witness.

These ad hoc measures cannot protect the privacy of child victims and witnesses as easily as statutory protections, because they require a greater expenditure of resources in the form of specialized motions and orders on a case-by-case basis to make them effective. Nevertheless, they may improve the chances that publicity will not adversely affect a child victim or witness, especially where the child is particularly vulnerable.

CONCLUSION

Efforts to protect crime victims, especially children, from the adverse impact of publicity have been hampered by perceived constitutional limitations. However, protective legislation can be designed (a) to protect the identities of child crime victims in police reports and court filings from public disclosure and (b) to allow courts to close hearings where potential harm to a child can be demonstrated. Such legislation appears likely to withstand constitutional challenge. Even in those jurisdictions that have yet to enact legislation to shield children from publicity, families and child advocates can take a number of preventive measures to minimize the harm from publicity to children who have been victimized or have witnessed a crime.

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